submitted, refers only to the judicial means of settlement of a case under the American Convention.[8] The Inter-American Commission, which is co-equal to the Inter-American Court and not bound by the Court's jurisprudence, continued to argue before the Court for a holistic interpretation of the crime of forced disappearance, which was finally adopted by the Court in 2009.[9]

But now, let us turn to our speakers and "fragmentation" as understood in the International Law Commission project as norm conflicts among the regional human rights systems. Our first speaker is Elena Abrusci, from the University of Essex in England. She has a PhD in law from the University of Nottingham where she wrote her dissertation on convergence and fragmentation in the case law of regional and international human rights bodies. She has been publishing in leading journals on indigenous rights, sexual orientation rights, and modern slavery.

Our next speaker is Silvia Serrano, a former colleague of mine at the Inter-American Commission on Human Rights, who has probably argued more cases before the Inter-American Court than anyone else on the staff. She has an LLM in international legal studies from Georgetown University and a Master's in legal argumentation from the Universidad de Alicante. Silvia will be speaking about pretrial detention and due process guarantees in criminal cases, which have been approached differently in the case law of the Inter-American and the European systems.

Our third speaker is Thomas Antkowiak, a law professor at Seattle University School of law. He has presented numerous cases to the Inter-American and other human rights systems. Thomas is also co-author of an important recent book on the American Convention on Human Rights, published by Oxford University Press. Thomas's presentation will be on "Social Rights in International Jurisprudence."

The European Court of Human Rights and Its Contribution to Judicial Fragmentation in International Human Rights Law

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*By Elena Abrusci**

Introduction

Following the International Law Commission Report on Fragmentation in International Law (IL), scholars have started to question whether such fragmentation could also have affected its subbranches, and, especially, international human rights law (IHRL). Due to the proliferation of both IHRL norms and institutions, especially at the regional level, this appeared to be a real possibility.

Judicial fragmentation could be defined as the situation where two courts, seized of the same or similar matter, issue contrasting judgments. Adopting this definition, that focuses on the outcome of the judgments, judicial fragmentation in IHRL proved to be a limited phenomenon since convergence turned out to be predominant.[1]

Nevertheless, an interesting result emerges from this analysis; in all instances of judicial fragmentation between regional human rights bodies, the European Court of Human Rights (ECtHR) is always present. This raises questions on why the judicial behavior of the ECtHR favors

[8] *Id.*, paras. 32–33.

[9] I/A Court H.R., Radilla Pacheco v. Mexico (Nov. 23, 2009).

* Human Rights Centre and School of Law-University of Essex (elena.abrusci@essex.ac.uk).

[1] See, among others, Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems (Carla M. Buckley, Alice Donald & Philip Leach eds., 2016).

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fragmentation and whether it is possible to identify some elements that explain the presence of the ECtHR in all cases of fragmentation. The incredibly high number of cases examined every year by the court and the variety of subject matters are certainly elements that contribute to this, especially considering that the ECtHR has often been the first body to render a judgment on a new topic. However, there are many other legal and non-legal factors that explain the involvement of the ECtHR in judicial fragmentation. The following examples will present some of them.

Indigenous Property Rights: The Absence of Judicial Dialogue

The case law of the ECtHR on indigenous property rights offers a good example of judicial behavior that led to fragmentation, especially if compared to the case law of the Inter-American Court of Human Rights (IACtHR).

The ECtHR ruled on the topic only in two cases, *Handölsdalen v. Sweden*[2] and *Hingitaq 53 v. Denmark*,[3] and in both circumstances the court dismissed the case or found against the applicants, ruling completely in contrast with similar cases before the IACtHR. The main feature of the ECtHR's adjudication of indigenous property rights-related cases is the application of a private property model to indigenous land claims and the subsequent failure to recognize the right to own and use the ancestral land without a formal legal title. Indeed, in both rulings, the ECtHR fell short of acknowledging the special position reserved to indigenous peoples in IHRL, as confirmed by the International Labour Organization Convention No. 169 and the UN Declaration on the Rights of Indigenous People (UNDRIP) and considered them as any normal applicant claiming rights over a land for which they did not have any proof of purchase or acquisition.

There are several reasons behind such an approach and the subsequent fragmentation triggered with the IACtHR. First, the debate on indigenous peoples' rights is underdeveloped in Europe considering that the neighboring issue of minorities' rights has catalyzed much of the attention for the relevance and number of minorities present in the European region. Second, this lack of expertise of the ECtHR on indigenous property rights, also due to the very limited case law, has not been compensated by any judicial dialogue with other regional counterparts. Despite the extensive case law of the IACtHR on the topic, with some cases presenting very similar facts to those adjudicated by the ECtHR, the Strasbourg court decided to completely ignore the jurisprudence of the IACtHR, which could have been extremely useful for better understanding the unique position of indigenous people.[4] Whilst the ECtHR engaged with a comparative law review, it only focused on the case law of its member states without going outside the European region. Lastly, the very low engagement of dedicated NGOs, which are very active in lobbying the IACtHR are almost completely absent before the ECtHR, contributing to this different consideration of the issue.

The Right to Marry for Same-Sex Couples: An Issue of Margin of Appreciation

Another topic where judicial fragmentation arose between the ECtHR and the IACtHR is the right to marry for same-sex couples. The Advisory Opinion of the IACtHR rendered in

[2] Handölsdalen v. Sweden, App. No. 39013/04, Admissibility (Eur. Ct. H.R. 2010).

[3] Hingitaq 53 v. Denmark, App. No. 18584/04, Admissibility (Eur. Ct. H.R. 2006).

[4] For instance, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser C.) No. 79 (Aug. 31, 2001) or Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser C.) No. 125 (June 17, 2005).

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November 2017[5] triggered a clear situation of fragmentation with the ECtHR in relation to whether states should provide a right to marry also for same-sex couples.

The ECtHR has addressed the issue in several cases and has always aligned itself to the position of the UN Human Rights Committee and adopted a very cautious position. In S*chalk and Kopf v. Austria* and *Chapin and Charpentier v. France*, among others, the ECtHR held that while it was a duty of the state to ensure the access to civil partnerships for same-sex couples in order to grant them the enjoyment of the right to a family life in the same way as to heterosexual couples, the same was not true for the right to marry.[6] Noticing that the letter of Article 12 of the European Convention on Human Rights provides the right to marry between a man and a woman (and for "everyone" or "all human beings" like in other provisions), the European Court established that the Convention does not provide a right to marry for same-sex couples. As marriage is an institution deeply rooted in local societies, its regulation—and eventual extension to same-sex couples—should be left to the single member state, thus granting a margin of appreciation (MoA) to a state when applying such a provision. Moreover, the ECtHR noticed that there was no European consensus on gay marriage, since only six out of the forty-seven member states at that time had adopted domestic legislation allowing gay marriage.[7] In light of that, the MoA granted should be wider.

This stands in complete opposition to the IACtHR's approach, which established that the right to marry should be extended to same-sex couples because "there is no legitimate aim that could make this distinction [between same-sex and heterosexual couples] necessary and proportionate under the Convention."[8] Similar to its European counterpart, the IACtHR also looked at the practice of its member states, but it clearly stated that the lack of a regional consensus could not constitute an obstacle to the advancement of human rights.[9] On the contrary, in virtue of the conventionality control, all member states are now required to align their domestic legislation with the interpretation of the American Convention as provided by the Court, going in the complete opposite direction from the ECtHR.

Looking at the Benches: Who Are the Judges?

The low engagement with judicial dialogue and a different attitude toward deference and subsidiarity between the ECtHR and the IACtHR are some of the adjudication approaches that triggered judicial fragmentation between these courts. However, they can be considered as motivated also by the identity of the judges who sit in the court and adopt these decisions. Looking at the educational and professional backgrounds of the current and previous judges that sit on the ECtHR and IACtHR, it is possible to observe some trends.[10] If one considers the number of current and previous judges of the two courts who received their university education outside their continent, the difference is obvious. More than 50 percent of the current judges of the IACtHR received their legal education outside their continent and all of them studied in Europe. On the contrary, among the current judges of the ECtHR, only 15 percent studied law outside Europe. The same trend can be found if the totality of the judges is taken into consideration, with 51 percent

[5] Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex. Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

[6] Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409; Chapin and Charpentier v. France, 2016-II Eur. Ct. H.R. 215.

[7] *Id.* at 57–60.

[8] Advisory Opinion OC-24/17, *supra* note 5, at 220.

[9] *Id.* at 219.

[10] All the following data are based on a study conducted by the author. Further detailed available upon request.

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of the IACtHR judges who studied outside the Americas (and all of them studied in Europe) and only 6 percent of the ECtHR judges who studied outside Europe. Education, and especially university education, significantly influences the reasoning and understanding of legal provisions. Undertaking university education in a continent different from that of origin may considerably expand the mind of the judge, introducing a completely different way to approach legal concepts and adjudication. This may result in endogenous and automatic assimilation of another regional perspective on human rights, and a higher likelihood of convergence with the human rights perspective of the region where the legal studies have been pursued. What we observe in the case of the IACtHR is a potential endogenous Europeanization of its judges that may contribute to the overall convergence between the two systems and the constant references from the IACtHR to the case law of the ECtHR. Differently, the ECtHR remains very much closed within its regional mindset, its judges having very little exposure, at least in their university background, to other non-European legal approaches. This Europeanization of regional human rights courts is also confirmed by the profile of the judges who sit on the African Court of Human and Peoples' Rights (ACtHPR), 73 percent of whom received university education outside the African continent and 63 percent of whom studied in Europe.

Similar trends affect the professional background of regional human rights judges. In particular, if one looks at the percentage of judges who served as UN special procedures mandate holders or as members of the UN treaty bodies, the different opening of the regional human rights courts toward a universalistic approach to human rights adjudication is evident. Fourteen percent of the current IACtHR judges served in such positions while the percentage drops to 4 percent in the case of the ECtHR. This data could contribute to further explain the less universalistic approach of the ECtHR and, at the same time, the overall convergence of IHRL toward a more universalistic interpretation pushed by the IACtHR.

Conclusions

Judicial fragmentation in IHRL, especially in the case law of regional human rights bodies, is a limited phenomenon. Yet, when it arises, the ECtHR is always one of the terms of comparison. The reasons behind the behavior of the Strasbourg court are mainly internal to the court. As shown by the example of the case law on indigenous property rights and the right to marry for same-sex couples, the lack of judicial dialogue with other human rights courts and a considerable use of the doctrine of the margin of appreciation are key features of the ECtHR adjudication and triggered fragmentation with the IACtHR.

In addition, the two examples presented here show also a different understanding by the ECtHR and the IACtHR of their role as supranational courts. The Strasbourg court is, indeed, strongly relying on the principle of subsidiarity and granting high degrees of deference to its member states, in plain contrast with the IACtHR's conventionality control doctrine.

Notwithstanding these differences, judicial fragmentation remains limited also for the lack of comparable cases before the different courts since many of the issues adjudicated by the ECtHR have not been addressed by any other regional body. New cases before the IACtHR or the ACtHPR or new challenges brought to the attention of the ECtHR may trigger further cases of fragmentation, exploiting the existing weaknesses and differences between the regional courts.

However, the bottom-line question remains whether we should aim for convergence in IHRL or we should simply accept and welcome fragmentation as a natural step for the development of the law and the increasing of human rights standards.

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