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Comparative Law at the European Court of Human Rights: the Quest for "Consensus" in the Advisory Opinion Mechanism

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SUMMARY: 1. Introduction. – 2. The Use of Comparative Remarks. – 3. European Consensus and its Contradictions. – 4. Comparative Law in the Advisory Opinions. Conclusions.

1. Introduction

In its recent implementation of the Advisory Opinion mechanism, the European Court of Human Rights confirmed the usual practice of attributing a fundamental role to comparative remarks. Protocol n° 16 allows the "highest domestic courts" to request the ECtHR to give an Advisory Opinion on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto". The objective of the Protocol is to "further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity". The opinions heretofore issued under Protocol n° 16 both include a vast recourse to comparison.

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In its first advisory opinion,[2] comparative law materials are widely examined, even if at the end they are not considered crucial in determining the outcome of the opinion: the Court indeed recalls that there is no European consensus among the 47 Member States on whether intended parenthood resulting from surrogacy ought to be recognised. The absence of European consensus would lead, in line with the Court's practice, to a wide margin of appreciation; but in this particular case, said margin ought to be abridged because the concern at stake encompasses particularly important features of an individual's identity as well as "essential aspects of the (children's) private life".[3]

In the second advisory opinion,[4] the ECtHR undertook a comparative survey addressing two issues: the first issue concerned the use of the "*blanket reference*" or "*legislation by reference*" technique for setting out the constituent elements of criminal offences in general and offences against the constitutional order of a country in particular. The second issue concerned the principle of non-retroactivity of (less favourable) criminal law and the principle of retrospective application of more favourable criminal law.[5]

The recourse to comparative analysis raises several problems, which depend on both the very nature and scope of Strasbourg's Court and on its oversimplified usage of comparison.

[2] ECtHR, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother Requested by the French Court of Cassation*, 10 April 2019, Request no. P16-2018-001.

[3] The lack of consensus, on the contrary, is considered crucial in relation to the choice of means by which to permit recognition of the legal relationship between the child and the intended parents. See further § 4.

As a consequence of the first Advisory Opinion, the French *Cour de Cassation* ordered to proceed with the transcription of the foreign birth certificate, thus recognizing the maternity *ex lege* of the intended mother (Cour de Cassation, Ass. plén., 4 October 2019, n. 648). See J. HOUSSIER, *L'affaire Mennesson ou la victoire du fait sur le droit*, in *AJ Famille*, 2019, 11, 592-594; L. MARGUET, *GPA: Quand la Cour de cassation facilite la reconnaissance du lien de filiation du second parent… au-delà même des exigences européennes?*, in *La Revue des droits de l'homme. Actualités Droits-Libertés*, 2020, 1-11.

[4] ECtHR, *Advisory Opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, 29 May 2020, Request no. P16-2019-001.

[5] Unanimous consensus among Member States has been detected on the principle of non-retroactivity of (less favourable) criminal law and on the principle of retrospective application of more favourable criminal law (§ 36). On the other hand, in relation to the use of "blanket reference", the ECtHR found no consensus among Member States on whether the referenced norms must be or may be of a certain nature or hierarchical level (§ 35).

This issue has already been largely addressed by the literature, but it seems now appropriate to go back to analysing again this problem under the new consultative mechanism.[6]

In general, the Court's area of competence puts it in the position to reconcile two apparently conflicting requirements: on the one hand, the uniformity of the protection of fundamental rights in the Member States of the Council of Europe and, on the other, the necessity to respect the legal, social, and cultural differences of said Member States. In this context, comparison may constitute a useful balance tool, but only if applied with a mindful approach and overtaking the idea of a mere "comparison by columns", *i.e.* a mere comparison of positive law between different legal systems.

In the light of the new consultative tool, legal doctrine is now called upon to verify whether a more abstract approach – and less linked to the specific case – can modify the dynamics in the use of legal comparison and may help to overcome the numerous reasons of criticism that have emerged so far in this respect. Taking this as a basis and opportunity for reflection, the paper is divided into three main parts. The first part concerns a topic which has been analysed many times by the literature: *i.e.* the ECtHR's recourse to the comparative law method and its connection to the doctrines of European consensus and the margin of appreciation. In the second part of the paper, some possible contradictions in the use of these two doctrines are addressed, with particular reference to the area of family relationships. The third part discusses the use of legal comparison in the context of the advisory opinions of the ECtHR, according to Protocol n° 16, exploring the problematic aspects of the application of the comparative law method in terms of consistency and transparency.

2. The Use of Comparative Remarks

The debate over comparative law as a tool available to national and supranational Courts has been discussed for a long time. Several studies have tried to analyse the influence of foreign legal data on case law, particularly in cases that encompass international elements, so that the

[6] A persistent wide interest around the doctrine of consensus and the use of comparative law by the ECtHR is testified by the large number of scholarly writings published in the last few years. Among many, see K. DZEHTSIAROU, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, 2015; E. POLGARI, *European Consensus: A Conservative and a Dynamic Force in European Human Rights Jurisprudence*, 12 *ICL Journal* (2017) 59-84; P. KAPOTAS, V. TZEVELEKOS, *Building Consensus on European Consensus. Judicial Interpretation of Human Rights in Europe and Beyond*, Cambridge, 2019; D. PEAT, C*onsensus Doctrine in the European Court of Human Rights*, in *Comparative Reasoning in International Courts and Tribunals*, Cambridge, 2019, pp. 140-177.

focus on the use of comparative law in the Courts has thus become a classical *locus* of comparative legal studies.[7]

The subject matter acquires a somewhat different practical connotation, when ECtHR's case law is analysed. Even the idea of universality – which comes with the protection of fundamental rights – may appear in contrast with the cultural relativism of any comparative approach.[8] We may then wonder whether different human rights perceptions – founded on national peculiarities – should be permitted to prevent the implementation of analogous rights throughout the Member States of the European Council.

The balance between the universality of fundamental rights and the peculiarities of national diversities has been pursued through some degree of "flexibility" in the implementation of the provisions of the European Convention on Human Rights and Fundamental Freedoms, and in particular through the doctrine of the so-called European consensus.

In other words, the Strasbourg Court often takes into consideration, in order to guide its decision, whether a common attitude among national legal systems does exist in relation to each specific problem: The higher the level of consensus spotted, the smaller the "room for manoeuvre" which the Court will grant to the national authorities will be.[9]

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[7] Among others, see T. KOOPMANS, *Comparative Law and the Courts*, 45 *Int'l & Comp. L. Quarterly* (1996) 545-556; U. DROBNIG, S. VAN ERP, *The Use of Comparative Law by Courts*, XIV[th] International Congress of Comparative Law, The Hague, 1999; B. MARKESINIS, J. FEDTKE, *The Judge as Comparatist*, 80 *Tulane Law Review* (2005) 11-167; C.L. ROZAKIS, *The European Judge as Comparatist*, 80 *Tulane Law Review* (2005) 257-279; G.F. FERRARI, A. GAMBARO, *Corti nazionali e comparazione giuridica*, Napoli, 2006; T.H. BINGHAM, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law*, Cambridge, 2010; M. BOBEK, *Comparative Reasoning in European Supreme Courts*, Oxford, 2013; M. GELTER, M. SIEMS, *Citations to Foreign Courts. llegitimate and Superfluous, or Unavoidable? Evidence from Europe*, 62 *Am. J. Comp. Law* (2014) 35-85; M. ANDENAS, D. FAIRGRIEVE (eds), *Courts and Comparative Law*, Oxford, 2015; N. VOGIATZIS, T*he Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court*, 25 *Eur. Public Law* (2019) 445-480.

[8] See M.-T. MEULDERS-KLEIN, *Internationalisation des droits de l'Homme et évolution du droit de la famille: un voyage sans destination?*, in *Internationalisation des droits de l'Homme et évolution du droit de la famille, Actes du Colloque du Laboratoire d'études et de recherches appliquées au droit privé*, Université Lille II, L.G.D.J., 1996, pp. 180-213, at p. 211 (explaining that the use of a comparative approach by the ECtHR may introduce relativism and social self-reference as a mode of producing norms into universal and transcendent sources).

[9] On the relationship between the doctrine of the margin of appreciation and European consensus, see E. KASTANAS, *Unité et Diversité: Notions Autonomes et Marge d'Appréciation des Etats dans la Jurisprudence de la Cour Européenne des Droits de L'Homme*, Bruxelles, 1996; E. BREMS, *Human Rights: Universality and*

In the first two advisory opinions as in many recent judgments of the ECtHR, specific paragraphs of comparison – entitled "Comparative Law", or "Comparative Law materials" or "Comparative survey" – are included; in all these parts of the decisions, the Court briefly describes the relevant practice of the Member States, but only to paint a picture of the legal state of the art, while the reasoning that leads the Court's decision may not be necessarily affected by this information.[10]

The use of comparative argumentative techniques, which inevitably require strong comparative sensitivity and the ability to recognize the "operational rules"[11] in each Member States' legal system, has not found a complete favor within a large part of the doctrine. Especially among scholars who deal with human rights, the relativism that the doctrine of consensus encompasses, is often remarked, because of its potential ability to "soften" the protection of human rights.[12]

In the perspective at hand, this issue interrogates the scholars not only in relation to the idea of the ECtHR as a vehicle for the integration of the national legal orders in the area of human rights, but above all as to the functions of comparative law and in particular to its harmonizing dimension.[13]

It may be useful anyway to distinguish between academic comparative research and comparative surveys drafted on behalf of the ECtHR. None can pretend that the latter should

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Diversity, The Hague-Boston-London, 2001; G. LETSAS, *Two Concepts of the Margin of Appreciation*, 26 *Oxford J. Legal Studies* (2006) 705-732; J. GERARDS, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 *European Law Journal* (2011) 80-120; G. REPETTO, *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell'interpretazione e giurisprudenza sovranazionale*, Napoli, 2011; K. DZEHTSIAROU, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, 2015, p. 132 ff.

[10] In an often-cited dissenting opinion, Judge Matscher criticised the superficial character of the Court's comparative approach and argued that "*autonomous interpretation would call for comparative studies of a far more detailed nature than those carried out so far by the Convention institutions*". Cfr. *Öztürk v. Federal Republic of Germany*, ECtHR 21 February 1984, appl. no. 8544/79, Dissenting Opinion of Judge Matscher.

[11] The idea of "operational rule" is introduced in the comparative debate by R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, in 39 *Am. J. Comp. Law* (1991) 1-34.

[12] E. BENVENISTI, *Margin of Appreciation, Consensus, and Universal Standards*, 31 *Int'l Law and Politics* (1999) 843-854, at p. 844 "Margin of appreciation, with its principled recognition of moral relativism, is at odds with the concept of the universality of human rights".

[13] For a comprehensive analysis, see M. GRAZIADEI, *The Functionalist Heritage*, in P. LEGRAND, R. MUNDAY (eds), *Comparative Legal Studies: Traditions and Transitions*, Cambridge, 2003, pp. 100-128; E. BANAKAS, *The Contribution of Comparative Law to the Harmonisation of European Private Law*, in A. HARDING; E. ORUCU (eds), *Comparative Law in the Twenty First Century*, The Hague, 2002, pp. 179-191.

be as accurate and scientific as the first, which has a more theoretical, historical, and "cultural" dimension. But an oversimplified process of comparison should definitely affect the objectiveness of the findings in the ECtHR's decisions. Even the recurrence of a European consensus may be wrongly detected by the Court if the process of comparison omits important data different from the mere legislation.[14]

A good example may come from an analysis of the "margin of appreciation" with reference to the rules concerning the right to respect for private and family life (Article 8) and the non-discrimination principle (Article 14). With regard to such provisions of the Convention, the ECtHR often assures a wide margin of appreciation to each national legal system, thus giving them the possibility to draw the concrete boundaries of said principles.[15] All preliminary comparative investigations then give the Court an easy way out of the issue at stake, if "*commonly accepted standards*"[16] are lacking. A more courageous attitude suggests that, when a fundamental right is at risk and substantial reasons are not provided to reject its recognition, the absence of common standards within States parties should not play a specific and decisive role.

The problem seems amplified in the recent tendency of the ECtHR to combine a "procedural" approach to the margin of appreciation with the doctrine of European consensus. The former means that, when the ECtHR is confronted with conflicting fundamental rights, scrutiny about the availability of procedural safeguards in the respondent State takes place. In many cases when the ECtHR has associated the level of the margin of appreciation to the quality of the parliamentary process, European consensus has also played a pivotal role in the Court's reasoning. In a significant number of these cases, both the analysis of European consensus and

[14] The risk of superficial analysis was particularly high until the end of last century, when the Court started a process of "professionalization" in the approach to the common standard inquiry. See K. DZEHTSIAROU, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, 2015, p. 86.

[15] Just to mention a few cases on Articles 8 and 14 where States have been allowed a wide margin of appreciation on the ground of lack of consensus, see *Mata Estevez v. Spain*, ECtHR 10 May 2001, appl. no. 56501/00; *Fretté v. France*, ECtHR 26 February 2002, appl. no. 36515/97; *Evans v. United Kingdom*, ECtHR 10 April 2007, appl. no. 6339/05; *Schalck and Kopf v. Austria*, ECtHR 24 June 2010, appl. no. 30141/04; *A., B. and C. v. Ireland*, ECtHR 16 December 2010, appl. no. 25579/05.

[16] *Tyrer v. United Kingdom*, ECtHR 28 April 1978, appl. no. 5856/72 (usually considered the first occurrence of the European consensus).

the procedural approach to the margin of appreciation led the Court to widen the overall margin of appreciation, thus restricting the effectiveness of protection.[17]

The technique of using comparative surveys in order to identify the level of consensus may also lead to a potential underestimation of the importance of comparative law, which is then identified as the tool of "moral relativism" inherent in the doctrine of consensus; in this perspective it has been argued that "the adjudicating organ must either adopt a moral standard or defer to a relativistic approach based on a comparative analysis",[18] thus suggesting that comparative law, applied to the field of human rights, can only lead to a paralyzing outcome for the evolution of the protection of fundamental rights. In contrast, many other authors have highlighted the tendency to create a "*ius commune of human rights*", which has its roots in comparative law, as an instrument to convey the contents of a growing expansion of global humanitarian protections. [19]

Similar viewpoints, however, may confuse some of the features of comparative law with the purpose of comparison. The latter is, by its nature, impartial and, in its consolidated dimension, is neutral towards the choices of the best model possible. Comparison, in other words, is strictly linked to the knowledge of the law in general and, when used in the case law, offers the chance to test the solutions followed in different countries faced with a particular problem.[20]

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[17] Clear examples of this connection are provided in *Shindler v. United Kingdom*, ECtHR 7 May 2013, appl. no. 19840/09; *Animal Defenders International v. United Kingdom*, ECtHR 22 April 2013, appl. no. 48876/08; *S.A.S. v. France*, ECtHR 1 July 2014, appl. no. 43835/11; *Parrillo v. Italy*, ECtHR 27 August 2015, appl. no. 46470/11. On the distinction between structural and procedural margin of appreciation, see G. LETSAS, *Two Concepts of the Margin of Appreciation*, 26 *Oxford J. Legal Studies* (2006) 705-732. The "procedural approach" is also illustrated by the former President of the ECtHR, David Spielmann, in *Whither the Margin of Appreciation?*, 67 *Current Legal Problems* (2014) 49-65, at p. 64.

[18] E. BENVENISTI, *Margin of Appreciation, Consensus, and Universal Standards*, cit., p. 851.

[19] See A. HARDING, P. LEYLAND, *Comparative Law in Constitutional Context*, in E. ORUCU, D. NELKEN (eds), *Comparative Law: A Handbook*, Oxford, 2007, pp. 313-338, at p. 328.

[20] The gathering of knowledge is widely considered the main function of a correct comparative law analysis. Moreover, legal comparison has been asserted as a rebellion against formalism and dogmatism. In this respect, a mere reproduction of legal data without a proper analysis of the context of law may reproduce exactly the same enemies that comparative law fought against. On the aims and functions of comparative law, still fundamental is R. SACCO, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 *Am. J. Comp. L.* (1991) 1-34.

In contrast with the "neutral" nature of comparative law, some authors have suggested that the Court could use the consensus doctrine as a mean for reaching the optimal legal regulation of the issue at stake. Consequently, "if all the states in Europe have the same propensity to adopt good laws and if the ECHR is able to survey all of their national laws, the best results under the Jury Theorem will be achieved by following the majority of states".[21]

Whatever the premise we assume about the functions of comparison and even if limited to short comparative surveys, the collection of legal data from multiple Member States requires a coherent method of acquisition, which means that comparison cannot be used mechanically and without an adequate method of investigation. Otherwise, the identification of a sort of "majority solution" among the Member States, acknowledged through the law in the books,[22] may be grounded in a dangerous interpretative bias. Moreover, an instrumental use of comparison may also emerge from a methodological suspect "cherry-picking" which tends to use comparative data with the exclusive purpose of justifying a decision taken on different grounds.[23]

3. European Consensus and Its Contradictions

The European consensus is one of the most frequent interpretative tools of the ECtHR: Where the comparison shows that the "domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground", then "a more extensive European supervision corresponds to a less discretionary power of appreciation".[24] The Court often

[21] S. DOTHAN, *The Optimal Use of Comparative Law*, 43 *Denver J. Int'l L. & Policy* (2014) 21-44, at p. 27, with a particular reference to Condorcet's Jury Theorem that justifies the use of majority rule and assesses the optimal size of deliberative bodies.

[22] Commendable exceptions, where case law of a Member State was considered, are *Cooper v. United Kingdom*, ECtHR 16 December 2003, appl. no. 48843/99, and *Eriksen v. Norwey*, ECtHR 27 May 1997, appl. no. 17391/90. See M. ANDENAS, D. FAIRGRIEVE, *"There is a World Elsewhere". Lord Bingham and Comparative Law*, in M. ANDENAS, D. FAIRGRIEVE (eds), *Tom Bingham and the Transformation of the Law*, Oxford, 2009, p. 855.

[23] This risk seems particularly evident when the Court draws data from jurisdictions outside the Council of Europe, in a clear demonstration of the technique of "cherry-picking", which is also one of the main objections arisen in the American debate against the judicial use of comparative law. See the case of *Sukhovetskyy v. Ukraine*, ECtHR 28 March 2006, appl. no. 13716/02, where the Court found no violation of Conventional norms in the refusal to register a candidate for parliamentary elections as he had failed to pay an electoral deposit. In the list of "*relevant comparative international practice*", the Court goes in detail about the solutions offered in Ireland, Canada, United Kingdom and Mauritius, showing a sketchy selection of comparators.

[24] *Sunday Times v. United Kingdom*, ECtHR 26 April 1979, appl. no. 6538/74, § 59.

conducts a comparative study on different legal systems and then identifies, in its decisions, the dominant approach. By doing so an interpretation that is dependent on national law will be the basis of the ECtHR's decisions in its affirmative role of protection of fundamental rights. Whenever there is a lack of uniform solutions, on the other hand, the margin of appreciation (re-)expands and the Court restrains its powers, thus respecting national diversity. From this point of view, the dynamic circulation of the judicial rules linked with fundamental rights shows a two-sided face: the case law of the ECtHR influences the evolution of domestic legislation but, at the same time, it appears affected by existing models.

Some of the main areas in which the ECtHR makes concrete application of the doctrine of consensus – such as, in the field of private law, family law and bio-law – almost constantly show that comparative analysis is performed to measure the trend spread into national law with reference to specific problems of legal policy.[25] The choices made by legislators of individual countries, therefore, seem to guide the interpretation of the provisions of the ECHR, which are often subjected to a process of evolutionary and flexible interpretation.[26] A more systematic use of evolutionary elements in the legal reasoning of the Court should allow overcoming the idea of a comparative method limited to detecting a common denominator.[27]

Moreover, the analysis of the decisions pronounced in the area of private law clearly shows the crucial importance that the ECtHR entrusts to comparative analysis in order to justify

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[25] I. GIESEN, *The Use and Influence of Comparative Law in "Wrongful Life" Cases*, 8 *Utrecht Law Rev.* (2012) 35-54.

[26] Since the European Convention on Human Rights can be regarded as a system of rules that expresses a common cultural heritage, the role of comparative law becomes a fundamental tool of interpretation in search of this common ground. Within a traditional voluntarist conception of international law, see E. BREMS, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, in 56 *Zeitschrift für ausländisches öffentliches Recht* (1996) 230-314, at p. 276: "*it is because the European System is supposed to be derived from the national systems of the member states that the comparative argument takes so much weight*".

[27] This definition dates back to some decisions of the late '70s. See *Tyrer v. United Kingdom*, ECtHR 28 April 1978, appl. no. 5856/72, § 31. See also *Scoppola v. Italy (No. 2)*, ECtHR 17 September 2009, appl. no. 10249/03 – on automatic ban on prisoners' voting rights and a possible breach of Article 3 ECHR – § 104 "*Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved*". On this subject, see D. SPIELMANN, M. TSIRLI, P. VOYATZIS (eds), *La Convention européenne des droits de l'homme, un instrument vivant. Mélanges en l'honneur de Christos L. Rozaki*s, Bruxelles, 2011, and C.L. ROZAKIS, *The European Judge as Comparatist*, 80 *Tulane Law Review* (2005) 257-279.

certain interpretations. This happened in the field of family law, where the decisions that find a violation of the Convention often reflect new trends in drawing the boundaries of new family models amongst Member States,[28] while the judgments of rejection often evoke the lack of a widespread consensus that would validate a restriction of the margin of appreciation granted to the individual States.

In family law, we may just think about the seminal decisions in matters of filiation, in which the ECtHR shows how far its influence over national legislation may arrive, in a path of gradual assimilation between legitimate and natural filiation. The first judgments of the Court thus were ahead of the times, coming up more than 35 years before some recent national updates, such as the reform of filiation approved in Italy in 2015. The first and most popular case, followed by abundant case law, dates back to 1979: the ECtHR decided to uphold the appeal of Ms. Marckx, in the case *Marckx v. Belgium*. At that time – it seems a story from another era – children born out of wedlock were confronted with restrictions on their patrimonial rights, in particular concerning the possibility to receive property from their mother or to inherit from the estate of their mother's family. In a period when no consensus at all was recognizable – and even no emerging trend whatsoever – the Court found various violations of Article 8 (*Right to respect for private and family life*) alone and in conjunction with Article 14 ECHR (*Prohibition of discrimination*), and then recognised full inheritance rights to Mr. Marckx's biological daughter.

After this case, the right to private and family life had to be safeguarded, without differentiating whether a child was born in or out of wedlock. Hence, the case *Marckx v. Belgium* can be identified as the inspiring source for subsequent cases where inheritance rights, family life and the principle of non-discrimination merged. Additionally, it has somehow forced national legislators to comply with the necessity of ensuring full equality to children's rights of succession.

This case is considered as the first one in which the reasoning of the Strasbourg Court has manifestly shaped the evolutionary patterns of domestic legislation in family and succession law.

Belgium has, albeit following a cumbersome legislative path and with a great deal of influence by its Constitutional Court's case law, recognised that biological children are part of

[28] The re-shaping of the family can be traced in some of the most important ECtHR cases. A complete list may be found in C. DRAGHICI, *The Legitimacy of Family Rights in Strasbourg Case Law*, Oxford-Portland (Or), 2017, pp. 26 ff.

the family and, therefore, are entitled to inheritance rights. Both France and Germany have modified their national law on successions, as a direct consequence of the ECtHR's case law and decisions. More specifically, following the judgment in *Mazurek v. France*,[29] France adopted the Law no. 2001/1135 that equated the position of biological and legitimate children in matters of inheritance, removing any discriminatory differences.[30] The Italian legislative reform on filiation, which recognised biological children as part of the family, had some significant consequences on inheritance rights too: full equality of children. A long and tedious process of recognition that found its spark in the decisions of the ECtHR.[31]

All the cases where the ECtHR has dealt with family law by searching commonly accepted standards show a somehow decreasing attitude of the Court towards judicial activism, inversely proportional to the growing relevance of the doctrine of European consensus. In this respect, in a significant number of recent decisions, when the Court excludes the presence of a violation of conventional norms, the issue of consensus plays a decisive role, although it is not clear whether it is used as a shield in highly sensitive areas. The most significant cases concern, once again, the right of family relations and, in particular, the marriage between persons of the same sex. In *Schalk and Kopf v. Austria*,[32] the complained violations regarded Articles 12, 8, and 14, in connection with the Austrian national legislation that recognised the right to marry only to persons of different sex (Art. 44, ABGB).[33] The judges, in this case, reject the complaint of Austrian citizens, stating that the Convention does not oblige Member States to legislate for or legally recognise same-sex marriages.

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[29] *Mazurek v. France*, ECtHR 1 February 2000, appl. no. 34406/97.

[30] Notwithstanding this legislative intervention, the transitional arrangements still showed some flaws. Hence, the ECtHR in a more recent case, *Fabris v. France* (ECtHR 21 July 2011, appl. no. 16574/08), has recognised that excluding a child born from an adulterous relationship from a *donation-partage* in 1970 (to which legitimate children were admitted) constitutes a breach of the principle of non-discrimination, following Additional Protocol n° 1, Art. 1.

[31] F. GIARDINI, *Unification of Child Status and Parental Responsibility: The Reform of Filiation Remodels the Family in the Legal Sense in the Italian Legal System*, 22 *Interdisciplinary Journal of Family Studies* (2017) 2-16.

[32] *Schalck and Kopf v. Austria*, ECtHR 24 June 2010, appl. no. 30141/04.

[33] Note, however, that when the application was submitted to the Strasbourg Court, in Austria the law on registered partnerships (*Eingetragene Partnerschaft-Gesetz*) had not yet entered into force. This law, starting from the 1st January 2010, gives same-sex couples the right to access to a form of legal recognition (and to a series of protections that go with it) even if it is not comparable to the institution of marriage.

Although accepting same-sex relationships as a form of "family life", the reasoning of the Court insisted on three kinds of considerations, ranging from the wording of Article 12, to the original intent of the framers of the Convention, until the final – and perhaps decisive – call to the "*little common ground*" between Contracting States in this area. The ECtHR, indeed, in recent years has been repeatedly appealed to in relation to a number of issues concerning homosexual couples, and their right to adopt. The orientation that prevailed so far proved to be ambivalent: on the one hand, the Court has traced the relationship between same-sex persons in the scope of "family life" under Article 8, resulting in an enhancement of the principle of non-discrimination.[34] On the other hand, however, the judges in Strasbourg do not believe that there is, for the Contracting States, an obligation to provide for the institution of same-sex marriage. This assumption has been recently confirmed in *Chapin and Charpentier v. France*, where the Court showed no hesitation in declaring again that there was no European consensus on same-sex marriage.[35]

From this perspective, the doctrine of European consensus seems to serve as a brake on the protection of rights granted by the ECtHR, since in the judgment on the existence of a conventional violation, the examination of the solutions adopted in other Member States plays a major role. If there is no doubt that the Court tends to balance the needs of protection of fundamental rights with the need to ensure a degree of legitimacy to its decisions,[36] however, a

[34] The consequences have been of great importance. Consider, just to mention some of the most significant applications, the affirmation of the right to have sex with a consenting person of the same sex (*Dudgeon v. United Kingdom*, ECtHR 22 October 1981, appl. no. 7525/76), the right of a lesbian woman to seek an adoption (*EB v. France*, ECtHR 22 January 2008, appl. no. 43546/02), the finding of a violation of the ECHR in case of denial of custody of a child to the biological father only motivated by his sexual orientation (*Salgueiro da Silva Mouta v. Portugal*, ECtHR 21 December 1999, appl. no. 33290/96), as well as the violation that results from the exclusion of gay couples from civil partnership reserved for heterosexual couples in Greek legislation (*Vallianatos and others v. Greece*, ECtHR 11 July 2013, appl. nos. 29381/09 and 32684/09).

[35] *Chapin and Charpentier*, ECtHR 9 June 2016, appl. no. 40183/07. After the application of Chapin and Charpentier, France had already changed its laws in May of 2013, introducing the so called "*mariage pour tous*". This circumstance led the ECtHR to consider that there was no violation of Article 12 in combination with Article 14: the applicants were indeed free to marry if they desired to, at the time of the decision.

[36] P. MAHONEY, R. KONDAK, *Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?*, in M. ANDENAS, D. FAIRGRIEVE (eds), *Court and Comparative Law*, Oxford, 2015, p. 120 ("Convincing and reliable interpretative techniques, such as the search for common European ground, brings as much objectivity to the exercise as possible and serve to justify any law-making accomplished by the Court when filling interpretative gaps left in the Convention law. The comparative-law process thereby adds legitimacy to the judgments of the Court").

non-systematic implementation of the "consensus argument" seems to diminish the level of protection, right when the "political" sensible choice would call for a more radical position, in order to strengthen the quality of life of minority groups.[37]

In a significant number of cases, then, the ECtHR seems to have given up adopting a proactive role and contributing to forming a general accepted approach among contracting States. This leads to a paradox: the ECtHR adopts this statistical criterion even when the protection of minorities is at stake, thus making the European consensus a tool used to justify its hesitancy to intervene.[38]

Moreover, even when commonly accepted standards exist, the ECtHR sometimes abdicates its role of safeguard of fundamental rights, as it clearly emerged in a case related to abortion. In *A, B and C v. Ireland* [39] the Court recognizes a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. At that time Ireland was the only State that allowed abortion solely where there was a risk to the life of the expectant mother. Nonetheless, the Court did not consider that this common approach decisively narrowed the broad margin of appreciation of the State, confirming the idea that an unsystematic and flexible use of comparison and of the doctrine of European consensus inevitably diminishes their value and epistemological strength.

4. Comparative Law in the Advisory Opinions. Conclusions

The special importance given to comparative law in the argumentative paths of the ECtHR caused a mixed reaction among the legal doctrine. European consensus has been

[37] See E. BRIBOSIA, I. RORIVE, L. VAN DEN EYNDE, *Same-Sex Marriage - Building an Argument before the European Court of Human Rights in Light of the US Experience*, 32 *Berkeley J. Int'l L.* (2014) 1-43, at p. 19 (stating that "the use of the consensus argument is often fraught with methodological imprecision and is often a means to conceal or justify a moral positioning of ECtHR judges"). Similar criticisms can be read in L. HODSON, *A Marriage by Any Other Name? Schalk and Kopf v Austria*, in 11 *Human Rights L. Rev.* (2011) 170-179, at p. 177, who criticized the use of the instrument of consensus, reputed as "clearly an unsatisfactory approach that leaves minorities vulnerable to majoritarian domination".

[38] A different approach is adopted by the Inter-American Court of Human Rights, in the decision *Atala Riffo and Daughters v. Chile*, Inter-Am. CtHR 24 February 2012, case no. 12.502: "*the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered*".

[39] *A., B. and C. v. Ireland*, ECtHR 16 December 2010, appl. no. 25579/05.

regarded as an interesting laboratory for the circulation of different legal models, but on the opposite side, it also gave rise to skepticism depending on the relativization of human rights' implementation.[40]

It is easy to forecast that this outcome will also emerge in the advisory opinion system, were the Court to replicate the same usage of comparative analysis.[41] As illustrated in the Explanatory Report to Protocol n° 16, all the advisory opinions form part of the case law of the Court, alongside its judgments and decisions; in this perspective, "[T]he interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions".

Comparative law material may even become more important if one considers the structure of the first Advisory Opinions: while usually the Court narrowly adapts its legal reasoning to the concrete facts of each case, under the mechanism of Protocol n° 16, the ECtHR disregards its engagement with the background facts and apply a more abstract reasoning.[42] Indeed, proceedings are still pending at the domestic level when the European Court is asked to give its Opinion and, as clarified in the Explanatory Report to Protocol n° 16, § 11, the aim of an application for an Advisory Opinion "is not to transfer the dispute concerned to the Court", given that the Court has "no jurisdiction either to assess the facts of a case (…) or to rule on the outcome of the proceedings".[43] Such more abstract way of considering the question submitted by a national high court may increase the relevance of comparative surveys, which could become more effective when questions are posed in more general terms.[44]

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[40] See V. GREMENTIERI, *Comparative Law and Human Rights in Europe*, in A.M. RABELLO (ed), *European Legal Traditions and Israel*, Jerusalem, 1994, p. 375.

[41] European consensus and the advisory opinion mechanism are jointly considered as instruments of dialogue between judges by P. BUREŠ, *The dialogue between judges leading to a consensus? On a mute and a silent dialogue before ECtHR*, in *Eur. J. Public Matters* (2017) 63-73.

[42] N. POSENATO, *New opinions ex Protocol no. 16 to the ECHR and the Inter-American advisory practice: some comparative remarks*, in *Eurojus*, 2020, 353-370, at p. 361 (explaining that "the issues admitted to the European consultative procedure, although defined in the context of the dispute in which they arose, may have a more abstract character not strictly limited to the factual framework of the case under analysis").

[43] ECtHR, Advisory Opinion 10 April 2019 (§ 25).

[44] An appropriate use of comparative method in the Court's advisory opinions would help better understand that a ratification of Protocol n° 16 doesn't cause any risk for national "sovereignty", as wrongly claimed by the Italian Parliament (on this basis, the Chamber of Deputies of the Italian Parliament has recently decided to postpone *sine die* the ratification of the Protocol). The request for an advisory opinion does not have as its object the conformity of a national law with the European Convention of Human Rights, but relates instead to

The interpretative technique of European consensus – reached through a comparative analysis – and the issues of advisory opinions formulated by national highest courts both enhance a kind of dialogue between national and European judges. Nevertheless, the concrete way in which the former instrument is going to be used will inevitably condition the success of the latter.

At the moment, after the release of only two advisory opinions, it is not possible to verify whether the use of legal comparison is going to operate in a different way with respect to the generality of the Court's case-law. However, some positive aspects can already be expected. First of all, the advisory function will be nourished by elements of knowledge that legal comparison can provide. This seems particularly true in the case of judicial protection of new rights, such as those rooted in the area of bio-law.

Furthermore, in the advisory opinions the ECtHR's legal reasoning can be developed – to a more consistent extent – through general principles and in a way less linked to specific cases. This makes it possible to avoid the distortions of a purely functional comparison,[45] very much at risk of bias linked to the different regulatory contexts of reference: the legal reasoning "*per principia*"[46] enriched by the information deriving from an adequate comparison - would then open the way, at the domestic level, to judicial specifications more respectful of the local context, but at the same time consistent with the Court's guidelines.

The first opinion, however, shows some uncertainties and inconsistencies regarding the role of comparative materials. This circumstance clearly emerges from the division of the opinion into two parts: in the first, the Court considers that Article 8 ECHR ought to be read as requiring domestic law to recognize the relationship between the intended parent and the child born through gestational surrogacy abroad. Even if there is no consensus among Member States on this regard, the Court gives priority to the doctrine of the best interest of the child. In the second part, however, the Court affirms that each Member State can reach the recognition of filiation by transcription or by adoption or even by other means, thus allowing for wide margins

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the interpretation of the Convention, an interpretation which – to be complete and adequate – requires consistent and transparent use of comparison.

[45] J. HUSA, *Methodology of Comparative Law Today: From Paradoxes to Flexibility?,* in *Rev. int. droit comp.* (2006) 1095-1117, at p. 1104 (summarizing the defects of functionalism and explaining that in its theory, functionalism recognizes the importance and relevance of context of laws but "in its practice it fails to live to the high standards it sets for itself").

[46] A. RUGGERI, *Ancora sul prot. 16: verrà dai giudici la sollecitazione al legislatore per il suo recepimento in ambito interno?,* in *diritticomparati.it*, 2020, 81-97, at p. 84.

of appreciation. Although the lack of consensus emerging from the comparative survey is referred to both the different questions, just in one case the doctrine of consensus is considered conclusive.[47]

Notwithstanding the cautious attitude of the ECtHR in its first Opinion,[48] the importance of the consultative mechanism can now be attested by a recent Italian case on surrogacy. Despite an interpretation offered by the Italian Court of Cassation, *en banc*, only one year ago,[49] the Constitutional Court has now been called on to decide the question of whether the prohibition to register the name of the second father of a child born abroad through a surrogate mother is compliant with the Constitution. In particular, this new question, raised by the Supreme Court,[50] regards the hypothesis that Italian laws – limiting the recognition of foreign documents and judgments on grounds of public policy – may be in contrast with the Constitution and the international rules on the protection of minors, insofar as they do not allow the registration of children of homosexual couples born through "surrogate motherhood" practices, which in Italy are forbidden (and also punished by criminal law). The possible contrast emerged as a consequence of the first advisory opinion of the ECtHR, which is – at least in part – based on comparative law analysis.

Although the outcome of this procedure is still uncertain, none can deny that the Advisory Opinions procedure, created with the aim to strengthen the dialogue between national

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[47] On the first issue, see § 43 of the Advisory Opinion, where the Court clarifies that "*despite a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, there is no consensus in Europe*"; on the second issue, see § 51: "*The Court notes that there is no consensus in Europe on this issue: where the establishment or recognition of a legal relationship between the child and the intended parent is possible, the procedure varies from one State to another*".

Moreover, the comparative survey shows a certain superficiality. It is sufficient to think about the Italian situation, which is not mentioned in any way, even though there are various judicial decisions that tend to admit the filiation relationship through adoption of minors within families (*adozioni in casi particolari*) or through transcription, both for same-sex and opposite-sex parents. The evolution of the case-law and the complex legal framework are recently illustrated by S. IZZO, *«From status to contract»: la trascrizione dei provvedimenti stranieri dichiarativi dello status del figlio d'intenzione*, in *articolo29.it*; see also M. WINKLER, K.T. SCHAPPO, *A tale of two fathers*, in *Italian Law Journal* (2019) 359-387.

[48] L. LAVRYSEN, *The Mountain Gave Birth to a Mouse: The First Advisory Opinion under Protocol No. 16*, in *strasbourgobservers.com*, 14 April 2019.

[49] Italian "Corte di Cassazione", sez. un., 8 May 2019, n. 12193, in *Fam. e dir.*, 2019, p. 653 (commented by M. DOGLIOTTI and G. FERRANDO).

[50] Italian "Corte di Cassazione", ord. 29 April 2020, n. 8325, in *Fam. e dir.*, 2020, p. 675 (commented by G. RECINTO).

courts and the ECtHR (but also to alleviate the Court's burden and reduce its backlog), may then constitute another effective instrument with a general harmonizing aftermath. Nonetheless, the first two opinions given by the Court seem to mirror all the reasons that gave rise to an increasing criticism during the last 20 years,[51] in particular with regard to the opacity of the methodology used to detect the European consensus and define the margin of appreciation.

The anomaly in the use of the doctrine of the consensus seems to reside on the rather non-systematic way, on the absence of a proper method of comparative investigation, on the consideration of legislative data only, and, finally, the confinement of the search for consensus to one particular rule with a complete irrelevance of context and background.[52]

Nevertheless, the outcome of these observations reveals a role of comparison more linked to justification than to interpretation,[53] as confirmed by the first Advisory Opinion on parenthood and cross-border surrogacy; in other words, the exercise of the comparative analysis is carried out in an inevitably superficial manner in the decisions of the ECtHR, without the implementation of a clear method that would certainly differ from the mere listing of sorts that (apparently) adhere to a given solution or other times simply quoting a majority trend among the Member States.[54] This circumstance makes the comparative surveys functional to the justification of the choices made on the different basis.[55]

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[51] Among others, see J.A. BRAUCH, *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn from the European Court of Human Rights*, 52 *Howard L.J.* (2009) 277-318, at p. 278 (arguing that "[d]espite hundreds of cases and over thirty years of experience, the ECHR has still not made clear what a European consensus is, or even how one would identify the consensus if it existed").

[52] From the ECtHR's case law it is possible to consider that, on certain occasions, the recognition of a broad consensus is not crucial, while in other decisions a mere "trend" may be useful to justify an innovative outcome. See, in this regard, the case of *Goodwin v. United Kingdom*, ECtHR 11 July 2002, appl. no. 28957/95, where the Court found no justification for barring a transgender individual from enjoying the right to marry under any circumstances, despite there not being any European consensus on the matter.

[53] P.G. CAROZZA, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 *Notre Dame L Rev* (1999) 1217-1237, at p. 1225.

[54] For a mere reference to the majority guidelines, see *Opuz v Turkey*, ECtHR 9 June 2009, appl. no. 33401/02, § 87, on domestic violence, and *Konstantin Markin v. Russia*, 22 March 2012, appl. no. 30078/06, paras. 71-75, on "parental leave".

[55] According to part of the legal doctrine, the Court of Justice of the European Union shares with the ECtHR the same absence of a clear comparative methodology. In this sense, see S. DOUGLAS-SCOTT, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 *Common Market L.R.* (2006) 629-665, at p. 657 ("Although the European Court of Human Rights and the ECJ are transnational courts

This is proved by the total lack of awareness regarding the importance of "operational rules" beyond definitions and general provisions:[56] this is an essential prerequisite for any comparative study, since comparison must look for the outcome of a complex numbers of factors and cannot limit itself to the mere consistency of the statements of different jurisdictions.

Furthermore, this approach demeans the potential of comparative law in the human rights practice, which has been accurately expressed by Christoph McCrudden: "the role of comparison is that of persuasion to an essentially moral position. Lawyers in the human rights context often use comparison to legitimate their argument that a particular interpretation of an existing human rights norm should be adopted, or as part of the process of generating further norms. The use of comparison as part of the process of persuasion not infrequently gives rise to highly selective, often rather simplistic comparative arguments".[57]

Reducing the impact of comparative law to the search for a European consensus, enlarging or reducing the States' margin of appreciation, may at the end become in contrast with the very spirit of the Convention and prevents from answering the question of why the consensus of a large number of jurisdictions should determine the content and purpose of conventional norms[58] or, conversely, why the absence of such consensus would necessarily imply the exercise of self-restraint by the Court.

During its 60 years of existence, the ECtHR developed from a small institution into the most influential regional human rights court, with more than 800 million people who can potentially submit an application before it, complaining about the violation of one of the rights enshrined in the European Convention on Human Rights. In view of the complexity of the entire system of protection of human rights, a superficial use of comparative law may have fatal consequences on the accuracy of its decisions.

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par excellence, and much of their case law is built out of general principles of law from Member States, there is very little clear comparative law methodology in their jurisprudence").

[56] Every jurist trained in comparative law knows that general provisions and theoretical formulations might be incoherent with the operational rules. On the opposite, it may happen that some operational rules are not contained in the official sources (*e.g.* civil code) but are nevertheless applicable. See R. SACCO, cit., *passim*.

[57] C. MCCRUDDEN, *Judicial Comparativism and Human Rights*, in E. ÖRÜCÜ, D. NELKEN (eds), *Comparative Law – A Handbook*, Oxford-Portland (Or), 2007, pp. 371-397, at p. 376.

[58] P.G. CAROZZA, cit., p. 1228.