Shifting Centres of Gravity in Human Rights Protection; edited by Oddný Mjöll
Arnardóttir and
Antoine Buyse
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1 Introduction

Oddný Mjöll Arnardóttir and Antoine Buyse

Dean Spielmann, the president of the European Court of Human Rights (ECtHR) recently argued that '[t]he future imagined at Brighton is one where the centre of gravity of the Convention system should be lower than it is today, closer temporally and spatially to all Europeans, and to all those under the protection of the Convention'.[1] This book brings together researchers from the fields of international human rights law, European Union (EU) law and constitutional law to reflect on the tug-of-war over the positioning of the centre of gravity of human rights protection in Europe, addressing not only the position of the Convention system vis-à-vis the Contracting States, but also its positioning vis-à-vis fundamental rights protection in the EU. The aim is, first, to analyse how current developments reflect conflicting trends with regard to the positioning of this centre of gravity, and to assess the implications thereof for the future of European human rights protection. Having thus set the scene, the second and connected aim is to take a critical look at the tools that have been developed at the European level for navigating these complex relationships, with the aim of identifying whether they are capable of responding effectively to the complexities of emerging realities in the triangular relationship between the ECHR, EU law and national law.

The metaphor of shifting gravity reflects not just constant changes in the European human rights architecture, but also – and this is important both from a political and legal perspective – a battle over which actor has the final say in human rights matters. Is it one of the two regional Courts, the one in Strasbourg or the one in Luxembourg, or is it national highest courts or legislatives? Even if state parties to both the EU's treaties and the European Convention on Human Rights and Fundamental Freedoms originally perceived themselves as masters of the treaties, the dynamics of European integration and the key role of the two European courts have greatly changed this traditional perception and even affected reality, in the sense that European and national judges are informally and formally – through their case law – influencing and reflecting upon each other's jurisprudence. National ministries of foreign affairs or justice are no longer the only conduits of communication.

1 Dean Spielmann, 'Whither the Margin of Appreciation' (2014) 67 CLP 49, 65.

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The gravity metaphor is not intended to convey any idea of inevitability: for Newton the apple may only have fallen from the tree to the ground due to the Earth's greater gravity with no other trajectory possible; in human rights protection the direction of pull-and-push movements can directly be influenced by the actors involved. This is done by the conscious creation of mechanisms which foster interaction, such as the preliminary reference procedure within the EU and the partly similar possibility for national judges to ask the ECtHR for an advisory opinion under Protocol 16. But it is also done by processes of trial and error, as shown by judicial dialogue – whether in comity or conflict – and the creation of the pilot judgment procedure in Strasbourg. Finally, it is in our view key to see constantly evolving doctrines of judicial restraint by courts as part of these shifting gravities. To put it differently, it is not just the institutional frameworks but also the doctrinal ones that influence where the final say on matters of human rights protection can be found. And it is not just a question of judicial dialogue between courts,[2] but also very often of a *monologue intérieur* within courts, both national and international, for example on the question of how much leeway international courts leave to domestic ones or, the other way around, how domestic judges deal with competing European human rights pronouncements coming from Strasbourg and Luxembourg. This volume endeavours to explore these dynamics by addressing the claim that there is nothing 'natural' about changes in gravity; rather, it is very often the result of conscious choices, as the quote from President Spielmann above illustrates, sometimes with unintended results.

The protection of human rights in Europe is currently at a crossroads as there are competing processes which push and pull the centre of gravity of this protection between the ECHR system in Strasbourg, the EU system in Luxemburg and Brussels, and the national protection of human rights.

In Strasbourg, the ECtHR currently faces severe challenges. The Brighton Declaration of 2012 addresses the problems the Court is facing in terms of efficiency, and in terms of the legitimacy dilemma created by the backlog of cases and increased criticism of the quality and consistency of the Court's case law.[3] While 'Brighton' mostly offers only minor adjustments to the current control mechanism, it also places a more serious long-term review of the Court's fundamental nature and role on the agenda for the coming decade. Substantively, 'Brighton' highlights the political momentum for bringing responsibility for the protection of ECHR rights 'home' to the Contracting States. The focus placed on the principle of subsidiarity and the margin of appreciation has already been concretised in Protocols 15 and 16 to the Convention, which are intended to emphasise the Court's subsidiary role vis-à-vis the Contracting States' prerogatives. While neither of the two Protocols has taken effect, recent case law and extrajudicial

2 See, famously, Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard Intl LJ* 191.

3 High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, 19–20 April 2012 (the 'Brighton Declaration'), <www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 21 August 2015, paras 11–12 ('Brighton Declaration').

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commentary[4] indicate that the Court is already on the path towards realising that goal. However, despite the emphasis on subsidiarity and margins, the Brighton Declaration is still firmly based on the premise of the ECtHR's continued 'key role in the system for protecting and promoting human rights in Europe'.[5] This was indeed also reflected in the Draft Agreement on the Accession of the EU to the ECHR, which positioned the ECtHR as the 'supreme' European human rights court through making its judgments (in cases to which the EU is party) binding on the EU and its courts.[6]

In Brussels and Luxembourg, however, forces seem to be pulling in a somewhat different direction. The EU is increasingly bringing its weight to bear upon the field of fundamental rights, most notably through giving the Charter of Fundamental Rights (CFR) the status of primary law. Further, since the Charter was proclaimed, all secondary legislation aims to comply with it[7] and an increasing volume of secondary legislation implement particular Charter provisions. Contrarily to the ECHR emphasis on subsidiarity and margins, the EU may even aim to fully harmonise legislation in the field of fundamental rights protection, leaving no discretion of implementation to the Member States.[8] The strengthening of the EU mandate in the field of fundamental rights protection also seems to have had an effect on the relationship between the Luxembourg and Strasbourg Courts. Gráinne de Búrca has for example noted that since the coming into force of the CFR, the case law of the European Court of Justice (ECJ) has become increasingly self-contained instead of engaging as before with the case law of the ECtHR.[9] Most recently, in its opinion of 18 December 2014, the ECJ also found the Draft Accession Agreement incompatible with EU law for reasons related to the special character of the EU legal system and the positioning of the ECJ as the supreme arbiter of questions of EU law.[10] Instead of moving towards a unified and harmonious approach to human rights protection in Europe, this controversial ruling, characterised in initial commentary as a 'bombshell'[11] and an 'unmitigated

4 Spielmann (n. 1); Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 HRLR 487.

5 Brighton Declaration (n. 3) para. 31.

6 Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 'Final Report to the CDDH', 47+1(2013)008rev2 <www.coe.int/t/dlapil/cahdi/Source/Docs2013/47_1_2013_008rev2_EN.pdf> accessed 21 August 2015, Appendix I ('Draft Accession Agreement').

7 See for example Communication from the Commission, 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals' (COM (2005) 172 final).

8 Case C-399/11 *Stefano Melloniv*. *Ministerio Fiscal* (Judgment 26 February 2013).

9 Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20*Maastricht Journal of European and Comparative Law* 168, 184.

10 Opinion 2/13, 18 December 2014.

11 Antoine Buyse, 'CJEU Rules: Draft Agreement on EU Accession to ECHR Incompatible with EU Law' (ECHR Blog, 20 December 2014) <http://echrblog.blogspot.nl/2014/12/cjeu-rules-draft-agreement-on-eu.html> accessed 21 August 2015.

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disaster',[12] has therefore intensified the tug-of-war over the centre of gravity of human rights protection in Europe.

The literature in this field tends to address only one of the above developmental strands at a time or to focus on only one link in the ECHR–EU–Member State triangle. This coincides with the general tendency in legal scholarship to treat international human rights law, EU law and domestic law as separate legal islands, which each – to a certain extent – maintaining their own discourse on the issues raised. For example, at the level of institutional developments, the literature on EU accession has focused on analysing the issues in relative isolation from the situation and current reform of the ECtHR.[13] And, similarly, the literature on the reform of the ECtHR is mostly centred on discussing models of individual or constitutional justice, but the issues have been framed in isolation from the question of EU accession and the consequences of the ECJ's strengthened mandate in respect of fundamental rights protection.[14] Moreover, the implications of the ECJ's opinion on the Draft Accession Agreement and its consequences for the positioning of the centre of gravity of human rights protection in Europe and the relations between the ECHR, the EU and national legal orders, may be manifold and deserve attention.

At the normative level there has hitherto been a rather clear consensus in political and academic discourses that, while the CFR sometimes provides a higher level of protection, the goal is the 'parallel interpretation'[15] and gradual convergence between the standard of protection in the Strasbourg and Luxembourg jurisprudence, so that normative clarity and consistency between the two regimes

12 Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (EU Law Analysis, 18 December 2014) <http://eulawanalysis.blogspot.nl/2014/12/the-cjeu-and-eus-accession-to-echr.html> accessed 21 August 2015.

13 For example Paul Gragl, 'A Giant Leap for European Human Rights? The Final Agreement on the European Union's Accession to the European Convention on Human Right' (2014) 51 CMLR 13; Jörg Polakiewicz, 'EU Law and the ECHR: Will the European Union's Accession Square the Circle?' (2013) EHRLR 592; Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 MLR 254; Paul Mahoney, 'From Strasbourg to Luxembourg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon' (2011) 31 HRLJ 73.

14 For example Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights' (2013) 12 HRLR 655; Jonas Christoffersen, 'Individual or Constitutional Justice: Can the Power Balance of Adjudication Be Reversed?', in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2013) 181; Andreas Føllesdal, Birgit Peters and Geir Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013).

15 Joint communication from Presidents Costa and Skouris, 24 January 2011 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 21 August 2015, para. 1.

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can be reached where relevant.[16] The ECJ's opinion on the Draft Accession Agreement has, however, to a certain extent exposed the complexities of this idealised vision for 'European' human rights protection, including the problematic issue of deciding where floors and ceilings of human rights protection lie.[17] In this context, it should be noted that the content of protected rights and the level of protection is to a large extent decided through application in concrete cases, heavily influenced by the ECHR margin of appreciation doctrine or similar methods of calibrating intensity of review in the EU context. As the relationship between the two European legal regimes on one hand and the national level on the other is governed by different principles and doctrines, it is mostly approached from the perspective of either EU law or the law of the ECHR. Studies adopting a common frame of reference for analysing the national relationship with both regimes are, accordingly, extremely few and far between.[18] Specifically, the margin of appreciation doctrine has not been analysed clearly from an ECHR–EU comparative perspective, which hampers a common understanding of how 'European' baselines are formed.[19] Also, although widely commented on in the literature, the key legal tools used to navigate the complex relationship between the respective actors (the principle of subsidiarity, the margin of appreciation (or similar techniques) and the ECtHR pilot judgment procedure) are underdeveloped theoretically,[20] and in need of some rethinking in light of the emerging landscape.

In light of all the above, this book is intended to take a critical look at the forces influencing shifting centres of gravity in European human rights protection and the implications thereof for the future of human rights protection in Europe; and to contribute to the rethinking of current doctrinal approaches to the navigation of the ECHR–EU–national triangle of human rights protection.

16 Draft Accession Agreement (n. 6), Preamble; Joint communication from Presidents Costa and Skouris (ibid.); Peter Van Elsuwege, 'New Challenges for Pluralist Adjudication after Lisbon: The Protection of Fundamental Rights in a Ius Commune' (2012) 30 NQHR 195, 216; Paul Gragl, '(Judicial) Love Is Not a One-Way Street: The EU Preliminary Reference Procedure as a Model for ECtHR Advisory Opinions under Protocol No. 16' (2013) 38 ELR 229, 237.

17 See Article 53 ECHR, Article 53 CFR and Case C-399/11 *Stefano Melloniv.Ministerio Fiscal* (Judgment 26 February 2013).

18 But see Giuseppe Martinico, 'Is the European Convention Going to Be the "Supreme"? A Comparative–Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 EJIL 401.

19 Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 ELJ 80, uses elements of the ECHR doctrine as a 'source of inspiration' (102) for arguments on the development of a (different) margin of appreciation doctrine in the EU context, without much analysis of if and how current practices are comparable.

20 E.g. Andreas Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle of International Law' (2013) 2 *Global Constitutionalism* 37; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 81; Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 NQHR 324, 325.

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Part I focuses on interactions in the triangle from an institutional and constitutional point of view. The contributions reflect how the key actors are trying to define their position vis-à-vis one another in a never-ending process. Groussot, Arold Lorenz and Petursson in Chapter 2 address the *telos*, the goals of the two European courts and the extent to which they align or clash. Proceeding from the stance that accession to the ECHR is valuable for the EU in terms of a better protection of the rights of individual citizens, they examine the ECJ case law after six years of application of the EU Charter of Fundamental Rights and the situation after the delivery of Opinion 2/13, and ask whether the aim of the full protection of fundamental rights in Europe can be reconciled with the effectiveness of EU law. Addressing also the relationship between the two European rights regimes, Björgvinsson in Chapter 3 discusses the EU's increased engagement with fundamental rights, Opinion 2/13, the *Bosphorus Airways* 'presumption of Convention compliance' for EU law, and the environment of political and judicial resentment that currently exists in the ECtHR. He argues that these developments have weakened the Court's claim to continue to play a leading role in European human rights protection on a pan-European level, and that they signal a shift in the centre of gravity from Strasbourg to Luxembourg. Turning, more specifically, to the relationship of the ECtHR with national courts, Ulfstein in Chapter 4 argues that the Court is an international court with constitutional functions in the national legal orders and that it should therefore be subject to constitutional standards adapted to its status as an international court. On the back of this approach, his chapter moves on to address how the ECtHR and national courts act – and should act – as part of a constitutional system across the international–national division. Martinico continues with this theme in Chapter 5 and examines the place of the European Convention in national constitutional law from the perspective of the 'price of success'. This, he argues, manifests itself when national judges first comply with the procedural duty in domestic law to take the case law of the Strasbourg Court into account, but then decide to depart from the concrete results reached by the ECtHR. Finally, Thorarensen in Chapter 6 critically reviews an upcoming new tool which it was hoped would establish a more fruitful 'constitutional' interaction between national judges and the ECtHR: the advisory opinion procedure of Protocol 16 ECHR.

Part II of the book aims to rethink a number of both classic and more recent doctrines and tools which have helped to shape interactions within the triangle. Part II reflects many of the ways in which the various actors can show higher or lower degrees of restraint towards one another in their case law, where the underlying assumption seems to be that the more serious one actor performs its task, the more leeway it can 'earn' from the other actors in the triangle. In Chapter 7 Buyse looks at how these shifts may have worked in the pilot judgment procedure of the Strasbourg Court, which has partially led to realignments both between the European and national levels but also between various Council of Europe institutions as well as within domestic systems. Turning then to doctrines of judicial restraint, Nic Shuibhne in Chapter 8 argues that while the ECJ rarely refers explicitly to a 'margin of appreciation', it does apply a comparable margin of

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discretion method in situations where fundamental rights and EU free movement rights come into conflict. While she argues that these developments also fit with the Charter of Fundamental Rights, she cautions about the implications of permitted differentiation for the classical requirement of uniform application of EU law across all of the Member States. Çalı in Chapter 9 argues that the ECtHR has started to shift its flexible case-by-case approach towards a variable standard of judicial review which manifests itself in a 'responsible courts doctrine'. Under this doctrine, the Court exhibits more leniency to domestic courts that take the case law of the ECtHR seriously. She argues that while such a doctrine offers a way out of criticisms of the Court as micro-managing well-established judiciaries, it also entails some costs and risks. Moving on to a comparative perspective, Arnardóttir and Guðmundsdóttir in Chapter 10 compare the margin of appreciation doctrine at the European Court of Human Rights with the exercise of judicial restraint at the European Court of Justice. They elaborate a distinction between systemic and normative elements of restraint (the former is, for example, reflected in Çalı's responsible courts doctrine) and find that despite being differently situated in the respective legal systems, and despite presenting core issues in different terms, there are some striking similarities in approaches to judicial restraint across both courts. Finally, in Chapter 11 Follesdal places the whole issue of interactions between actors in a wider politico-philosophical perspective, arguing for a more justifiable 'person-centric' conception of subsidiarity to inform doctrines of judicial restraint and balance respect for the sovereignty of states with protection of the human rights.

We sincerely hope that this book will be of interest not just to legal scholars, but also to those who study human rights from other perspectives such as political science or European studies. It is an explicit attempt to bring together the perspectives of Strasbourg, Luxembourg and national legal orders by analysing their interactions. Gravity may lead to matters coming closer together, but may equally cause clashes. This book analyses both possibilities in the constantly evolving European human rights architecture.