SESSION 1

THE THREE-DIMENSIONAL RELATIONSHIP BETWEEN THE ECHR, EU LAW AND DOMESTIC LAW: COEXISTENCE AND CROSS-FERTILISATION IN THE CONTEXT OF RECENT DEVELOPMENTS

Professor Davíð Pór Björgvinsson, Copenhagen University and University of Iceland, former judge at the European Court of Human Rights

The Role of the European Court of Human Rights in the Changing European Human Rights Architecture

In the presentation I will reflect on the challenges ahead for the European Court of Human Rights in asserting its role in the future pan-European human rights protection in light of the three-dimensional relationship between the ECHR, EU law and domestic law.

Professor Xavier Grousset, Lund University

The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?

The aim of my presentation is to assess the impact of the EU Charter of Fundamental Rights on the relationship between the European Court of Justice and the European Court of Human Rights and more particularly on the case law of the Luxemburg Court. The analysis shows that many paradoxes have been generated by the entry into force of the EU Charter of Fundamental Rights. This situation leads to undue complexity of the system of human rights protection in Europe, whereas the individual should benefit from a simple, clear and effective system of human rights protection. I will divide my presentation into three sections. The first section will look at the paradox of autonomy. The second section will focus on the paradox of minimalism. The third section will look at the paradox of coherence. The conclusion will concern the meta-paradox of complexity which is inherent to the three other paradoxes.

Dr. Giuseppe Martinico, Scuola S.Anna, Pisa

National Judges Between EU law and the ECHR: The Legacy of Kamberaj

The aim of this paper is to investigate how EU law has given national judges arguments to reconsider the force of the ECHR in the domestic legal order.

My investigation originates from the fact that in many jurisdictions - for different reasons - national judges have started disapplying national law conflicting with the ECHR. This phenomenon recalls the Simmenthal doctrine and indeed, when looking at some controversial cases - like Italy - it is possible to notice that judges expressly refer to an analogical extension of the Simmenthal argument when setting aside a piece of legislation incompatible with the European Convention.

This is not strange at all: EU law has given a great contribution towards changing the mind of national judges: they are now accustomed to the idea of dealing with different legal materials.
and different courts. They also know the strategic potential of this situation: national judges have different fungible bullets now if they want to question their legislator or if they want to trigger a jurisprudential change in the established case law of their Constitutional or Supreme courts.

This kind of strategic use of the preliminary ruling mechanism is very well-known (Alter) while as for the ECHR this does not happen due to the absence of a mechanism comparable to the preliminary ruling in the ECHR’s system.

However, and the recent Kamberaj example is key from this point of view, national judges may rely on the (still) indirect connections existing between the system of the ECHR and EU law in order to devise further strategy to empower themselves.

Thanks to the EU preliminary ruling mechanism, thus, national judges may use the ECHR or the case law of the ECtHR in the same way they use EU law, that is to question, for instance, the established case law of their Constitutional or Supreme Courts. At the same time, this may have contributed to the extension of some of the principles traditionally reserved to EU law to the ECHR and, again the Kamberaj case is emblematic: in Kamberaj national judges tried to use Art. 6 TUE (commanding the future accession of the EU to the ECHR) to extend the Simmenthal doctrine to the ECHR.

**Professor Björg Thorarensen, University of Iceland**

_The Advisory Jurisdiction of the ECtHR. A Symbolic Step or Means to Reinforce the Domestic Implementation of the European Convention of Human Rights?_

The presentation will address the aims and possible future impact of Protocol No. 16 to the European Convention on Human Rights which was opened for signature on 2 October 2013. The Protocol extends the jurisdiction of the European Court of Human Rights to give advisory opinions to the highest courts of the State Parties on questions of principle relating to the interpretation or application of the rights and freedoms of the Convention in the context of a concrete case pending before them. The procedure will be optional for State Parties.

This procedural innovation in the Court’s functions was suggested in the ongoing reform process starting in 2000, which aimed at enhancing the effectiveness of the Convention in national legal systems and the reform of the Convention system to react to the increasing flow of applications. The initial main argument underlying the idea of the advisory opinion procedure was that it should strengthen the interaction between the Court and national authorities, in order to foster dialogue between courts and enhance the Court’s “constitutional role” (Report of the Group of Wise Persons to the Committee of Ministers, November 2006).

The presentation will seek answers to some important questions raised by the new Protocol. Firstly, what is the aim of enhancing a constitutional role for the European Court of Human Rights towards the domestic courts of the State Parties and is it feasible to strengthen it? Secondly, it will be discussed whether the new procedure serves mainly as a symbolic gesture to underline this role with little practical consequences or whether it is likely to be widely applied by national courts and have a significant impact to enhance a more effective domestic implementation of the Convention.
SESSION 2
SUBSIDIARITY AND THE MARGIN OF APPRECIATION: IN NEED OF SOME RE-THINKING?

Professor Andreas Føllesdal, Oslo University

Subsidiarity to the Rescue? Resolving Tensions Between the Margin of Appreciation and Human Rights Protection

How should an international human rights court or treaty body best “balance the sovereignty of Contracting Parties with their obligations under the Convention” (Macdonald 1993, 123) – paying due respect to both the treaty and to its sovereign creators? The Margin of Appreciation (MA) doctrine used by the European Court of Human Rights (ECtHR) is often taken to illustrate such a ‘balancing.’ The present paper explores whether and how a defensible ‘Principle of Subsidiarity’ can alleviate some of the challenges posed by the MA doctrine.

The MA doctrine of the ECtHR is to grant a state the authority, within certain limits, to determine whether the rights of the European Convention on Human Rights (ECHR) are violated in a particular case. The doctrine is not found in the Convention text proper, but is a long standing practice of the Court. The MA doctrine has received much praise and criticism, some of it well deserved: It expresses some respect for sovereign democratic self-government, yet it is so vague that even to call it a ‘doctrine’ seems unduly charitable. More fundamentally, the MA doctrine may grant both the ECtHR and powerful states too much discretion, and put human rights at risk, contrary to the purpose of the ECHR.

The paper explores whether a principle of Subsidiarity can help specify the MA doctrine in more defensible directions, whilst expressing due deference to legitimate domestic decisions. Various versions of subsidiarity hold that the burden of argument rests with those who seek to move decisions away from the fundamental units toward more centralized bodies. The paper partly explores what version of subsidiarity should be brought to bear, since some such versions themselves are unsound. I then address some contested and salient aspects of the MA doctrine, in particular the proportionality test and the narrowed MA when the ECtHR identifies an ‘emerging European consensus’.

Professor Geir Ulfstein, Oslo University

The ECtHR and National Courts: A Constitutional Relationship?

The current debate about the long term future of the ECtHR should take account of the characteristics of the Court and its interaction with national courts. The ECtHR has a constitutional function in the sense that it reviews decisions from national courts. But the Court’s functions must be determined on the basis of international law. On the other hand, national courts’ legal basis is national constitutional law.

How can the ECtHR and national courts interact in a constitutional manner when they are parts of different legal systems?
Professor Niamh Nic Shuibhne, University of Edinburgh

*The Court of Justice, Fundamental Rights, and the Margin of Appreciation: Would Less be More?*

This paper seeks to demonstrate, as a preliminary objective, that there is a clear distinction between explicit and implicit use of the ‘margin of appreciation’ doctrine in the case law of the Court of Justice. The explicit language of the doctrine has, to date, been used very sparingly and in three main contexts: first, in a purely descriptive sense when referring to ECtHR case law and related principles; second, to confirm the autonomy enjoyed by the EU institutions in certain spheres of decision-making (for example, in the field of competition law and anti-dumping); and, third, to convey the idea of broad discretion for the Member States in certain policy spheres, principally in cases concerning certain social benefits. The critical linking point here is that none of these categories involves the development of the Court of Justice’s case law on the protection of fundamental rights in a substantive sense. In that jurisprudence, we can perhaps detect an implicit margin of appreciation, but only in certain cases and only in an incomplete form. The paper thus has two main aims in this connection: first, to establish the existence and to outline the character or profile of the implicit margin of appreciation doctrine that is arguably evident in the Court of Justice’s fundamental rights case law; but, second, to question the contribution that the concept actually makes – evaluating in turn whether a more worked-out, explicit margin of appreciation should be developed by the Court of Justice, or whether its imprint would be better eradicated from Luxembourg’s framework of fundamental rights protection altogether.

Dr. Basak Cali, Senior lecturer, University College London

*Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review*

The relationship between the highest domestic courts and the European Court of Human Rights has been subject to much pan-European debate in the past decade. Much criticism of the European Court of Human Rights has relied on the assumption that it has attempted to micro manage domestic high courts that are perfectly capable of carrying out Strasbourg-proof rights interpretation themselves. In response to this criticism, the European Court of Human Rights has developed what I call a nascent ‘responsible courts’ doctrine - a doctrine with parallels to the doctrine of ‘responsible representative governments’ in the WTO hormones case.

In this paper, I review the development and the trigger conditions of this doctrine in Strasbourg case-law. I then compare this doctrine with the existing judicial review standards that Strasbourg uses - under the margin of appreciation umbrella in particular. Next, I turn to the policy implications of this doctrine. I argue that, on balance, a variable standard of international judicial review that differentiates between how domestic courts handle Strasbourg case-law is a sound strategy for a transnational court that is dealing with a broad scope of domestic legal systems (and that of the European Union when it accedes to the Convention) with varying degrees of domestic human rights protection. Whilst a strong judicial review of courts with weak human rights protections may lead to a backlash from some domestic judges, it may also offer an incentive for others who want to be seen as responsible internationally.
Speaking the Same Language? Comparing Margins of Appreciation at the ECtHR and the ECJ

The doctrine of the margin of appreciation is a multifaceted tool in the jurisprudence of the European Court of Human Rights. It is most commonly described as performing at the same time the dual roles of being a structural/procedural tool that places formal limits on the Court’s powers of review and of being a substantive/normative tool for the balancing of individual rights and communal interests (Yourow 1996, Letsas 2006, Arai-Takahashi 2013). The doctrine is somewhat controversial and under-theorised and it has also been pointed out that it may sometimes be applied as ‘window dressing’ in the form of a label the Court places on its findings without any real bearing on how it has reached them (Arai-Takahashi 2013).

In contrast the European Court of Justice only rarely refers to a ‘margin of appreciation’ but relies instead on the language of subsidiarity, proportionality and the political and economic choices that are in certain circumstances for the Member States and not the Court to decide upon. It has nevertheless been suggested in recent works that the ECJ’s approaches are in some ways similar to that employed under the margin of appreciation doctrine (Sweeney 2007, Gerards 2011).

The EU Charter of Fundamental Rights and the intended EU accession to the ECHR are based on the premise that the human rights jurisprudence of both regimes should gradually converge and form a coherent normative whole. For this to be possible the two regimes must speak the same language to the extent possible, also with respect to how the boundaries between international/European review and Member State autonomy are delineated. This paper takes the distinction between the structural and normative conceptions of the margin of appreciation as its starting point and inquires where approaches under the two regimes share commonalities and where not and whether it is possible, really, to compare the two regimes with reference to a concept of a margin of appreciation.
SESSION 3
ACCESS TO JUSTICE AND EFFECTIVENESS OF PROTECTION: THE EFFECTS OF CURRENT DEVELOPMENTS ON VICTIMS AND VULNERABLE GROUPS

Professor Philip Leach, Middlesex University, Director of the European Human Rights Advocacy Centre

Access to Justice in Strasbourg – Can a Balance be Found?

Within an increasingly constitutionalised European human rights legal system, how significant is the principle of access to justice? The individual right of petition has always been the cornerstone of the European human rights system, and member states’ support for this principle has recently been reiterated in Interlaken, Izmir and Brighton. But does the European Court’s excessive caseload, its development of a more collective approach to litigation which focuses on systemic questions and the ascendancy of the subsidiarity principle, mean that individual access must necessarily be restricted or curtailed? Are there particularly vulnerable victims of human rights violations in Europe who will lose out? This contribution will seek to argue in favour of a nuanced recognition of the various distinctive tasks which the Court can and should carry out, encompassing Grand Chamber judgments on significant legal questions and at the same time upholding the right of individual petition, particularly in developing areas of law and in relation to egregious or systemic violations.

Dr. Antoine Buyse, Associate Professor, Utrecht University

Flying or Landing? The Future Position of the Pilot Judgment Procedure in the Changing European Human Rights Architecture

The pilot judgment procedure now exists for over a decade and was established as an attempt to deal with structural violations. It has had a number of side-effects which result from its very features. The first important one is that by giving more specific indications to states, the Court partly takes upon itself a role previously almost uniquely fulfilled by the Committee of Ministers – there is a shift of gravity within the Council of Europe in that respect. Secondly, in many pilot cases the Court ‘freezes’ large numbers of comparable cases until the state party deals with it pilot judgment. The result is a mixed blessing: it delays justice for those who have already lodged comparable claims in Strasbourg and may eventually even return those claims to the national level. On the other hand, if a pilot judgment procedure works effectively, one judgment in a single case may help to resolve an issue for a much larger group including those who did not even yet take the long road to Strasbourg. This presentation will go into both of these side-effects in the general context of the idea and the practice of the pilot judgment procedure.
Lorna McGregor, Reader, University of Essex

Alternative Dispute Resolution and the ECHR: Proposing a Rights-Based Framework

In 1975, the European Court of Human Rights (ECtHR) held that, ‘one can scarcely conceive of the rule of law without there being a possibility of having access to the courts’ (Golder v United Kingdom). However, the presumption of the court as the principal forum for dispute resolution continues to be eroded at the national and regional level. Alternative forms of dispute resolution (ADR), including agreement-based ADR (such as mediation and conciliation) and adjudicative ADR (such as arbitration) continue to burgeon, are increasingly employed within the court process and enjoy the support of the EU. The diversification of the form and nature of dispute resolution processes has led some commentators to argue that it is now more appropriate to talk of ‘appropriate dispute resolution’ or ‘proportionate dispute resolution’ rather than ADR. This approach rejects the idea that other forms of dispute resolution are alternatives to courts as the dominant model but rather the ‘forum should fit the fuss’. While socio-legal and feminist scholarship has examined the virtues and risks of ADR in detail, international human rights law has not engaged with the issue as extensively in scholarship or practice. This paper attempts to bridge these fields through an examination of the methodology the European Court of Human Rights currently uses and should use in the future to determine the compatibility of ADR with Articles 6(1) and 13. It examines the issue with particular attention to protecting against power imbalances between parties, procedural justice and equality and non-discrimination.

Dr. Alexandra Timmer, researcher, Utrecht University

Vulnerable Groups: A Booming Concept in ECtHR Case Law and EU Policies

Both the EU and the ECtHR increasingly emphasize the need to protect “vulnerable groups”. On top of that, human rights literature is packed with references to “vulnerable groups”. Most of the time, however, this term seems to be used without real reflection on its content.

This paper starts by briefly discussing vulnerability theory. In what ways are people vulnerable? What are the problems with labelling only specific groups ‘vulnerable’? Then it charts the ways in which the Strasbourg Court has deployed the concept of vulnerable groups in its recent case law. After discussing the ECtHR, the paper moves on to give a brief overview of EU policies (both internal and external) aimed at vulnerable groups. In conclusion, the paper will reflect on how the intention to prioritize vulnerable groups runs up against the reality that the EU and the ECtHR, as institutions, are also vulnerable themselves.