Resolving conflicts in European fundamental rights protection

Valorisation Addendum

Fundamental rights are used today when discussing almost any political subject, at all levels of governance, international, European and national: immigration, crime, family law and healthcare, to name just a few. The centrality of rights and the trend to translate political issues in human rights terminology inevitably takes issues away from the political arena and leads to a shift in the relationships between political institutions and courts. Europe is no exception to this global trend, and the legal systems governing in Europe have followed suit. Over the past two decades, new bills of rights have been adopted (e.g. EU Charter), old ones have been adapted (e.g. the Dutch bill of rights), European bills have been given effect in domestic legal orders (see e.g. the incorporation of the ECHR in the Nordic countries, Ireland and the UK), while the EU has been developing a human rights policy and now even has a human rights commissioner.

The result is the existence of a highly complex web of partly autonomous, partly interrelated systems of fundamental rights protection in Europe. This complexity is caused by the co-existence of three legal systems, each with their catalogue of fundamental rights and their own enforcement system. At the national level fundamental rights are mainly to be found in constitutions, sometimes complemented with international treaties, and, sometimes also, EU law. Secondly, at the international level, individuals can bring individual complaints before the European Court of Human Rights (ECtHR) alleging violations of their fundamental rights as protected by the ECHR. Thirdly, fundamental rights are also protected in the context of EU law, where they derive from the Charter, common traditions and the ECHR. Nevertheless, human rights protection remains first and foremost a national responsibility, and places national courts and national human rights at the centre. Consequently, national courts may be confronted with competing and conflicting obligations arising from different catalogues of rights. After all, the catalogues may not require the same level of protection and are interpreted by different highest courts, while clear rules governing their mutual relationship are lacking.

The research conducted in this book seeks to provide national judges with much-needed guidance on how they can and should resolve conflicts caused by the co-existence of different human rights mechanisms and standards in Europe. Part I and II deal with the instances of divergences and conflicts between EU and ECHR law, as interpreted by their respective courts, i.e. the Court of Justice of the European Union (CJEU) and the ECtHR. Part III is devoted to national courts. It develops a theoretical construction of possible ways – scenarios – to approach conflicts between EU and ECHR law. It then tests the different scenarios in light of actual practice of domestic courts. The final section of Part III offers guidance for national courts when faced with conflicting obligations arising in EU and ECHR law.

Since many contemporary societal problems involve or are translated into issues of fundamental rights national courts are expected to play a more prominent role in fundamental rights protection – a role that is not always considered entirely legitimate as it is not considered democratic. The same is true for European courts, which are often considered not to be the best placed to strike the balance between fundamental rights and other interests, and impact on national choices. While governments are in principle committed to improve fundamental rights protection, there is growing unease about the legitimacy of relying on courts, especially on European Courts. Finally, the sheer complexity of the current system, which involves national and European Courts further challenges the legitimacy of the system and, as a consequence, of fundamental rights themselves. This book aims to shed light on the functioning of the system, which is necessary for the courts functioning in it, and for the individuals and non-governmental organisations (NGOs) who want to use the system in the development of their litigation strategies. In this latter context, the research is relevant for lawyers and legal professionals too, regardless of their area or type of practice, since human rights issues may arise in any kind of litigation. It may help them in preparing to advise clients, design their litigation strategies, negotiate with opposing counsel, or persuade a judge.

The results are suitable to be communicated to national and European judges, lawyers in the field of human rights protection and beyond, and other

interested parties. The findings can contribute to a better understanding of the national and European systems of human rights protection (independently and in combination) and the interplay between different catalogues of fundamental rights.

The overall aim of this research is to contribute to an enhanced and more effective protection of fundamental rights where minimum level of protection is guaranteed across Europe. In this sense, it is important for every single one of us.