Interpretation of Fundamental Rights in a Multilevel Legal System

An analysis of the European Court of Human Rights and the Court of Justice of the European Union
School of Human Rights Research Series, Volume 46

The titles published in this series are listed at the end of this volume.
Interpretation of Fundamental Rights in a Multilevel Legal System

An analysis of the European Court of Human Rights and the Court of Justice of the European Union

Hanneke Senden
Hanneke Senden
Interpretation of Fundamental Rights in a Multilevel Legal System

Cover: Juriah Mosin, Dreamstime.com

Typesetting: Anne-Marie Krens – Tekstbeeld – Oegstgeest

This is the commercial edition of the dissertation published by Intersentia under ISBN 978-17-8068-027-9

The research for this publication was made possible by a grant from the Netherlands Organisation of Scientific Research (NWO).

© 2011 Intersentia
www.intersentia.com | www.intersentia.co.uk


No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means without written permission from the publisher.
Writing my PhD has been a learning experience in many ways. One of the most important lessons learned in this process is that, even if I wrote this thesis myself, the result could not have been what it is today without the help and support of many others. I would like to thank everyone who has been a part of this process in one way or the other.

I am grateful to the International Office from both Leiden University and Boston University for facilitating my stay in Boston. The European courts were far, very far away in Boston, but the distance from Europe helped me to get a good overview of the whole project. This period has therefore been really important for the whole process.

Even though the writing process has had its ups and downs throughout the years, the atmosphere made possible by my colleagues at the Department of Constitutional and Administrative Law in Leiden has been a true highlight! Also colleagues from other departments have contributed to a pleasant experience in Leiden. Weekly lunches, PhD lunches and occasional dinners brought interesting perspectives to the table. All these colleagues have contributed to a valuable time in Leiden. Two names should be mentioned in particular, because I am not sure that I would have ever finished this PhD if it wasn’t for them. Janneke, thank you for your devoted guidance, human touch and your faith in me! And Marina, my partner in PhD. The fact that we could share all the laughs, frustrations and more laughs over this project means a lot to me!

Finally, my family and friends. Where would I have been without my friends? Not in Istanbul, Kirchberg, Marrakech, London, Ischgl, Aït-Benhaddou, Cape Town, the Sahara, Cunel, Paris, Stellenbosch, Gerlos and Rabat, that’s for sure. Thanks for all these brilliant trips, some more culturally responsible than others, but always great fun! Moreover the lunch dates, sports classes and many long dinners with friends have formed a great distraction from writing my PhD.

Finally, my own and Joep’s family have been wonderfully supportive in many perspectives, perhaps most importantly by knowing when to ask and when not to ask about my progress. I should, however, particularly complement my father for trying to make some sense of my project and closely following (and commenting on) any news related to it. All of you, but mostly Mum & Dad and Toos & Joop thanks for your support!
And last but not least: Joep. I know I have complained many times whenever I was stressed that you do not know how hard it is to finish a PhD. I realize now that I do not know how hard it is to live with someone who finishes a PhD. And perhaps it is better that I didn’t know. Thank you for always making me laugh!
# CONTENTS

## PART I – INTRODUCTION

Chapter 1  
Introduction  
1.1 Interpretation versus application  
1.2 Interpretative aids  
1.3 Values in judicial argumentation  
1.4 Methodology  
1.5 Outline  

Chapter 2  
Context of legal argumentation in the European Court of Human Rights  
2.1 Character of the European Convention  
2.2 ECtHR a constitutional court?  
2.3 Style of judgment  
2.4 Subsidiarity  
2.5 Conclusion  

Chapter 3  
Context of legal argumentation in fundamental rights cases for the Court of Justice of the European Union  
3.1 The CJEU and Fundamental Rights  
3.2 The CJEU and the ECHR  
3.3 Argumentation by the CJEU  
3.4 Conclusion  

## PART II – THEORETICAL ANALYSIS

Chapter 4  
Interpretation methods and interpretative principles  
4.1 Terminology: Method, rule, principle?  
4.2 Hierarchy of interpretation methods?
## Contents

4.3 Methods of interpretation 50
  4.3.1 Textual interpretation 50
  4.3.2 Teleological interpretation 55
  4.3.3 Systemic or contextual interpretation 59
  4.3.4 Subjective or historical interpretation 62
  4.3.5 Comparative method of interpretation 66
  4.3.6 Conclusion 69
4.4 Principles of interpretation 69
  4.4.1 European Court of Human Rights 70
    4.4.1.1 Principle of evolutive interpretation 70
    4.4.1.2 Principle of practical and effective rights 73
    4.4.1.3 Principle of autonomous interpretation 77
    4.4.1.4 Democracy in the European Convention system 79
    4.4.1.5 Human dignity and personal autonomy 81
  4.4.2 Court of Justice of the European Union 82
    4.4.2.1 Principle of meta-teleological interpretation 83
    4.4.2.2 Principle of effectiveness (**effet utile**) 84
    4.4.2.3 Principle of autonomous interpretation 86
    4.4.2.4 Principle of evolutive interpretation 87
4.5 Conclusion 89

Chapter 5

Teleological interpretation 91
5.1 A theoretical point of view 92
  5.1.1 Interpreting by reference to object and purpose 93
  5.1.2 Object and purpose? 97
  5.1.3 How to determine the object and purpose 99
  5.1.4 Criticism related to method in general 102
5.2 Teleological interpretation in the ECtHR and CJEU 103
  5.2.1 CJEU 103
  5.2.2 ECtHR 105
5.3 Which way forward? 107
5.4 Conclusion 109

Chapter 6

Comparative interpretation 111
6.1 Comparative interpretation in more detail 112
  6.1.1 What is comparative interpretation? 112
  6.1.2 General basis for comparative interpretation? 113
  6.1.3 ‘Internal’ and ‘external’ comparative interpretation 115
  6.1.4 Purposes of comparative interpretation 117
6.1.5 The distinction between internal and external component revisited 122
6.1.6 Criticism of comparative interpretation 123
6.1.6.1 Criticism of the legitimacy of comparative interpretation as a method of interpretation 123
6.1.6.2 Criticism of the use of comparative interpretation 127
6.1.7 Solutions for addressing the criticism 131
6.2 Comparative interpretation and the ECtHR 135
6.3 Comparative interpretation and the CJEU 138
6.4 Conclusion 142

Chapter 7
Principle of evolutive interpretation 145
7.1 Some preliminary remarks on evolutive interpretation 146
7.2 Evolutive interpretation and international law 149
7.3 Evolutive interpretation and national law 154
7.4 European Court of Human Rights 161
7.4.1 Basis and justification for evolutive interpretation 161
7.4.2 Meaning and nature of evolutive interpretation in the context of the Convention 163
7.4.3 How is evolutive interpretation established? 164
7.4.4 When does the ECtHR rely on evolutive interpretation? 166
7.4.5 Evolution upwards? 168
7.4.6 Conclusion 169
7.5 Court of Justice of the European Union 169
7.6 Conclusion 171

Chapter 8
Principle of autonomous interpretation 173
8.1 Autonomous interpretation and international law 174
8.2 European Court of Human Rights 176
8.3 Court of Justice of the European Union 184
8.4 Conclusion 188
### PART III – CASE LAW ANALYSIS

- **European Court of Human Rights – General introduction**
  - 193

#### Chapter 9
**Teleological interpretation in the case law of the ECtHR**
- 195
  - 9.1 How can this method of interpretation be recognized?
  - 196
  - 9.2 What does the Court refer to when speaking about object and purpose?
  - 201
  - 9.3 How does the court establish the object and purpose or underlying values?
    - 9.3.1 Objective or subjective intention?
    - 205
    - 9.3.2 Which documents play a role in establishing the subjective or objective purpose?
    - 210
    - 9.3.3 What other factors play a role in establishing the subjective or objective purpose?
    - 212
  - 9.4 Role of teleological interpretation in the interpretation process
  - 213
  - 9.5 Relation with other interpretative aids
  - 219
  - 9.6 Conclusion
  - 221

#### Chapter 10
**Comparative interpretation in the case law of the ECtHR**
- 223
  - 10.1 What is comparative interpretation according to the ECtHR?
  - 224
  - 10.2 When is it used in the Court’s reasoning?
    - 10.2.1 Comparative method in the interpretation phase
    - 226
    - 10.2.1.1 Comparative interpretation used for ‘regular’ interpretative problems
    - 227
    - 10.2.1.2 Comparative interpretation used to adopt a new interpretation different from the former interpretation
    - 230
    - 10.2.1.3 Comparative interpretation used to argue that the Court should not adopt a specific interpretation
    - 233
    - 10.2.1.4 Comparative interpretation to show textual difference
    - 235
    - 10.2.2 Comparative method in the application phase
    - 237
    - 10.2.3 Specific type of cases?
    - 240
    - 10.2.4 Conclusion
    - 241
  - 10.3 Any justification?
  - 241
  - 10.4 Comparative interpretation – how?
    - 10.4.1 Finding a consensus or trend
    - 245
    - 10.4.2 Separate references to international, regional and foreign materials
    - 255
    - 10.4.3 Used to support argument or decisive argument?
    - 259
10.4.4 Does the ECtHR acknowledge the distinction between internal and external materials? 260
10.4.5 Who collects the materials? 261
10.5 Role of comparative reasoning in relation to other methods and principles 262
10.6 Conclusion 264

Chapter 11
Evolutive interpretation in the case law of the ECtHR 267
11.1 Identification of evolutive interpretation in the case law 268
11.2 Why invoked by the Court? 272
11.3 When does evolutive interpretation play a role? 275
11.4 How does the Court find an ‘evolution’? 281
11.5 Relation to other interpretative aids 285
11.6 Conclusion 287

Chapter 12
Autonomous interpretation in the case law of the ECtHR 289
12.1 What is autonomous interpretation? 290
12.2 Autonomous interpretation: interpretative principle or method? 292
12.3 Why autonomous interpretation? 293
12.4 When autonomous interpretation? 297
12.5 How is autonomous meaning established? 302
12.6 Conclusion 308

Chapter 13
Interpretation in the case law of the CJEU 311
13.1 The CJEU and the interpretation of fundamental rights 314
13.2 Comparative Interpretation 318
13.2.1 Introduction 318
13.2.2 Role of national constitutional traditions 320
13.2.2.1 The basis for invoking national constitutional traditions 322
13.2.2.2 CJEU and national constitutional traditions 324
13.2.2.3 Advocate General and national constitutional traditions 331
13.2.2.4 Comparing approaches 340
13.2.2.5 The purpose of invoking national constitutional traditions 340
13.2.2.6 Common Traditions? 344
13.2.2.7 Material 347
13.2.2.8 Conclusion 351
13.2.3 Role of the ECHR 352