

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

Senden, H.C.K.

Citation

Senden, H. C. K. (2011, November 8). 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. Intersentia, Antwerp. Retrieved from https://hdl.handle.net/1887/18033

Version: Not Applicable (or Unknown)

License: License agreement concerning inclusion of doctoral thesis in the

Institutional Repository of the University of Leiden

Downloaded from: https://hdl.handle.net/1887/18033

Note: To cite this publication please use the final published version (if applicable).

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

Cover: Juriah Mosin, Dreamstime.com

 $Type setting: \ Anne-Marie \ Krens-Tekstbeeld-Oegstgeest$

School of Human Rights Research Series, Volume 46

A commercial edition of this dissertation will be published by Intersentia under ISBN 978-17-8068-027-9

The titles published in this series are listed at the end of this volume.

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

© 2011 H.C.K. Senden

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.

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

PROEFSCHRIFT

ter verkrijging van de graad van Doctor aan de Universiteit Leiden, op gezag van Rector Magnificus prof. mr. P.F. van der Heijden, volgens besluit van het College voor Promoties te verdedigen op dinsdag 8 november 2011 klokke 15.00 uur

door

Hanneke Ceciel Katrijn Senden

geboren te Goirle in 1981

Promotiecommissie:

Promotor: prof. mr. J.H. Gerards (Radboud Universiteit Nijmegen,

voorheen Universiteit Leiden)

Overige leden: prof. mr. M. Claes (Universiteit Maastricht)

prof. mr. A.W. Heringa (Universiteit Maastricht)

prof. dr. R.A. Lawson mr. dr. C.E. Smith

ACKNOWLEDGEMENTS

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!

Acknowledgements

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

PAR	PART I – INTRODUCTION		
Cha	apter 1		
Intr	oduction	3	
1.1	Interpretation versus application	7	
1.2	Interpretative aids	8	
1.3	Values in judicial argumentation	10	
1.4	Methodology	13	
1.5	Outline	13	
Cha	apter 2		
Con	text of legal argumentation in the European Court of Human Rights	15	
2.1	Character of the European Convention	16	
2.2	ECtHR a constitutional court?	16	
2.3	Style of judgment	20	
2.4	Subsidiarity	22	
2.5	Conclusion	23	
Cha	apter 3		
Con	text of legal argumentation in fundamental rights cases for the Court		
of J	ustice of the European Union	25	
3.1	The CJEU and Fundamental Rights	26	
3.2	The CJEU and the ECHR	33	
3.3	Argumentation by the CJEU	35	
3.4	Conclusion	39	
PAR	TT II – THEORETICAL ANALYSIS	41	
	pter 4		
Inte	rpretation methods and interpretative principles	43	
4.1	Terminology: Method, rule, principle?	44	
4.2	Hierarchy of interpretation methods?	47	

Contents

4.3	Method	s 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	Conclus	sion	89
Cha	pter 5		
		interpretation	91
5.1		retical 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	Teleolo	gical 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	Conclus		109
Cha	pter 6		
		e 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
	614	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	Compai	rative interpretation and the ECtHR	135
6.3	Comparative interpretation and the CJEU		
6.4	Conclusion		
Cha	pter 7		
Prin	ciple of	evolutive interpretation	145
7.1	Some p	reliminary remarks on evolutive interpretation	146
7.2	Evoluti	ve interpretation and international law	149
7.3	Evoluti	ve interpretation and national law	154
7.4	Europea	an 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 o	f Justice of the European Union	169
7.6	Conclus	sion	171
	pter 8		
	_	autonomous interpretation	173
8.1		mous interpretation and international law	174
8.2	-	an Court of Human Rights	176
8.3	Court o	f Justice of the European Union	184
84	Conclus	sion	188

Contents

PAR	г III – С	ASE LAW ANALYSIS	191
Euro	pean Co	urt of Human Rights – General introduction	193
-	pter 9		
		nterpretation in the case law of the ECtHR	195
9.1		n this method of interpretation be recognized?	196
9.2		es 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?		205
	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		teleological interpretation in the interpretation process	213
9.5		with other interpretative aids	219
9.6	Conclusi	ion	221
-	pter 10		
	-	interpretation in the case law of the ECtHR	223
		comparative interpretation according to the ECtHR?	224
10.2		it used in the Court's reasoning?	226
	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
		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
		ification?	241 245
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	260
	10.45	internal and external materials?	260
10.5	10.4.5	Who collects the materials?	261
10.3	principle	comparative reasoning in relation to other methods and	262
10.6	Conclusi		264
10.0	Conclus	Oll	204
	pter 11		
		erpretation in the case law of the ECtHR	267
		ation of evolutive interpretation in the case law	268
	_	roked by the Court?	272
		pes evolutive interpretation play a role?	275
		es the Court find an 'evolution'?	281
		to other interpretative aids	285
11.6	Conclus	ion	287
Cha	pter 12		
Auto	nomous	interpretation in the case law of the ECtHR	289
12.1	What is	autonomous interpretation?	290
12.2	Autonon	nous interpretation: interpretative principle or method?	292
12.3	Why aut	onomous interpretation?	293
12.4	When au	atonomous interpretation?	297
12.5	How is a	autonomous meaning established?	302
12.6	Conclusi	on	308
Cha	pter 13		
Inte	rpretation	in the case law of the CJEU	311
13.1	The CJE	U and the interpretation of fundamental rights	314
13.2	Compara	ative 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
		Comparing approaches	340
	13.2.2.5	The purpose of invoking national constitutional traditions	340
		Common Traditions?	344
		Material	347
	13.2.2.8	Conclusion	351
	13.2.3	Role of the ECHR	352

Contents

	13.2.4	Role of other international instruments	363	
	13.2.5	Conclusion	366	
13.3	Teleolog	367		
	_	aterpretation methods and principles	374	
	13.4.1		374	
	13.4.2	Autonomous interpretation	378	
13.5	Conclus	ion	382	
PAR	г IV – С	ONCLUSION	387	
-	pter 14			
Conclusion			389	
14.1	Interpret	390		
14.2	Teleolog	391		
14.3	Compara	393		
14.4	Evolutiv	399		
14.5	Autonor	nous interpretation	401	
14.6	General	conclusion	402	
Samenvatting			405	
Bibli	ography		415	
List	st of cases			
Index	idex			
Curri	Curriculum vitae			