

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



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
mail@intersentia.co.uk

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

British Library Cataloguing in Publication Data. A catalogue record for this book is available from
the British Library.

*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.*

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, Ait-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

PART I – INTRODUCTION	1
Chapter 1	
Introduction	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
Chapter 2	
Context 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
Chapter 3	
Context of legal argumentation in fundamental rights cases for the Court of Justice 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
PART II – THEORETICAL ANALYSIS	41
Chapter 4	
Interpretation methods and interpretative principles	43
4.1 Terminology: Method, rule, principle?	44
4.2 Hierarchy of interpretation methods?	47

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 (<i>effet utile</i>)	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	191
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?	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 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?	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
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?	245
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		
Evolutionary interpretation in the case law of the ECtHR		267
11.1	Identification of evolutionary interpretation in the case law	268
11.2	Why invoked by the Court?	272
11.3	When does evolutionary 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

Contents

13.2.4	Role of other international instruments	363
13.2.5	Conclusion	366
13.3	Teleological interpretation	367
13.4	Other interpretation methods and principles	374
13.4.1	Evolutionary interpretation	374
13.4.2	Autonomous interpretation	378
13.5	Conclusion	382
PART IV – CONCLUSION		387
Chapter 14		
Conclusion		389
14.1	Interpretation methods and interpretative principles	390
14.2	Teleological interpretation	391
14.3	Comparative interpretation	393
14.4	Evolutionary interpretation	399
14.5	Autonomous interpretation	401
14.6	General conclusion	402
	Samenvatting	405
	Bibliography	415
	List of cases	433
	Index	443
	Curriculum vitae	447