Rezension: Hanneke Senden, Interpretation of fundamental rignts in a multilevel legal system (Cambridge: Intersentia, 2011)

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Hanneke Senden, *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*. Cambridge: Intersentia, 2011. 455 pages. ISBN: 978-1-78068-027-9. EUR 85.

Fundamental rights provisions are often formulated in a general manner and leave many questions open as to their exact scope and meaning. With little guidance from the legislator, judges are usually left with the difficult task of determining the meaning of vague concepts in individual cases. International and regional human rights courts are often criticized for their insufficiently justified reasoning or for the interpretative techniques they use. The use of judicial discretion in those situations is sometimes considered to lead to judicial activism or judicial lawmaking. This criticism should not be underestimated, as the efficiency and institutional credibility of supranational courts depends on the Member States' cooperation. Due to a lack of perceived transparency and objectivity, poorly justified decisions can give rise to resentment and lack of willingness to respect them. It is therefore crucial to address this criticism and to identify ways which could improve judicial reasoning in human rights cases. Senden does this by focusing on the interpretative techniques used by judges at the European supranational level.

The book, written as a PhD thesis, fills a gap in literature by providing a comprehensive and consolidating comparative outlook on selected interpretation techniques used by the European Court of Human Rights (ECtHR) and the ECJ. Much has been written on specific interpretation techniques, the interpretative approach used by either one of these Courts and on the interpretation of human rights treaties in general. Seminal research has also been carried out on

the interpretation theory of the European Convention of Human Rights and EU law in general. Further, comparisons of the interpretative techniques used by the ECtHR and other supranational human rights courts have also been previously published. However, comparative research on selected interpretative aids used by both the ECtHR and the ECJ in the field of human rights was lacking until now.

Senden makes a clear argument and uses a logical structure which is easy to follow for the reader. The book has three parts. The first part introduces the topic, the ECtHR, and the ECJ. The second part provides a general overview of interpretative methods and principles (Ch. 4), and then focuses on four interpretative aids (Chs. 5 to 8). In part three, Senden analyses how the ECtHR (Chs. 9 to 12) and the ECJ (Ch. 13) have dealt with these four techniques in their case law. Part four consists of a synthesis where the author considers the results obtained from the theoretical and case law analysis.

Senden's analysis is limited to the ECtHR and the ECJ for two main reasons. First, both the ECtHR and the ECJ operate in a complex legal context, where they need to decide individual cases while taking simultaneously into account the national and the European context. Second, the two judicial bodies have been criticized for their reasoning in general and for the specific interpretative methods that they have used. As the success of both Courts depends to a great extent on the acceptance and cooperation of national authorities, it becomes crucial to address the criticism directed against them (p. 6). Such an explanation provides an important justification for the choice made by the author. However, Senden could have insisted more on the comparability of both Courts, which are part of two very different legal regimes.

The author begins her analysis by distinguishing between the interpretation and the application phases of human rights adjudication to situate the topic of her book, which focuses on the interpretative process. (pp. 7–8). According to her distinction, interpretation refers to the phase when a fundamental right is defined. The court decides here whether the facts of the case fall within the scope of the relevant fundamental right. The application phase deals with the question whether a specific right has been violated. In this second phase, facts play a greater role in a judge's reasoning. The questions arising in the application phase often consist in determining whether the limitation of the rights is prescribed by law, whether it serves a legitimate goal and whether it was necessary in a democratic society. Both phases serve a different goal in the judicial argumentation and they complement each other. In the interpretation phase, interpretative aids (for instance, textual, teleological or autonomous interpretation) play a role, whereas in the application phase, techniques such as the margin of interpretation and the balancing of rights and interests are used.

The distinction introduced by Senden provides an interesting theoretical tool for her analysis. It may, however, be difficult to apply to certain concepts used by both courts, such as the margin of appreciation or the principle of subsidiarity, which play a fundamental role in supranational human rights adjudication. Senden argues that interpretation is to a large extent aimed at unifying the meaning of fundamental rights and ensuring that it does not differ from country to country. In contrast, to this the application phase can vary from country to country, due to the differences existing between the various States (for instance, their differing policy choices). The margin of appreciation can thus play a role in the application phase to grant room for the specific national considerations, but it should not play a role in the interpretation phase (p. 8).

The author is less categorical about the principle of subsidiarity in the ECHR and EU contexts. She finds that while the principle of subsidiarity under the ECHR might not play an explicit role in the interpretation process, the features of the ECHR system do have an impact on the relationship between the Strasbourg Court and the national authorities, and this relation plays a role in the interpretation process. (p. 23). In the context of the EU, subsidiarity might play an implicit role in interpretation to the extent that the ECJ relies on national constitutional traditions and varies the scope of its review depending on the type of action under examination (p. 38). Such an analysis provides for an interesting argument which should nevertheless be explored further due to the difficulty of neatly separating the interpretation and application phases.

Senden further distinguishes between the concepts of "methods of interpretation" and "principles". A "method of interpretation" is defined as "a technique which is used to justify a particular line of reasoning or a particular outcome" (pp. 44–45). A "principle" on the other hand serves as an "an objective or aim that can be taken into account when interpreting a provision with the help of an interpretation method" (p. 45). The author decided to limit her research to two methods (teleological and comparative interpretation) and to two principles (evolutive and autonomous interpretation) on the basis of the criterion whether these interpretative aids help judges specifically address the multilevel context in which they have to operate.

For Senden, a decisive criterion for determining whether a certain interpretative aid can be regarded as a principle is whether an additional interpretative method has been used in its support. Thus, merely citing a principle would not in Senden's view justify a specific interpretation. The analysis revealed that comparative and teleological interpretation were recognized by both courts as interpretative methods in their case law. The more controversial question here was whether the ECtHR used evolutive and autonomous interpretation as principles and whether it has relied on any additional interpretative technique to establish the meaning of an evolutive or autonomous concept. The case law of the ECJ was not sufficiently extensive to draw any significant conclusions in this regard (p. 391).

As regards teleological interpretation, the author concludes that this technique has played a role at the macro and micro levels. Macro-interpretation, a concept introduced by Lasser (2004) in the context of the ECJ, refers to the phenomenon that certain interpretative principles are based on an understanding of the object and purpose of the Treaty system as a whole. These principles are thus a reflection of some of the values that underlie the Treaty system (pp. 391–392). According to the author, the ECJ's fundamental rights case law does not really show signs of meta-teleological reasoning, whereas the ECtHR visibly appears to rely on this technique. Micro-teleological interpretation was found to exist in the case law of both courts. The ECJ has mainly dealt with it when fundamental rights problems had some basis in a legal text. In those situations, the ECJ mostly substantiated the reference to the objective of the text or provision, and explained how it has arrived at its conclusion. In the case law of the ECtHR, the object and the purpose of a particular provision were not always substantiated, nor was it always explained how the object and purpose have been established (p. 392).

The author's conclusions concerning the use of the comparative method of interpretation constitute a central point of her comparison, due to the important role that this method has played in the case law of the ECJ and the ECtHR. Both courts have been found to use this interpretative technique to solve regular interpretative problems and to help them shape the evolutive approach (p. 393). In addition, the ECJ has used it to construe fundamental rights where there previously was no existing EU fundamental rights catalogue. The ECtHR has also relied on this method as a justification to avoid certain interpretative matters or to corroborate its textual interpretation. (p. 394). Crucially, Senden distinguishes here between internal and external comparative interpretation (pp. 115–116): internal comparative interpretation takes place when references are made to legal materials or to the practice of the States that fall within the jurisdiction of the respective court, whereas external comparative interpretation refers to all other foreign instruments that are used in judicial reasoning (p. 394). It has been found that neither the ECtHR nor the ECJ explicitly acknowledge the distinction between them. Both courts refer to internal sources to demonstrate the existence or lack of a consensus in order to find a basis for an interpretative conclusion (p. 394). The problem here lies in the fact that there are no numerical guidelines to establish when there is a consensus, which affects the objectivity of this method.

Senden notes that while a legitimate justification can be found for the use of internal sources, the reasons often cited for looking at external instruments hardly explain why they are relevant (pp. 117–131, p. 396). According to her view, a possible justification for the use of external sources could lie in dialogical interpretation, a concept developed by Choudhry. The main idea behind this concept is that references to external comparative materials should be used to improve the judge's understanding of his or her own system. As a result of this self-reflection,

it is then possible to argue on the basis of the judge's own system whether the external solution fits. The reasons for adopting or refusing a solution thus come from one's own system, which enhances the legitimacy of referring to external materials (pp. 131–135, p. 397). Senden makes here an important argument which constitutes an interesting starting point for a discussion. Dialogical interpretation could indeed improve the legitimacy of judicial reasoning based on external sources. Further, it may be easier for some judges to adopt because it originates from their domestic legal system (and not an external or foreign source). An alternative point of view to that adopted by the author would be to view the use of external sources as a way to avoid fragmentation of international human rights law. In situations where external and internal sources have similar aims but contain different standards which could apply to a single case, additional care should be taken to harmonize the different meanings of the fundamental rights considered (i.e. systemic interpretation). Viewed from this perspective, dialogical interpretation could further exacerbate the problem of fragmentation by reinforcing an interpretation based on the internal aims of a legal regime. Another important aspect to take into account here is the self-perception of both courts: while the ECtHR considers itself as an international court, the same cannot be readily said about the ECJ. This self-perception may explain in part why the ECtHR is willing to rely on external sources. It should also be emphasized that the use of external sources by the ECtHR varies across the subject areas and in accordance to the instrument considered. For this reason, it may be difficult to generalize and to establish an all-encompassing interpretative approach which could apply to all external sources.

This book is an interesting and welcome contribution to the growing comparative literature on the ECtHR and the ECJ. Using an original perspective, it addresses the fascinating question of judicial interpretative process in the expanding common playing field of both courts. Further, in areas where literature already exists, Senden adds to the discussion by using a different approach. The book also provides a clear and concise analysis of a selected number of interpretation techniques in the European human rights context. This focused analysis gives the author the opportunity to engage meaningfully with the question involved. The author's approach could have been enriched by paying greater attention to the different nature of the ECHR and EU regimes, the self-perception of each Court and the external (fragmented) realities of human rights adjudication. However, this should not detract the reader from the fact that Senden makes an important statement regarding the need to better justify judicial reasoning in human rights cases, not only at the European, but also at the international level.

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