General Principles of the European Convention on Human Rights

Second Edition

The European Convention on Human Rights is one of the world’s most important and influential human rights documents. It owes its value mainly to the European Court of Human Rights, which applies the Convention rights in individual cases. This book offers insight into the concepts and principles that are key to understanding the European Convention and the Court’s case law. It explains how the Court approaches its cases and its decision-making process, illustrated by numerous examples taken from the Court’s judgments. Core issues discussed include: types of Convention rights (such as absolute rights); the structure of the Court’s Convention rights review; principles and methods of interpretation (such as common-ground interpretation and the use of precedent); positive and negative obligations; vertical and horizontal effect; the margin of appreciation doctrine; and the requirements for the restriction of Convention rights.

Janneke Gerards is professor of fundamental rights law at Utrecht University and Dean of the Legal Research Master. Her research focuses on European and national fundamental rights law, equal treatment law, judicial review, constitutional law and new technologies. Her activities outside the university include being a deputy Judge in the Appeals Court of The Hague. She is also a member of the Netherlands State Commission against Discrimination and Racism and of the Advisory Board of the Netherlands Human Rights Institute. Since 2015, Janneke Gerards is a member of the Royal Netherlands Academy of Arts and Sciences.
General Principles of the European Convention on Human Rights

SECOND EDITION

Janneke Gerards

Utrecht University
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Preface to the second, fully revised edition

Fundamental rights, such as the right to life or the right to freedom of expression, have since long been recognised and protected on the level of the States. The horrors of the Second World War made very clear, however, that national institutions alone cannot be trusted to offer full protection of fundamental rights. The acute awareness of the vulnerability of national protection of fundamental rights led to the development of many international and regional systems to allow for external supervision and to enhance cooperation and interdependency in the field of fundamental rights. Both on the international level and in Europe, new mechanisms were introduced and important monitoring and judicial bodies have been created.

One of the most significant and revolutionary mechanisms was created in 1950. Since that year, our fundamental rights are guarded by the European Court of Human Rights (‘ECtHR’ or ‘Court’), based on the European Convention on Human Rights and Fundamental Freedoms (‘ECHR’ or ‘Convention’). Originally designed as an ‘alarm bell’ system that would allow early intervention in case of threats of tyranny or oppression, the ECHR system has developed into one of the most successful examples of international collaboration and supervision. Rather uniquely for an international court, individual victims of violations of fundamental rights can seek redress and compensation at the ECtHR.

Over time, the effect of the Court’s work on the protection and development of fundamental rights has proved to be enormous. The Convention rights have become deeply embedded in most national legal systems and in some cases have effected true transformations of national law and policy. Many explanations can and have been given for the Court’s transformative power and impact. They range from the independent status of the Court and the authority of its judges to the socialising and mobilising effects of the Court’s judgments on civil society. However, a significant explanation for the Court’s impact also relates to its role of interpreting the Convention, explaining its wording and determining how the various provisions should be applied in concrete cases.

This, indeed, is what the Court has been seeing as its central task at least from the 1970s, when the first applications started to trickle in. At the time,
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The Court’s judges seized on the opportunity to provide a set of very well-considered general criteria, principles and notions of fundamental rights adjudication. In fact all judgments the Court handed down in this first period of its existence can be rightly claimed to be ‘classics’, which continue to be read and studied by law students and professionals alike. Notions and doctrines such as the margin of appreciation doctrine, common ground interpretation, the fair balance test and positive obligations, which have become part of almost every lawyer’s vocabulary and play a central role in the present book, were all developed at the time.

The development of such useful high-quality general standards of fundamental rights law seems to be an important explanation for the Court’s success. National courts have eagerly (but equally often quite reluctantly) adopted these standards and have been shown to use them in their own, national adjudication. This has brought about an even deeper impact of the Convention case law, and even more so if national applications led to legislative or administrative changes. Moreover, national actors have learned to anticipate the Court’s case law and may try to prevent Convention violations from taking place by ensuring that their legislation, decisions and judgments meet the relevant requirements. Admittedly, this process of embedding has been (and continues to be) slow and halting, and many of the Court’s judgments – or even its very existence – are met with deep and fierce criticism. Nevertheless, the impact of the Court’s judgments and standard-setting is a reality, and the Court has never stopped developing new standards and criteria to keep pace with developments in European law and society.

In view of the great importance of the Convention standards as developed by the Court and their deep impact on national law, lawyers and scholars cannot do without a good understanding of them. Of course, it is possible to mainly specialise in the application of particular fundamental rights or in particular human rights issues, such as the impact of the Convention on national criminal procedure or on migrants. Even then, however, it is useful to understand the vocabulary of the Court and have an insight into the principles and notions that lie at the very basis of all the case law about the Convention.

It is for this reason that the current book focuses on the central principles of the Convention as they have evolved in the Court’s case law over the past decades. Notions such as that of positive obligations, proportionality and common ground reasoning are all explained, just like famous (yet surprisingly complex) doctrines such as the margin of appreciation doctrine. These explanations are firmly rooted in several foundational issues: the core principles that form the very basis of the Convention (the effectiveness and
subsidiarity principles), the functioning of the Court, and the general approaches and strategies the Court has developed to deal with the tensions and difficulties inherent in the Convention system. An endeavour has been made not to make the explanations too technical or theoretical, and to allow the Court to speak for itself as much as possible. To this end, many examples and citations of the Court’s judgments and decisions have been added to illustrate the various concepts and doctrines and to enliven the text. References to relevant cases and literature are contained in the footnotes, but interested readers can also find a list of general sources at the end of each chapter.

The set-up of the book is as follows. The first three chapters are meant to provide important background information. Chapter 1 explains some of the basics of the Convention system, such as the two main principles already mentioned (effectiveness and subsidiarity) and the structure of the Convention rights. It also contains a brief typology of the Convention provisions according to the possibilities for justification of interferences with the exercise of a right. Chapter 2 offers an introduction to the functioning and procedure of the ECtHR and gives an insight into the most important admissibility requirements. Chapter 3 aims to provide a deeper understanding of the Court’s overall argumentative approach, in light of its double role to both dispense individual justice and give general clarity about the Convention rights’ meaning.

The book then turns to the interpretation of the Convention rights. First, Chapter 4 discusses a number of tools and principles that guide the Court in giving meaning to the Convention: the Vienna Convention on the Law of Treaties and the principles of evolutive and autonomous interpretation. More concretely, Chapter 5 then discusses various methods that the Court often uses in giving meaning to the many rights and terms contained in the Convention, such as textual, harmonising and common ground interpretation.

In the third part, three doctrines are addressed that are at the very core of the Court’s case law. Chapter 6 discusses the positive obligations doctrine, Chapter 7 deals with the horizontal effect of the Court’s case law (that is, in relations between private parties, such as individuals or companies), and Chapter 8 is dedicated to the margin of appreciation doctrine.

The three last chapters of the book are devoted to the review of restrictions of the exercise of fundamental rights. These chapters centre around the three main standards that the Court has defined in its case law for assessing the reasonableness of limitations of fundamental rights: lawfulness (Chapter 9), a legitimate aim (Chapter 10) and proportionality or necessity (Chapter 11).

The current book is the second edition of this volume; the first appeared in 2019. Much has happened in the world and in the Court’s direct context
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since then, and many changes and revisions have been made to bring the book up to date and reflect the latest developments. Chapter 2 – about the Court’s workings and procedure – has been newly added, just like the lists of literature for each chapter. The research for this second edition has been closed on 15 July 2022; later developments could be included only occasionally.

Readers who are interested in how all concepts, doctrines and principles discussed in the present book work out for the various rights protected by the Convention have a wealth of sources at their disposal. In particular, however, you could consult J.H. Gerards et al., Fundamenta l Rights – the European and International Dimension (Cambridge University Press, 2022). Although that book also addresses the way fundamental rights have been developed in EU and international instruments, it contains relevant explanations of almost all Convention rights and it can be regarded as a kind of second volume for the present book.