

MAKALAH



Analysing Judgements

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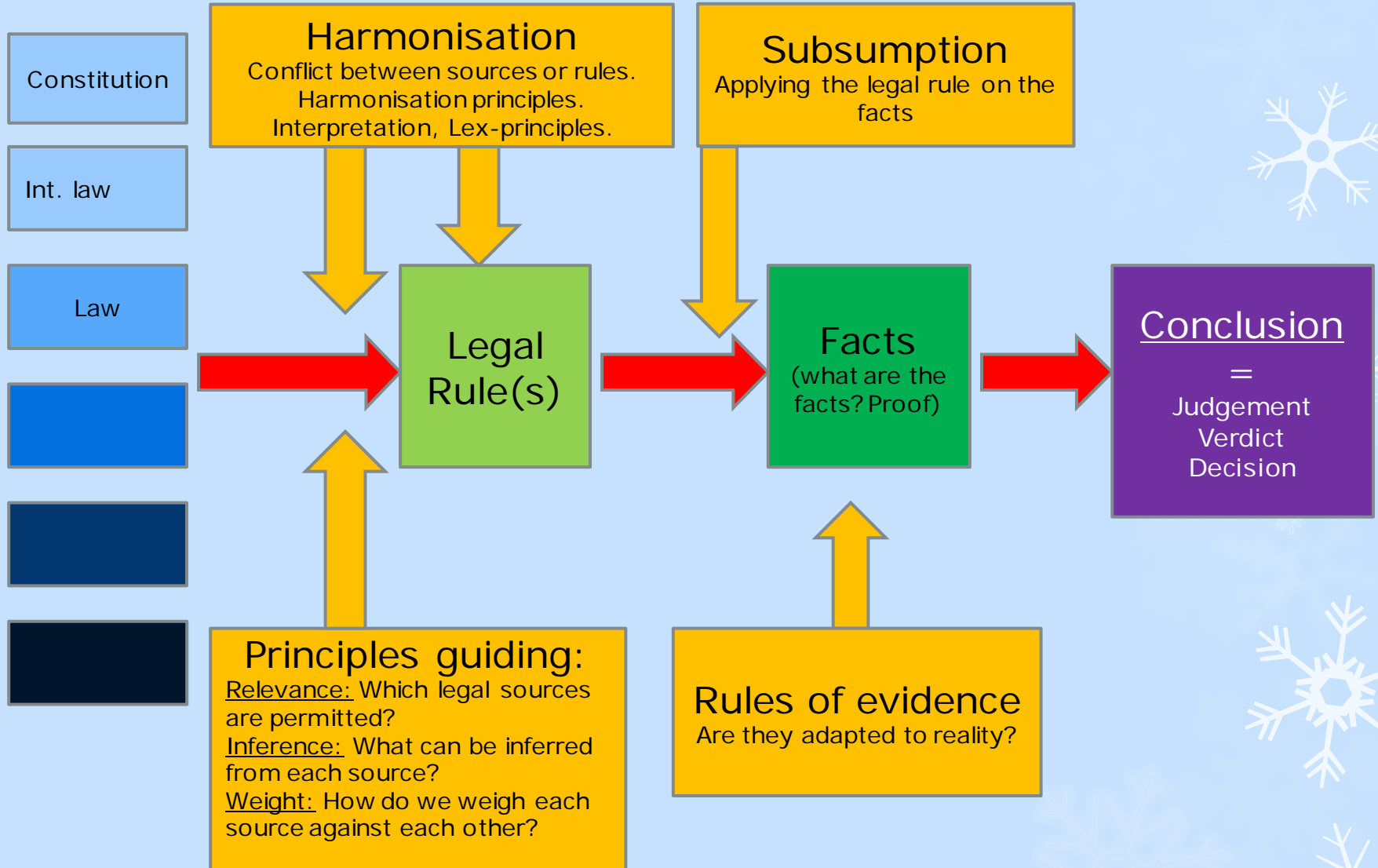
Part 1. Analysis of judgements



Legal Theory – The legal decision making process

- Relevant legal sources
- Principles for relevance, weighing, conclusions
- End product = Legal Rule / Sum of all relevant sources
- The facts: what has happened?
- Rules of evidence
- Applying the legal rule on the facts = Subsumption
- Conclusion

Legal Sources



What is an analysis?

- Oxford Dictionary

Detailed examination of the elements or structure of something, typically as basis for discussion or interpretation



Analysing a judgement

- How does the Court Argue?
- Why does the Court argue this way?
- Assess the Courts use of legal sources.



The parties

- Who are the parties to the complaint?
- The question of admissibility – Jurisdiction of the Court
- Which claims are the bases for the complaint brought forward by the complainant?
- Applicable legal basis (relevant provisions) claimed by the complainant
- Arguments pro et contra by the parties

The Court

- Applicable relevant legal sources (Provisions). Which legal sources have the Court considered?
- Legal question. Which question will the Court consider after having made a synthesis of the relevant legal sources?
- The facts. Guided by rules of evidence.
- Reasoning. Argumentation by the Court.
- Conclusion

Questions

- Why do you (not) agree with the Court?
 - The reasoning
 - Forgotten some arguments?
 - Forgotten some applicable provisions?
 - Weighing of arguments
 - The conclusion
- None legal arguments? Value judgement?

Part 2. Interpretation principles of HCHR



General approach

- A convention must be interpreted according to international law rules on the interpretation of treaties.
 - The Vienna Convention on the Law of Treaties (1969)

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Article 31

General rule of interpretation

1. A treaty shall be interpreted in **good faith** in accordance with the **ordinary meaning** to be given to the terms of the treaty **in their context** and in the light of its **object and purpose**.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its **preamble and annexes**:
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. There shall be taken into account, together with the context:
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.*
4. A **special meaning** shall be given to a term if it is established that the parties so **intended**.

1. A treaty shall be interpreted in **good faith** in accordance with the **ordinary meaning** to be given to the terms of the treaty **in their context** and in the light of its **object and purpose**.

● **Luedicke, Belkacem and Koc v FRG**

The Court adopted the ordinary meaning of the words «gratuitement» and «free».

In the case against West-Germany the state's penal code allowed for a claim of reimbursement for expenses to lawyer if the defendant was convicted. If that was allowed the risk was, according to the Court, that the right to free counsel became illusory. The defendant could then be forced to defend himself if he considered a risk of having to pay for the expenses after trial.

2. Emphasise upon the object and purpose of the Convention – A teleological approach

● **Golder v UK**

The Court read «**access to Court**» into the fair trial Guarantee, despite an absence of a clear wording in the guarantee.

The Court has read the object into the Convention as «the protection of individual human rights» and the maintenance and promotion of «the ideals and values of a democratic society».

● **Wemhoff v FRG**

Given «that it is a law-making treaty, it is also necessary to **seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty**, and not that which would **restrict to the greatest possible degree the obligations undertaken by the parties**».

Dynamic or evolutive interpretation

● **Tyrer v UK**

The Convention “is a living instrument which... must be interpreted in the light of present day conditions”.

The Court could not “but be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe” when considering whether judicial corporal punishment was consistent with Art. 3.

What was determinative, the Court stated, were the standards currently accepted in European society, not those prevalent when the Convention was adopted.

● Children born out of wedlock and homosexuals

Dynamic or Evolutive interpretation

- Limitation: the Convention will not be interpreted to reflect change so as to introduce into it a right that was not intended to be included when the Convention was drafted.
- ECHR: could not read a right to divorce into art. 12 right to marry – even though generally accepted in Europe.
- Draw a line between permissible judicial interpretation, and judicial legislation which is not permitted = incremental rather than sudden change.

Reliance upon European national law standards

- Democracy
- Freedom of speech
- Freedom of religion or belief
- Administration of Justice
 - Wide differences – some common standards must be respected
 - Due process
 - Speedy processes
 - Impartiality and independence of tribunals

The principle of Proportionality

- **Soering v UK**

“inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection the individual’s fundamental rights”.

- ECHR: the restriction must be “proportionate to the legitimate aim pursued”.
- “pressing social need”

The principle of Proportionality

● AGGA v. GREECE (2003)

"Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the **unavoidable consequences of pluralism**. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to **ensure that the competing groups tolerate each other**"

Necessary in a democratic society

- Notion of necessity implies that the **interference corresponds to a pressing social need** and, in particular, that it is **proportionate to the legitimate aim pursued** (Olsson v. Sweden, 1988)
- "**Necessary**" does neither mean "indispensable", "absolutely necessary" or "strictly necessary", nor "admissible", "ordinary", "useful", "reasonable" or "desirable" (Handyside v. UK, 1976)
- Democracy: pluralism, tolerance and broadmindedness (Handyside v. UK, 1976)
- Compare with Pancasila

The doctrine of margin of appreciation

- A state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action in the area of a Convention right.
- **Handyside v UK (1976)**
 - “By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [moral] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.”
 - Nevertheless, Article 10 (2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements art. 19, is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Art. 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.

The doctrine of margin of appreciation

- A certain degree of deference is given to the judgement of national authorities when they weigh competing public and individual interests in view of their special knowledge and overall responsibility under domestic law.
- Compare with national judicial review
- The domoa is applied differently, with the degree of discretion being allowed to the state varying according to the context.
 - High: National security & Public Emergency, Protection of Public Morals, Where there is little “common ground” between the contracting parties.
 - Low: In administration

The Fourth Instance Doctrine

- The Court does not function as a fourth instance trying claims that merely state that a national Court has made an error of fact or law. Inadmissible
- Nor does it try abstract claims that national law violates the Convention.
- Must be concrete claims.

Effective interpretation

- Artico v Italy

The Court stated that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.

The Court found a breach of the right to legal aid (art. 6(3)(c)) because the legal aid lawyer appointed by the state proved totally ineffective

- Extra-territorial effect.

The autonomous meaning of Convention terms

- ECHR on "law and lawful".

Must be a national law basis, but accordingly qualify:

- "a law must not be arbitrary"
- It must also be consistent with the general principles of the Convention, i.e.
 - Publicly available
 - Reasonably predictable effect

Recourse to the preparatory work

- In order to confirm the meaning of the Convention (Vienna Convention art. 31) recourse may be had to the preparatory work.
- Or where the application of a rule leaves its meaning “ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable”.

Sources for interpretation Principles

1. International Court of Justice Statute, Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. **international custom**, as evidence of a general practice accepted as law;
 - c. the **general principles** of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, **judicial decisions** and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.