

Data Analysis as a Method to gather Data to study the Relation between Fundamental Rights and Rule of Law

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ABSTRACT:

The research described here involves the relation between fundamental rights and the rule of law. In the end we want to find out what meaning is attributed to ‘rule of law’ by the European Court of Human Rights. In this article we describe our method to gather the data we need to be able to perform an analysis of the reasoning process by the Court.

KEYWORDS: Empirical Research, Database Research, HUDOC, Fundamental Rights, Rule of Law

1. INTRODUCTION

The subject of our research is the relation between fundamental rights and the rule of law. The background of the research relates to the research program of the Paul Scholten Centre for Jurisprudence with a focus on the analysis of the concept ‘rule of law’ from a multidisciplinary perspective, including normative, analytical and empirical research (Wilde de, 2012).

We were intrigued by the judgment of the European Court of Human Rights (the Court) in the case of REFAH PARTİSİ and others v TURKEY³. In this case the Court argued that the largest and governing party in Turkey could be banned to protect the rule of law.

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In the REFAH case we see that interference on an individual's fundamental right by the State is justified with an appeal on 'rule of law'. This may be a problem because the major principle within the rule of law is the guarantee of fundamental rights.

We want to find out what meaning is attributed to 'rule of law' by the Court when used as an argument to justify interference. We chose to restrict our research to the articles 8, 9, 10 and 11 of the European Convention of Human Rights (ECHR) because these articles guarantee fundamental rights to individuals but these rights may also be subject to limitations.

Our research questions are:

1. is 'rule of law' used as argument in the Court's judgments in articles 8 to 11 ECHR cases?
2. if so, is 'rule of law' used in these arguments to justify interference in these rights?

If these questions result in a set of judgments with 'rule of law' in arguments to justify interference then these judgments are used for further analysis on the basis of the following research questions:

3. what is the reasoning process used by the Court?
4. what is the meaning attributed to 'rule of law' by the Court?

The focus in this article is on the method applied to gather the data (research questions 1 and 2). Before we describe our method we first introduce the subject of fundamental rights and rule of law in relation with the ECHR and the Court as far as it is relevant at this point.

2. FUNDAMENTAL RIGHTS AND THE RULE OF LAW

The Court is the instrument for the protection of human rights guaranteed by the ECHR. Their aim is to protect democracy and the rule of law in Europe. In our research we selected the articles 8 – 11 of the ECHR. Article 8 is right to respect for private and family life. Article 9 is freedom of thought, conscience and religion. Article 10 is freedom of expression and article 11 freedom of assembly and association. The right and freedoms are guaranteed in the first paragraph of the articles. However, these right and freedoms are not absolute, in the second paragraphs of the articles the conditions of possible restrictions on these right and freedoms are described. It is possible for a State to interfere in a fundamental right as guaranteed in the articles 8 to 11 of the ECHR, there is a so called 'Community Exception'.

³ CASE OF REFAH PARTİSİ (THE WELFARE PARTY) AND OTHERS v. TURKEY Grand Chamber, Judgment, Strasbourg 13 February 2003.

“... recognition that the rights of the individual may properly be restricted in the interest of our community at large if certain demanding conditions are satisfied.” (Bingham, 2010, p.74).

When a case comes before the Court, the first question the Court has to assess is if there is interference by the State in a fundamental right of an individual. If there is no interference there is no violation. If there is interference the next question is if this interference in a fundamental right by the State can be justified. To be able to assess the justification there are three questions to be answered. First the question if the interference is in accordance with the law. If so the next question is if the interference serves a legitimate aim, and if so the last question is if the interference is necessary in a democratic society (see Fig. 1). When all the four questions have been answered positively the Court will conclude that there is no violation.

[the Applicant argued]			
[the Government argued]			
[the Court's Assessment]			
[is there interference?]	no	no violation	
yes			
[is the interference justified?]			
in accordance with the law? (prescribed by law)	no	interference not justified	violation
yes			
aim(s) that are legitimate?	no	interference not justified	violation
yes			
necessary in a democratic society? margin of appreciation principles proportionate	no	interference not justified	violation
yes			
interference justified			
no violation			

Figure 1: Basic reasoning process in the Court's assessment of an 8 – 11 ECHR case.

In the REFAH case article 11 of the ECHR is at stake, being freedom of assembly and association⁴. In the Court's assessment the first question is "is there interference?".

The parties accepted that REFAH's dissolution and the measures which accompanied it amounted to an interference with the applicants' exercise of their right to freedom of association.

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraph 50).

So the answer is "Yes there is an interference".

The next question then is "is the interference justified?".

Such an interference will constitute a breach of Article 11 unless it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of that provision and was "necessary in a democratic society" for the achievement of those aims.

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraph 51).

The Court then explains that "prescribed by law" means in accordance with the law and that it also implicates the accessibility of the provisions in issue and the foreseeability of their effects. The Court argues:

..the written law most relevant to the question whether the interference was "prescribed by law" is the Turkish Constitution

there thus resulted a divergence between the Law on the regulation of political parties and the Constitution

The Turkish Constitution cannot be amended by ordinary legislation and takes precedence over statute law

a conflict between the Constitution's provisions and those of ordinary legislation is resolved in the Constitution's favour

⁴ Article 11 of the ECHR freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

the Court considers that the applicants were reasonably able to foresee that they ran the risk of proceedings to dissolve REFAH if the party's leaders and members engaged in anti-secular activities, and that the fact that the steps laid down in section 103(2) of Law no. 2820 were not taken, having become inapplicable as a result of the 1991 changes to the Criminal Code's provisions on anti-secular activities, could not prevent implementation of the dissolution procedure required by the Turkish Constitution

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraphs 58, 60, 61, 63).

Consequently the interference was "prescribed by law".

The following question to be answered by the Court is "are the aims legitimate?" The Court argues:

Taking into account the importance of the principle of secularism for the democratic system in Turkey, it considers that REFAH's dissolution pursued several of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraph 66).

Consequently the interference serves a legitimate aim.

The last question that has to be answered by the Court is if the interference is "necessary in a democratic society?".⁵

⁵ On the question of the relationship between democracy and the Convention, the Court has already ruled, in *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998.

"Democracy is without doubt a fundamental feature of the European public order ...

That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society ...

In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."

... that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for human rights and democracy.

The Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent.”

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraph 93).

The category ‘necessary in a democratic society’ also involves the question whether there is ‘a pressing social need’ for the interference.

the Court finds that the acts and speeches of REFAH’s members and leaders cited by the Constitutional Court were imputable to the whole of the party, that those acts and speeches revealed REFAH’s long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems and that REFAH did not exclude recourse to force in order to implement its policy and keep the system it envisaged in place. In view of the fact that these plans were incompatible with the concept of a “democratic society” and that the real opportunities REFAH had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a “pressing social need”.

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraph 132).

The category ‘necessary in a democratic society’ also involves the question if the measure complained of is ‘proportional’

that the interference in issue in the present case cannot be regarded as disproportionate in relation to the aims pursued.

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraph 134).

The Court’s conclusion regarding Article 11 of the ECHR is:

Consequently, following a rigorous review to verify that there were convincing and compelling reasons justifying REFAH’s dissolution and the temporary forfeiture of certain political rights imposed on the other applicants, the Court considers that those interferences met a “pressing social need” and were “proportionate to the aims pursued”. It follows that

REFAH's dissolution may be regarded as "necessary in a democratic society" within the meaning of Article 11 § 2.

Accordingly, there has been no violation of Article 11 of the Convention.

(Case of REFAH PARTİSİ and Others v Turkey 13 February 2003, paragraph 135).

In the REFAH case the Court uses 'rule of law' as an argument to justify interference in the fundamental right guaranteed in article 11 of the ECHR. The Court refers to 'rule of law' when assessing if the interference is 'necessary in a democratic society'.

We want to know if there are more Court judgments on articles 8 to 11 of the ECHR in which 'rule of law' is used as argument by the Court and, if so, if 'rule of law' is used to justify interference in these rights.

We chose to start with a simple database search in HUDOC⁶. HUDOC is the database of the Court. In this database one can find the official version of an ECHR judgment or decision in an easy and efficient way. In the next paragraph we describe our research method.

3. DATA ANALYSIS

De Mulder was one of the first legal researchers in the Netherlands who wrote about Jurimetrics, the empirical study of the law using methods and techniques from statistics (De Mulder, 1984)⁷. In that time there were hardly any legal data available in digital format. Today legislation and judgments, both national and international, are available online for free. These big (legal) data provide chances and opportunities for legal research (see, for example, Winkels, 2015; Leeuw, 2015; Raad voor de Rechtspraak, 2014; De Mulder, van Noortwijk & Combrink-Kuiters, 2010). Not only to develop new information tools to enhance the search of these data, to create networks of types of legal data so users can find the information they want more easily and can share it and organize it in the way they want, but also to use these data sets for empirical research (see, for instance, Malsch et al., 2015)⁸.

⁶ The acronym HUDOC stands for Human Rights Documentation.

⁷ See for Empirical Legal Research and Computer Science & Law, for instance, Malsch, 1989; Den Haan, 1996; Combrink - Kuiters, 1998, Muntjewerff, 2014; Muntjewerff, 2013; Muntjewerff, 2000; Muntjewerff & van Loo (2013), Winkels e.a, 2013.

⁸ See also research by the NSCR and the WODC.

Improvements in human language technology and in techniques for storage and rapid analysis of large data collections have created new opportunities for automated analysis and interpretation of legal text. Although we are familiar with these new developments and methods we preferred to start with a simple data search in an existing database (see, for instance, Boeije & 't Hart, 2010). In legal research the use of legal databases has become a standard way of working. However, researchers do not explicitly describe their research method (see, for example, De Graaf et al., 2015; Lautenbach, 2012).

We chose to do a data search in HUDOC, the database of the Court where one can find the official version of an ECHR judgment or decision in an easy and efficient way⁹.

3.1 HUDOC

The HUDOC interface is available in English, French, Russian and Turkish. Judgments and other texts are available in one or both of the Court's official languages being English and French. To be able to answer the questions if 'rule of law' is used as argument in Court judgments in articles 8 to 11 ECHR cases and if 'rule of law' is used to justify interference in these rights, we chose the following way of working.

We first had to select the type of judgments. The HUDOC database provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

We chose to select Court judgments of the Grand Chamber and the Chamber as published in HUDOC. To determine the corpus of judgments we took the following steps:

- 1) select judgments in HUDOC
- 2) open each judgment
- 3) use 'find' and search for 'rule of law' in the text of each judgment
- 4) mark 'rule of law' in the selected judgment (highlight with yellow)
- 5) determine if 'rule of law' is used only in documents (as in, for instance, legislation) or (also/only) in arguments in each judgment
- 6) save 'rule of law' only in documents judgments in separate folder
- 7) save 'rule of law' also/only in arguments judgments in separate folder

⁹ The Court was established on the 21th of January 1959.

In saving the judgments each individual judgment is given the date, the case name, the article number, number of appearances of ‘rule of law’ text, number of ‘rule of law’ in arguments and type of result, pos or neg, referring to the outcome of the assessment as either being positive for the applicant (interference not justified) or negative for the applicant (interference justified).

For example 20020429 CASE OF PRETTY v. THE UNITED KINGDOM 8-2 2 rol 1 arg 1 Court neg means:

20020429	date of the judgment being 29 th of April 2002
PRETTY vs the UK	name of the case in HUDOC
8-2	article 8 paragraph 2 ECHR
2 rol	text ‘rule of law’ appears twice in the text of the judgment
1 arg	text ‘rule of law’ appears once as argument
1 Court	the argument was given by the Court
neg	the outcome is negative for the applicant, the interference by the State is justified

3.2 HOW TO SELECT JUDGMENTS IN HUDOC

To select judgments that provide data to be able to answer our research questions we took the following series of steps in the HUDOC search:

- 1) go to the HUDOC Case Law database¹⁰
- 2) select Judgments of the Chamber and the Grand Chamber
- 3) use filters
 - English
 - importance level Case reports and level 1
 - articles 8-2, 9-2, 10-2, 11-2
- 4) perform on the resulting body of judgments a text search on “rule of law”

To narrow our search we used the filters ‘Language’, ‘Importance’ and ‘Article’.

In the filter ‘Importance’ we chose Case reports and level 1 judgments because they contain a full analysis and can be searched under all fields.

¹⁰ <http://hudoc.echr.coe.int>

Case reports are judgments, decisions and advisory opinions delivered since 1998 which have been published or selected for publication in the Court's official Reports of Judgments and Decisions. Level 1 (high importance) refers to all judgments, decisions and advisory opinions not included in the Case Reports which make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State. We filtered on articles 8 to 11 and decided to narrow the search to the second paragraph of the articles, because that is where the possible interference on the right and freedoms given in the first sections is regulated.

With the text search function we are able to search for a sequence of words within the documents in the relevant collection, in our case the text fragment “rule of law”. HUDOC displays the number of hits inside a given document. It is possible to select the option ‘Highlight Exact term only’ which highlights the exact term we have searched on being “rule of law”. The default operator in HUDOC is ‘AND’ so our field searches are cumulative. The selection process resulted in a corpus of judgments with references to the text ‘rule of law’. The selection is set on the date the HUDOC database was searched being 18 October 2013 (fixed date). The results were recorded in Excel (see Fig. 2). Only the set of judgments where ‘rule of law’ appears in arguments of the Court will be used a further analysis of the reasoning process and an analysis of the meaning that is attributed by the Court to ‘rule of law’ (research questions 3 and 4).

4. OUTCOME

On 18 October 2013 there were 39622 judgments in the HUDOC database, the largest number being judgments by the Chamber (37562) and a smaller number of judgments by the Grand Chamber (2060). When using the filter for English there remain 15881 judgments. Judgments are stored in HUDOC in English as well as in the language of the State involved not being English. This accounts for the halving in the number of judgments. When using the filter on Case Reports and level 1 judgments there remain 1760 judgments. Within these 1760 judgments there are 469 judgments relating to articles 8-2 to 11-2. The text search on “rule of law” within the 469 judgments resulted in 141 judgments (see Table 1)¹¹.

¹¹ The first Judgment in which ‘rule of law’ is mentioned is the CASE OF GOLDER v. THE UNITED KINGDOM, 21 February 1975.

selection step	number of judgments
judgments	39.622
Chamber	37.562
Grand Chamber	2060
English	15.881
Level 1	1001
Case Reports	759
8-2, 9-2, 10-2, 11-2	469
8-2, 9-2, 10-2, 11-2 “rule of law”	141

Table 1: Number of judgments found in HUDOC per selection step.

When filtering on article number the number of appearance of the articles 8-2 to 11-2 is also indicated (see Table 2).

article	number of appearance
8-2 ECHR	224
9-2 ECHR	29
10-2 ECHR	195
11-2 ECHR	55
total	503

Table 2: Number of appearances of articles 8-2, 9-2, 10-2, 11-2.

The difference between the total of 503 articles 8-2 to 11-2 in Table 2 and 469 judgments on 8-2 to 11-2 in Table 1 can be explained by the fact that in 34 judgments more than one article is mentioned.

Of the 141 judgments with ‘rule of law’ in the text, judgments in which ‘rule of law’ appears in an argument of the Court are saved in one folder, where judgments in which ‘rule of law’ appears in another part of the text are saved in a second folder.

Of the 141 judgments there were 94 judgments with ‘rule of law’ in arguments of the Court and 47 judgments in which ‘rule of law’ appeared in another part of the text (see Table 3).

‘rule of law’ in argument Court 94	‘rule of law’ in other part of the judgment 47	
	in argument parties	in documents ¹²
	25	22

Table 3: Number of judgments ‘rule of law’ in argument or other part of the judgment.

¹² With documents we refer to the appearance of the text ‘rule of law’ in a cited text, for instance, a statute and where the citation is not part of the argument of the Court.

All 94 judgments were read and recorded in an Excel sheet with name, article, category, ‘rule of law’ in Court’s assessment and violation as column items (see Figure 2). For example, the REFAH case is listed as follows:

case name 20030213 CASE OF REFAH PARTISI THE WELFARE PARTY AND
OTHERS v. TURKEY 11 6 rol 2 arg 2 Court 1 neg
article 11-2
category ‘necessary in a democratic society’,
‘rule of law’ [§93.... the principle of secularism is certainly one of the fundamental
principles of the State which are in harmony with the rule of law and respect
for human rights and democracy.....]
violation no

20040217 CASE OF MAESTRI v. ITALY 11-2 2 rol 1 arg 1 Court	11-2	quality of law: u	yes (11)				
20031028 CASE OF STEUR v. NETHERLANDS 10-2 1 rol 1 arg 1 Court	10-2	general	yes (10)				
20030717 CASE OF PERRY v. THE UNITED KINGDOM 8-2 1 rol 1 arg 1 Court	8-2	in accordance w	yes (8)				
20030429 CASE OF NAZARENKO v. UKRAINE 8-2 1 rol 1 arg 1 Court	8-2	in accordance w	yes and no, after 11 July 1999 (aanpassing wet) (8)				
20030429 CASE OF ALIEV v. UKRAINE 8-2 1 rol 1 arg 1 Court	8-2	in accordance with law; foreseeability					
20030429 CASE OF POLTORATSKIY v. UKRAINE 8-2 1 rol 1 arg 1 Court.doc	8-2	in accordance with law; foreseeability					
20030429 CASE OF DANKEVICH v. UKRAINE 8-2 1 rol 1 arg 1 Court	8-2	in accordance with law; foreseeability					
20030429 CASE OF KUZNETSOV v. UKRAINE 8-2 1 rol 1 arg 1 Court	8-2	in accordance with law; foreseeability					
20030213 CASE OF REFAH PARTISI THE WELFARE PARTY AND OTHERS v. TURKEY 11	11	necessary in democratic society					
			no (11)				
20030213 CASE OF CETIN AND OTHERS v. TURKEY 10-2 2 rol 1 arg 1 Court.doc	10-2	necessary in der	yes (10)				
20020429 CASE OF PRETTY v. THE UNITED KINGDOM 8-2 2 rol 1 arg 1 Court neg	8-2	necessary in der	no (8)				
20020409 CASE OF YAZAR AND OTHERS v. TURKEY 10,11 3 rol 1 arg 1 Court	11 (jo. 10)	general	yes (11)				

Figure 2: Overview of judgments with ‘rule of law’ in argument of the Court in Excel¹³

¹³ For purpose of readability we did hide the column ‘rule of law’ in argument Court. Cases in red are cases in which the interference is justified and there is no violation. Cases in black are cases in which the interference is not justified and there is a violation. Cases in blue are cases in which the interference is not justified and there is a violation where the cases and judgements are the same only the applicants differ.

This showed that there are cases in which besides articles 8-2 to 11-2 other ECHR articles are present. In 17 cases ‘rule of law’ appeared in the argument of the Court in assessing articles 2, 5 or 7 of the ECHR.

‘rule of law’ in argument Court		‘rule of law’ in other part of the judgment	
94		47	
art. 8-2	41	in argument parties	in documents
art. 9-2	6	25	22
art. 10-2	22		
art. 11-2	8		
other	17		

Table 4: Number of judgments articles ‘rule of law’ in 8-2, 9-2, 10-2, 11-2 or other articles.

If we sort these 94 judgments to interference justified and interference not justified we see that in 13 cases the Court assessed that the interference is justified whereas in 82 cases that the interference is not justified. In one case the Court assessed that there was partly a justified interference and partly a not justified interference¹⁴. We recorded the case both in the column ‘rule of law’ interference justified as in the column ‘rule of law’ interference not justified. This accounts for the sum of 95 cases. Of the 13 cases in which the interference is justified a further specification of types of cases can be made. There are 6 cases in which the interference is justified and ‘rule of law’ is used as an argument by the Court, however, not as an argument to justify the interference. The interference is justified with another argument and more, the rule of law argument is used in favour of the applicant.

There are two cases in which the interference is justified and ‘rule of law’ is used as an argument by the Court to justify the interference, however, for articles outside our scope of 8-2 to 11-2 ECHR. In 5 cases the Court assessed that the interference of the State is justified with an appeal on ‘rule of law’ as argument.

¹⁴ The CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM, 25 March 1983.

“To sum up, the stopping of Mr. Silver’s letter no. 7, Mr. Noe’s letter no. 10 and Mr. Cooper’s letters nos. 28-31 was both "in accordance with the law" and justifiable as "necessary in a democratic society" (see paragraphs 95, 102, 101 and 103 above). These interferences therefore did not constitute a violation of Article 8 (art. 8). The same conclusion applies as regards the delaying of Mr. Noe’s letter no. 12 (see paragraphs 95 and 104 above). On the other hand, the stopping of the 57 remaining letters was not "necessary in a democratic society" (see paragraph 99 above); there has therefore been a violation of Article 8 (art. 8) in each case.” NB ‘rule of law’ in category “in accordance with the law”. (CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM, 25 March 1983, paragraph 105).

Of the 82 cases in which the interference is not justified we see that there are 2 cases in which the interference is not justified and ‘rule of law’ is used as an argument by the Court, however, not as the argument to decide that the interference is not justified. There is a violation but not for ‘rule of law’ reasons. Then there are 15 cases in which the interference is not justified and ‘rule of law’ is used as an argument by the Court to state that the interference is not justified, however, for articles outside our scope of 8-2 to 11-2 ECHR. This leaves 65 cases in which the interference is not justified and ‘rule of law’ is used as an argument by the Court to state this (see Table 5).

‘rule of law’ in argument Court					
interference justified			interference not justified		
other argument	other article	rule of law	rule of law	other article	other argument
6	2	5	65	15	2

Table 5: Number of judgements with ‘rule of law’ in argument Court interference justified – interference not justified.

If we look at the cases in which ‘rule of law’ is used as an argument to either justify or not justify interference by article we see that in the 5 cases where the interference is justified with the argument ‘rule of law’ there are two cases on article 8-2, two on article 9-2, none on article 10-2 and one on article 11-2. In the 65 cases where the interference is not justified with the argument ‘rule of law’ there are 35 cases on article 8-2, two on article 9-2, twenty one on article 10-2 and seven on article 11-2 (see Table 6).

‘rule of law’ in argument Court							
interference justified + rule of law				interference not justified + rule of law			
5				65			
art 8	art. 9	art. 10	art. 11	art 8	art. 9	art. 10	art. 11
2	2	0	1	35	2	21	7

Table 6: Number of judgements with ‘rule of law’ in argument Court interference justified – interference not justified by article.

For the 5 cases in which the interference is justified with ‘rule of law’ as argument we also looked in what specific category the Court uses ‘rule of law’ as argument, being ‘in accordance with the law’, ‘aims that are legitimate’ and ‘necessary in a democratic society’ (see Table 7)¹⁵.

article	date	name	interference	category
8-2	25 - 03 - 1983	Silver v UK	justified	necessary in a democratic society
8-2	29 - 04 - 2002	Pretty v UK	justified	necessary in a democratic society
9-2	10 - 11 - 2005	Leyla Sahin v Turkey	justified	necessary in a democratic society
9-2	04 - 12 - 2008	Dogru v France	justified	necessary in a democratic society
11-2	13 - 02 - 2003	REFAH v Turkey	justified	necessary in a democratic society

Table 7: Judgments with ‘rule of law’ in argument to justify interference by article and category

We found that in all 5 cases where the interference is justified ‘rule of law’ is used in the category ‘necessary in a democratic society’.

We did the same for the 65 cases in which the interference is not justified with ‘rule of law’ as argument (see Table 8).

category article	in accordance with the law	legitimate aim(s)	necessary in a democratic society	general
8-2	34	0	1 ¹⁶	0
9-2	1	0	1	0
10-2	2	1 ¹⁷	16	2
11-2	2	0	3	2

Table 8: Number of judgments with ‘rule of law’ in argument to determine that interference is not justified by article and category

In the 65 cases where the interference is not justified we found ‘rule of law’ in 39 cases in the category ‘in accordance with the law’, in one case in the category ‘aims that are legitimate’ and in 21 cases in the category ‘necessary in a democratic society’. There are also 4 cases in which the argument used is more general and does not refer to either one of the categories. Here we see that in most article 8-2 cases the Court uses ‘rule of law’ to argue that an interference should be ‘in accordance with the law’. Whereas in the majority of article 10-2 cases the Court uses ‘rule of law’ to argue that an interference should be ‘necessary in a democratic society’.

¹⁵ The category ‘in accordance with the law’ or ‘prescribed by law’ also implies references to ‘quality of law’ and foreseeability’.

¹⁶ This is the CASE OF ZEHENTNER v. AUSTRIA, 16 July 2009.

¹⁷ This is the CASE OF THE SUNDAY TIMES v. THE UNITED KINGDOM, 26 April 1979.

Summarizing the use of ‘rule of law’ as argument by the Court by category we see that ‘rule of law’ is used in 39 cases within the category ‘in accordance with the law’, in 26 cases within the category ‘necessary in a democratic society’ and only in one case within the category ‘aims that are legitimate’ (see Table 9).

	interference justified ()	interference not justified ()
in accordance with the law	0	39
aim(s) that are legitimate	0	1
necessary in a democratic society	5	21
general	0	4

Table 9: Judgments with ‘rule of law’ in argument per category

We found that ‘rule of law’ is used as argument in Court judgments in articles 8-2 to 11-2 ECHR cases and we also found that ‘rule of law’ is used to justify interference in these rights. In the period 1959 to 2013 there are 5 cases in which the Court assessed that the interference of the State in the fundamental right of one of her citizens is justified with an appeal on ‘rule of law’. These cases are:

19830325 CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM 8 1 rol 1 arg 1 Court
 20020429 CASE OF PRETTY v. THE UNITED KINGDOM 8-2 2 rol 1 arg 1 Court neg
 20030213 CASE OF REFAH PARTISI THE WELFARE PARTY AND OTHERS v. TURKEY 11-2 6 rol 2 arg 2 Court 1 neg
 20051110 CASE OF LEYLA SAHIN v. TURKEY 9-2 2 rol 1 arg 1 Court 1 neg
 20081204 CASE OF DOGRU v. FRANCE 9-2 1 rol 1 arg 1 Court 1 neg¹⁸

In these 5 cases the Court justified the interference with an appeal on ‘necessary in a democratic society’.

5. CONCLUSIONS

The relation between fundamental rights and the rule of law is the subject of our research. In this article we focused on our method of data gathering.

¹⁸ In the CASE OF DOGRU vs FRANCE, 4 December 2008, the Court refers in her argumentation to the argumentation in the CASE OF LEYLA SAHIN v. TURKEY, 10 November 2005.

Our first research question was “is ‘rule of law’ used as argument in the Court’s judgments in articles 8 to 11 ECHR cases?”, our second research question was “if so, is ‘rule of law’ used in these arguments to justify interference in these rights?”

Our findings show that indeed the Court refers to ‘rule of law’ to argue that certain restrictions on human rights are necessary. It shows that in the period 1959 – 18 October 2013 ‘rule of law’ is used as argument in Court judgments in articles 8-2 to 11-2 ECHR. It also shows that in 5 cases ‘rule of law’ is used as argument by the Court to justify interference in these rights. The next step in our research is to answer our questions 3 and 4 being “what is the reasoning process used by the Court?” and “what is the meaning attributed to ‘rule of law’ by the Court?”. We will both look at the reasoning process in the 5 cases in which the interference is justified as well as in the 65 cases in which the interference is not justified (see Appendix). The case of *SILVER AND OTHERS v. THE UNITED KINGDOM* is an intriguing case because it both involves a justified interference and a not justified interference. In analysing the reasoning process we hope to see what meaning is attributed to ‘rule of law’ by the Court.

To gather our data we used HUDOC, the database of the European Court of Human Rights. It is relatively easy to use HUDOC to gather data the way we did. However, we also experienced some difficulties. When searching for ‘rule of law’ as text within article 8-2 to 11-2 ECHR cases HUDOC also provided cases where ‘rule of law’ is used in articles outside our scope. HUDOC also delivered 4 cases in which there was no explicit reference to articles 8-2 to 11-2 in the text of the judgments. So why did HUDOC come up with these 4 cases? It appeared that in the case details in HUDOC there was a reference to articles 10 and 10-2. HUDOC is not intended for research generating statistics. For statistics they refer to the Court’s annual reports which are published online.

We searched for the explicit text reference ‘rule of law’, however, it is possible that the Court uses a more implicit reference to ‘rule of law’ in her argumentation.

We were able to find the explicit references, however, the implicit references are more difficult to find. Implicit references should be operationalized i.e. ‘rule of law’ is also the reference to x, y and/or z. But then we do not know what meaning is attributed by the Court. That is why we carry out this study in the first place. We have to find out what meaning is attributed to ‘rule of law’ by the Court by analysing the reasoning process first.

There is also the problem of the weight of the text ‘rule of law’ in the argument of the Court. We do not know yet in what way we may solve this problem.

Our data analysis was performed by hand. This is possible because the amount of cases we found was limited. However, with a larger amount of cases this becomes impossible.

Performing an automatic search and analysis may then be a better way of working. In using data mining methods and techniques to extract patterns and knowledge from these large amount of data we might even discover (new) patterns and dependencies.

All this said and done we do believe that legal databases are rich environments waiting there to be used also already with a more traditional way of working. However, when doing so we want to emphasize the need for an explicit description of the method of data gathering.

REFERENCES

- Albers, P. (2007). How to measure the rule of law: a comparison of three studies. In HiiL (2007), *Rule of law inventory report: academic part*, The Hague.
- Bedner, A. (2007). *Annex I: An Elementary Rule of Law Model*. Den Haag: HiLL.
- Bingham, T. (2010). *The Rule of Law*. Londen: Penguin Books.
- Bod, R. (2014). *A New History of the Humanities: The Search for Principles and Patterns from Antiquity to the Present*. Oxford University Press.
- Boeije, H. & Hart 't, H. (2010). *Onderzoeksmethoden*. Boom Lemma Uitgevers.
- CASE OF REFAH PARTİSİ (THE WELFARE PARTY) AND OTHERS v. TURKEY Grand Chamber, Judgment, Strasbourg 13 February 2003.
- Combrink - Kuiters, L. (1998) Kennis van zaken: Een jurimetrisch onderzoek naar rechterlijke besluitvorming inzake voogdij en omgang.
- De Mulder, R. (1984). *Een model voor juridische informatica*. (A model for the application of computer science to law). Lelystad: Vermande.
- De Mulder, R., van Noortwijk, K., & Combrink-Kuiters, L., “Jurimetrics Please”, in *European Journal of Law and Technology*, Vol 1, Issue 1, 2010.
- Enschedé, Ch. J. (1975). Een nieuw handboek. *Delikt en Delinkwent*, 5 (1), pp. 1 - 6.
- Gerards, Z. (2015). Extracting Evidence from Multimedia Big Data. Inaugurele rede Forensic Data Science. FNWI, UvA.
- Graaf de, J.H., Polhuijs, E., Bahadur, N.N., Meij van der, N. & Schäperkötter (2015). *De toepassing van het Internationaal Verdrag inzake de rechten van het Kind in de Nederlandse rechtspraak*. Deel II 1 septemver 2011 – 1 september 2014. Amsterdam: Centre for Children’s Rights Amsterdam (CCRA).
- Haan den, N. (1996). *Automated Legal Reasoning*. Academisch Proefschrift UvA: Amsterdam.
- HUDOC <http://hudoc.echr.coe.int/>;
- HUDOC <https://www.youtube.com/watch?v=reO12mvvIYE&feature=plcp>
- HUDOC FAQ (2015) Frequently asked questions regarding content and search in HUDOC.
- HUDOC (2015). HUDOC 2.2 User Manual New features. HUDOC European Court of Human Rights.
- Krygier, M. (2011). Four Puzzles about the Rule of Law: Why, What, Where and Who Cares? In Fleming, J.E. (ed.). *Getting to the Rule of Law*. New York: New York University Press.
- Lautenbach, G.E.T. (2012). *The rule of law concept in the case law of the European Court of Human Rights*. UvA.
- Leeuw, F.L. (2015). Wetgeving, empirisch-juridisch onderzoek en Legal Big Data. *Recht der Werkelijkheid* 2015 (36) 2, pp. 50 – 65.
- Malsch, M., Kranendonk, R., Keijser de, J. Elffers, H., Komter, M. & Boer de, M. (2015). Kijken, luisteren, lezen. De invloed van beeld, geluid en schrift op het oordeel over verdachtenverhoren. *Politiewetenschap 79, Politie en Wetenschap*, Apeldoorn; Reed Business, Amsterdam 2015.
- Malsch, M. (1989). *Lawyer’s predictions of juridical decisions: a study on calibration of experts*. Leiden (PhD thesis).
- Muntjewerff, A.J. (2014). Using the Think Aloud Method to Gather Data on What it takes to Comprehend a Legal Decision. *Law and Method*, 2014:12. doi: 10.5553/REM/.00000

- Muntjewerff, A.J. & Loo van, K. (2013). Fundamental Rights and the Rule of Law. *Research Plan*. FdR. UvA.
- Muntjewerff, A.J. (2013). CASE reading, structuring and analysing decisions by judges. *European Journal of Law and Technology*, 4 (1).
- Muntjewerff, A.J. (2012). Een expliciet model voor structureren en analyseren van rechterlijke beslissingen. Europees Symposium Juridische Argumentatie EUR, Rotterdam. In E.T. Feteris e.a. (red.), *Gewogen oordelen. Essays over argumentatie en recht*, Den Haag: BJu 2012, pp. 269 - 288.
- Muntjewerff, A.J. (2000). *An Instructional Environment for Learning to Solve Legal Cases PROSA*. Amsterdam: UvA (PhD thesis).
- Newell, A. & Simon, H.A. (1987). Computer Science as Empirical Inquiry: Symbols and Search. *Turing Award Lectures 1975*. ACM 287 – 313.
- Opijnen van, M. (2014). *Op en in het web. Hoe de toegankelijkheid van rechterlijke uitspraken kan worden verbeterd*. Academisch Proefschrift. Boom Juridische Uitgevers.
- Oskamp, E.W. (1998). *Computer-ondersteuning bij Straftoemeting. De ontwikkeling van een databank*. Arnhem: Gouda Quint. (A supportive system for sentencing. The development of a database).
- Raad voor de Rechtspraak (2014). *Slimme technologie om vindbaarheid rechterlijke uitspraken te verbeteren*. Den Haag
- Simon, H.A. (1995). Artificial Intelligence: an empirical science. *Artificial Intelligence* 77 (1995) 95 – 127. Elseviers Science B.V.
- Tamanaha, B.Z. (2004). *On the Rule of Law. History, Politics, Theory*. Cambridge: Cambridge University Press.
- White, R.C.A. & Ovey, C. (2010). *The European Convention on Human Rights*. Oxford University Press
- Wilde, de M. (ed.) (2012). Paul Scholten Centre *Research program. The Rule of Law at the Limits*. UvA.
- Winkels, R. , Ruyter de J. & Kroese H. (2011). Determining Authority of Dutch Case Law. In Atkinson, K.M. (ed). *Legal Knowledge and Information Systems*. Frontiers in Artificial Intelligence and Applications 235.
- Winkels, R. (2015). OpenLaws Project: Big Open Legal Data. *Proceedings of the 18th International Legal Informatics Symposium IRIS 2015*, Universität Salzburg, pp. 189 – 196.
- Worryng, M. (2015). Data Science in Beeld. *Inaugurele rede DataScience for Business Analytics*. FEB, UvA.

APPENDIX

1. interference justified 'rule of law' used as argument by the Court to justify the interference

19830325 CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM 8 1 rol 1 arg 1 Court
20020429 CASE OF PRETTY v. THE UNITED KINGDOM 8-2 2 rol 1 arg 1 Court neg
20030213 CASE OF REFAH PARTISI THE WELFARE PARTY AND OTHERS v. TURKEY 11-2 6 rol 2 arg
2 Court 1 neg
20051110 CASE OF LEYLA SAHIN v. TURKEY 9-2 2 rol 1 arg 1 Court 1 neg
20081204 CASE OF DOGRU v. FRANCE 9-2 1 rol 1 arg 1 Court 1 neg

2. interference not justified 'rule of law' used as argument by the Court

2.1 article 8-2

19830325 CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM 8 1 rol 1 arg 1 Court
19840802 CASE OF MALONE v. THE UNITED KINGDOM 8 3 rol 3 arg 3 Court
19880324 CASE OF OLSSON v. SWEDEN No. 1 8 1 rol 1 arg 1 Court
19900424 CASE OF KRUSLIN v. FRANCE 8-2 5 rol 5 arg 5 Court
19900424 CASE OF HUVIG v. FRANCE 8-2 5 rol 5 arg 5 Court
19980710 CASE OF LAMBERT v. FRANCE 8-2 4 rol 4 arg 3 Court
20000216 CASE OF AMANN v. SWITZERLAND 8-2 2 rol 2 arg 2 Court
20000504 CASE OF ROTARU v. ROMANIA 8-2 4 rol 4 arg 4 Court
20000512 CASE OF KHAN v. THE UNITED KINGDOM 8-2 3 rol 3 arg 1 Court
20010925 CASE OF P.G. AND J.H. v. THE UNITED KINGDOM 8-2 2 rol 2 arg 1 Court
20030429 CASE OF KUZNETSOV v. UKRAINE 8-2 1 rol 1 arg 1 Court
20030429 CASE OF POLTORATSKIY v. UKRAINE 8-2 1 rol 1 arg 1 Court
20030429 CASE OF NAZARENKO v. UKRAINE 8-2 1 rol 1 arg 1 Court
20030717 CASE OF PERRY v. THE UNITED KINGDOM 8-2 1 rol 1 arg 1 Court
20040427 CASE OF DOERGA v. THE NETHERLANDS 8-2 3 rol 3 arg 2 Court
20051215 CASE OF KYPRIANOU v. CYPRUS 8 4 rol 2 arg 1 Court
20060606 CASE OF SEGERSTEDTWIBERG AND OTHERS v. SWEDEN 8-2 2 rol 2 arg 2 Court
20060608 CASE OF LUPSA v. ROMANIA 8-2 1 rol 1 arg 1 Court
20070403 CASE OF COPLAND v. THE UNITED KINGDOM 8-2 1 rol 1 arg 1 Court
20070619 CASE OF CIORAP v MOLDOVA 8-2 1 rol 1 arg 1 Court
20071206 CASE OF LIU v. RUSSIA 8-2 2 rol 2 arg 2 Court
20080424 CASE OF C.G. AND OTHERS v. BULGARIA 8-2 3 rol 3 arg 3 Court
20080520 CASE OF GULMEZ v. TURKEY 8-2 2 rol 2 arg 2 Court
20080701 CASE OF LIBERTY AND OTHERS v. THE UNITED KINGDOM 8-2 2 rol 2 arg 2 Court
20081204 CASE OF S. AND MARPER v. THE UNITED KINGDOM 8-2 1 rol 1 arg 1 Court
20090210 CASE OF IORDACHI AND OTHERS v. MOLDOVA 8-2 1 rol 1 arg 1 Court

20090310 CASE OF BYKOV v. RUSSIA 8-2 5 rol 5 arg 2 Court
20090716 CASE OF ZEHENTNER v. AUSTRIA 6, 8-2 1 rol 1 arg 1 Court neg
20090917 CASE OF ENEA v. ITALY 8-2 1 rol 1 arg 1 Court
20100112 CASE OF GILLAN AND QUINTON v. THE UNITED KINGDOM 8-2 4 rol 3 arg 2 Court
20100713 CASE OF KURIC AND OTHERS v-1. SLOVENIA 8 4 rol 1 arg 1 Court
20110726 CASE OF M. AND OTHERS v. BULGARIA 8 2 rol 2 arg 2 Court
20120417 CASE OF PIECHOWICZ v. POLAND 8-2 1 rol 1 arg 1 Court
20120626 CASE OF KURIC AND OTHERS v. SLOVENIA 8 5 rol 2 arg 1 Court
20120703 CASE OF X v. FINLAND 8-2 5 rol 5 arg 5 Court

2.2 article 9-2

20001026 CASE OF HASAN AND CHAUSH v. BULGARIA 9-2 3 rol 3 arg 3 Court
20090212 CASE OF NOLAN AND K. v. RUSSIA 9 2 rol 2 arg 2 Court

2.3 article 10-2

19790426 CASE OF THE SUNDAY TIMES v. THE UNITED KINGDOM No. 1 6,10 4 rol 4 arg 1 Court
19920423 CASE OF CASTELLS v. SPAIN 10 1 rol 1 arg 1 Court
19970224 CASE OF DE HAES AND GIJSELS v. BELGIUM 10-2 2 rol 2 arg 1 Court
19980923 CASE OF STEEL AND OTHERS v. THE UNITED KINGDOM 10-2 1 rol 1 arg 1 Court
20010419 CASE OF MARONEK v. SLOVAKIA 10-2 2 rol 1 arg 1 Court
20010717 CASE OF EKIN ASSOCIATION v. FRANCE 10-2 1 rol 1 arg 1 Court
20020321 CASE OF NIKULA v. FINLAND 10-2 3 rol 1 arg 1 Court
20030213 CASE OF CETIN AND OTHERS v. TURKEY 10-2 2 rol 1 arg 1 Court
20031028 CASE OF STEUR v. NETHERLANDS 10-2 1 rol 1 arg 1 Court
20040617 CASE OF ZDANOKA v. LATVIA 10 2 rol 2 arg 1 Court
20060921 CASE OF MONNAT v. SWITZERLAND 10-2 1 rol 1 arg 1 Court
20080708 CASE OF VAJNAI v. HUNGARY 10 8 rol 2 arg 1 Court
20090226 CASE OF KUDESHKINA v. RUSSIA 10-2 3 rol 1 arg 1 Court
20091006 CASE OF KULIS AND ROZYCKI v. POLAND 10 1 rol 1 arg 1 Court
20100422 CASE OF FATULLAYEV v. AZERBAIJAN 10-2 1 rol 1 arg 1 Court
20100914 CASE OF SANOMA UITGEVERS B.V. v. THE NETHERLANDS 10-2 2 rol 2 arg 2 Court
20110118 CASE OF MGN LIMITED v. THE UNITED KINGDOM 10-2 1 rol 1 arg 1 Court
20110315 CASE OF OTEGI MONDRAGON v. SPAIN 10-2 3 rol 3 arg 1 Court
20120607 CASE OF CENTRO EUROPA 7 S.R.L. AND DI STEFANO v. ITALY 10-1 3 rol 2 arg 1 Court
20120925 CASE OF EGITIM VE BILIM EMEKCILERI SENDIKASI v. TURKEY 10-2 1 rol 1 arg 1 Court
20121002 CASE OF KAKABADZE AND OTHERS v. GEORGIA 10, 11 1 rol 1 arg 1 Court

2.4 article 11-2

19980130 CASE OF THE UNITED COMMUNIST PARTY OF TURKEY AND OTHERS v. TURKEY 11-2 4
rol 3 arg 3 Court

19980710 CASE OF SIDIROPOULOS AND OTHERS v. GREECE 11-2 1 rol 1 arg 1 Court

20020409 CASE OF YAZAR AND OTHERS v. TURKEY 10,11 3 rol 1 arg 1 Court

20010210 CASE OF STANKOV AND THE UNITED MACEDONIAN ORGANISATION ILINDEN v.
BULGARIA 11 1 rol 1 arg Court

20040217 CASE OF MAESTRI v. ITALY 11-2 2 rol 1 arg 1 Court

20091008 CASE OF TEBIETI MUHAFIZE CEMIYYETI AND ISRAFILOV v. AZERBAIJAN 11 1 rol 1 arg
1 Court

20110412 CASE OF REPUBLICAN PARTY OF RUSSIA v. RUSSIA 11 3 rol 1 arg 1 Court