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Fundamental Rights Seen Through the "Pluralistic Interpretive Box": The National, European Court of Human Rights, and Court of Justice of the European Union Perspective

ABSTRACT: *Interpretation, or the judicial understanding of the legal acts in the process of protection of the human rights, is becoming increasingly interesting and controversial, both from an aspect of the applied interpretation technique (which interpretation method is applied by the judge in a specific case and why), as well as from an aspect of the legal opportunism/legitimacy of the interpretation. It is a fact that so far, neither the European, nor the national legal theories and practice have offered coordinated systematic approach regarding the application of the legal interpretation methods, which often leads to different interpretation of the legal norms by the national and the European courts when applied in similar or identical legal situations for protection of the human rights. It is considered that the different interpretation of the legal documents by the judges endangers the protection of the human rights, but also the legal security of the citizens. Judicial discretion in choosing an interpretive method in a particular case by the national, or by the courts in Luxembourg and Strasbourg further complicates the already complex procedure of protection of human rights, which directly creates new problems instead of solving the existing ones. The "pluralistic interpretive box" is continuously filled with new and new cases from different approaches by different courts in the process of protection of human rights, which leads to increased scientific interest for a more detailed consideration of this issue.*

The growing scientific interest in the impact of the legal interpretation on the (non) equality of the human rights protection is the main reason for writing this paper, in which I will try to explain the connection between the three different, but still related issues encountered in the multilevel system of human rights protection in Europe. The first issue addressed in the paper concerns the most common methods of legal interpretation applied in the national and European court proceedings. The second issue concerns

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the search for a consistent answer to whether and how much legitimacy and legality the court decisions made by applying judicial discretion have when the interpretive method in judicial decision-making is chosen, and the third issue refers to finding an answer to the impact of such court decisions on the functionality and efficiency of the multi-level system of protection of human rights, that is, to what extent such court decisions have a positive or negative effect on the human rights protection. Given that each national court has its own instruments and techniques of interpretation by which the judges make their decisions, the need to study their causality and effectiveness is more than evident.

■ **KEYWORDS:** interpretative methods, principles, fundamental human rights, ECtHR, CJEU, Strasbourg Court, Luxembourg Court.

1. Introduction

The forms and methods of judicial and legal interpretation, as well as their optimal application, are becoming increasingly important in legal science and practice. Judicial discretion in legal interpretation sheds new light on the process of upholding national and international judicial jurisdiction and on the creation of new laws on human rights and freedom. Judges of courts, both at the national and international levels, through the application of correct interpretive methods and techniques in the process of protecting human rights, are increasingly becoming creators rather than enforcers of legal norms. Legal science increasingly speaks about *judocracy* and *judicial legislation* when aiming for human rights protection. However, citizens are only able to protect their human rights based on the interpretation of the legal norms by judges in courts. To address this dilemma, objective and impartial answers are yet to be found.

Judicial discretion in the interpretation of legal norms gives a new meaning, and sometimes, new content to these norms so often that citizens are forced to question who are the real legislators and the real enforcers of the law in a specific country, within a specific organization, or union of states? Do parliaments as legislators, in accordance with the principle of separation of powers, really create the law, or are they losing the *battle* to the executives in terms of judicial power? Judges, when asked whether they create new laws through the interpretation of existing legal norms, hardly ever admit that, through their judicial reasoning and discretion, they create *new* laws in the process of human rights protection. Academics, professors, analysts, and human rights experts, through their broader interpretations of legal norms, refer to the judges as 'drivers of the European legal train'.

Renowned academics and university professors are often cited as opinion makers in formulating the Strasbourg or Luxembourg judgments.[2] This known fact is disguised in the realm of interpretive methods and the need for their enhanced application. The use of the comparative method of legal interpretation in the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has been criticized with regard to the rule of law.[3] The basic principle of the rule of law is the accountability in the use of power by obeying the law. Going by this definition, it can be said that the imbalanced judicial discretion in judicial proceedings is an arbitrary abuse of judicial power. Hence, there is a great need to analyze and determine the extent to which the method of comparative interpretation of the law is in accordance with the rule of law.[4]

Meanwhile, most human rights are established in a very generic and often imprecise manner, which raises the question of how to ensure the protection of fundamental rights when they are not well-defined? What happens in numerous cases under the scope of the protection of private and family life?[5] Should the difference in interpretation of this concept by the Strasbourg Court and the Luxembourg Court be particularly noted in terms of whether it also covers companies and legal entities, or is it applicable only to individuals? Does the protection of the freedom of association of citizens in civil associations include the right to protection not associated with any organization? Further, what about the freedom of religion? Does freedom of religion include the protection of all religions or only the religion of the believer? Does the protection of freedom of movement include the right, e.g., of a disabled person to have unimpeded access to a place or restaurant?[6]

The answers to the above questions are almost always inaccurate and can be viewed through the prism of many factors, depending on the national case-law or

2 For instance, the ECtHR, over the past three decades, relied on the comparative analysis prepared by legal scholars and professionals or by research assistants from several European and non-European countries in the civil and common law jurisdictions and international law. Extensive comparative analyses are possible when the principle of evolutive interpretation is applied. In these cases, the court explicitly wants to draw attention to the existence or absence of any concrete developments in the field. This was the case, for instance, with respect to the legal position of transsexuals in several cases: *Rees v. the United Kingdom, ECHR (1986); Cossey v. the United Kingdom, ECHR (1990); Sheffield and Horsham v. the United Kingdom, ECHR (1998); Christine Goodwin v. the United Kingdom, ECHR (2002); I. v the United Kingdom, ECHR (2002).*

3 Based on academic discussions, two main conceptions of the rule of law emerge: the substantive and the formal conceptions. The differences between these conceptions are that formal theories focus on the proper sources and forms of legality, while substantive theories also include requirements about the content of the law. See: Craig, 1997, pp. 467–87.

4 In the case-law of the ECtHR, the comparison is carried out randomly and is interpreted arbitrarily.

5 Lawson, 1994, pp. 219, pp. 250. The CJEU interpreted Art. 8 of the ECHR narrowly in that this provision was only 'concerned with the development of man's personal freedom and may not, therefore, be extended to business premises'.
European Court of Justice, 1989, ECR 2859, at para 18. See: ECtHR, 1989.

6 Dzehtsiarou, 2011, pp. 534–553.

judicial reasoning in the interpretation of the law. Carozza (2004)[7] presents an interesting position, which responds to the views of De Burca and Eeckhout, that this debate is not about human rights, but about the need to strike the right balance between human rights protection at the European level on the one hand, and respect for the autonomy of EU member states on the other.

Inaccuracy and lack of clarity in legal regulations lead to a greater probability of judicial interpretations in a way closest to the subjective judicial understanding and as a specific interpretive method of a legal norm. If, according to the judge, the text of the legal norms is not precise, then based on the national and European case-law, the right to judicial discretion is exercised based on its interpretation. This possibility has led to the dilemma regarding legal interpretation and its (non) justification, that is, the logical question of *how* the judge arrived at a particular interpretative court decision.

The answer to this question can be analyzed in two stages: the first is the heuristic part of the process related to the application of a different method of interpretation in a similar or the same case depending on the judge's assessment, and the second is related to the court decision and the reasons for the same. The reasons are mostly related to the judicial elaboration of the legal arguments used to explain the court's decision. The legal arguments facilitating court decisions are subject to evaluation and analysis by other judges, academics, experts, legislators, and the general public to strengthen or criticize the legitimacy of the court decision.

Judges often draw legal arguments based on legal acts, such as conventions, pacts, and agreements. However, many legal arguments are not derived from written legal acts, but from internationally recognized principles, and sometimes, from political and pragmatic interests, particularly to protect social or economic interests. These loosely defined principles, customs, and constitutional conventions can cause serious threats to the synchronicity of judicial practice, especially when judges employ subjective approaches to address human rights protection.

2. Interpretation and application of law in the judicial protection of human rights

Before discussing the application of interpretative methods in national and European legal practice, it is important to emphasize the differences in legal theory and the principles and methods of legal interpretation. This difference is best analyzed in the German Constitutional Court, which classifies basic human rights based on principles rather than rules. In my opinion, this position can pose a direct threat to human rights because if they are viewed as principles and not as rules, the importance of human rights in democratic societies is undermined. It is interesting to note that in international legal literature, as well as in national and European court practice, there is no

7 Carozza, 2004, pp. 35–59.

common approach to the legal terminology being used. Each author and judge can view an interpretative approach either as a method or as a principle, although the two words are not synonymous.

The key difference between a method and a principle is that the interpretative method defines the technique employed by the judge to present legal arguments in support of the court decision for passing the verdict. The interpretative method is a tool used by the judge to make a subjective court reasoning objective, by which they verify the court's decision. In other words, the method aims to explain to the parties in the process, and to the public in general, the legal facts and arguments based on which the judge passed the decision. Unlike the interpretative method, the interpretative principle does not aim to explain the reasoning technique behind the court decision by analyzing the legal norms used but aims to explain the essence of the legal norms in general, that is, the goal of the agreement, convention, or pact. For this reason, the courts in Strasbourg and Luxembourg do not view the comparative and teleological interpretation of a law as a principle, but as a method.

Another important issue is the difference between the interpretation phase and the phase of application of human rights in the court process. In the first phase, the judge defines the meaning, range, and essence of human rights or freedom as a means of protection—e.g., whether the concept of protection of private and family life also covers the right to protection of a certain personal hobby, and how broad is the scope of this protection. In the second phase, the judge has an obligation to determine whether that human right or any other segment of the law is truly violated or not. Both phases play an important role in the judicial process, although the present study highlights that the interpretative phase is more abstract compared to the more specific applicative phase.

The abstract character of the interpretative phase is because the judge, through court practice, as well as, through applied legal theory, determines and formulates the *content and range* of human rights and freedoms, while the applicative phase is reflected in the position of the judge on whether there is a violation of human rights. In the applicative phase, the meaning of the legal arguments and facts presented to the judge to decide the course of the verdict occupy a dominant place. Broadly speaking, the applicative phase decides whether the restrictions on human rights are determined by a law or convention on human rights, whether these restrictions are legally justified, and whether they are in accordance with the democratic values in society.

Although viewed separately, both the interpretative and applicative phases are complementary and interrelated. The interpretative phase places emphasis on the scope and content of human rights and freedoms, which are subjects for court protection. Meanwhile, the applicative phase determines whether certain aspects of human rights have been violated in a specific court case through the application of legal arguments and facts. Given that these two phases have different scopes of activity, different interpretation methods can be applied within their use. While the teleological, textual, and autonomous methods of interpretation are more common in the interpretative

phase, the applicative phase is more dominated by the techniques of interpretation, such as the margin of appreciation and the balance of rights, as well as the interests of the other.[8]

As such, the primary difference between the two phases is that the interpretative phase aims to secure an equal and uniform judicial approach in explaining the essence of a certain human right or freedom that is protected by national and international laws. The margin of assessment plays an important role in the applicative phase, especially in the protection of national character when determining the content and boundaries of protection of a certain human right. However, the margin of assessment should not be applied during the interpretative phase.

The main criticism addressed toward judges in the application of an interpretative method when passing their verdicts is the imprecision and lack of clarity on the legal arguments in the application of EU laws or the CoE (Council of Europe) law (primarily the European Convention on Human Rights (ECHR)). Instead, court decisions must not only aim to find the most specific legal solution in a given case but also serve as guidelines for a better understanding of the European stand on human rights. The courts in Strasbourg and Luxembourg play a key role in utilizing existing laws and setting new legal standards for the protection of human rights and freedoms. The two courts have the legal obligation to pass well-grounded, well-explained, and righteous decisions that can provide practical guidance on how to protect human rights and freedoms at the national level.

Bearing in mind this mission, national authorities and the public must persuade European courts to make decisions that uphold the legal foundation of the society. In fact, the most important goal of the legal decisions passed by European courts is to be persuasive by using legal arguments and detailed explanations acceptable to national authorities and the public. However, the use of interpretative methods by judges can lead to informed legal decisions when it is clear that both courts share the position that

8 'The determination of the margin of appreciation in the ECtHR has been combined with two principles of interpretation: evolutive and autonomous interpretation. It has been argued that these principles contradict each other and the doctrine of margin of appreciation. Theoretically, evolutive interpretation means that the interpretation of certain terms of the Convention might change over time in accordance with changes in European (or other) societies; a comparative exercise is thus inherent in this principle. An evolutive interpretation was invoked, for instance, in the *Sheffield case* with respect to the use of "protection of morals" as a justification ground. The Court established that at the time when the dispute took place, no evolution was discovered concerning the public acceptance of transsexuals. Specifically, it said, 'the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status'. Since there was no evolution in this field, the margin of appreciation given to the respondent state was considered to be broad. In contrast, autonomous interpretation emphasizes that the Convention constitutes a legal order that is different from that of the contracting states. Thus, in principle, comparison becomes unnecessary. The Court has also looked for a common position in several cases in which it based its arguments on the principle of autonomous interpretation. In the *Sunday Times* case, for instance, the Court argued that 'the expression "authority and impartiality of the judiciary" has to be understood "within the meaning of the Convention"'. See: Ambrus, 2009, p. 358.

judicial decisions cannot be based only on the subjective persuasion of judges, but on objective parameters as well.

Although judges have the right to analyze an existing law, they do not have the right to create a new law or modify the existing one. At present, it is difficult to draw a fine line between the interpretation and application of law. Keeping in mind that the fundamental rights in the constitutions are very broadly and, quite often, imprecisely defined, judges may face a very broad spectrum of subjective interpretation, which often comes under serious criticism by the scientific and judicial public.

Thus, the methods of legal interpretation need to be applied by judges very carefully and only in extraordinary circumstances when there is a justified reason to do so. In my opinion, judicial reasoning must not be the only source for drawing legal arguments but should always be used as an auxiliary tool to strengthen the legal background for passing judicial decisions. Lately, however, legal interpretation by judges is highly common, which if applied without control, distorts the very meaning of law by enhancing judicial discretion in the application of the law.

This controversy becomes particularly visible when comparative interpretation is applied, considering that in each specific case, it is easy to find comparative data to support the position of the judge in the given case. The rich scientific and professional archive, as well as the national/European judicial and scientific case-law provide a solid basis for judges to undertake comparative analysis and draw subjective opinions when applying the law.

As a result, there might be a high scope for manipulations, which certainly harms the righteousness of the protection of human rights and freedoms. Pragmatically speaking, this scope for manipulation is much broader in European courts (CJEU and ECtHR), considering that the national differences in the application of law can sometimes be of a controversial nature. For this purpose, this study will analyze the experiences of European courts and the problematic aspects derived from the application of interpretative methods.

3. CJEU and interpretation methods: Experiences and controversies

Constitutive agreements in EU law allow the interpretation of the legal provisions by the CJEU (Court of Justice of the European Union), thus pointing out its focal place in the process. However, these agreements do not contain a provision that specifically outlines the use of compulsory interpretative methods by the Court. This absence of a single uniform approach in the use of interpretative methods leads to widespread judicial discretion and free judicial choice based on the views of the judge in the EU legal order. However, is the Luxembourg court truly moving in line with the protection of the EU legal order, or perhaps it chooses its direction for other reasons?

A wise and informed interpretation of the legal agreements and other provisions is an important competence of the highest EU court, which is often achieved through a

preliminary ruling procedure[9] as determined in Art. 234 of the EU Treaty. Meanwhile, the application of the interpretation is linked with the lower courts in the EU and, of course, the national courts of the EU members.

Lately, the Luxembourg court has grown into a decision-making court for the protection of fundamental rights in Europe due to the different interpretations of the concept of "minimum standard" concerning the protection of these rights. Art. 53 of the ECHR and Art. 53 of the Fundamental Rights Charter, although considered identical, contain a crucial difference pertaining to the obligation to respect the principle of primacy of the EU law. Based on this principle, the Luxembourg Court has a wide scope for applying the Charter in accordance with its own interpretation. Although it was believed that the national constitutional courts would oppose this new development, the opposite occurred. The German, French, Italian, Austrian, and Belgian constitutional courts agreed with a few interpretations made by the Luxembourg court and applied them as a standard in their work,[10] which practically increased the scope of the application of the Fundamental Rights Charter with regard to the ECHR.

To date, EU member countries have the right to call on national legal acts as part of fundamental rights protection if these acts provide the highest standards of protection without violating the key principles of the EU law—supremacy and effectiveness—as well as, the unity of the Union. The EU Court of Justice mainly uses three interpretation methods, although other methods are also applied. These are textual,[11] systematic, and teleological methods of interpretation. The textual method focuses on the interpretation of the text of the legal provision by analyzing the words it contains. The systematic interpretation method aims to highlight the context of the legal provision, while the teleological method, also known as the functional method, aims to determine the interpretation of the legal provision that will best achieve the goal of that provision.

9 It is interesting to mention that the Strasburg Court first promoted this principle in 1964. In 1993, the European Commission of Human Rights strongly encouraged national courts to make preliminary references to the ECJ (case *Soc. Divagsa v. Spain* (12.5.1993) *and Fritz and Nana S. v. France* (28.6.1993). The Strasbourg Court took over several advancements of the ECJ case-law, e.g., with regard to self-incrimination, the right of having a name, or the right of keeping one's state of physical health a secret. The ECtHR has also used references to EU law and the ECJ's case-law to operate reversals of case-law (December 1999 in the *Pellegrin v. France case*), *Goodwin v. United Kingdom case* (11.07.2002).

10 The PSPP-judgment of the *Bundesverfassungsgericht*, the Austrian *Verfassungsgerichtshof*, the Belgian Constitutional Court, the French *Conseil Constitutionnel*, the Italian *Corte Costituzionale,* and lastly the same *Bundesverfassungsgericht* in the *Right to be Forgotten I* & *II* issued in November 2019, have adopted the European fundamental rights in their interpretation of the CJEU as a standard of review for their own proceedings.

11 In the literature, it is generally assumed that the CJEU employs the textual method of interpretation, on occasion applying it to show the limits of its own competence. Some authors consider that the textual method of interpretation is the main method of interpretation employed by the CJEU. The main focus in the literature, however, is to show the limits of the textual method in the case-law of the CJEU.

The three most frequently applied interpretation methods introduced by the Strasburg Court presumed that they had to be taken into account by all EU and national institutions. This position of the Court was clearly mentioned in 1963, in the case *of Van Gend & Loos,*[12] where the Court of Justice viewed the spirit,[13] content, and text of the legal provisions, which led to the principle of the direct effect of the EU Law. The Court ruled that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprises not only member states but also their nationals. Independent of the legislation of Member States, Community Law therefore not only imposes obligations on individuals but is also intended to confer upon them rights, which become part of their legal heritage'.

This principle was in agreement with the realization of Art. 31, para. 1 of the Vienna Convention on the Law of Treaties: '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'.[14] The Vienna Convention limits the teleological method of interpretation by giving primacy to the text, which means that the object and purpose cannot be invoked to contradict the text. In addition to the above-mentioned methods, and of equal importance but certainly not of less importance, is the comparative method of interpretation, through which the Court considers the directions and standards of international law and practice for human rights protection, as well as, experiences drawn from the constitutional traditions of EU member states. The comparative method also often calls on the laws of EU members.

The comparative analysis of the national regulations in human rights protection can help European courts verify the legal grounds for their decisions that could cause disagreements. However, this method can cause certain difficulties in terms of reducing the credibility of judges and European courts in general. In the protection of human rights, the EU Court of Justice highlights the case-law of the ECtHR, the importance of the ECHR, the International Pact for Civic and Political Rights, and other international legal instruments. The case-law of the U.S. Supreme Court also has a very strong influence on human rights protection, although in cases that concern federalism, homosexuality, and death penalty, except certain references drawn from EU law, the U.S. Supreme Court has not quoted any other decision of the EU Court of Justice.

The Luxembourg Court is often criticized for its unclear reasoning. E.g., Prof. Von Bogdandy criticizes the Court for broadening its scope on certain rights without a strong legal justification. According to him, the key role of the Luxembourg Court is to secure coherent and harmonious application of EU law in the Union. Based on the well-established jurisprudence of the EU Court of Justice, national courts are, in

12 Bermann, 2002, pp. 239–242.

13 The CJEU refers to the spirit of the treaty as one of the main considerations for the Court when determining the scope of a provision.

14 Art. 32 of the Vienna Convention emphasizes on the preparatory work (*travaux preparatoires*) of a treaty as an additional interpretation tool, which is not used as an auxiliary instrument in cases related to interpretation of agreements, but as a preparatory activity.

turn, under the obligation to interpret national norms, so far as possible, in a manner consistent with EU law.

As the *Cilfit case* points out,[15] national courts must bear in mind some factors when interpreting or applying EU law: 'EU law uses terminology, which is peculiar to it. Legal concepts do not necessarily have the same meaning in EU law and in the law of member states. Every provision of EU law must be placed in its context and interpreted in light of the provisions of EU law as a whole. National courts, when interpreting or applying EU law, are obliged to adopt the same methods of interpretation as the Court of Justice'.

In the absence of a relevant case-law of the CJEU, it is entirely legitimate that national courts should regard the views expressed by other national courts on questions pertaining to EU law. This approach is conducive to the harmonious application of EU law in all member states. It is also consistent with the *Cilfit case* and the notion of *acte claire* as a ground for declining to make a reference pursuant to Art. 234.

4. Divergent interpretations of fundamental rights by the CJEU and Strasbourg-Luxembourg Courts

The disparities in incorporating the ECHR in the EU legal system have led to a number of challenges in the protection of fundamental rights within the Union. The ECHR is part of the EU legal system through its incorporation into the constitutions of member states, and its importance in human rights protection has never been disputed. However, the CJEU is quite rigid when it comes to the protection of "the particular characteristics of EU law", and the need for special interpretation and application of fundamental rights within the EU.

According to the Luxembourg Court, the ECtHR should not be able to 'call into question the CJEU's findings in relation to the *ratione materiae* of EU law', which could naturally include the interpretation of fundamental rights.[16] This statement undoubtedly points to a disparity in issues that originate from EU law and the free judicial interpretation of the protection of fundamental rights determined in accordance with the Charter. The case-laws of both courts contain several different interpretations of fundamental rights based on the EU Charter on Fundamental Rights and the ECHR.[17] This paper highlights several important cases. E.g., the CJEU has established that violations of fair trial guarantees could not be invoked as grounds for denying the execution of the European Arrest Warrant (EAW),[18] while the ECtHR follows a different approach

15 *SRL Cilfit v Ministry of Health C-283/81* [1982] ECR 3415.

16 Opinion 2/13 *Draft Agreement on Accession of the European Union to the ECHR, (paras 183–186).*

17 The Zolotukhin judgment precisely highlights the different perspectives of the Luxembourg and Strasbourg Courts to the realization of the *Ne Bis in Idem rule* at the European level.

18 CJEU, C-399/11 *Stefano Melloni v Ministerio Fiscal*, paras 38, 44, 46, 63 and operative part; CJEU, C-261/09 *Mantello* [2010] ECR I-11477, para 37; CJEU, C-123/08 *Wolzenburg* [2009] ECR I-9621, para 57, Dec. 13032011 *Poinika Chronika* 2012, 494, Areios Pagos.

in similar cases where a violation of Art. 6 of the ECHR amounts to a "flagrant denial of justice".[19]

To simplify, the established standards for the protection of fundamental rights based on the Charter on Fundamental Rights cannot be a subject of divergent interpretations in the interest of higher human rights standards, even if they are determined by the ECtHR or other international instruments of law. This rule corresponds with the principle of supremacy and effectiveness of EU law, as presented in the *Melloni* case.[20]

In this case, the Luxembourg court managed to secure a protective clause in Art. 53 of the Charter. Another example of divergent textual interpretations of the two courts is Art. 52, para. 1 of the Charter. A textual interpretation highlights the difference between the "absolute" and the "qualified" rights as determined in the Charter as redundant, bearing in mind that the EU legislator has the right to impose restrictions on both types of rights in the interest of the EU's protection and the demands for its greater safety and efficiency. Therefore, it is considered that Art. 52, para. 1 of the Charter can serve as a basis for additional restrictions on fundamental rights beyond those that the Strasburg Court considers necessary in a democratic society.

The disputes and tensions that occur between the two courts in the understanding and interpretation of legal norms are particularly visible in the area of criminal law, especially in instances of violations of the secondary EU law by an EU member country that threatens certain fundamental rights protected within the ECHR. The problem becomes more complex when the issue is reviewed within the preliminary ruling procedure by the Luxembourg Court, which is defined in EU law as 'the keystone of the judicial system of the EU'.[21]

These tensions further escalate when a decision of the Luxembourg Court is different from that of the Strasbourg Court based on an initiative for individual action by any physical person or group of citizens. In a case where the ECtHR, in considering whether that law is consistent with ECHR, had to provide a particular interpretation from among plausible options, there would most certainly be a breach of the principle that states that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law. However, the CJEU is not obliged to follow the directions of the Strasbourg Court when it comes to the protection of EU law's supremacy and efficiency.

Additionally, even if the Luxembourg Court passed a decision in a preliminary ruling procedure, Art. 53 of the ECHR can create further impediments, considering that it reserves the right of the states to establish higher standards for the protection of fundamental rights, contrary to what has been decided by the Luxembourg Court when

19 ECtHR, *Soering v. UK*, no 14038/88, Series A-161, para 113; ECtHR, *Al-Saadoon and Mufdhi v. UK*, no 61498/08, ECHR 2010, para 149; ECtHR, *Othman (Abu Qatada) v. UK*, no 8139/09, ECHR 2012, paras 258–260.

20 CJEU, C-399/11 *Melloni para 60*; Opinion of Advocate General Bot, C-399/11 *Opinion Melloni* paras 102–114, 124–137.

21 Opinion 2/13 *Draft Agreement on Accession of the European Union to the ECHR,* para 176.

quoting Art. 53 of the Charter. There is also a situation where the Strasbourg Court demands the application of higher standards in the protection of human rights without considering the specifics of the EU law, which points to the possibility of divergent interpretations of the law. Considering that Protocol 16 of the ECHR does not liberate the national court from the obligation to address a preliminary question according to Art. 267 (3) of the Treaty on the Functioning of the European Union (TFEU), the referring court could find itself in the awkward position of having to decide which European Court to refer the question to, or if it could refer it to both Courts simultaneously.[22] What happens with the legal equality of citizens and the efficient protection of human rights in such cases?

5. Interpretative principles of the ECtHR: Strong narrative without a major impact?

The ECtHR has an interpretative mechanism created as a result of the different interpretations of the ECHR by the national courts in light of the principle of subsidiarity. As stated many times thus far, the ECHR is an instrument that is interpreted differently in accordance with the principle of consensus among the CoE member countries. The consensus on the interpretation of the ECHR has the goal of securing uniform access of the CoE member countries to the legal framework regarding human rights protection. In addition, the principle of consensus aims to justify the broad margin of appreciation as determined by the member countries in cases where consensus is impossible to achieve.

It is well-known that the ECHR often employs the comparative method of interpretation in order to support its arguments.[23] Although this type of interpretation can be considered a "common European standard", it can cause major inconsistencies in the application of the ECHR, considering that it does not include a definition or a criterion for its use.

22 See: *Ioannis Kargopoulos,* 2015, pp. 96–100.

23 The comparative method is not always consistently applied by the Court in the process of sourcing legal arguments in specific cases. In the Court's practice, we can find examples where the comparative method was considered critical in establishing legal arguments (such as in the *Odièvre v. France case, ECHR (2003))* concerning the question whether one can obtain identifying information about one's natural family in the case of anonymous child abandonment. In another example, the Court did not apply this method (in the *Öllinger v. Austria case, ECHR (2006*)) concerning the conflict between the right to peaceful assembly and the right to manifest one's religion, or in *Pini et al. v. Romania case, ECHR (2004*) concerning the conflict between the applicants' right to develop family ties with their adopted children and the children's interests. In the *Stoll v. Switzerland, ECHR (2007) case* concerning the applicant's conviction for 'secret official deliberations' as an alleged violation of his right to freedom of expression, a comparison was carried out. No comparative considerations were brought up, for instance, in the *Vereniging Weekblad Bluf! v. the Netherlands, ECHR (1995) case,* in which the seizure and subsequent withdrawal of a particular issue of a journal was at stake.

Therefore, we can conclude that the Strasbourg Court, similar to the Luxembourg Court, does not provide a precise guideline or framework for the use of interpretative methods. This drawback is also present in the doctrine of margin of appreciation, which emphasizes the use of interpretative methods and principles, but at the same time, does not provide guarantees for a uniform standard for application of the Convention.[24]

Although it is clear that the creation of a "uniform standard" of human rights is a slow and complex process, the absence of consensus among the member countries on sensitive issues justifies the broad application of the margin of appreciation, except when it comes to issues regarding discrimination.

6. Conclusions

Based on the above discussion, we can draw several conclusions regarding the application of interpretative methods in the practice of the two European courts. First, the European legal system does not offer a single systematic theory for a uniform understanding and implementation of legal interpretation methods at the national and European levels. The absence of an objective procedure leads to the application of divergent interpretative methods in the same or similar cases at national and European fundamental rights protection courts, which endanger individual freedoms and the overall legal framework of the society. As such, it is pertinent to maintain the same standards of interpretation and application of fundamental rights.

Given that there is no unified or common approach to the use of legal interpretation methods by the national or the Strasbourg and Luxembourg Courts, the application of legal interpretation of fundamental rights protection cases depends on judges' discretion, which could create subjective and biased judicial decisions in specific cases. Additionally, it is acceptable to have a system of uniform substantive law in the same language within the EU. To create such a uniform concept, member states must give up their own legal language. This approach will be applicable in national courts too, considering that the application of EU law is under crisis due to inconsistent terminology.

The idea that judicial creativity should only be present in activist or pro-integration decisions and not in cases where the Court decides to remain within the boundaries of existing legal norms, and its case-law is a plausible way of navigating the complexities of legal interpretation and directing judges on how far they can apply the methods of legal interpretation. Judicial creativity in activist or pro-integration decisions could be considered the margin of appreciation in the legitimacy of the judges' judicial discretion in using methods of legal interpretation. In cases outside of this framework, the method of interpretation based on the subjective assessment

24 In this direction, an example with a definition of the beginning of life is *Vo v. France* (GC), 53924/00, 8 July 2004).

of the judge might lead to legal uncertainty and pose impediments to the protection of fundamental rights.

Given that judges in Europe are not held accountable by any EU institution, the arbitrary interpretation methods used by judges can lead to a chaotic legal and human rights situation. This is one of the primary reasons why academics and scholars persist on this issue and aim to find a proper solution for creating a framework for defining and limiting of judges' discretion in selecting a method of interpretation in certain cases. The current case-law framework leaves scope for possible judicial voluntarism that could cause serious legal consequences at the European level as seen in a number of cases.

The methods of legal interpretation refer to the judge's approach to written legal materials (such as legislation or precedents) and, more generally, the way the legal argumentation is prepared based on general legal principles or canons of legal reasoning. Interpretation of unwritten materials where pragmatic, and sometimes, political reasons hide behind the judge's chosen method of interpretation is a question of great concern.

Do we have the legal right to talk about rethinking legal interpretation in the present situation of divergent judicial practices and inconsistent case-laws? We can revisit to the positions determined in the maxim: '*interpretatio cessat in claris'* and demand that the European and national courts use the methods of interpretation restrictively and only in cases when they face a confusing legal text. Thus far, the practice denies the opinion presented by Lasser that the CJEU follows a meta-teleological approach, which 'refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules.'[25] According to the author, this meta-teleological approach tries to identify the *"constitutional telos*" or constitutional goal of the EU, which may 'provide a thicker normative understanding of the law beyond the decision in the case [at] hand'.

However, what does "*constitutional telos*" of the EU truly mean and can it be sustained through the application of different methods of interpretation by the CJEU?[26] This question has led me to propose a new approach and "a new vessel that will sail on the open European sea". Building this new boat on an open sea, to borrow an expression from Jürgen Habermas, may be a necessary project, however difficult it may be. The CJEU may need to take up the task of providing justifiable answers to questions without obvious answers since judges have taken the position of legislators, which de facto, they are not.

25 Lasser, 2005.

26 Rasmussen, 1986; Neill; Hartley, 1996.

Bibliography

- Ambrus, M. (2009) 'Comparative law method in the jurisprudence of the ECtHR in the light of the rule of law', *Erasmus Law Review,* 2(3) [Online]. Available at: www.erasmuslawreview.nl (Accessed: 30 September 2021).
- Bermann, G. (2002) *Cases and Materials on European Union Law,* 2nd edn. St. Paul, MN: West Academic Publishing.
- Carozza, P. (2004) 'The Member States' in Peers, S. and Ward, A. (eds.) *The EU Charter of Fundamental Rights: Politics, Law and Policy*. Portland: Bloomsbury Publishing, pp. 35–59.
- Craig, P. (1997) 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law* (Autumn), pp. 467–487.
- Dzehtsiarou, K. 'Does consensus matter? legitimacy of European consensus in the case-law of the European court of human rights', *Public Law,* pp. 534–553 [Online]. Available at: http://ssrn.com/abstract=1944920 (Accessed: 27 September 2021).
- Hartley, T. C. (1996) 'The ECJ, Judicial Objectivity and the Constitution of the EU', *Law Quarterly Review,* Vol. 112.
- Lasser, M. (2005) *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press.
- Neill, P. *The European Court of Justice: A Case Study in Judicial Activism*, evidence submitted to the House of Lords Select Committee on the European Communities.
- Peers, S. and Ward, A. (2004) *The EU Charter of Fundamental Rights: Politics, Law and Policy.* Bloomsbury Publishing.
- Rasmussen, H. (1986) *On Law and Policy in the European Court of Justice.* Dordrecht: Nijhoff.
- Rick, L. (1994) 'Confusion and Conflict? Divergent Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg' in Lawson, R., de Blois, M. (eds.) *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers – Volume 3: Dynamics of the Protection of Human Rights in Europe*, Kluwer Academic Publishers.