MINISTERUL EDUCAȚIEI
UNIVERSITATEA „TITU MAIORESCU" DIN BUCUREȘTI
Calea Văcărești, nr. 187, sector 4, București, cod 040051
tel.: 021 316 16 46, fax: 021 311 22 97, e-mail: rectorat@univ.utm.ro, www.utm.ro

TITU MAIORESCU UNIVERSITY

DOCTORAL SCHOOL OF LAW

DOCTORAL THESIS

- S U M M A R Y -

HUMAN RIGHTS AS INTERPRETED BY THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

PhD Supervisor

Prof. Univ. Dr. Ciucă Aurora

PhD Student

Neagoe Vlad Mihai

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The importance and timeliness of the human rights theme appears in almost all modern discourse and seems to have become a 'new ideology', in which the 'litigability' of specific instruments becomes a constant concern of the international community. Thus, human rights – alongside the democratic regime and the rule of law - are one of the pillars of any modern democratic society. Neither the purely democratic regime, subject to the risk of the 'tyranny of the majority'[1], nor the rule of law, as an imperative for respect of the law and the separation of powers, are sufficient to adequately protect fundamental human rights in a democratic society. In other words, as often stated, fundamental human rights are not subject to vote.

In this area, the *process of legal interpretation* has the broadest thematic and bibliographical scope. It is linked to the very essence of law, which concerns the application of the legal rule to social relations, requiring that the relevant rule be related to the social realities it regulates.

Therefore, particularly sensitive specific subjects, such as the legal rule and its means of concretization in social reality, are those with which we have operated in approaching the various methodologies of legal interpretation, such as textual, contextual, teleological or evolutionary.

The best-known writers of theory of interpretation and human rights have been chosen for the analysis of academic literature in the field of research, from all times and from both European legal *systems*, both civil-law and *common-law*.

Finally, *the choice of the two major supranational European courts* is as natural as challenging. They are the exponents of jurisdictions in Europe and both represent unique experiments in the most successful legal world. Hence the expression due to the exponential growth in their volume of judgments, they are 'victims of their own success'[2].

In this regard, it was emphasized that the interpretation of human rights in the two major European supranational courts has some *special particularities*, as they have a much broader perspective than national courts, which minimizes the risk of influence from national contemporary or excessively conservative or, on the contrary, highly advanced orientations, which could appear contrary to the evolution of a 'modern democratic society', since the international judge is less

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[1] The term 'tyranny of the majority' is attributed to Alexis De Tocqueville in his book *Democracy in America*. See, for example, Chapter XV of Volume I: *Unlimited Power Of The Majority, And Its Consequences - II -Tyranny Of The Majority*, in the 2000 edition of Harper Perennial Modern Classics.

[2] See the use of the expression also in the doctrine, *e.g.*, Lynne Turnbull, *A Victim of its Own Success: The Reform of the European Court of Human Rights*, European Public Law, vol. 1, no. 2, 1995, pp. 215-225.

subjective than the national one, given that he is judging in a supranational context and together with other fellow judges coming from different national backgrounds.

The choice of both supranational courts was justified by the *cross-fertilization* relationship between the case-law of the two European courts, thus creating a full picture of the legal interpretation of fundamental human rights, which is much needed in today's challenging legal world.

As regards *the methodology of scientific research*, faithfully following the famous Cartesian saying that "it is far better never to contemplate investigating the truth about any matter than to do so without a method"[3], I undertook the approach with a careful methodical approach, in which I have made full use of the well-known scientific research methods specific to the legal field, which I have combined with each other for a correct rational exposition and a more readable understanding (synthetic, analytical, logical, diachronic, historical, critical-comparative and illustrative method).

Chapter I deals with ***legal interpretation in public international law with a special focus on human rights***.

In this respect, it is based on the premise that legal interpretation, together with the statutory rule and social reality, is *the third fundamental component of the law.*

From a doctrinal point of view[4], legal interpretation is viewed in the light *of two opposing concepts,* namely *the theory of descriptive interpretation*, which states that interpretation is a *function of knowledge*, and *the theory of normative interpretation*, sometimes referred to as the theory of realist interpretation, according to which the interpretation is a *function of will.*

The legal interpretation can only be achieved through *legal reasoning*, which the doctrine[5] understands either *normatively* (as a theory of adjudication that seeks to prescribe how judges should decide cases) or *descriptively* (that seeks to explain how judges actually decide cases).

The starting point of any interpretation is the *legal rule*, as the core of the entire legal system, recalling the views of the authors enshrined in legal theory from Romania (Eugeniu Speranția, Andrei Rădulescu, Octavian Ionescu or Mircea Manolescu) as well as from abroad (Norberto Bobbio, Michel Troper, H.L.A. Hart or Ronald Dworkin).

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[3] René Descartes, *Discours de la méthode*, Editura Flammarion, Paris, 2000, pp.124, 125.
[4] Michel Troper, *La philosophie du droit*, Presses Universitaires de France/Humensis, Paris, 2018, 3rd ed., pp. 78 ff.
[5] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, 2012, pp. 1, 2. The author quotes Karl Llewellyn, with the notion of *stability factors*, from *The Common Law Tradition: Deciding Appeals*, Little, Brown and Company, Boston, 1960, pp. 19 et seq.

The theories and methods of interpretation have been approached in the light of the concepts of established legal scholars, practitioners or even non-legal authors (Hans Kelsen, Aharon Barak or Umberto Eco).

With respect to the *legal interpretation in the field of human rights*, the emphasis was on the need for legal interpretation in the application of rules enshrining human rights, distinguishing between *the interpretation phase* and the *rights enforcement phase.*

The hierarchy of human rights was also addressed, emphasizing that "there is no one-size-fits-all theory of human rights", but rather an indivisibility or interdependence of human rights (in a more profane sense, "what good is it to a starving man to be free?"[6]), while noting that the doctrine[7] identifies a "hard core of human rights", containing rights not susceptible to derogation.

As regards the interpretation of human rights treaties, two characteristics have been emphasized in this respect, in the sense that, on the one hand, *human rights treaties are law-making treaties or normative or legislative treaties* (*traités-lois)*, and not '*contract treaties*' (*traités-contrats*), and, on the other hand, *human rights treaties are to be interpreted broadly and not restrictively* (which is contrary to the usual way of interpreting treaties, according to which they are to be interpreted restrictively, like any international obligation - *in dubio mitius*) .

The Vienna Convention on the Law of Treaties of 1969, as a 'treaty on treaties', was analyzed separately in terms of Articles 31 to 33 of the Convention, which are at the 'centre of the Convention', and represent a commendable initiative for a 'codification that remains unknown even to many legal orders'. They are regarded as 'a masterpiece of precise drafting' which offers 'considerable flexibility' without 'eroding the legal certainty which *jus scriptum* is intended to provide'.[8]

Chapter II presents ***the major doctrines of legal interpretation and how they are reflected in the field of human rights***, starting from the *double justification*: on the one hand, *legal doctrines support the assimilation of practical solutions*, and on the other hand, they *reflect the compromise between different perspectives of the case.*

The need for the analysis arose from "the difficulties that must arise in the process of interpretation when what essentially divides the parties is not so much a disagreement as to the

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[6] Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights,* European Journal of International Law, vol. 12, no. 5, 2001, p. 918.

[7] Frédéric Sudre, *European and International Human Rights Law,* trans. Raluca Bercea (coordinator), Polirom Publishing House, Iași, 2006, pp.162 and 163.

[8] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Koninklijke Brill NV, Leiden, The Netherlands, 2009, p. 445.

meaning of terms as a difference of attitude or state of mind. The parties will then be working on different coordinates; they will be traveling parallel paths that never meet..."[9] .

The analysis was limited to the three great doctrines of law, identified as such by other authors such as Norberto Bobbio or Aharon Barak: jusnaturalism, legal positivism and legal realism.

With regard to *the doctrine of jusnaturalism*, it has been emphasized that, although there are no certain criteria for qualifying a natural right, it is nevertheless possible to establish some benchmarks, in the light of the historical development of ideas of natural law. These are also reflected in the case-law of the European courts, such as in the ECtHR case *Sabanchiyeva and others v. Russia*[10] (on the respect for family life in terms of the preservation of the memory of the deceased by close relatives) or in the CJEU case *Walt Wilhelm and others v. Bundeskartellamt*[11] (which referred to a *general requirement of fairness* that the first sanction should be taken into account in the event of the repetition of accusations).

As for the *doctrine of legal positivism*, it has often been presented in international legal academia as "*the big bad wolf of legal philosophy*"[12].

This is illustrated in the practice of the ECtHR, for example on the ground of Art. 6 (1) of the ECHR, where it was held that the adjective 'civil', alongside the concept of 'rights and obligations', cannot be ignored in that text[13]. Likewise, in the case-law of the CJEU, where in the *Barber* case[14], the European court held that its interpretation does not apply retroactively, given that it would have a direct impact on many EU companies which "were reasonably entitled to consider that Article 157 did not apply to such pensions".

The doctrine of legal realism, born from the Latin maxima *ex facto jus oritur* (law emanates from facts)[15], with the US Supreme Court Justice Oliver Wendell Holmes Jr. (1841 - 1935) as its exponent,

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[9] ECtHR, Judgment of the Court (Plenary Session) of February 21, 1975, *Golder v. the United Kingdom,* Application No. 4451/70, separate opinion of Judge Fitzmaurice, paragraph 23.

[10] ECtHR, Judgment of the Court of June 6, 2013, *Sabanchiyeva and Others v. Russia,* Application No. 38450/05.

[11] ECtHR, Judgment of the Court of February 13, 1969, *Walt Wilhelm and Others v. Bundeskartellamt*, Case 4/68, EU:C:1969:4, para. 11.

[12] Théodore Christakis, *Human rights from a neo-voluntarist perspective*, in Jörg Kammerhofer, Jean D'Aspremont (eds.), *International Legal Positivism in a Post-Modern World*, Cambridge University Press, 2014, p. 16. The author quotes Matthew Kramer, in *The Big Bad Wolf: Legal Positivism and Its Detractors*, American Journal of Jurisprudence, vol. 49, 2004, pp. 1-10.

[13] ECtHR, Judgment of the Court (Grand Chamber) of July 12, 2001, *Ferrazzini v. Italy*, Application No. 44759/98, paragraph 30.

[14] CJEU, Court judgment of May 17, 1990, *Barber*, Case C-262/88, EU:C:1990:209.

[15] Virgil Matei, *Dicționar de maxime, reflecții, expresii latine comentate*, Editura didactică și pedagogică, Bucharest, 2013, p. 101.

with the famous saying "*the life* of *the law has not been* logical: *it has been experience*", is also reflected in some European court decisions.

Thus, the recent ECtHR judgment of the Grand Chamber of April 9, 2024 in *Verein Klimaseniorinnen Schwiz and Others v. Switzerland*[16] , had its source in the reality of social life, where environmental pollution has become a worrying constant in the international legal community.

In the CJEU case-law, the best example of legal realism could be found in the area of European citizenship, in the *Ruiz Zambrano* case[17] , in which the Court of Justice held that, by expelling Ruiz Zambrano, an illegal immigrant to the EU, his two minor children, with the status of European citizens, would have been forced to the same effect, thereby affecting the substance of their rights and *de facto* losing their European citizenship, in which context it was possible to recognize in favour of their father a right of residence, provided for by Art. 21 TFEU, precisely because of this effect, which is linked to the reality of the dynamics of social life, an aspect emphasized in legal doctrine by President Lenaerts himself.[18]

Chapter III is devoted to the presentation of ***human rights protection mechanisms at the level of the ECtHR and the CJEU***, outlining the main features of each protection system.

In the ECHR system, reference was made to the individual application (introduced by Additional Protocol No. 11 of 1998), the requirement of significant disadvantage (Protocol No. 14 of 2004, recalling Dworkin's famous phrase "taking rights seriously"), the principle of subsidiarity and the importance of margin of appreciation (expressly emphasized in Protocol No. 15 of 2013, which adds to the Preamble of the Convention in this respect) or requests for advisory opinions (Protocol No. 16 of 2013), with some clarifications on the legal force of the Convention in the domestic legal order of the Contracting States, emphasizing that "the first judge of the Convention is the national court".[19]

With regard to the CJEU, emphasis was made as to its openness to the protection of human rights since the *Stauder*[20] and *Internationale Handelsgesellschaft*[21] cases.

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[16] ECtHR, *Verein Klimaseniorinnen Schwiz and Others v. Switzerland.*

[17] CJEU, Judgment of the Court (Grand Chamber) of March 8, 2011, *Ruiz Zambrano*, Case C-34/09, EU:C:2011:124, paragraph 42.

[18] Koen Lenaerts, *EU citizenship and the European Court of Justice's 'stone-by-stone' approach*, in International Comparative Jurisprudence No 1 (2015) 1-10, p. 2. The author quotes *Justice* Oliver Wendell Holmes Jr, *The Common Law*, John Harvard Library, 2009, p. 3.

[19] Corneliu Bârsan, *European Convention on Human Rights. Commentary on articles*, vol. I, All Beck Publishing House, Bucharest, 2005, p. 98.

[20] CJEU, Judgment of the Court of 12 November 1969, *Stauder*, Case 29/69, EU:C:1969:57, paragraph 7: "On this interpretation, the provision in question contains nothing of such a kind as to prejudice fundamental human rights enshrined in the general principles of Community law and protected by the Court.".

[21] CJEU, Judgment of the Court of December 17, 1970, *Internationale Handelsgesellschaft*, Case 11/70, EU:C:1970:114.

In the field of human rights, at EU level there are thus three formal sources on human rights listed in Art. 6 (3) TEU. The first source is the *EU Charter of Fundamental Rights*, which became legally binding in 2009 with the Lisbon Treaty. The second source is the *ECHR* itself, which for decades has been treated by the CJEU as a "special source of inspiration" for the Union's human rights principles. The third source is the *general principles of EU law*, which is a body of legal principles, including on human rights, that have been developed by the CJEU over the years before the Charter was drafted. The Court of Justice usually states that the general principles of Union law are derived from *national constitutional traditions*, the *ECHR* and *other international treaties* signed by Member States. The doctrine emphasizes that these three sources overlap, creating some legal confusion.[22]

Furthermore, with the entry into force of the Lisbon Treaty[23] on December 1, 2009, since the Charter has "the same legal value as the Treaties", it can rightly be said, in our opinion, that the *European Union has placed the protection of fundamental rights at the heart of its legal system.*[24]

In accordance with Article 19 of the Treaty on European Union, the Court of Justice "shall ensure that in the interpretation and application of the Treaties *the law* is observed" (emphasis added), a wording which has led some authors[25] to stress the need to respect the rule of law in the process of interpreting the Treaties, so as to ensure that "the Union is founded on the rule of law", as confirmed by the case-law of the CJEU.[26]

In our opinion, the wording of Art. 19 TEU, which puts at the forefront of the jurisdiction of the CJEU the task of complying with the *law* as such, not only with the founding treaties or EU law, is particularly relevant to the full jurisdiction of the EU judicature, from which we have drawn some personal conclusions on the importance of compliance with the principles of law in general.

Chapter IV highlights the main features of the ***legal interpretation of ECHR and CFREU.***

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[22] Paul Craig, Gráinne de Búrca, *EU LAW - Text, Cases, and Materials*, Oxford University Press, 7th edn, 2020, p. 1046.
[23] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, December 13, 2007 (2007/C306/01).
[24] For Romanian doctrine on human rights in the EU, see, for example, Augustin Fuerea, *European Union Law - principles, actions, freedoms*, Universul Juridic Publishing House, Bucharest, 2016; Alina Gentimir, *Human Rights in the European Union. Curs universitar. Masterat*, Editura Universul Juridic, Bucharest, 2021.
[25] Koen Lenaerts, José A. Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Editura Bruylant, Bruxelles, 2020, par. 1.
[26] See, *e.g.*, most well-known cases CJEU, Judgment of the Court (Grand Chamber) of September 3, 2008, *Commission and Others v. Kadi (Kadi II)*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, para. 66; CJEU, Judgment of the Court (Grand Chamber) of October 6, 2015, *Schrems*, C-362/14, EU:C:2015:650, para. 60; CJEU, Judgment of the Court (Grand Chamber) of February 27, 2018, *Associação Sindical dos Juízes Portugueses*, C- 64/16, EU:C:2018:117, para. 31.

As far as the ECHR is concerned, first, the *Convention is a law-making treaty protecting fundamental rights*, from which *two basic rules* in the interpretation of the Convention can be discerned.

The first is the *internal rule which requires the ordinary meaning of words to be attributed to the context in which they are used, taking into account the object and purpose of the Convention*, and the second is the *external rule which requires the Convention to be interpreted in accordance with the international law of which it forms part.*

Second, the *Convention is a treaty endowed with a specific control mechanism,* by establishing a supranational court with sole jurisdiction and granting the right of individual application, with the corollary of binding force and supervision of the enforcement of judgments by setting up the Committee of Ministers as a special body entrusted with this task.

As far as the CJEU is concerned, authors supporting different theories of interpretation in the field of EU law have been cited. For example, Gerard Conway[27] proposes "a rule-bound theory of normative interpretation (*rule-bound theory*) as a model for the Court of Justice, emphasizing five main criteria of interpretation: (i) the centrality and authority of the constitutional text and the normative priority of its ordinary meaning; (ii) the application of the *lex specialis* principle to structure systemic or integrated interpretation; (iii) the resolution of indeterminacy arising from abstraction by originalist interpretation, primarily by recourse to the legal traditions of the Member States or relevant preparatory materials indicating the intentions of the authors or ratifiers of legal norms; (iv) a preference for dialectical reasoning and the explication of interpretative hypotheses; and (v) the relevance of the unfairness argument only in exceptional cases. *This can be understood as a principled (not principles-driven) approach to legal reasoning, in emphasizing a method and process as having priority over a more pragmatic orientation to intuition and consequences*".

As regards the Charter, two *fundamental principles of interpretation* have been identified.

First, the Charter can only be interpreted in compliance with *the principle of conferral of powers on the Union* ("The Charter is the shadow of EU law.... just as an object defines the contours of its shadow, so the scope of EU law determines the scope of the Charter")[28], in which context it is possible to distinguish between two known situations in which the Charter applies (*situations d'agence*, where

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[27] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge University Press, 2012, p. 144.

[28] Koen Lenaerts, José A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, 2nd edn, 2021, p. 1713.

the *Charter applies in situations where Union obligations require a Member State to take action, so that the Member States act as the EU's agent*, and *situations dérogatoires*, where *the Charter also applies in situations where Union obligations must be complied with when a Member State derogates from EU law on the basis of an authorization provided for in Union law*).

Second, the Charter is to be applied in accordance with *the principle of proportionality*, which is set out in Art. 52 (1) of the Charter. In this respect, it has been pointed out that the principle of proportionality in the interpretation of fundamental rights occupies a special place not only because of the effort to synthesize and balance competing rights and interests, but also because of the need for a comparative approach in relation to the different systems of national, international and supranational law. From this latter comparative perspective, the literature has rightly pointed out that proportionality has a 'viral quality' due to its relatively rapid spread 'from one jurisdiction to another'.[29]

Next, the notions of *margin of appreciation* and *autonomous concepts* in both legal systems for the protection of human rights were discussed.

As far as the ECHR is concerned, the authors[30] who have introduced a distinction between two different uses of the margin of appreciation doctrine have been mentioned. The first is the *substantive concept of the margin of appreciation*, which refers to cases in which the Court is called upon to decide whether a particular interference with a right under the ECHR is justified in a democratic society on the basis of the restriction clauses of the relevant articles of the ECHR, in particular Articles 8 to 11 of the ECHR. The second is *the structural concept of the margin of appreciation*, expressing in fact a substantive principle of interpretation. This occurs in cases where the Court considers that it must be subject to the decision of the national authorities because there is no consensus among Member States as to whether the applicant before the court has the human rights they claim.

Moreover, we have attempted a definition from our own perspective, bearing in mind that *the margin of appreciation of the State consists in the extent of the prerogatives of its authorities, which the Court accepts as falling within their powers, in accordance with national law, within the limits of respect for conventional fundamental rights, both in terms of proportionality between certain competing interests and in terms of the very incidence of the right in question in the situation at issue.*

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[29] Alec Stone Sweet, Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, vol. 19, 2008, Columbia Journal of Transnational Law, pp. 73, 76, *apud,* Maja Brkan and Šejla Imamović, *Article 52: Twenty-Eight Shades of Interpretation?*, in Michal Bobek, Jeremias Adams-Prassl (coordinators), *The EU Charter of Fundamental Rights in the Member States*, *Hart Publishing/Bloomsbury Publishing Plc*, 2020, p. 427.

[30] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, 2007, p. 12 and pp. 80 et seq.

As far as *autonomous concepts* are concerned, reference was made from a critical point of view to the specialist doctrine[31] that has identified "four very interesting aspects in this semantic violation" implied by the notion of autonomous concepts in relation to national legal systems: "The first is the *normative nature of state classifications*. In the Court's reasoning, it is possible for the State to go wrong in identifying an instance of a Convention concept, *despite the fact that this identification is officially made in some piece of legislation*. The second is what I shall call the *argumentative challenge*. It captures the fact that the applicant does not argue directly that his rights have been violated but is first interested in disputing the correctness of some official classification. This is natural for unless the classification is mistaken, the applicant enjoys no right under the ECHR. The challenge, moreover, is not austere; it is supported by arguments about what really counts as an instance of the relevant legal concept, not only in the applicant's case but more broadly speaking. I shall call this the *substantive character* of the applicant's challenge. The fourth and final point is the *interdependence* between the ECHR concepts and domestic legislation. The ECtHR does not take the concept that figures in domestic legislation to be identical to the one in the Convention, but it does not take it to be totally irrelevant either."

In our opinion, *the theory of autonomous concepts*, as referred to in legal literature, is as necessary as it is natural in any legal system, be it national, international or supranational. In other words, *different legal systems attract autonomous legal qualifications*.

In the conventional system, *the theory of autonomous concepts* is *necessary* because it is the only way to respect the presumption of consistent and unitary use of legal terminology, which can only be specific to that system, beyond some natural reciprocal correlations with other systems. It is also *natural* because, like any other legal system, the Convention is based on and promotes certain values and principles, as set out in the Preamble to the Convention, which can only be expressed in their own way within the axiological system of which they form part.

Within the framework of EU law, *the discretion of Member States* to set their own standards of protection of fundamental rights depends on whether *there is a uniform or different level of protection within the EU* (*Melloni* case[32] and *Åkerberg Fransson* case).[33]

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[31] George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, European Journal of International Law, vol. 15, no. 2, 2004, p. 284.

[32] CJEU, Judgment of the Court (Grand Chamber) of February 26, 2013, *Melloni*, Case C-399/2011, EU:C:2013:107.

[33] CJEU, Judgment of the Court (Grand Chamber) of February 26, 2013, *Åkerberg Fransson*, Case C-617/10, EU:C:2013:105.

As regards the legal means of harmonizing human rights standards, the Court of Justice uses its own *autonomous concepts*. From that perspective, the *sui generis* nature of EU law, as enshrined in *Van Gend en Loos*, implies, on the one hand, its autonomy in relation both to the law of the Member States and to international law and, on the other hand, the use of autonomous concepts to preserve it.

In the light of the categories of judgments of the CJEU, as they have been doctrinally divided by Tridimas[34] ("outcome cases"; "guidance cases"; "deference cases"), another author, Leandro Mancano[35] , has sought to circumscribe the autonomous concepts of the Court of Justice in the field of the European arrest warrant, analyzing illustrative cases in this respect.

Finally, with regard to *the relationship with the domestic laws and practices of the Member States*, following the opinion of the well-known author Neil Mac Cormick[36], legal or constitutional pluralism has increasingly gained ground and is today invoked by more and more authors, who present it as a palliative to the interference of competences of national/constitutional, international and supranational jurisdictions, one of the forms of legal pluralism appearing in the well-known theory of *ordered pluralism* of Mireille Delmas-Marty[37], who defines it as "maintaining a separation, without imposing fusion, and yet constructing something like an order, or an ordered space: this could be the answer to the legal complexity of the world".

In our opinion, we have defined *the theory of legal/constitutional pluralism* as *that legal situation which presupposes the existence of several legal systems, closely connected and not hierarchizable, between which there is a continuous mutual tension, with a possible provocative and weighting effect.* As can be seen from our own definition, legal pluralism, apart from the damage to legal certainty caused by the lack of predictability of the connections between interconnected legal systems and the shortcomings caused by their plurivalence, may present some positive aspects, such as, on the one hand, their mutual challenge which can lead to new systemic approaches and, on the other hand, their balancing by inducing self-control to prevent possible systemic collisions - all reminiscent of Jhering's 'struggle for law', now seen from a new supranational systemic perspective.

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[34] Takis Tridimas, *Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction*, International Journal of Constitutional Law, vol. 9, no. 3-4, 2011, pp. 739, 740.

[35] Leandro Mancano, *Judicial harmonization through autonomous concepts of European Union Law: the example of the European arrest warrant Framework Decision*, European Law Review, vol. 43, no. 1, 2018, pp. 80-85.

[36] Neil MacCormick, *Questioning Sovereignty, Law State and Nation in the European Commonwealth*, Oxford University Press, 1999, reprinted in 2002, pp. 117 ff. See, for his earlier position oriented towards radical pluralism, Neil MacCormick, *Beyond the Sovereign State*, in *The Modern Law Review*, vol. 56, no. 1, 1993, pp. 1-18.

[37] Mireille Delmas-Marty, *Les forces imaginantes du droit II, Le pluralisme ordonné*, Éditions du Seuil, Paris, 2006, pp. 20 et seq.

Chapter V was dedicated to ***the general methods of legal interpretation*** , identified in a number of four broad methods (textual, contextual, teleological and evolutionary).

First, *the method of textual interpretation* has been analysed, as the first rule of legal interpretation, which is based directly on the interpreted legal text. Thus, legal terminology can be seen from a *double semantic aspect*: a *conventional meaning* (*terminus vulgaris*) and a technical meaning (*terminus technicus*). In the Vienna Convention, the relativity of the meaning of a term is confirmed by para. 4 of Article 31, which provides for the possibility of a "special" meaning beyond the ordinary meaning of terms.

Thus, several *characteristics of textual interpretation* have been identified (first rule of interpretation, satisfaction of legal certainty, compliance with the requirements of the rule of law and lack of specificity in the field of human rights).

Moreover, semantic differences in the terminology used may also result from the drafting of the relevant rules in several authentic languages, which is characteristic of human rights, which are often enshrined in multilingual international normative instruments. In this respect, it has been pointed out that the Vienna Convention has a whole article dedicated to the interpretation of treaties authenticated in two or more languages.

Furthermore, cases on textual interpretation have been identified in ECHR practice (e.g. analyzing the word "respect" in Art. 2 of Protocol No. 1 to the ECHR on the right to education in *Gorzelik and Others v. Poland*[38] *or* on the ground of Art. 6 ECHR on public delivery of judgments, in which the Court has never considered that it must adopt a literal interpretation of the words "publicly pronounced" in *Sutter v. Switzerland*[39]).

In the CJEU's practice, for example, the Court has used literal interpretation in refusing to attribute to directives a direct horizontal effect (the invocation by individuals of rights against other individuals), holding that, since the binding nature of directives concerns "any Member State to which they are addressed", an individual cannot invoke rights enshrined in a directive against another individual, a situation which is provided for by the Treaty only for regulations.[40]

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[38] ECtHR, Judgment of the Court of January 10, 2017, *Osmanoğlu and Kocaba v. Switzerland,* Application No. 29086/12, para. 92.

[39] ECtHR, Judgment of the Court (Plenary Session) of February 22, 1984, *Sutter v. Switzerland,* Application No. 8209/78, paragraphs 33, 34; Judgment of the Court of June 28, 1984, *Campbell and Fell v. the United Kingdom,* Application No. 7819/77; 7878/77, paragraph 91; Judgment of the Court of March 1, 2011, *Welke and Białek v. Poland,* Application No. 15924/05, paragraph 83.

[40] CJEU, Judgment of the Court of 26 February 1986, *Marshall,* Case 152/84, EU:C:1986:84, paragraphs 48 and 49; CJEU, Judgment of the Court of 14 July 1994, *Faccini Dori,* Case C-91/92, EU:C:1994:292.

Second, *contextual interpretation* has been addressed, in a sense internal to the normative act interpreted, external to it or by reference to the international legal context.

In this respect, the case-law of the two European Courts on the interpretation of the preamble of a treaty, their preparatory works or their integration into the system of international law was analysed.

In the practice of the ECHR, reference to the Preamble of the Convention has given rise, for example, to the notion of a "democratic society", which is "characterized by pluralism, tolerance and openness". [41]

The case-law of the CJEU has, for example, emphasized the evolution of the interpretative value of preparatory works (*travaux préparatoires)*, with the doctrine stressing that "the ossification of interpretation feared by some academics can be avoided if the Court of Justice takes the travaux préparatoires into account in a dynamic manner, bearing in mind that recourse to one method of interpretation does not preclude recourse to another[42] .

Third, reference was made to *the teleological interpretation*, which is intended to achieve the purpose of the legislative act as a whole, relating to its subject matter in a uniform manner, and in particular, referring only to certain provisions or other specific aspects thereof. It is enshrined in Article 31 para. 1 of the Vienna Convention on the Law of Treaties, which provides that the ordinary meaning to be given to the terms of the treaty is to be determined both by reference to their context and "in the light and purpose" of the treaty. In the same sense, Article 31 para. 2 of the Vienna Convention, the context also refers to the preamble to a treaty, which usually contains the most general provisions including, inter alia, the purposes of the treaty.

In this context, it has been emphasized that, although they may be connected, teleological interpretation is nevertheless distinct from evolutive interpretation. Thus, while teleological interpretation seeks the purpose of the legislation having the treaty text as its source, evolutive interpretation is determined mainly by the dynamics of the social relations forming the subject-matter of the regulation. As has been pointed out in legal literature, "the purpose of the treaty reflects the common intention of the States that concluded the treaty", which takes into account precisely of "the rational kernel contained in the *subjectivists`* thesis that presents the establishment of the common will of the contracting parties as the object of the interpretation of international treaties"[43] . On the

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[41] ECtHR, Judgment of the Court (Grand Chamber) of November 10, 2005, *Leyla Şahin v. Turkey*, Application No. 44774/98, paragraph 108.

[42] Fabrice Picod, in Preface to Koen Lenaerts, José A. Gutîérrez-Fons, *Les méthodes...* .

[43] Edwin Glaser, *Rules of Interpretation of International Treaties*, Editura Academiei Republicii Socialiste România, Bucharest, 1968, p. 125

other hand, however, the evolutive interpretation departs precisely from this intention of the authors, and takes into account the dynamics of society, as we shall see below.

In ECHR practice, as early as the Preamble to the Convention, which is part of the "context" of a treaty under Art. 31 para. 2 of the Vienna Convention, it can be observed that "the aim of the Council of Europe is to achieve a greater unity between its members and that one of the means of attaining that aim is the protection and development of human rights and fundamental freedoms", in which context, according to its settled case-law, in interpreting the Convention, the Court must take account of the object and purpose of the Convention and of the domestic legal systems of the other Contracting States.[44] For example, whether or not a right or an obligation is of a 'civil nature' within the meaning of the Convention is to be determined not by reference to its classification in national law, but to its substantive content and the effects conferred on it by the domestic law of the State.[45]

By applying the method of teleological interpretation, the Court has ruled that the purpose of the Convention is to protect *rights that are not theoretical or illusory, but concrete and effective*.

With regard to the Court of Justice's teleological interpretation, the doctrine[46] has emphasized that "finding a meaning beyond the words of the law helps the Court to shape its decisions according to the expectations received. Certainty at a deeper level is thus closely linked to *telos* and dynamic methods of interpretation as sources of sense-building.".

As has been pointed out, the teleological interpretation of the founding treaties has led to the adoption of a broad or even extensive interpretation of the rights and freedoms enshrined and a strict interpretation of the limitations and restrictions provided for. The Court has thus been able to depart once again from a traditional conception of public international law according to which treaty clauses which limit the sovereignty of States must be interpreted restrictively.[47]

In this context, several characteristics of EU law that lend it to teleological interpretation have been identified and analyzed (*the teleological nature of EU law*, which falls within the scope of the attainment of objectives that the Member States have set themselves in the concretization of a common effort; the *general and abstract nature of the terms used in EU law*, which establish these objectives, determining their concretization in accordance with the aims pursued by the relevant

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[44] ECtHR, Judgment of the Court (Plenary Session) of June 28, 1978, *König v. Germany*, Application No. 6232/73, paragraph 89.
[45] ECtHR, Judgment of the Court of 28 May 2020, *Evers v. Germany*, Application No. 17895/14, para. 65.
[46] Elina Paunio, *Legal Certainty in Multilingual EU Law: Language, Discourse and Reasoning at the European Court of Justice*, Ashgate Publishing, 2013, p. 4.
[47] Fabrice Picod, in Preface to Koen Lenaerts, José A. Gutîérrez-Fons, *Les méthodes...* .

provisions; *the lacunary nature of EU law*, specific to a new and developing legal system, contributing to the application of teleological interpretation in particular).

At the same time, it was recalled that some authors[48] distinguish three types of teleological interpretation (*functional interpretation*; *teleological interpretation stricto sensu*; *consequentialist interpretation*).

It was concluded that, regardless of how it is regarded, the teleological method often comes into competition with other methods of interpretation, it being known that they are not autonomous, but interdependent, without having a predetermined value, the process of interpretation having a unique and unitary character.

Finally, *the method of evolutionary interpretation* was analysed, in the context of which the debate between the followers of the two currents, referred to by continental authors[49] as the "American quarrel" (*querelle américaine*), which has its roots in America and is due to the old and rigid character of the US Constitution, was mentioned. On the one hand, *the originalist theories* have been retained, whose adherents interpret the constitutional text according to the period of its adoption. In general, a distinction is made between *originalism*[50] , which ascribes to the text the meaning it had to a "*fully informed observer* at the time it was adopted", and *intentionalism*, a current that refers to the intention of the drafters of the text at the time of its adoption, both of which are forms of *textualism*, by which is meant "the doctrine that words are of the greatest importance and that what they reveal in their context is what the text means". On the other side is *the evolutionary theory*, called the *living constitution* or *living tree theory*, according to which it should be interpreted in relation to the current conditions of society in an evolutionary manner that reflects current standards of living. It is often evoked by the phrase in the 1958 American case of *Trop v. Dulles*, according to which the meaning of the text is changed to reflect "*the evolving* standards *of decency that mark the progress* of *a maturing society*".[51]

The dominant metaphor of the "living constitution" comes from the judgment of Lord Sankey of the British Judicial Committee of the Privy Council, who wrote in 1929 that "[the Constitution Act, 1867] planted in Canada a living tree capable of growth and expansion within its natural limits".[52]

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[48] Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice*, Oxford, Clarendon, 1993, pp. 251-262. See the application of Bengoetxea's distinction of the three types of teleological interpretation in Koen Lenaerts, José A. Gutiérrez-Fons, *Les méthodes...*, par. 59 et seq.

[49] Michel Troper, *Le droit et la nécessité*, Presses Universitaires de France, Paris, 2011, p. 164.

[50] Antonin Scalia, Bryan A. Garner, *Reading Law...*, p. 435 et seq.

[51] SCOTUS, *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

[52] Andras Jakab, Arthur Dyevre, Giulio Itzcovich (coordinators), *Comparative Constitutional Reasoning*, Cambridge University Press, 2017, p. 159. The judgment cited is *Edwards v. Attorney General for Canada*, 1930.

In the European Convention system, the evolutive or dynamic interpretation has had its own development, which has not been without controversy, although today the character of the Convention as a living instrument to be interpreted in the light of current conditions is firmly rooted in the case-law of the European Court. The doctrine of the evolving interpretation of the European Convention was enshrined by the ECHR in the now famous paragraph of the now historic judgment of April 25, 1978 in the *Tyrer* case, which concerned the applicant's (minor) complaint of degrading treatment in the context of a corporal punishment of *whipping*: "The Court must also recall that the Convention is a living instrument which, as the Commission rightly pointed out, must be interpreted in the light of present-day conditions"[53] . Not more than a few months later, on 13 June 1979, the Court was to invoke the living instrument doctrine of *Tyrer* in the following evolutionary solution handed down in the *Marcks* case[54] , which concerned the violation of the right to family life by Belgian legislation that distinguished between children born in the family (legitimate) and those born outside the family (considered illegitimate, whom the mother had to recognize formally or by court order). The same Judge Fitzmaurice was to deliver dissenting opinions in which he strongly argued that the intention of the drafters of the Convention never had anything to do with the legal situation in the cases in question, the doctrine[55] describing these opinions as launching an "originalist attack on the majority judgment".

In this context, one can look at the debate at the time in Dworkin's terms about the concrete and abstract intentions of the drafters of the European Convention, raising the question of what is more important: their intention to protect a list of fundamental freedoms of their citizens, whatever they may be (abstract intentions of principle) or their intention to protect what they believed, 50 years ago, to be those freedoms (concrete intentions of detail)?

Like the European Court of Human Rights, the Court of Justice of the EU has consistently held that provisions of European Union law must be interpreted, in particular, in the light of its stage of development "at the date at which the provision in question is to be applied"[56] .

However, given the difference in "age" of more than 50 years between the European Convention born in 1950 and the Charter of the Union of the 2000s, it seems natural that the CJEU's dynamic interpretation effort should not be as strong as that of the ECtHR.

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[53] ECtHR, Judgment of the Court of 25 April 1978, *Tyrer v. the United Kingdom*, Application No. 5856/72, paragraph 31.
[54] ECtHR, Judgment of the Court (Plenary Session) of June 13, 1979, *Marcks v. Belgium*, Application No. 6833/74.
[55] George Letsas, *A Theory...*, p. 64.
[56] CJEU, Judgment of the Court of October 6, 1982, *CILFIT*, Case 283/81, EU:C:1982:335, paragraph 20; Judgment of the Court of October 17, 1991, *Commission v Spain*, Case C-35/90, EU:C:1991:394, paragraph 9; Judgment of the Court of July 28, 2016, *Association France Nature Environnement*, Case C-379/15, EU:C:2016:603, paragraph 49.

Thus, in the well-known CILFIT case[57] , the Court stated that "each provision of Community law must be placed in its context and interpreted in the light of the totality of the provisions of that law, its aims and the stage reached in its development at the date on which it is to be applied".

Along the lines of CILFIT, the dynamic approach also seems to be required of national courts when considering whether preliminary references are necessary, the Court noting in *Association France Nature Environnement*[58] that "it is for that national court to examine to what extent it is not obliged to refer a preliminary reference to the Court of Justice by reference to the characteristics of European Union law and the specific difficulties of interpreting it. Thus, each provision of European Union law, including the case-law of the Court of Justice in the field in question, must be placed in its context and interpreted in the light of the provisions of that law as a whole, its aims and the stage reached in its development at the date on which that provision is to be applied.

The evolving interpretation is observed in Union law especially in the area that the doctrine[59] has termed "federal common law", understood as the process by which the Union courts attempt to define concepts that are contained in provisions of Union law but which do not fall within the areas in which the Union legislature has competence, such as family law. In the absence of a jurisprudential or doctrinal definition of 'federal common law', the author points out that it refers to 'concepts, principles and rules of Union and Community law, formulated by the Court of Justice, which are not clearly suggested by a provision of primary or secondary Community law', embodying in effect 'the notion of filling in all the gaps which may be regarded as impeding the attainment of the objectives of the Union legal order'.

Perhaps the most relevant judgment on the evolving interpretation is the Coman case[60] , from the Constitutional Court of Romania, which came against the background of a continuous evolution of practice in the area of judicial protection of same-sex relationships. The CJEU proceeded in the case to interpret the notion of "spouse" in Art. 2 para. 2(a) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Chapter VI dealt with ***judicial activism as a current trend in legal interpretation .***

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[57] CJUE, Judgment of the Court of Justice of October 6, 1982, *CILFIT, cited above,* paragraphs 17 and 20.
[58] CJEU, Judgment of the Court of July 28, 2016, *Association France Nature Environnement,* Case C-379/15, EU:C:2016:603, p. 49, *https://curia.europa.eu* (accessed June 8, 2024).
[59] Koen Lenaerts, Kathleen Gutman, *"Federal Common Law" in the European Union: A Comparative Perspective from the United States*, American Journal of Comparative Law, vol. 54, no. 1, 2006, p. 7.
[60] CJEU, Judgment of the Court (Grand Chamber) of June 5, 2018, *Coman*, Case C-673/16, EU:C:2018:385, para 45.

After a presentation of the history of the concept of judicial activism, with its sources in American law, the current jurisprudential guidelines and contemporary doctrinal criticisms were presented.

Thus, it was shown that judicial activism (*judicial activism*) and, by inversion, judicial *restraint* (*judicial restraint*) are derived from American jurisprudence, where two major trends of thought in judicial interpretation (*judicial constructivism*), diametrically opposed, are still being debated: *originalism* (interpreting the law according to the conceptions of the time of its adoption) and *evolutionism* (interpreting the law in accordance with the evolution of society in favor of fundamental rights).

Like any idea, the notion of judicial activism is older than the term, which was first used by a journalist, Arthur Schlesinger Jr. in an article in *Fortune* magazine in January 1947. [61]

In American doctrine, the conceptions of two former Supreme Court justices exemplify the originalism (judicial passivism) - evolutionism (judicial activism) dichotomy, with *Justice* Antonin Scalia on one side, as a follower of the originalist current[62], *and Justice* Stephen Breyer[63] on the other side.

Aharon Barak[64] defines an activist judge as a judge who chooses, from the set of possibilities before him, the one that most changes the existing law, and a passivist judge as a judge who chooses from all the possibilities the one that most preserves the existing situation. Thus, the author continues, an activist judge can be conservative when the change he or she brings about generates new conservative positions. Similarly, a passivist judge might be liberal if, by preserving what exists, he preserves the liberal values embodied in the existing norm. Of course, it may well be the case that behind such a qualification are merely concerns of expediency and not true assimilated values, about which Barak points out that "we often find people who preach activism as a reason to change a rule they don't like, and once the change has been accomplished, they begin to preach judicial restraint as a reason to preserve it. These double standards are unfortunate; they undermine public confidence in the system." Accordingly, it makes no sense to say that the activist judge is a "good" judge or that the self-restraining judge is a "good" judge. A good judge is a judge who chooses the best possibility, who can make a change or preserve what exists.

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[61] Keenan Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, California Law Review, vol. 92, no. 5, 2004, pp. 1441-1477.
[62] *Ibid.*
[63] Stephen Breyer, *Making Our Democracy Work: A Judge's View,* Vintage Books, New York, 2011, p. 88.
[64] Aharon Barak, *Discrecionalidad judicial*, Editura Palestra, Lima, 2021, translation from English into Spanish of the original edition written in Hebrew in 1987, pp. 211, 215.

In terms of judicial activism at the ECHR , the Court embraced the living instrument doctrine very early on in *Tyrer v. the United Kingdom*[65] in which corporal punishment of minors was held to be degrading treatment. Shortly after *Tyrer*, in *Young, James and Webster v. the United Kingdom*[66] , the Court categorically rejected originalism, removing the reference to the travaux préparatoires of the Convention and concluding that "to interpret Article 11 as permitting any kind of coercion in the field of trade union membership would undermine the very substance of the freedom it is designed to guarantee (para. 52). In the *Belgium Linguistics* case of 1968[67] , often cited as a point of reference in the fundamental rights guidance, the Court condemned the State for its laws on the use of language in education, which prevented certain children from having access, solely on the basis of their parents' residence, to French-language schools in the six communes on the outskirts of Brussels in the language region. The Strasbourg Court emphasized in that case: "The Convention implies a fair balance between the protection of the general interest of the community and respect for fundamental human rights, while attaching particular value to the latter".

The most recent solution oriented towards the defence of fundamental rights, which can be said to have been actively evolutionary at the highest possible level, concerns the right to a healthy environment. Although the ECHR does not enshrine this right as such, which falls into the category of third-generation rights (right of solidarity), it has protected it through the prism of other conventional rights whose actual exercise was affected by it. Thus, in the judgment of the Grand Chamber of 9 April 2024 in *Verein Klimaseniorinnen Schwiz and Others v. Switzerland*[68] , on the complaint of a private-law association of elderly persons, the Court examined the legal situation concerning the provision of a healthy environment from the perspective of the right to privacy under Article 8 ECHR and the right to a fair trial under Article 6 ECHR.

The Court's judgment in *Klimaseneniorinnen* did not come on empty ground, with the climate change debate naturally not touching the Court from the perspective of the protection of fundamental rights. The words of former ECtHR President Linos-Alexandre Siciliano[69] were recalled, who emphasized that "unfortunately, we have entered the era of the Anthropocene", in which nature is being destroyed by man, a context in which, more than ever, it is right and proper that the European court should continue to pursue the line of authority that allows it to enshrine the right to live in a

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[65] ECtHR, *Tyrer v. the United Kingdom.*
[66] ECtHR, *Young, James and Webster v. United Kingdom.*
[67] ECtHR, *Belgian Linguistic* Case, para. I.B.5.
[68] ECtHR, *Verein Klimaseniorinnen Schwiz and Others v. Switzerland.*
[69] Linos-Alexandre Sicilianos, President *illo tempore* of the ECtHR, *Opening address*, in *Dialogue between judges* - 2020, *The European Convention on Human Rights: living instrument at 70*, p. 29.

healthy environment. However, the environmental emergency is such that the Court cannot act alone. We cannot monopolize this fight for the survival of the planet. We must all take responsibility.

With regard to judicial activism at CJEU , it has been observed that while the Strasbourg Court's jurisprudence has been marked by the continuing rise of human rights in the conventional system of specific protection, the Court of Justice of the European Union has been determined in its active approach by the very nature of the EU legal system, which sought to create from scratch a new supranational legal order as a legal first in the world. It may therefore seem natural that its efforts to carve its own way into the judicial fabric of the new supranational order should be as bold and salutary as they are debated and criticized.

Legal literature[70] has identified *two developments* in Union law that have prompted accusations of judicial activism and criticism of the human rights-oriented approach.

The first of these is the *extension of the scope of EU law in recent years.* The internal market has always had spill-over effects into non-market policy areas, which has led the Court to become involved in policy areas that Member States considered to be theirs, such as taxation, social security or education. Today, the European Union has become a multi-purpose organization that has a direct impact on sensitive policy areas such as immigration policy and criminal proceedings, thus multiplying the occasions on which the Court can be seen as activist when called upon to flesh out the often vague provisions of EU primary and secondary law in such areas.

The second development noted by the same authors is the *decline in scholarly support for EU legislation.* More and more legal writings can be found criticizing the general direction taken by the integration process (e.g. through the drafting and adoption of the Constitutional Treaty), as well as certain pieces of legislation and rulings of the European Court of Justice. The legal literature is now as critical of EU lawmaking and judicial interpretation as comparable national legal scholarship, and legal scholarship as a whole is more reluctant to support its plans for 'more Europe'.

In conclusion, while the Union has been built on the foundations of a strong legal order that provides achievable rights for individuals, it is argued that the political and collective dimensions of European integration often lag behind.

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[70] Elise Muir, Mark Dawson; Bruno de Witte, *Introduction: the European Court of Justice as a political actor*, in Mark Dawson, Bruno De Witte, Elise Muir, *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing Limited, 2013, p. 2.

The subject of the Court's judicial activism is by no means a new one, the Court having been in the spotlight since its inception, and the doctrine on the Court's role as a political actor is well known, starting with D.G. Valentine in his book *The Court of Justice of the European Communities.*[71]

However, with the Lisbon Treaty, which extended the Union's competence in the Area of Freedom, Security and Justice (AFSJ) and adopted the Charter of Fundamental Rights of the European Union, the Court of Justice began to judge new matters such as judicial cooperation in criminal matters and to apply the Charter as a shadow of Union law[72] . This is how the Luxembourg court has earned and assumed its newly acquired position as a "court of human rights"[73] .

By way of example, Dehousse[74] identifies four ways in which the Court can be said to interact with political institutions: (i) as an *organizer of the political agenda* (e.g. in deciding Case 6/72 *Continental Can*, the Court paved the way for the Commission's adoption of the first Merger Regulation); (ii) as a *policy innovator* (e.g. in *Cassis de Dijon*, it introduced the principle of mutual recognition, which was to subsequently animate the entire 1992 Strategy on the New Approach to the Internal Market) iii) as performing a *legitimizing function* (e.g. in the 1986 *Commission v. Germany* and other insurance cases, it paved the way for a decisive change in insurance regulation); and iv) as a *catalyst for EU legislation* (because, by identifying obstacles to the achievement of EU objectives, it paves the way - and puts pressure on States - for further harmonization).

Of course, in its human rights-oriented approach, the Court of Justice finds support in the case-law of the ECHR, based on Art. 52 para. 3 of the Charter, through the so-called process of *cross-fertilization between the two European courts.*[75] Moreover, the doctrine speaks of the "unionization" of the Convention and the "conventionalization" of the European Union.[76]

Finally, some *conclusions on judicial activism* were formulated , regarding its advantages, risks and limits, and an attempt was also made to define it, seen as *humanist jurisprudentialism* (human

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[71] See, Werner Feld, *Valentine: The Court of Justice of the European Communities*, Michigan Law Review, vol. 65, no. 4, 1967, about Donald Graham Valentine, *The Court of Justice of the European Communities* (London/S. Hackensack (NJ): Steven & Sons/Fred Rothman & Co, 1965, pp. 370-404.

[72] Koen Lenaerts, José A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward, *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, ed. 2, 2021, p. 1713.

[73] Allan Rosas, *The Court of Justice of the European Union: A Human Rights Institution*, Journal of Human Rights Practice, 2022, pp. 204-214.

[74] Renaud Dehousse, *The European Court of Justice: the Politics of Judicial Integration*, Basingstoke: MacMillan, 1998, 82-96.

[75] Tobias Lock, *The European Court of Justice and International Courts, Oxford University Press,* 2015, pp. 212 and 214.

[76] Douglas-Scott, S., *The Court of Justice of the European Union and the European Court of Human Rights after Lisbon*, in Weatherhill S., De Vries S., Bernitz U. (coordinators), *The Protection of Fundamental Rights in the EU after Lisbon*, London: Hart Publishing, 2013, *apud* Aurora Ciucă, *op.cit.*, p. 170.

rights-oriented legal interpretation), as *that way of legal interpretation that goes beyond the strict meaning of the legal text interpreted, but promoting a solution within the law (intra legem) or in addition to the law (praeter legem), without being directly against the law (contra legem), novel in relation to previous case-law (ex novo), aimed at giving new dimensions to the standards of protection of fundamental rights and adapted to the evolution of a constantly changing human society.*

The **final Chapter VII** deals with ***the relationship between ECHR and CJEU and the state of the Union's accession to the Convention.***

The two European Courts in Strasbourg and Luxembourg, which have been empowered to exercise their jurisdictional powers under the two systems, appear to have had to engage in what has been called "*cross-fertilization*", which has been said to have led to the "unionisation" of the Convention and the "conventionalisation" of the European Union, as will be outlined below. Their relationship has often been described as one of "good neighborliness" (*bon voisinage*)[77] . Thus, the European Convention and the EU Charter of Fundamental Rights appear as two *sister treaties* on human rights in Europe.

Next, after having addressed some procedural issues in the interaction between the ECHR and the CJEU (the admissibility condition of exhaustion of domestic remedies, provided for by Art. 35 par. 1 of the Convention, in respect of which the European Court considers that it is not necessary to refer the matter to the CJEU[78] ; the obligation for the domestic court to give reasons on the ground of Art. 6 of the Convention for the decision rejecting the referral to the CJEU with a preliminary reference[79] ; the requirement of adversarial proceedings in Art. 6 para. 1 of the Convention having regard to the closure of the oral part as soon as the conclusions were presented[80] ; the length of the domestic procedure in terms of the right to a fair trial within a reasonable time does not extend to the period during which the case was stayed due to a reference for a preliminary ruling by the domestic court to the CJEU[81]), the relationship between ECHR and CJEU has been analyzed, starting with

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[77] Delphine Dero-Bugny, *Les rapports entre la Cour de justice de l'Union européenne et la Cour européenne des droits de l'homme*, Bruylant, 2015, par. 1.

[78] ECtHR, Decision of the Court of September 8, 2015, *Laurus Invest Hungary KFT and Others v. Hungary*, Application No. 23265/13 et al., para. 42.

[79] ECtHR, Judgment of the Court of 13 February 2020, *Sanofi Pasteur v. France*, Application No. 25137/16, paragraph 69.

[80] ECtHR, Decision of the Court of 20 January 2009, *Cooperatieve Producentenorganisatie v. The Netherlands*, application no. 13645/05.

[81] ECtHR, Judgment of the Court of 27 June 2017, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Application No. 931/13, para 212.

their first reciprocal reference (Decision of June 10, 1958, *X c. Germany*[82] or Decision of December 9, 1987, *Etienne Tête v. France).*[83]

In this context, a separate section was devoted to *the presumption of equivalent protection* (the Bosphorus presumption) , enshrined in the Judgment of June 30, 2005 in *Bosphorus Airways v. Ireland*[84] , based on the premise that, where a State has transferred sovereign powers to an international organization, "it is contrary to the object and purpose of the Convention for Contracting States to be wholly exonerated from liability under the Convention in the matters covered by that transfer; the Convention's guarantees could be limited or excluded in a discretionary manner, thus depriving it of its binding character and undermining the practical and effective nature of the protection it offerš ".

Two conditions are therefore necessary for the application of *the Bosfor presumption*, which have been analysed as such, on the one hand that *the Member State has no margin of discretion in the application of EU law,* and on the other hand that the *full control mechanism provided for by EU law* must be *used.*

As regards *the accession of the Union to the ECHR*, the CJEU's opinions on this issue (*Opinion 2/94 of March 28, 1996 of the Court of Justice of the European Communities*[85] and *Opinion 2/13 of December 18, 2014 of the Court of Justice of the European Union*[86]), as well as the current state of accession negotiations (the *revised Draft Agreement on the accession of the EU to the ECHR*[87] was also *drafted* as an annex to the last Report of the Steering Committee on Human Rights to the Committee of Ministers (see the Annex to the last Report of the Steering Committee on Human Rights to the Committee of Ministers). To finalize the accession process, however, it requires several steps, including a positive opinion from the Court of Justice and ratifications by the European Parliament and national parliaments.

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[82] ECtHR, Decision of June 10, 1958, *X v. Germany*, Application No. 235/56.
[83] ECtHR, Decision of December 9, 1987, *Etienne Tête v. France*, Application No. 11123/84.
[84] ECtHR, *Bosphorus Airways v Ireland*, para 154.
[85] CJEU, Opinion 2/94 of 28 March 1996, issued by the CJEU at the request of the Council of the European Union - "Accession of the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms", EU:C:1996:140.
[86] CJEU, Opinion 2/13 of December 18, 2014, delivered by the CJEU (Plenary) at the request of the European Commission - 'Opinion delivered pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the said draft with the EU and FEU Treaties', EU:C:2014:2454.
[87] The Report with Annex on the Draft Agreement is available on the Council of Europe's website at: https://rm.coe.int/steering-committee-for-human-rights-cddh-interim-report-to-the-committ/1680aace4e (accessed December 10, 2023).

In particular, for the success of the European project, we have expressed the view that the Strasbourg court should continue to grant the CJEU a *wide margin of appreciation in the interpretation and application of EU law*, which the Luxembourg court can make full use of, without affecting the process of balancing the minimum conventional standard of fundamental human rights on the one hand, and the specific requirements of harmonization of EU law and the ideals of unity enshrined in it on the other. Moreover, the need to continue to strike the *right balance in the case of competing standards of the Member States and the European Union* for *the* protection of different fundamental human rights must be satisfied. [88]

The judicial dialog between the two supranational courts is therefore both necessary and welcome.

In this context, our proposal was to *confer the prerogative to refer cases pending before the European Court of Justice for an advisory opinion on the Court of Justice itself, whether they are direct actions or preliminary references.*

Beyond the legal arguments, however, I was of the opinion that the Union's accession to the ECHR will constitute a real declaration of intent to ensure full protection of fundamental human rights in the EU, which will increase public confidence in the European judicial system and thus support the legitimacy of the European integration process.

In our **Conclusions**, we have emphasized that legal interpretation in the field of human rights is perhaps the broadest and most profound subject of law. It starts from the legal norm as the basic cell of law, passes through the great legal doctrines in order to correctly assimilate the complex issues, then applies the specific methods of the theory of interpretation, and ends with conceptual approaches of a philosophical-legal nature. All of this is specifically circumscribed to the subject matter of fundamental human rights, which are applied in many areas of social life.

The need for legal interpretation is all the more necessary in the field of human rights, where, as we have noted, legal texts contain comprehensive terminology, open to various interpretations in the process of their application.

The characteristics of the interpretation of human rights require taking into account their recognized specificity, such as to receive a broad and ascending interpretation, in accordance with

[88] One of the examples of the adaptation of a national standard of human rights protection (linked to the principle of application of the most favorable criminal law - *mitior lex*) with the specific requirements of legislative harmonization and good functioning of the EU (on the protection of the EU's financial interests by effective and dissuasive sanctions) is the recent preliminary ruling of the CJEU, delivered on the request of a national court in Romania, in CJUE, Case C-107/23 Lin (PPU), Judgment of the Court (Grand Chamber) of 24 July 2023, EU:C:2023:606.

the requirements of today's society, by ensuring a fair balance between competing rights and between them and the public interest, but with a special regard to the former, as shown in the practice of the Convention.

While other systems of law, such as the American system, are still in dispute between originalist and evolutionary interpretations, in Europe human rights have undoubtedly been settled - here human rights are interpreted in the light of current societal conditions, by giving a living character to human rights instruments, in order to ensure a rising standard of protection of fundamental human rights.

However, no interpretive approach should be absolutized, but balance should be sought in the process of legal interpretation.

In this regard, we must be aware that the application of any legal text reflects the great doctrines of law, such as natural law, positive law or legal realism, which need to be known and assimilated, precisely for a better assimilation of the proposed solutions and understanding of the different perspectives from which they are approached.

Relating legal interpretation to the legal system as a whole, we have observed that Neil MacCormick's legal pluralism or Mireille Delmas-Marty's ordered pluralism are receiving increasing attention in the context of the heated debates on the priority of the various legal orders. In this respect, we have emphasized that, while conventional law seems to have earned its place as the minimum standard of protection in this area, EU law, particularly with regard to human rights, is still disputing its rightful place between national and European systems of protection.

Like the authors cited above, we share the need to respect the specific nature of Union law in order to safeguard the European order sui-generis. Only by paying due attention to the principle of *pacta sunt servanda* can Union law be preserved and equality between Member States ensured.

To this end, we must not regard Union law as a foreign law or a separate branch of law, but must assimilate it as a law common to all Member States, which in every respect is interwoven with national law, subject to the principle of attribution.

In this context, the limit within which the judge can act is given by the understanding of judicial activism, seen as humanist jurisprudentialism, in the sense of orienting the judicial solution towards the protection of fundamental human rights. Without being able to be qualified as good or bad, as we have seen, judicial activism must be characterized, as we have said, by total compatibility with the legal system and by avoiding the production of major imbalances in society. This means that judicial activism must not be denied, but neither encouraged, but allowed to develop naturally, in interstitial spaces and through molecular actions, to use Holmes' words.

The challenges of the Union's accession to the ECHR cannot be avoided, but must be tackled with the utmost responsibility. Starting from the premise affirmed by the European Court of Justice regarding the legitimacy of the process of European integration, it seems necessary to safeguard the specific nature of Union law as a supranational legal order by imposing special mechanisms to prevent divergent solutions at the highest European level. It must therefore be borne in mind that the CJEU must always have the opportunity to give its opinion on the interpretation of EU law before it reaches the Strasbourg courts, in which context the latter must take account, in particular, of the principles of equivalence and effectiveness or the principle of equality, which characterize EU law. It remains to be seen whether the *Bosphorus* presumption will continue to apply, as Paul Mahoney hoped, by giving the Union a wide margin of discretion, but it would certainly be beneficial to a responsible approach to human rights in the Union's legal order, whose centripetal forces are competing to form common European standards.

Finally, our proposal to confer on the Court of Justice the power to make requests for advisory opinions to the European Court of Justice after the EU's accession to the ECHR, such as those that would have been prohibited to the national courts of the Member States when they implement EU law, is intended to establish the direct judicial dialogue between the two major supranational courts, which is so necessary for the convergence and future success of their case-law on human rights.

Beyond all this, the most important thing is that the whole process of legal interpretation is approached by all those involved, with responsibility and integrity, with full practical and academic knowledge, with the utmost *bona fides*.