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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

The Rise of Hermeneutics in Human Rights Interpretation in the Case-Law of the ECtHR and the Domestic Courts

AİHM ve Ulusal Mahkemeler İçtihadında Temel Hakların Yorumunda Hermeneutiğin Yükselişi

Murat Erdoğan*

Abstract
This paper aims to argue that over approximately the last 70 years, both constitutional courts in Continental European legal systems and the European Court of Human Rights have implemented an evolutive (dynamic) approach to human rights by making broad interpretation of both constitutional or Convention rights. It also argues that the philosophical grounds of this interpretive approach are consistent with Gadamer's conception of "philosophical hermeneutics," which refers to interpretation as a cognitive dialogue on the text, between the author's and the reader's intent, which is not strictly bound by an obligation on the reader to adhere to the author's intent.

Keywords
Legal Hermeneutics, Gadamer, Interpretation of Human Rights, Judicial Review, ECtHR

Öz
Bu çalışmada, son 70 yılda gerek Avrupa İnsan Hakları Mahkemesi gerekse de Kıta Avrupası ülkelerindeki Anayasa Mahkemelerinin Sözleşme'de yer alan haklar ya da Anayasalarda yer alan temel hak ve özgürlükleri genişletici bir şekilde yorumlayarak bu haklara evrimsel (dinamik) bir yaklaşım kazandırdıkları öne sürülmektedir. Dahası, Mahkemelerin benimsediği bu yorumsal anlayışın temelinde Gadamer'in "felsefi hermeneutik" adını verdiği bir kavramsallaştırmanın yattığı ileri sürülecektir. Bu anlayış, yorum faaliyetini, yazar ile okuyucunun niyeti arasında, okuyucunun yazarın niyetine sıkı sıkıya bağlı olmadığı bilişsel bir diyalog süreci olarak algılamaktadır.

Anahtar Kelimeler
Hukuksal Hermeneutik, Gadamer, Temel Hakların Yorumu, Yargısal Denetim, AİHM

* **Corresponding Author:** Murat Erdoğan (Asst. Prof.), Ankara Hacı Bayram Veli University, Department of Constitutional Law, Ankara, Turkey. E-mail: murat.erdogan@hbv.edu.tr ORCID: 0000-0002-2825-7348

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The Rise of Hermeneutics in Human Rights Interpretation in the Case-Law of the ECtHR and the Domestic Courts

Introduction

This paper aims to argue that the philosophical grounds of the European Court of Human Rights' (hereinafter ECtHR) current interpretive approach to human rights corresponds to Gadamer's new hermeneutics, which refers to interpretation as a cognitive dialogue on the text, between the author's and the reader's intent, which is not strictly bound by an obligation on the reader to adhere to the author's intent.[1]

The protection of human rights by judiciary constitutes a significant part of rights protection in the contemporary legal culture of Europe. This is mostly because of the rise of constitutional review, which began in the United States and then spread all over continental Europe, starting from Germany after the Second World War and to East Central European countries in the post-communist era, which is the so-called *expansion of judicial review*.[2] However, it would not be wrong to say that judicial interpretation of constitutional rights is not the only determinant factor in a legal system when it comes to protecting human rights. The success of the protection for human rights also depends on civil society's power to protect these rights and the efficiency of political participation through democratic institutions.[3] This debate over who protects human rights – courts or people- has been and continues to be the dominant controversy since human rights emerged as a legal concept both domestically and internationally.

To shed a light upon this dichotomy is only a completion of half of the task of showing the significance of interpretation. In order for there to be protection of human rights, there should also be an integrated interpretive approach to rights for common and civil law systems' judiciary, which they can embrace no matter how they are designed. On that matter, Dworkin and Gadamer's similar views on interpretation contemporarily become much more visible than ever in judicial interpretation of human rights within European judiciaries. Indeed, Dworkin's interpretive theory bore a striking resemblance to the work of Gadamer, particularly in terms of interpretation.[4] The common point of these two philosophers is that the process of interpretation and understanding is based on the idea that it is a free activity of the interpreter herself/himself. This is the so-called "*philosophical hermeneutics*," which

1 Hans-Georg Gadamer, 'Classical and Philosophical Hermeneutics' (2006) 23 (1) Theory, Culture And Society 29, 45

2 Tom Ginsburg, Judicial Review In New Democracies Constitutional Courts In Asian Cases (1st edn, Cambridge University Press 2003) 3

3 For an argument that rights could be best protected through democratic institutions and processes, see, Richard Bellamy, Political Constitutionalism: Republican Defence of the Constitutionality of Democracy (Cambridge University Press 2007)

4 For e.g., Paolo G. Annino, An Evaluation Of Ronald Dworkin's Hermeneutical Theory Of Law (Dphil Thesis, Fordham University 1997) 3

constitutes a background of a particular method for human sciences. Therefore, it is crucially important to clarify these ideas for a better understanding of human rights interpretation.

I. The Reasons for Adopting a Hermeneutical Approach to Interpretation of Human rights

Constitutional judicial review[5] has developed dramatically over the last century.[6] It follows from this that a particular form of judicial review has been expanding its authority and jurisdiction; a rights-based approach to adjudication has been displacing the previous goal-based or duty-based approaches.[7] Though a great number of Anglo-American scholars criticize it harshly,[8] it is necessary to demonstrate why it is unavoidable in today's democracies that there is an expansion of judge-making law through judicial interpretation and what the consequences of this development are for the interpretive positions of courts.

A. The Dichotomy Between Political (or Popular) and Legal Constitutionalism

The background for the evolution of the interpretation of rights to be described has been a controversy among legal scholars since the second half of 20th Century to present day over who protects human rights – courts or legislations- though it has grown old and tired today.[9] In this section, I will try to sketch distinctive features of this debate as a controversy between legal and political constitutionalism.

According to Montesquieu, those who form the judicial power will not make law; they will be "only the mouth that pronounces the words of the law." Similarly, in the 18th Century, Jeremy Bentham used the term "judiciary law" to describe the position that a judge should make the law rather than declaring the existing law, a judicial approach he disagreed with.[10] As Cappelletti accurately argues, the scope of

5 By using the term judicial review, I am making a reference to constitutional review, which involves constitutionality of norms and acts of state. Thus the term judicial review used here is not in administrative sense, but in constitutional sense. However, it is very hard to distinguish these two in common law systems to the contrary to Continental European legal systems, yet, judicial review of administrative acts by courts is on the rise and expanding its boundaries as well as constitutional review. For the rise and expansion of administrative judicial review in United Kingdom, see Mark Elliot, The Constitutional Foundations of Judicial Review (Hart Publishing 2001) 1-3, 17-19

6 Ginsburg (n 2) 3

7 I am borrowing this terminology from Dworkin, for rights-based approach as well as duty-based and goal-based approaches, see Ronald Dworkin, Taking Rights Seriously (Harvard University Press 1978) 90-96

8 For an ultimate overview for these criticisms see, Jeremy Waldron, 'The Core of The Case Against Judicial Review' (2006) 115 (6) The Yale Law Journal., 1346, 1348-1353, for two significant works on the case against judicial review, also see, Mark Tushnet, Taking the Constitution Away from The Courts (Princeton University Press 1999), particularly, 153-156, Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford University Press 2004)

9 Kent Roach, 'The Varied Roles of Courts and Legislatures in Rights Protection' in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds) *Parliaments and Human Rights Redressing the Democratic Deficit* (Hart Publishing 2015) 405

10 Mauro Cappelletti, The Judicial Process in Comparative Perspective (Clarendon Press 1989) 3

judiciary law has undergone an enormous expansion since those thinkers' days.[11] The underlying reason of this is that the twentieth century brought something different to the world's conception and understanding of law. Contrary to Bentham and Montesquieu's views, law under legislation was not perfect at all; in fact, without leaning towards a moral ground, these modern institutions posed a great danger of democracy turning into a majoritarian tyranny, which is likely to cause horrible consequences, such as those that became evident during World War II.[12] This simply sank legal scholars around the whole world into a great despair and led to emergence of legal realism and critical legal thought.[13]

Critical legal thinkers thought that there was an inevitable vagueness implicit in the nature and concept of law which led to understanding of law under political terms as it is surrounded by ambiguities. Under this postmodern approach, the concept of law had begun to be seen as equal with politics[14] until famous legal philosopher Ronald Dworkin made an attempt to rescue the reputation of law. His grasp of law as an interpretation was clearly an objection against such views of law as an indeterminate concept.

According to Dworkin's legal philosophy, law can be best understood as an interpretive concept.[15] Whereas a traditional approach to law considers that interpretation is necessary to resolve the ambiguities caused by textual materials such as a word, a clause, or a rule and to choose between alternative reasonable determinations of the meaning,[16] Dworkin held an account that interpretation should be studied as a general activity in law, i.e., a mode for knowledge.[17] Considering interpretation as a general activity in the judicial process inevitably brings out the fact that every case is a hard one and every case is a matter of interpretation. According to him, interpretive concepts are of a special kind whose correct application depends not on a fixed criteria or an instance-identifying decision procedure but rather on the normative or evaluative facts that best justify the total set of practices in which that concept is used.[18] That is to say that Dworkin's interpretive account has put the judiciary into a crucial position to define the legal meanings of constitutional texts.

11 ibid 3

12 For a similar argument see e.g. William Scheuerman, Carl Schmitt: The End of Law (Rowman&Littlefield Publishers 1999) 139

13 For cases of legal realism of 1920's American legal thought and its revival under the name of critical legal thought, see, John Hasnas, 'Back to the Future: From Critical Legal Studies forward to Legal Realism, or How not to Miss the Point of Indeterminacy Argument' (1995) 45 (84) Duke Law Journal 84, 86-98

14 For the sum of thoughts in favour of legal indeterminacy see e.g. Lawrence B. Solum, 'Indeterminacy' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010) 479-491

15 For e.g. Ronald Dworkin, A Matter of Principle (Harvard University Press 1985) 167-181

16 Donald E. Bello Hutt, 'Against Judicial Supremacy in Constitutional Interpretation' (2017) (31) Revus, Journal for Constitutional Theory and Philosophy of Law 83, 86

17 For e.g. Ronald Dworkin, 'Law as Interpretation' 1982 (60) Texas Law Review 179, 182

18 D. Plunkett and T. Sandel, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' 2013 (19) Legal Theory 242, 243

Now, there is the other side of coin. Many famous scholars in the United States defend the popular constitutionalism, which means that "the ordinary citizens," rather than the courts, "are the most authoritative interpreters of the Constitution."[19] Their criticisms against judicial supremacy and their argument are based on the idea that rights could be best protected by the people themselves rather than the courts, and this positioncannot be ignored. Furthermore, it is possible to see echoes of their popular constitutionalist ideas on the other side of Atlantic as well in the United Kingdom, being defended by Richard Bellamy under the name of political constitutionalism[20] or civic republicanism.

There are some critical approaches to this dichotomy between the cases against and in favour of judicial review. In a creative work by John Hart Ely, he defends a theory of judicial review between interpretivism and non-interpretivism, which he defines the former as the idea that judges deciding constitutional issues should confine themselves to enforcing norms explicit or implicit in the Constitution whereas he defines the latter as courts needing to go beyond that set of references to enforce norms that cannot be discovered within the four corners of the document.[21] Ultimately, he rejects both ideas formed upon judicial review, and instead, he defends a participation-oriented and representation-reinforcing approach of judicial review,[22] which means a restricted judicial review that scrutinizes democratic participation processes strictly but does not get involved with policy-making. In fact, what he defends is an institutional model middle way between against and in favour of judicial review, but of course as he defends it, it is criticized for being too vague and incomplete.[23]

It is clear that there is a dichotomy of opinion regarding the scope of judicial review. If one speaks of the authority to interpret the constitution belonging to representative bodies elected by the popular will of the people, the inevitable outcome she/he would reach is to be the weak form of judicial review, in which the scope of judicial review is narrow and judicial interpretation of the constitution can be displaced by ordinary legislative majorities in the relatively short run.[24] It follows from this that in a weak form of judicial review, the basic method for defining the person who is the ultimate

19 H.J. Knowles and J.A. Toia, 'Defining 'Popular Constitutionalism: The Kramer versus Kramer Problem' (2014) 42 (1) Southern University Law Review 31, 31

20 Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 (4) Perspectives on Politics 805, 805-806, also for sum of ideas articulated by political constitutionalists see e.g. Richard Bellamy, 'Political Constitutionalism and The Human Rights Act' (2011) 9 (1) International Journal of Constitutional Law 86, 90-91

21 John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1980) 1, also it should be carefully pointed out that, in Ely's work, interpretivisim is about the same thing as positivism whereas non-interpretivism is one form of natural law approach. Therefore, in Ely's terminology, contemporary usages of these two words are upside down.

22 ibid 88

23 Stanley Conrad Fickle, 'The Dawn's Early Light: The Contributions of John Hart Ely to Constitutional Theory' (1981) 56 Indiana Law Journal 637, 637-638

24 Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 (8) Michigan Law Review 2781, 2786

interpreter of the constitution is determined through a process of exchange between the courts and legislatures over time,[25] which brings out a moderate dialogue between these two. Conversely, if one argues that judges are in a better position to interpret the Constitution, she/he is a defendant of strong judicial review, in which the courts have general authority to determine what the Constitution means and in which the courts' constitutional interpretations are authoritative and binding on the other branches, at least in the short to medium run.[26]

Constitutional Courts, taking place in civil law systems particularly in Continental European and Asian legal systems, are often considered as a strong form of judicial review, which means that they have a strong and binding authority on other branches of the state.[27] We can observe that when it comes to strong or weak forms of judicial review, there is a great emphasis on the finality of courts' judgments,[28] but there is no emphasis on to what extent courts' precedents and interpretation are binding on the legislative and judicial branches. This idea deserves attention because though it seems true in procedural terms once its limits are understood, it is extremely difficult to defend the idea that constitutional courts constitute a strong form of judicial review. Indeed, Constitutional Courts such as those of Germany, Italy, and Turkey have the ultimate power to strike down a law; however, on the contrary to Supreme Courts in common law systems, Constitutional Courts have no authority to impose a judicial order on nor to require their decision to be followed by other courts. It follows from here that a remedy such as constitutional complaint or individual application to constitutional courts emerges as a result of constitutional courts' pursuit of effective implementation of their judgments.

A supreme court of a common law system has absolute binding precedent on other courts' jurisprudence. However, a constitutional court has no binding precedent on other supreme courts such as the Court of Appeal and the Court of Administration, which coexist in civil law systems. Therefore, a constitutional court in such legal orders are under pressure to enforce the minimum requirements of human rights on the one side and complying with other courts' jurisdictions on the other. According to Samuel Issacharoff;

> "… even if constitutions are anticipated to be incompletely realized agreements, courts are unlikely to find fully satisfactory guidance within the four corners of the text or through the more common forms of contract interpretation. At the time of constitutional negotiations, particularly in societies quickly emerging from authoritarian rule, the participants in the constitutional bargain are unlikely to have longstanding relations

25 Mark Tushnet, 'Weak Form Judicial Review and "Core" Civil Liberties' (2006) 41 Harvard Civil Rights-Civil Liberties Review 1, 3

26 Tushnet 'Alternative Forms of Judicial Review' (n 24) 2784

27 Ginsburg (n 2) 7-8

28 For e.g. Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 Columbia Journal of Transnational Law 285, 292

> of trust among themselves, nor much experience with what may be the difficult issues of implementation in the new constitutional order. The result is likely to be a document that is in large part aspirational and that uses terms of broad ambition but little specificity (for example, "due process of law," "equal protection," or "privileges and immunities"). This places a distinct institutional pressure on constitutional courts in new democracies to act as common law rather than civil law institutions, ones attendant to the incremental realization of core constitutional objectives through the accretion of decisional law. For jurists largely trained in the civil law tradition of close-quartered exposition of textual commands, the transition is challenging."[29]

It is this challenge that makes constitutional courts be a negotiator among other courts in centralized judicial review systems, in which the interpretive principles of constitutional rights developed within this institutional environment. Put it differently, the underlying reason behind the emergence of constitutional complaint procedures, e.g., in Germany and Turkey, and aggressive implementation of norm review judgments in Italy are not coincidental developments. They are rather an inevitable pathway in civil law systems where constitutional courts search for a legal environment for their judgments to be followed by other courts. Under such conditions, constitutional complaint procedure have been introduced, and national constitutional courts, just as the ECtHR, have been forced to develop a more rights-based and interpretive approach to human rights which they ought to discover underlying norms and principles.

I will argue that the philosophical foundations of this interpretive approach were "*philosophical hermeneutics*."

B. Philosophical and Legal Hermeneutics: a Theoretical Frame

One of the most influential legal philosophers of the 20th Century, Ronald Dworkin had a conception of law that it was not based solely on written legal rules but also based on moral principles underlying beneath such written rules. This conception was crucial for post-World War II Continental European legal orders, in which the legal system is mostly based on strict textuality.[30] Another famous philosopher of 20th Century was Gadamer, who developed the "philosophical hermeneutics" approach for the interpretation of texts. There is a striking resemblance between the opinions of these two philosophers regarding the nature of interpretation. This is so-called hermeneutics.

29 Samuel Issacharoff, 'Constitutional Courts and Democratic Hedging' (2010) 9 (4) The Georgetown Law Journal 961, 983

30 For e.g. Jeffrey B. Hall, 'Taking "Rechts" Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany' (2008) 9 (6) German Law Journal 771, 771-772

1. Philosophical Hermeneutics

Hermeneutics is a term that covers many different areas. The term itself comes from ancient stories in Greek mythology. According to said stories, Hermes was the messenger of the gods who brought the messages of the gods to human beings, delivering the messages verbatim.[31] Similarly, in theology, hermeneutics signifies the art of rightly interpreting the Holy Scriptures, which is an important ancient art.[32]

Today, hermeneutics is described as a field of philosophy most concerned with investigating the nature of understanding and interpretation.[33] Thus, the term hermeneutics is used to define a particular method of interpretation in human sciences, which was developed by Gadamer in line with the work of Heidegger's systematic views on the philosophy of being (ontology). According to Mootz, for post-Heidegger philosophers, hermeneutics is an inquiry into the modalities of "being-in-the-world" that allow all meaning to emerge and is thus ontological.[34] However, hermeneutics' revolutionary approach in terms of interpretation lies not only in ontology but also in philosophy of knowledge, epistemology, for hermeneutics constitutes a scientific method in human sciences.

According to Hoy, ever since Kant, epistemologists have taken one particular area of knowledge, natural sciences, as paradigmatic of all other areas of knowledge, which makes accounting for the possibility of scientific knowledge the major part of their task.[35] However, in the 19th and 20th Centuries, this epistemological position was challenged. Consequently, in contrast to the natural sciences method, a new method for human sciences, which is more preoccupied with procedures for understanding and interpreting, emerged.[36]

Finally, one can clearly see that a new approach to hermeneutics has gained a crucial importance, particularly in the field of international law since the beginning of the 21st Century. According to Kemmerer;

> "Gadamer's conversational hermeneutics opens new perspectives for a contextual theory and praxis of international legal interpretation that brings together various disciplinary perspectives and cultural experiences, and thereby allows for a more nuanced and dynamic understanding of sources and their interpreters within their respective interpretative communities."[37]

31 Gadamer, Classical and Philosophical Hermeneutics (n 1) 29

32 ibid 30-31

33 David Couzens Hoy, 'Interpreting The Law: Hermeneutical and Poststructuralist Perspectives' (1985) 58 (135) Southern California Law Review 135, 136

34 Francis J. Mootz, 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur' (1988) 68 Boston University Law Review 523, 526-527

35 Hoy (n 33) 136

36 ibid 136

37 Alexandra Kemmerer, 'Sources in the Meta-Theory of International Law: Hermeneutical Conversations' in Samantha Besson and Jean d'Aspremont (eds) *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 29

The premises of hermeneutics, in fact, began to emerge in the 19th Century as a method against the strict legislative position of scientific positivism, particularly the position resulting from ideas uttered by Schleiermacher and Dilthey. Schleiermacher was the first philosopher who attempted to free hermeneutics from all theological and dogmatic characterization by conceiving it as a universal scientific doctrine of understanding and interpretation.[38] According to him, understanding is a relative and never-ending process carried out by the reader of a text; thus, it has a circular character. The reader's position amongst the author's intent, text, and himself ought to be one in such a way that the reader should understand the author better than the author herself/himself.[39] In order to achieve this, the reader must recreate the historical and psychological situations in which the author of an interpreted work found himself[40].

Wilhelm Dilthey was the philosopher who carried Schleiermacher's approach to hermeneutics one step further, approaching it as a scientific method. According to him, hermeneutics is a method used for understanding human phenomena, and a methodology which is appropriate to natural objects is not adequate for this purpose. It follows from this that Dilthey distinguishes human studies from natural sciences and calls the former "*human sciences (Geistewissenschaften)*."[41] That makes hermeneutics a theory of the art of understanding the manifestations of life which are fixed in writing.[42] However, understanding such manifestations of human phenomena cannot be possible unless the reader engages with not only text but the author's experiences in a historical and psychological sense.[43]

Schleiermacher and Dilthey were two philosophers whose, among others, theory has changed the grasp of interpretation once and for all. However, there is something common in both philosophers' views regarding interpretation; that is that the reader is under psychological obligation to engage with the both the context of writing and the author's intent. In other words, these two philosophers tell interpreters what they *ought* to do. Gadamer does not for he is only after what *is* truly happening to the reader within the process of interpretation.[44] It follows that the views of Gadamer is based on the opinions of Heidegger, who stresses that being precedes the method. This is so-called "*the ontology of understanding*."[45]

38 Gadamer, Classical and Philosophical Hermeneutics (n 1) 34

39 J. Stelmach and B. Brozek, The Methods of Legal Reasoning (Springer 2006) 177

40 ibid 177

41 For e.g. Richard Palmer, Hermeneutics Interpretation Theory in Schleiermacher, Dilthey, Heidegger and Gadamer (Northern University Press 1969) 103-104

42 Stelmach and Brozek, (n 39) 178

43 Palmer (n 41) 108-118

44 Stelmach and Brozek (n 39) 190

45 Gadamer, Classical and Philosophical Hermeneutics (n 1) 34, also see Stelmach and Brozek (n 39) 168

Gadamer points out in his popular work *Truth and Method* that the purpose of his hermeneutics conception "is not to develop a procedure of understanding, but to clarify the conditions in which understanding takes place. But these conditions do not amount to a "procedure" or method which the interpreter must of himself bring to bear on the text; rather, they must be given."[46] Gadamer's theory, on the contrary to intentionalist theories, does not rely on a search for objectivity on determining the author's intention; rather, it relies on a battle or play among the author's intent, the reader's intent, and the text itself.[47] Notwithstanding the rules that are imposed on himself, what the reader in fact does is to try to find for herself/himself an appropriate context based on his/her own experiences and prejudices. Thus, the process of interpretation can, in no circumstances, be considered as a given activity that is likely to be regulated by such given rules. Eskridge puts this as: "… interpretation is neither the discovery of the text's intended meaning, nor the imposition of the interpreter's views upon the text; rather, interpretation is the common ground of interaction between text and interpreter, by which each establishes its being."[48]

Intentionalists reproach Gadamer's theory to be too variable and relative, that focusing on the reader's intentions rather than the author's is likely to conclude that the reader can consciously decide textual meaning by arbitrarily altering the context.[49] Gadamer's response to such criticisms is that the context itself conditions the reader's grasp of the text, not the other way around. However, the reader cannot be considered to be completely free to decide the meaning of the text for the text is already determinate enough, i.e., to narrow the range of possible contexts.[50] Following from that, though interpretation is a free activity, the integrity of a text is still able to constrain the reader's understanding of a part as it best fits within the whole.[51] Thus, as Heidegger put it before, such interaction between the text and interpreter has a circular character. This conception, known as a hermeneutical circle, is highlighted by Eskridge as follows:

> "Just as the horizon of the text changes over time, partly through interpretive encounters, so too the interpreter's viewpoint, or horizon, is transformed in the encounter. …The dynamic process of interpretation works thus: Upon our first approach to the text, we project our pre-understandings onto it. As we learn more about the text, we revise our initial projections, better to conform with the presumed integrity of the text as it unfolds to us. Essential to the interpreter's conversation with the text is her effort to find a common ground that will both make sense out of the individual parts of a text and integrate them into a coherent whole."[52]

46 Hans-Georg Gadamer, Truth and Method (Continuum 2004) 295

47 Hoy (n 33) 137

48 William Eskridge, 'Gadamer/Statutory Interpetation' (1990) 90 Columbia Law Review 609, 617

49 Hoy (n 33) 136

50 ibid 136

51 John Mcgarry, Intention, Supremacy and the Theories of Judicial Review (Routledge 2017) 15, also see Gadamer, *Truth and Method* (n 46) 294

52 Eskridge, (n 48) 627

2. A Passage from Philosophical Hermeneutics to Legal Hermeneutics: Dworkin's Legal Theory

Soon after his work was published, it did not take too much time for legal scholars to realize that Gadamer's theory was, in a great extent, applicable to the interpretation of legal texts, most specifically statutory provisions.[53] Contemporarily, Ronald Dworkin's account for interpretation is marked as one of the most important examples of legal works influenced by Gadamer's hermeneutical theory.[54] Furthermore, Dworkin himself clearly states that he was influenced by Gadamer's account, as he describes it as recognizing, while struggling against, the constraints of history striking the right note[55]. Therefore, Dworkin's account of interpretation, in one sense, is a passage through philosophical hermeneutics to legal hermeneutics.

Like Gadamer, Dworkin relies on the idea that an act of interpretation is unavoidably conditioned by the position of the interpreter. This demonstrates that two philosophers agree on the phenomenology of interpretation and on the role that criteria play within it.[56] Moreover, Dworkin shares Gadamer's view on the integrity of texts as a coherent whole under his conception of law as integrity. In *Law's Empire,* he clearly states that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.[57] Through this, law is a concept that might be understood under the light of coherent integrity reached by an interpretive approach implicit in judicial decisions.

Dworkin used a famous *chain novel* metaphor to manifest the interpretive aspect of law as integrity. Accordingly, he describes judges as writers of a novel which has been and continues to be written. Each writer contributes a single chapter and "the writer's first task is to fashion a critical interpretive view of the received text and provide new material that fits the novel."[58] Dworkin names this approach, in which the present interpretation is shaped by the past, as *constructive interpretation*.

Dworkin, in order to understand the logic of interpretation, identifies three separate stages that together produce it. The first one is preinterpretive stage, which consists of the identification of "the rules and standards taken to provide the tentative content of the practice" to be interpreted. The second one is the interpretive stage, in which "justification will take the form of an argument made with reference to the political

53 ibid 612

54 For e.g. Kenneth Henley, 'Protestan Hermeneutics and the Rule of Law: Gadamer and Dworkin' (1990) 3 (1) Ratio Juris 14, 16, 22

55 Ronald Dworkin, Law's Empire (Harvard University Press 1986) 62

56 Hoy (n 33) 148

57 Dworkin, A Matter of Principle (n 15) 225

58 James Donato, 'Dworkin and Subjectivity in Legal Interpretation' (1998) 40 (6) Stanford Law Review 1517, 1532

principles that best justify the practice." The third one is the post-interpretive stage, which "serves to permit adjustments or reforms in the justification of a practice."[59] Hence, this stage is one where interpretation reshapes itself.

It is not difficult to observe that Dworkin's stages of interpretation have significant resemblance with a legal hermeneutical circle. Thus, Dworkin uses Gadamer's emphasis on the circular character of interpretation and adopts it to a legal scheme. However, though these two philosophers' accounts on interpretation have several striking characteristics in common, each of their accounts also have some differences as well. The best piece to reveal such a difference, quoted by Hoy from Dworkin's work, is as follows:

> "…an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art. Different theories or schools or traditions of interpretation disagree, on this hypothesis, because they assume significantly different normative theories about what literature is and what it is for and about what makes one work of literature better than another."[60]

As Hoy interprets Dworkin's work by inferring from this statement, he states that: "(Dworkin) wants to model legal on literary interpretation, whereas Gadamer prefers to model literary on legal interpretation."[61] In line with this, Dworkin held the position that when judges face an interpretive challenge in any hard case, there will always be competing conceptions in front of them, which they interpret concepts such as equal concern and respect, justice and fairness.[62] This unavoidably urges judges to make a choice between different conceptions. In order to find the right answer that best justify the total set of practices in which a related concept is used, judges always have to hold the balance between these different conceptions. Thus, Dworkin's "*Hercules*" arises as a judge who discovers the right answer or principle with a grasp of past practices and future expectations.

The criticism on Dworkin's position is mostly based on the assumption of his expectation from judges to balance different conceptions without taking their own value-judgments into account. According to such critics, "contrary to Dworkin's analysis, there are as many valid legal interpretations as there are different conceptions of justice and of fairness consistent with the equal concern and respect principle, just as there are as many "best" aesthetic interpretations as there are different plausible aesthetics."[63] This point is also dissenting position of John Hart Ely's charge on Dworkin. According to Ely, "the error here is one of assuming that

59 Gregory Leyh, 'Dworkin's Hermeneutics' (1987) 39 Mercer Law Review 851, 858-859

60 Hoy (n 33) 148, Dworkin, 'Law as Interpretation' (n 17) 531

61 Hoy (n 33) 148

62 Dworkin, Law's Empire (n 55) 70-72

63 Michel Rosenfeld, 'Dworkin and the One Law Principle: A Pluralist Critique' (2005) 3 (233) Revue Internationale de Philosophie 363, 388

something exists called the method of moral philosophy, whose contours sensitive experts will agree on."[64]

This point can be seen as a connection point between the hermeneutical approach to rights and the Federal German Constitutional Court. It is possible to understand such point by taking Robert Alexy's work into account on fundamental (constitutional) rights. According to Alexy, values and value-judgments are two different things. If somebody states something *has* a value, this is a *value-judgment.* However, it is entirely different to manifest that something *is* a value. Whereas value-judgments lead someone to engage in *evaluation*, values serve as *the criteria of evaluation*.[65] Evaluations can be based on a single criterion of evaluation or on several. However, evaluations according to one criterion can have fanatical tendencies. Therefore, on a pluralist account, evaluative criterions as a basis for evaluations are to be balanced with each other.[66] This is the exact point of why the Federal German Constitutional Court states that, "freedom of the press carries with it the possibility of coming into conflict with other values upheld by the Basic Law."[67] In sum, Alexy states that the Federal Constitutional Court regards different rights and freedoms as the values to be balanced among each other.

II. The Implementation of Hermeneutical Approach by Domestic Courts and the ECtHR

Not surprisingly, the interpretative approach mentioned above flourished in a Continental European rights protection system, which had been influenced by common law, and it has led to the emergence of a unique interpretive approach adopted by the European Court of Human Rights. In this section, I will describe how it has been implemented both by the Federal German Constitutional Court and the European Court of Human Rights.

A. The Emergence of a New Interpretive Approach by the German Constitutional Court

The absence of *stare decisis* in Continental European legal orders is a procedural challenge in establishing a strong form of judicial review. However, some such Constitutional Courts in past 70 years have evolved from being just a negative lawmaker into a much more effective representative of increasingly legal constitutionalism by trying to develop an effective judicial rights protection mechanism. For instance, the Federal German Constitutional Court has done this by developing an evolutive

64 Ely (n 21) 57-58

65 Robert Alexy, A Theory of Constitutional Rights (Julian Rivers tr, Oxford University Press 2002) 88-89

66 ibid 90

67 ibid 86

interpretation using its constitutional complaint jurisdiction, which enables the Court to decide on a different but stable basis for each case under the light of a principle-oriented approach.[68]

According to Alexy, rules are definitive norms whereas principles could be seen as norms competing with each other as a result of their nature as optimization requirements.[69] This optimization process over principles also builds a bridge between common law thinking and the strict textuality of the Continental European law tradition by finding a middle way that it is a matter of choices among principles in every case. Thus, the principles model functions as a bridge connecting the application of German basic rights with common law traditions. Through this, it has become that the defining term of German constitutional law is constitutionalization rather than constitutionalism.[70] Therefore, it would be useful to examine the interpretation made by the Court, in particular *Elfes* in 1957 and *Lüth* Case in 1958, which has been shown as the cornerstones of German constitutional rights interpretation.

In the Elfes Case, the complainant was a socialist politician whose participation in a congress abroad was obstructed by the government's refusal to renew his passport. German Court, in this case, had to decide, though it is not expressed textually in German Basic Law (*Grundgesetz*), whether the complainant has a right to movement to go abroad or not. In a much clearer sense, the German Court had to decide whether the human rights of the Basic Law extended beyond the explicit guarantees of the Constitution, and this was indeed a problem with the interpretation of Article 2 of German Basic Law, which acknowledges and protects the freedom of action generally.[71] The German Court acknowledged that the freedom of action encapsulates the right to move abroad and found the complaint admissible by extending its jurisprudence beyond textual interpretation.[72] Thus, the Elfes Case of the Federal German Constitutional Court has been shown as one of the most important cases in German constitutional history as a beginning point of constitutionalization of German legal system[73].

Through the Elfes Judgment, the German Constitutional Court adopted an evolutive interpretation approach, and since that point, it has been acknowledged that the interpretation of constitutional rights has had a significant effect on whole legal system. However, this is not enough. What makes the constitutionalization

68 For e.g. see Michaela Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From anti-Nazism to Value Formalism' (2014) 12 (3) International Journal of Constitutional Law 626, 642-644

69 Alexy (n 65) xxviii, also 47-48

70 Jan Henrik Klement, 'Common Law Thinking in German Jurisprudence-on Alexy's Principles Theory' in Matthias Klatt (ed), Institutionalized Reason: The Jurisprudence of Robert Alexy (Oxford University Press 2012) 199

71 Alex Tschentscher, The Basic Law (Grundgesetz): The Constitution of Federal Republic of Germany (May 23rd, 1949), (Jurisprudentia, 2016) 19.

72 *BVerfGE 6, 32.*

73 Tschentscher (n 71) 19

of a legal system possible is its capacity of extendibility to all specific matters of private law as well as public law. It was the Lüth Case that opened a door to private law matters by bringing up the horizontal effect of constitutional rights into the agenda.[74] As to the facts of case, Erich Lüth was a politician who had publicly called for the boycott of a film by a director who was notorious as a Nazi film maker. For his public calls, civil court convicted him to pay an indemnity, and Lüth lodged a constitutional complaint against the decision. Consequently, the Court extended the controlling power of basic rights to the domain of private law by requiring an interpretation of contractual obligations and other private interactions that are compatible with human rights.[75]

B. ECtHR's Hermeneutical Approach to Human Rights

Interpretive methods and principles in every system develop in terms of premises of a legal system in which these methods and principles are used.[76] The European Court of Human Rights, so far, has seemed to shape its interpretive position under interpretive principles such as the living instrument approach with evolutive interpretation,[77] autonomous concepts,[78] positive obligations,[79] and horizontal effect of rights[80] as well as proportionality and margin of appreciation.[81] The former four characterise the principles of a broad interpretation of human rights whereas latter two represent a narrower approach. However, the ECtHR's interpretive principles are enumerated. According to Koch:

> "It has often been noticed that the Court reads the ECHR as a *living instrument* and that it has adopted an even very *dynamic style of interpretation*. The by now quite aged Convention is interpreted in the light of *present-day conditions*, and limited emphasis is accordingly put on the preparatory works. It is also common knowledge that the Court applies a *contextual style of interpretation* in order to establish "harmony with the logic of the Convention", and that the Court reads the treaty in the light of its *object and purpose*. Also, the principle of *effectiveness* is usually referred to when discussing the principles of interpretation of the Court indicating that the Court prefers a "practical and effective" solution to one which is "theoretical and illusory". Finally, for a long

74 For e.g. Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press 1989) 376

75 Tschentscher (n 71) 20

76 By methods, I mean textual, historical, systematic and teleological interpretation, which are granting authority to a certain reasoning on the basis of different reasons, depending on the theory behind the interpretation method. However, principles serve as an objective or aim that can be taken into account when interpreting a provision with the help of an interpretation method. These can be identified autonomous concepts, margin of appreciation, evolutive interpretation etc. on this matter, *see*, Hanneke Senden, Interpretation of Fundamental Rights in a Multilevel Legal System, (Intersentia 2009) 45-47

77 *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) paras 31-33

78 *Engel and Others v. Netherlands* App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 08 June 1976) paras 81-82

79 *Airey v. Ireland* App no 6289/73 (ECtHR, 09 September 1979) para 24

80 *X and Y v. Netherlands* App no 8978/80 (ECtHR 26 March 1985) para 23

81 *Ireland v. The United Kingdom* App no 5310/71 (ECtHR 18 January 1978) para. 36

> time is has been generally recognised that the Convention encompasses what is called *'positive' obligations* including those stemming from the notion of 'Drittwirkung' or third-party effect."[82]

The European Court, from time to time, has used such interpretive principles as a tool for "European integration through law" as it has been evolving from the position of a legal diplomatic institution to an effective court which has an integrationist jurisprudence.[83] Recently, alongside the increase of the contracting parties' number, the overall population under the jurisdiction of the Court has reached approximately 850 million people, which brings a huge caseload for the ECtHR. In 2012, the European Court stated in the Final Declaration of Brighton Conference that it welcomed and encouraged open dialogue between the Court and States Parties as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention.[84] Thus, the interpretive principles of the ECtHR have been and continue to be transferred into domestic legal systems. Along these lines, acceptance and domestic implementation of judgments by the contracting parties to the ECHR will be ensured[85].

1. Classical Hermeneutics in Early Jurisprudence of the ECtHR

How could an international treaty become such an important document that demonstrates its contracting parties' commitment to human rights as an idea? The answer to this question lies in the usage of interpretive principles by the ECtHR in its jurisprudence. The Court, above all, is an international institution. Therefore, the Court's interpretation, in the beginning years of its jurisprudence, was formed under the *jus cogens* rules of the interpretive method.[86] Peremptory rules of treaty interpretation, later on, were codified in the Vienna Convention on the Law of Treaties within articles 31-33. The Court, clearly refers to the Vienna Convention, in the Loizidou Case, stating that the Convention (ECHR) must be interpreted in the light of the rules of the interpretation set out in the Vienna Convention.[87]

Article 31/1 of the Vienna Convention states that: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of*

82 Ida Elisabeth Koch, Human Rights as Indivisible Rights The Protection of Socio-Economic Demands under the European Convention on Human Rights (Martinus Nijhoff Publishers 2009) 39

83 Madsen, Mikael Rask, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford University Press 2011) 46-47

84 Council of Europe, *High Level Conference on the Future of the European Court of Human Rights Brighton Declaration*, Brighton, 18-20 April 2012, H/Inf (2012) 3, 117.

85 Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 (10) German Law Journal 1730, 1730

86 For e.g. Alexander Orakhelashvili, 'Restrictive Interpretation of Human Rights Treatise in the Recent Jurisprudence of European Court Human Rights' (2003) 14 (3) European Journal of International Law 529, 561-563

87 *Loizidou v. Turkey* App no 15318/89 (ECtHR 18 December 1996) para 41

the treaty in their context and in the light of its object and purpose." Though this provision constitutes a general frame of interpretation which falls within the scope of textualism, Article 32 of the Convention states that "supplementary means of interpretation" should be considered as well:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

In the first years of its jurisprudence, even before the Vienna Convention had been drafted, the ECtHR frequently referred to "ordinary meaning to be given to the terms of the treaty." In its very first case, *Lawless v. Ireland*, the Court held that the plain and natural meaning of that provision was that a person may be detained only for the purpose of bringing him before a competent legal authority whether or not he is detained on suspicion of having committed a crime or to prevent him from committing an offence. The Court also held in its judgment that it was not permissible to resort to preparatory work when the meaning of the clauses to be construed was clear and unequivocal.[88]

The Court continued its textual approach in the cases throughout the 1960's. In the *Belgian Linguistic Case* of 1968, as the Court interpreted Article 2 of the Protocol (P1-2), it held that "this provision does not require of States that they should, in the sphere of education or teaching, respect parents' linguistic preferences, but only their religious and philosophical convictions. To interpret the terms "religious" and "philosophical" as covering linguistic preferences would amount to a distortion of their ordinary and usual meaning and to read into the Convention something which is not there."[89] One can clearly see that the Court's interpretive approach in these years was a strict textual interpretation alongside an intentionalist approach.

2. A Hermeneutical Turn in the Jurisprudence of the ECtHR after 70's

In the year 1968, the Court held in *Wemhoff v. Germany* that it was necessary to seek the interpretation that was most appropriate in order to realise the aim and achieve the object of the treaty, in which case it was not possible for the Court to

88 *Lawless v. Ireland* App no 332/57 (ECtHR 01 July 1961) paras 11, 14

89 *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium* (Merits) App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (ECtHR 23 July 1968) para 6.

accept the restrictive meaning of "trial" [90] and that the meaning of word "trial" should be interpreted under substantive accounts. Under such interpretation, the Court began to move from its textual approach. This has become much more visible in the judgments of the ECtHR in 1970's starting from *Golder v. The United Kingdom.*

According to Letsas, *Golder* was a case that laid the foundations for interpretative principles, which have now become important for the thousands of applications that the Court receives each year.[91] In the *Golder Case*, the applicant was a prisoner serving his sentence and had been denied permission to consult a solicitor with the aim of instituting libel proceedings against a prison officer. The United Kingdom argued that the ECHR does not confer a right to access to court, given the absence of an explicit provision which clearly indicates such a right.[92] However, the Court held that Article (6/1) embodies the "right to a court," of which includes the right of access, i.e., the right to institute proceedings before courts in civil matters. Added to this are the guarantees laid down by Article 6 para. 1 (art. 6-1) in regards to both the organisation and composition of the courtand the conduct of the proceedings.[93]

The *Golder Case*, thus, introduced a new debate to European legal systems, which has been held between originalists and non-originalists in the context of American constitutional law, namely that of 'unenumerated' rights.[94] Following that, the European Court of Human Rights, from that time on, has improved its jurisdiction in terms of interpretation from a strict textuality to a philosophical hermeneutics approach. Thus, the Court's interpretive ethic, as Letsas points out, became more focused on the substance of the human right at issue and the moral value of it in a democratic society rather than engaging in linguistic exercises about the meaning of words or in empirical searches about the intentions of drafters.[95]

Within the following four years of *Golder*, ECtHR made its approach much clearer in the *Engel*, *Tyrer*, and *Airey* Cases. In the *Engel Case*, the Court regarded the term "criminal charge" as an autonomous concept from the domestic laws of contracting parties.[96] The Court in 1978 acknowledged the "living instrument" approach, in which the interpretive principle underlies *Tyrer*.[97] These interpretive principles have

90 *Wemhoff v. Germany* App no 2122/64 (ECtHR 27 July 1968) paras 7-8

91 George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 (3) European Journal of International Law 509, 515

92 ibid 515

93 *Golder v. United Kingdom* App no 4451/70 (ECtHR 21 February 1975) para 36

94 Letsas (n 91) 515

95 ibid 520

96 (n 78)

97 (n 77)

become quite familiar for domestic rights protection systems as well as international mechanisms, in which they constituted a philosophical and legal hermeneutics approach to rights.[98]

The ECtHR did not stop there; it extended its interpretive approach to even social and economic rights. In the *Airey* Case, the Court held that fulfilment of a duty under the Convention, on occasion, necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive, and "there is ... no room to distinguish between acts and omissions."[99] Furthermore, the Court, in this case, broadened the scope of rights in favour of social and economic rights, stating that an interpretation of the Convention might extend into the sphere of social and economic rights. The Court continued by stating that there should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[100]

The world in the 1980's was undergoing a crucial transformation with the third wave of democratization, which refers to transitions to democracy in mostly Eastern European countries. These countries gradually recognised the compulsory jurisdiction of the Court, and among them, there were countries suffering from crucial structural human rights problems. In line with this, the Court found a chance to apply and develop its interpretive principles more broadly and perhaps more bravely.[101]

In 1993, the Court held in *Öneryıldız v. Turkey* that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entailed, above all else, a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.[102] Thus, by using the positive obligations principle, the Court began to extend the scope of rights into third generation rights such as the right to environment.

The above cases demonstrate that the ECtHR, as an international rights protection mechanism, changed the rules of the game in interpretation. The Court developed interpretive principles, reasonably inspired by domestic jurisdictions of its contracting parties, such as the Elfes and Lüth Decisions of the Federal German Constitutional Court. In any case, the European Court of Human Rights' interpretive principles has been and continues to be formed under the postulates of philosophical and legal hermeneutics[103]. However, the ECtHR's explicit focus on the substance of the

98 Koch (n 82) 39-40

99 (n 79) para 5.

100 (n 79) para 26.

101 For an example of the Court's double standard, see the comparison between Aksoy v. Turkey and Brannigan and McBride v. The United Kingdom in Marie-Benedicte Dembour, Who Believes in Human Rights Reflections on the European Convention (Cambridge University Press 2006) 51-53

102 *Öneryıldız v. Turkey* App no 48939/99 (30 November 1993) para 89

103 Koch (n 82) 56-57

human rights has led the Court to go further. The Court, in 2002, released the *Pretty* Judgment, which manifests the ECtHR's understanding of human rights and should be marked as one of the cornerstones in the Court's jurisprudence. The importance of the judgment was its emphasis on human dignity as one's freedom and capacity to choose and on the conception of dignity as a basis of rights.[104] Though the ECtHR has mentioned human dignity several times before[105] *Pretty*, this was one of the very first cases that the Court put not only legal but also a moral flesh on the bare bones of human rights. Thus, the Court took a truly hermeneutical step that, from that time on, the concept of human rights is to be understood not only by the Convention's object and purpose but also by human dignity as personal autonomy.[106] In 2006, the Court, in *Sorensen and Rasmussen,* held that 'the notion of personal autonomy' is an important principle underlying the interpretation of the Convention guarantees,[107] and it repeated this wording in *Vordur Olafsson v. Iceland*.[108]

The European Court of Human Rights, from time to time, uses textual interpretation as well, for instance, *Johnston v. Ireland* in 1986[109] and the *Bankovic* Case in 2001.[110] However, one can argue that the Court's evolutive interpretation prevails over the textual and intentional approach. Thus, the European Court of Human Rights' interpretive principles, in a hermeneutical sense, is shaping human rights conceptions of European domestic legal orders.

Today, partially because of the past temperamental relationship between them, the ECtHR relies on domestic courts' judgments more than it used to.[111] Thus, it is a well-known fact that the ECtHR has made a procedural turn in the protection of human rights in recent years,[112] meaning that the Court chooses a path that is marked by a preference for a procedural review of national authorities as well as the domestic courts rather than a strict scrutiny of the facts (substantial review). Such an approach would naturally give rise to a responsible domestic courts doctrine, allowing domestic courts a larger discretionary space with regard to making rights violation

104 Benedict Douglas, 'Too attentive to our duty: the fundamental conflict underlying human rights protection in the UK' (2018) 38 (3) Legal Studies 360, 362

105 ibid 362

106 For e.g. N.R. Koffeman, *(The right to) personal autonomy in the case law of the European Court of Human Rights,* (LL.M), Leiden, 2010, available at: https://scholarlypublications.universiteitleiden.nl/access/item%3A2885722/view, Access: 21.08.2021, 5-8.

107 *Sorensen and Rasmussen v. Denmark,* App Nos 52562/99 and 52620/99, (ECtHR, 11 July.2006) para 54.

108 *Vordur Olafsson v. Iceland,* App no 20161/06, (ECtHR, 27 April 2010) para 46.

109 *Johnston and Others v. Ireland,* App No 9697/82, (ECtHR, 18 December 1986) para 52.

110 *Bankovic and Others v. Belgium and Others,* App no. 52207/99, (ECtHR, 12 December 2001).

111 Eirik Björge, 'Bottom-Up Shaping of Rights: How the Scope of Human Rights at the National Level Impact upon Convention Rights', in Eva Brems, Janneke Gerards (eds) *Shaping Rights in the ECHR: The Role of The European Court of Human Rights in Determining the Scope of Human Rights,* (Cambridge University Press, 2013) 229.

112 Eva Brems, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Janneke Gerards, Eva Brems (eds) *Procedural Review in European Fundamental Rights Cases,* (Cambridge University Press, 2017) 17-18.

determinations and also that domestic courts should responsibly take into account the interpretation of the Convention rights as developed through ECtHR case law[113].

Particularly, Protocol No. 16 to the European Convention on Human Rights approved by the Plenary Court on 18 September 2017 corresponds to the "*shared responsibility*" doctrine by promoting a legal interaction between national courts and the ECtHR. Article 1 of Protocol No. 16 to the Convention confers jurisdiction on the Court to give advisory opinions on questions of principle concerning the interpretation or application of the rights and freedoms defined in the Convention or the Protocols. The aim of the procedure has been anticipated to further the interaction between the Court and the national courts and tribunals of the Contracting Parties to the Convention by promoting constructive dialogue between the Court and the national courts and tribunals.[114] Although much praised, some procedural challenges can be observed in Protocol No. 16 such as the parallel existence of two similar types of optional preliminary rulings in the Court of Justice of the European Union (CJEU) and the ECtHR, which might unnecessarily complicate the harmonious coexistence of the various legal orders[115] and might cause delays and confusion[116] in judicial proceedings.

It should be noted, furthermore, that the "procedural turn" of the ECtHR has been criticised for coming at the expense of the implementation of a dynamic approach through judicially restraining the Court and international judges in favour of national authorities.[117] However, the procedural move has been praised and claimed to be synergetic with an effective right protection. According to Kleinlein,

> "Contrary to the fears expressed by some critics, this move, while closely intertwined with the concept of subsidiarity, does not diminish substantive human rights obligations… *as* the procedural approach facilitates a dynamic evolution either in the practice of Convention States (analytic or bottom-up approach) or by the Court (constructive or top-down approach) ..."[118]

113 Başak Çalı, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights' in Oddný Mjöll Árnadóttir, Antoine Buyse (eds) *Shifting Centres of Gravity in Human Rights Protection: Rethinking Between the ECHR, EU, and National Legal Orders,* (Routledge, 2016), 155.

114 European Court of Human Rights, *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017),* para 2.

115 Koen Lemmens, 'Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?' (2019), European Constitutional Law Review 15 (4), 691, 693.

116 Janneke Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights A Comparative and Critical Appraisal' (2014) Maastricht Journal of European and Comparative Law, 21 (4) 630, 632.

117 see for. e.g. P. Cumper, T. Lewis, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court Of Human Rights' (2019) International and Comparative Law Quarterly, 68 (3) and Øyvind Stiansen, Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) International Studies Quarterly 64 (4)

118 Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019), International and Comparative Law Quarterly, 68 (1) 91, 92, see also Robert Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) Human Rights Law Review, 18 (3)

Either way, it should be acknowledged that as a result of the "*procedural turn or approach*," the hermeneutical interaction between the ECtHR and domestic courts –particularly Constitutional or Supreme Courts- of the parties to the Convention will be the determinant factor in the future.

Concluding Remarks: Why do we oblige our judges to apologize?

Like any revolution, the judicial revolution of rights in Europe were twofold: First, below to top, then the other way around. It started with a pressure from legal systems and jurisdictions of the domestic courts of Europe (such as Britain and Germany) to the European Court of Human Rights, and it proceeded to radiate from there to European legal orders. However, as is known, a revolution devours its children. In order to comply with the interpretive requirements of the European Court of Human Rights, European domestic courts can now be said to be trying to develop a dialogue between the Court's and their own jurisdictions.[119] Particularly in the United Kingdom, a reform has been made by enacting the Human Rights Act in 1998, which deeply affects its legal and judicial system[120].

However, it seems that unless domestic courts fully understand and engage with the conception of rights as well as the interpretive principles of the ECtHR, judges will unavoidably have to apologize to the applicants. Perhaps, two examples from very different geographical, political, and legal positions under the jurisdiction of the ECtHR, one from the west, United Kingdom, and one from the east, Turkey, could be enlightening for exemplifying my point.

The first example is *Squirrell Ltd. v. National Westminister Bank plc and HM Customs and Excise*, in 2006 from the United Kingdom Chancery Division of High Court. As to the facts of case, the Bank suspected that Squirrel Ltd's (the applicant) bank account contained the proceeds of crime and froze the account, in accordance with section 328 (1) of the Proceeds of Crime Act, without showing any reason. The applicant, *inter alia*, applied for an order to unblock the account on the basis that there was no evidence that it was guilty of any wrongdoing. Consequently, though the applicant did not commit any crime or wrongdoing, his company's account remained blocked for 16 days, which kept him making any necessary payments during that time, including payment to lawyers to appear before court on his behalf.

The interesting fact in this case is that the judge started his own judgment by stating that, "*I should say I have some sympathy for parties in Squirrel's position.*

119 Lord Kerr, 'The Need for Dialogue Between National Courts and the European Court of Human Rights' in (eds) Spyridon Flogaitis, Tom Zwart, Julie Fraser, *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength,* (Edward Elgar Publishing, 2013) 105.

120 For e.g. Roger Masterman, 'Aspiration or Foundation? The status of the Strasbourg Jurisprudence and the "Convention Rights" in domestic law', in Helen Fenwick, Gavin Phillipson, Roger Masterman, (eds.) *Judicial Reasoning under the Human Rights Act,* (Cambridge University Press, 2007) 57-60.

It is not proved or indeed alleged that it or any of its associates has committed any offence. …it cannot be suggested that either Natwest of HMCE are required to give a cross undertaking in damages. In the result, if Squirrell is entirely innocent, it may suffer severe damage for which it will not be compensated."[121] In the judge's view, "*the course adopted by Natwest was unimpeachable. It did precisely what this legislation intended it to do. In the circumstances, there can be no question of me ordering it to operate the account in accordance with Squirrell's instructions. To do so would be to require it to commit a criminal offence. …Sympathy for the position in which Squirrell finds itself do not override those considerations*."[122] At the end of the day, Squirell Ltd. gained the sympathy of the judge but not compensation even if there was a possibility that the bank transactions on his account would be arbitrary.

The second example is the *Emin Aydın* Case from the Turkish Constitutional Court in 2015. Emin Aydın is a newspaper columnist at a local journal in a small town called Çine in the Western region of Turkey. The town is so small that only four public prosecutors hold office. In one of his columns, the journalist used all four prosecutors' names in a way that could be insulting to each one of them. After all four prosecutors pressed charges against him, one of these prosecutors carried out the investigation and brought the charges before the Criminal Court. The Criminal Court convicted him, and the High Court of Appeal approved the conviction; thus, after all legal remedies had been exhausted, the case came before the Turkish Constitutional Court as an individual application (constitutional complaint).

The applicant's argument was that the public prosecutor must be impartial as well as judges for public prosecutors are under a legal obligation to carry out an impartial investigation and to collect evidence both in favour and against the suspect on the public's behalf. Otherwise, this would be breach of the right to a fair trial in Article 6 of the ECHR and Article 36 of the Constitution of Turkey. However, in neither instance did the courts nor did the Turkish Constitutional Court agree with this argument because there was not a legal provision which allowed the applicant to challenge the impartiality of a public prosecutor as there was under Turkish Criminal Code for recusation of judges.[123]

In its judgment, the Turkish Constitutional Court held that, "*Even if it is an undesirable occasion that a public prosecutor becomes both either victim or plaintiff and the investigator of any case, in the Turkish Penal Law system, there is no such provision giving room for a foundation of the "recusation of public prosecutor." It is legally possible for a public prosecutor to carry out and finalize an investigation in*

121 *Squirrell Ltd. v. National Westminister Bank plc and HM Customs and Excise, [2006] -1-W.L.R.-637,* para 7.

122 ibid para 21.

123 Turkish Constitutional Court, *Emin Aydın (2) Başvurusu,* App No: 2013/3178

which he/she is either victim or plaintiff."[124] Similar to Squirrel Ltd., the columnist gained the sympathy of the Constitutional Court, which states that such occasion is *undesirable;* however, quite like Squirrel, he could not persuade the judges to overturn the judgment of the criminal court.

The common point of the above two cases is that there is an implicit apology from judges to the applicants in each of them. Even if judges, as one can see, have sympathy for an applicant's situation, they feel restricted by the strict textuality and the intention of the legislation and fail to engage with hermeneutical context of human rights. Thus, today, a judicial protection of rights is to be understood and formulated under a *hermeneutical awareness*,[125] for, as Leyh points out, hermeneutics vigorously resists views of reason and rationality as historically disengaged, denies that truth is transcendent, and holds untenable the idea that language is a neutral instrument capable of impartially representing objects in the world.[126]

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Bibliography

Books, Articles and Reports

Alexy, R, A Theory of Constitutional Rights (Julian Rivers tr, Oxford University Press 2002)

Annino, PG, An Evaluation of Ronald Dworkin's Hermeneutical Theory of Law (Dphil Thesis, Fordham University, 1997).

Bellamy, R, Political Constitutionalism: Republican Defence of the Constitutionality of Democracy, (Cambridge University Press, 2007).

Bellamy, R, 'Political Constitutionalism and The Human Rights Act' (2011) 9 (1) International Journal of Constitutional Law 86-111.

124 *"Bir Cumhuriyet savcısının herhangi bir olayın hem mağduru veya müştekisi hem de soruşturmasını yürüten kişisi olması istenir bir durum olmamakla birlikte Türk Ceza Hukuku sisteminde "Cumhuriyet savcısının davaya bakamaması ve reddi" müessesesine yer verilmemiştir. Cumhuriyet savcısının kendisinin bizzat mağdur ya da müşteki durumda olduğu bir soruşturmayı yürütmesi ve sonuçlandırması yasal olarak mümkündür.* ibid para 28

125 Gadamer, *Truth and Method* (n 46) 534

126 Leyh, (n. 59) 855

Björge, E, 'Bottom-Up Shaping of Rights: How the Scope of Human Rights at the National Level Impact upon Convention Rights', in Eva Brems, Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of The European Court of Human Rights in Determining the Scope of Human Rights*, (Cambridge University Press, 2013)

Brems, E, 'The "Logics" of Procedural-Type Review by the European Court of Human Rights' in Janneke Gerards, Eva Brems (eds) *Procedural Review in European Fundamental Rights Cases*, (Cambridge University Press, 2017)

Cappelletti, M, *The Judicial Process in Comparative Perspective*, (Clarendon Press, 1989).

Çalı, B, 'From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights' in Oddný Mjöll Árnadóttir, Antoine Buyse (eds) *Shifting Centres of Gravity in Human Rights Protection: Rethinking Between the ECHR, EU, and National Legal Orders,* (Routledge, 2016)

Council of Europe, *High Level Conference on the Future of the European Court of Human Rights Brighton Declaration*, Brighton, 18-20 April 2012, H/Inf (2012) 3.

Cumper, P/Lewis, T, 'Blanket Bans, Subsidiarity, and the Procedural Turn of the European Court Of Human Rights' (2019) International and Comparative Law Quarterly, 68 (3) 611-638

Dembour, MB, Who Believes in Human Rights Reflections on the European Convention (Cambridge University Press 2006)

Donato, J, 'Dworkin and Subjectivity in Legal Interpretation' (1998) 40 (6) Stanford Law Review 1517-1541

Douglas, B, 'Too attentive to our duty: the fundamental conflict underlying human rights protection in the UK' (2018) 38 (3) Legal Studies' 360-378

Dworkin, R, A Matter of Principle (Harvard University Press 1985)

Dworkin, R, 'Law as Interpretation' 1982 (60) Texas Law Review 179-200

Dworkin, R, Law's Empire (Harvard University Press 1986)

Dworkin, R, Taking Rights Seriously, (Harvard University Press, 1978).

Dzehtsiarou, K, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 (10) German Law Journal 1730-1745

Elliot, M, The Constitutional Foundations of Judicial Review, (Hart Publishing, 2001).

Ely, JH, Democracy and Distrust: A Theory of Judicial Review (Harvard University Press 1980)

Eskridge, W, 'Gadamer/Statutory Interpetation' (1990) 90 Columbia Law Review 609-681

European Court of Human Rights, *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention (as approved by the Plenary Court on 18 September 2017.*

Fickle, SC, 'The Dawn's Early Light: The Contributions of John Hart Ely to Constitutional Theory' (1981) 56 Indiana Law Journal 637-672

Gadamer, HG, 'Classical and Philosophical Hermeneutics' (2006) 23 (1) Theory, Culture And Society 29-56

Gadamer, HG, Truth and Method (Continuum 2004)

Gardbaum, S, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 Columbia Journal of Transnational Law 285-320

Gerards, J, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights A Comparative and Critical Appraisal' (2014) Maastricht Journal of European and Comparative Law, 21 (4) 630-651

Ginsburg, T, Judicial Review In New Democracies Constitutional Courts In Asian Cases (1st edn, Cambridge University Press 2003)

Hailbronner, M, 'Rethinking the Rise of the German Constitutional Court: From anti-Nazism to Value Formalism' (2014) 12 (3) International Journal of Constitutional Law 626–649.

Hall, JB, 'Taking "Rechts" Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany' (2008) 9 (6) German Law Journal 771-798

Henley, K, 'Protestan Hermeneutics and the Rule of Law: Gadamer and Dworkin' (1990) 3 (1) Ratio Juris 14-28

Hasnas, John, 'Back to the Future: From Critical Legal Studies forward to Legal Realism, or How not to Miss the Point of Indeterminacy Argument' (1995) 45 (84) Duke Law Journal 84-132

Hoy, DC 'Interpreting The Law: Hermeneutical and Poststructuralist Perspectives' (1985) 58 (135) Southern California Law Review 135-176.

Hutt, DEB, 'Against Judicial Supremacy in Constitutional Interpretation' (2017) (31) Revus, Journal for Constitutional Theory and Philosophy of Law 83-106

Issacharoff, S, 'Constitutional Courts and Democratic Hedging' (2010) 9 (4) The Georgetown Law Journal 961-1012

Kemmerer, A, 'Sources in the Meta-Theory of International Law: Hermeneutical Conversations' in Samantha Besson and Jean d'Aspremont (eds) *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017).

Kleinlein, T, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019), International and Comparative Law Quarterly, 68 (1) 91-110

Klement, JH, 'Common Law Thinking in German Jurisprudence-on Alexy's Principles Theory' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012)

Knowles, HJ/Toia, JA, 'Defining 'Popular Constitutionalism: The Kramer versus Kramer Problem' (2014) 42 (1) Southern University Law Review 31-59

Kramer, L, The People Themselves: Popular Constitutionalism and Judicial Review, (Oxford University Press, 2004).

Koch, IE, Human Rights as Indivisible Rights The Protection of Socio-Economic Demands under the European Convention on Human Rights (Martinus Nijhoff Publishers 2009)

Koffeman, N.R., *(The right to) personal autonomy in the case law of the European Court of Human Rights*, (LL.M), Leiden, 2010, available at: https://scholarlypublications.universiteitleiden.nl/access/item%3A2885722/view, Access: 21.08.2021.

Kommers, D, The Constitutional Jurisprudence of the Federal Republic of Germany (Duke University Press 1989)

Lemmens, K, 'Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?' (2019), European Constitutional Law Review 15 (4) 691-713

Letsas, G, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 (3) European Journal of International Law 509-541

Lever, A, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 (4) Perspectives on Politics 805-822

Leyh, G, 'Dworkin's Hermeneutics' (1987) 39 Mercer Law Review 851-866

Lord Kerr, 'The Need for Dialogue Between National Courts and the European Court of Human Rights' in (eds) Spyridon Flogaitis, Tom Zwart, Julie Fraser, *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength*, (Edward Elgar Publishing, 2013)

Madsen, MR, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics* (Oxford University Press 2011)

Masterman, R, 'Aspiration or Foundation? The status of the Strasbourg Jurisprudence and the "Convention Rights" in domestic law', in Helen Fenwick, Gavin Phillipson, Roger Masterman, (eds.) *Judicial Reasoning under the Human Rights Act*, (Cambridge University Press, 2007)

Mcgarry, J, Intention, Supremacy and the Theories of Judicial Review (Routledge 2017)

Mootz, FJ., 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur' (1988) 68 Boston University Law Review 523-617

Orakhelashvili, A, 'Restrictive Interpretation of Human Rights Treatise in the Recent Jurisprudence of European Court Human Rights' (2003) 14 (3) European Journal of International Law 529-568

Palmer, R, Hermeneutics Interpretation Theory in Schleiermacher, Dilthey, Heidegger and Gadamer (Northern University Press 1969)

Plunkett, D/ Sandel, T, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' 2013 (19) Legal Theory 242-281

Roach, K, 'The Varied Roles of Courts and Legislatures in Rights Protection' in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds) *Parliaments and Human Rights Redressing the Democratic Deficit* (Hart Publishing 2015)

Rosenfeld, M, 'Dworkin and the One Law Principle: A Pluralist Critique' (2005) 3 (233) Revue Internationale de Philosophie 363-392

Scheuerman, W, Carl Schmitt: The End of Law, (Rowman&Littlefield Publishers, 1999).

Senden, H, Interpretation of Fundamental Rights in a Multilevel Legal System, (Intersentia 2009)

Solum, LB, 'Indeterminacy' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell 2010)

Spano, R, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) Human Rights Law Review, 18 (3) 473-494

Stelmach, J/Brozek, B, The Methods of Legal Reasoning (Springer 2006)

Stiansen, Ø/Voeten, E, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) International Studies Quarterly 64 (4) 770-784

Tushnet, M, 'Alternative Forms of Judicial Review' (2003) 101 (8) Michigan Law Review 2781-2802

Tushnet, M, Weak Form Judicial Review and "Core" Civil Liberties' (2006) 41 Harvard Civil Rights-Civil Liberties Review 1-22

Tushnet, M, Taking the Constitution Away from The Courts, (Princeton University Press, 1999).

Tschentscher, A, The Basic Law (Grundgesetz): The Constitution of Federal Republic of Germany (May 23rd, 1949**)**, (Jurisprudentia, 2016)

Waldron, J, 'The Core of The Case Against Judicial Review' (2006) 115 (6) The Yale Law Journal 1346-1406

Court Judgments

Airey v. Ireland App no 6289/73 (ECtHR, 09 September 1979)

Bankovic and Others v. Belgium and Others, App no. 52207/99, (ECtHR, 12 December 2001)

Case "Relating to Certain Aspects of the Laws on the Use of Languages in Educatıon in Belgium" v. Belgıum (Merits) App nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, (ECtHR 23 July 1968)

Engel and Others v. Netherlands App nos 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 08 June 1976)

Golder v. United Kingdom App no 4451/70 (ECtHR 21 February 1975)

Ireland v. The United Kingdom App no 5310/71 (ECtHR 18 January 1978)

Johnston and Others v. Ireland, App No 9697/82, (ECtHR, 18 December 1986)

Loizidou v. Turkey App no 15318/89 (ECtHR 18 December 1996)

Lawless v. Ireland App no 332/57 (ECtHR 01 July 1961)

Öneryıldız v. Turkey App no 48939/99 (30 November 1993)

Sorensen and Rasmussen v. Denmark, App Nos 52562/99 and 52620/99, (ECtHR, 11 July.2006)

The Federal German Constitutional Court –Bundesverfassungsgericht, *BVerfGE 6, 32.*

Turkish Constitutional Court, *Emin Aydın (2) Başvurusu,* App No: 2013/3178

Tyrer v United Kingdom App no 5856/72 (ECtHR, 25 April 1978)

X and Y v. Netherlands App no 8978/80 (ECtHR 26 March 1985)

Vordur Olafsson v. Iceland, App no 20161/06, (ECtHR, 27 April 2010)

Wemhoff v. Germany App no 2122/64 (ECtHR 27 July 1968)

Squirrell Ltd. v. National Westminister Bank plc and HM Customs and Excise, [2006] -1-W.L.R.-637.