The Interpretation Function of the European Judge - Basis for Preliminary Rulings

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Abstract: One of the legal mechanisms that have contributed to the strengthening of EU law in relation to national legal systems is the reference for preliminary rulings. Essentially, in this proceeding, the national court refers a question and the Court of Justice of the European Union, in a preliminary ruling, answer on the interpretation of EU law. Through these binding decisions with a jurisdictional nature, the European judge not only ensures an official interpretation of EU law but an uniformity of application. Unlike ordinary law court activity, where the object of judgment is a fact that is related to a rule of law, in a preliminary judgment, the object of judgment is the interpretation of EU law provision. Similarly, a national constitutional court acts, it being the only competent authority to interpret the Constitution of a State; from this perspective, the Court of Justice of the European Union is a true "European constitutional court" because it has the exclusive jurisdiction to interpret Community law. The interpretation function of the European judge, as well as that of constitutional judge, has certain features that distinguish the jurisdictional activity of a fundamental ordinary judge. This study aims to address this topic less studied by doctrine and capture those features of the interpretation function of the European judge.

Keywords: interpretation function; EU law; Court of Justice of the European Union; preliminary rulings

1. Introduction

One of the fundamental texts of European treaties, crucial for the development of EU law and its enforcement in the national legal systems, was the current art. 267 of the Treaty on the Functioning of the European Union[2] (former art. 234 of the

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[2] Consolidated version of the Treaty on the Functioning European Union, was published in the Official Journal of the European Union no. 2010/C83/01 from 30. 03. 2010. Article 267: The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning a) the interpretation of the Treaties b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to

Treaty establishing the European Community prior art. 177 Treaty establishing the European Economic Community). As shown, "few have guessed when drawing up Treaty, which will be importance of this article in building of Community law" (Craig, of Burca, 2009, p. 576). Through this legal mechanism - preliminary ruling procedure - have created the premises for a real collaboration between the European judge and the national judge in the application of Community law, where the Court of Justice of the European Union (CJEU) is "an official arbiter of interpretation of Union law" (Șandru, Banu & Calin, 2013 XV).

In a broad sense, the activity law enforcement by a court is marked by a "bipolar" character (Zagrebelski, 1988, p. 40; Smend, 1928, p. 213). Interpretation takes place between two poles: the first is the law, and the second is the practical case that must be resolved under the law.

This study aims to examine how this interpretation function of European judge is done in the preliminary ruling procedure.

2. Literature Review

The specialized literature has addressed the issue of the judge's interpretative function as an essential component of his jurisdictional activity and the expressed views have been extremely diverse.

In an extreme variant was even argued that the interpretation is not necessary; according to this doctrine called the "clear sense", it was considered that the text as support speech should not be interpreted (Kerchove, 1978, p. 13, Bienvenu, 1979, p 1). The main criticism of this doctrine is that to appreciate the "clarity" of a text is required in advance to have a "judgment" that eventually is also an interpretation of that text (Perelman, 1972, p. 30).

From another point of view, it was shown that although a law could be interpreted without reference to a particular case, however, it meant "amputation" of this activity (Zagrebelsky, 1988, p. 40).

Regarding the subject of interpretation, there have been a number of distinctions in terms of such notions as "legal text", "provision of law/legal provision" or "law norm". In the Italian doctrine (Crisafulli, 1984, p. 42, Guastini, 1989, p. 6) it is argued that "provision" is a legal text or norm document in a lexicological way.

enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

French literature uses the term "provision" in contrast to the "norm" (Duguit 1919, p. 320; Eisenmann, 1983, p. 344; Cornu, 1987, p. 15), while Romanian doctrine, to name the "exteriority" of "legal rules" uses the notion of "text" instead of "provision" (Popa, Eremia & Cristea, 2005, pp. 136-141; Ardeleanu, 2009, pp. 84-88; Cimpoeru, 2010, p. 64).

From a certain perspective, the CJEU acts as a true "constitutional court" which checks compliance of derivated acts the European bodies with treaties of the Union, just as a national constitutional court verifies the conformity of laws with the Constitution of the State. Relevant in this respect is the literature on interpretative decisions of the constitutional courts (di Manno, 1997; Cimpoeru, 2010) which will be used in this study.

In this situation, we believe that our approach to analyze the E interpretative function of the European judge is not only original but also useful because in this way we can examine the inner resorts of the CJEU jurisdictional activity. Next, we make an overview of the categories of disputes in the preliminary ruling procedure, we examine the need for interpretation and criticism terror "plain meaning" and, eventually, we analyze in detail the European judge interpretative function as the foundation of the preliminary rulings.

3. Preliminary Issues

Having regard to the provisions of art. 267 of the Treaty on Functioning European Union, we can say that the preliminary procedure covers two categories of litigation:

- "litigation of interpretation" (interpretation of EU law);
- "litigation of legality" (validity of acts of the EU institutions, bodies, offices or agencies).

In the case of "litigation of interpretation", the Court seeks to find out the exact meaning of normative provisions and contents of both the EU Treaties and secondary legislation.

Establishing the validity of an act of the EU institutions, bodies, offices or agencies the aim is verifying by the Court if that act is in compliance with Community law. This is what the doctrine is called "litigation of legality" and aimed only secondary Community law. In other words, "litigation of legality" examines the conformity of an inferior Community act in relation to higher Community legislation.

The Community act under consideration in the "litigation of legality" can be both normative and individual character. Moreover, in practice, there are meet some situations in which the two categories of litigation about "interpretation" and "validity" should be combined. Establishing of the validity may depend on a matter

of interpretation, so that the contested Community act is considered valid only if it is interpreted in some sense.

4. Need of Interpretation

In terms of etymology, the word "interpretation" comes from the Latin *interpretations, interpretatio, interpres*. The interpres word is formed by inter preposition - which evokes the ideea of relation - and praes word which is an old form of the verb "to buy", "sell". The first meaning of the *interpres* word originally was "intermediate affairs" (Walde, 1965, p. 710; Meillet 1959, p. 320). Subsequently, the semantic meaning has expanded and acquired other meanings such as "mediation task", "interpreter" as "one that provides communications" (Kerchove, 1978, p. 165).

Transposing the etymological sense of the word in terms of law - which, except the custom, is essentially writing - we can define the interpretation as an intellectual operation that allows finding the meaning of the text, the interpreter having a role of "intermediate" in this operation. Moreover, in the Roman law the jurists were called *juris interpres* or *juris consultus* (Paclot, 1988, p. 3).

4.1. Denial of Interpretation

The conception that denies the interpretation assumes that the text is a transparent medium of speech and, therefore, being unambiguous it should not be interpreted. The doctrine has the starting point from Roman law adagio in *in claris non fit interpretatio/ interpretatio cessat in claris*, the key word for this concept is "clarity" and hence the name of doctrine of "clear sense" or "clear meaning" (Kerchove, 1979, p. 13).

4.2. Criticism of the Doctrine "Clear sense"

Perelman (1972, p. 30) summarizes very well the limits of this doctrine as follows: *"Since we can say that the text is clear? When the meaning is clear to the legislator who issued the text? When the meaning is clear to the judge? When the two clear meanings coincide?"*.

The main criticism is about the fact that even the "clarity" of a legal text is a matter of interpretation. To say that a text is "clear" it is necessary *a priori* to have judgment on the meaning, in other words, it requires interpretation to determine whether the text is clear or not. Also, Perelman shows that the rule of law shall be interpreted in context given the general rules and of ratio legis. It follows that, always, the activity recognition of a text clear or not is preceded by an interpretation of that text. The interpretation appears as an intellectual operation is "interposed" between the legal published text and its application.

5. Object of Interpretation

At first glance it would seem that the object of interpretation in the jurisdictional activity of the European judge is even the Community which is the object of the preliminary ruling; but when we use the term "act" we mean "text" or "sense" of it? The answer to this question is intimately related to some terminological distinctions between the concepts of "text of law" and "norm", and the relations between them.

5.1. Terminological Distinctions: "Provision", "Text", "Norm"

Often, in juridical language, these terms are used with the same meaning, talk of "text of law", "provision of law / legal" or "rule of law" without making necessary distinctions. Of course, from a general perspective, this is allowed, but from a strictly scientific point of view, among these legal categories, there are essential differences.

In the Italian doctrine (Crisafulli, 1984, p. 42; Guastini, 1989, p. 6; Zagrebelski, 1988, p. 279) it is argued that "proposal" is a legal text in a lexicological sense, in other words "*a linguistic textual formula"* (Zagrebelski, 1988, p. 279).

In this sense the "provision" refers to the whole document, to a part of it or a certain sentence in a certain proportion. Crisafulli states that "the provisions" should not be confused with Articles or its internal parts (sections, paragraphs). He argues that *"to have a provision with legal significance it is often necessary to be the contest of several linguistic sentences, even if "topographical" they are scattered in the text of the text of law; on the contrary, there are frequent situations where a single unitary sentence of grammar and syntax (which is expressed in an article or paragraph), there are distinct provisions, with their own meanings.* "In essence, according to this author, "provision" is a linguistic formula that provides support for "norm".

French literature uses the term "provision" in contrast to the "norm". Thus, some authors (Grzegorczyk, 1974, pp. 243-256), "disposal" would be "a piece of law, or a grammatical sentence or a unit of the text (such as an article, paragraph or subparagraph sn). Other authors (Duguit, 1919, p. 320, Eisenmann, 1983, p. 344, Cornu, 1987, p. 15), under the influence of the civilian doctrine, use the term "legal act" instead of "provision".

Further, according to the Romanian doctrine (Popa, Eremia, Cristea, 2005, pp. 136-141; Ardeleanu, 2009, pp. 84-88; Cimpoeru, 2010, p. 64), to name the "exteriority" of a "rule of law", we use the notion of "text" instead of "provision". In our opinion, this approach has some advantages: a) expresses the idea of the exterior "support" for legal norms contained b) evokes not only the idea of law viewed as a whole, but also as "part" of it, c) harmonizes with other legal concepts used in the general theory of law, such as "norm", "provision", "penalty" etc.

Finally, it should be noted that this choice is made with a methodological purpose, namely to explain a number of concepts and legal mechanisms.

At this point we can say that by the theory of legal interpretation, "object" of interpretation is "text" of the act because it can be observed perceived. But this "object" itself means nothing, it requires a "norm".

What is a "norm"? Hans Kelsen (1962, p. 7) gave a clear and precise answer: "the norm is the meaning of an act."

Etymologically, the word "norm" comes from Latin. "Norm" mean "tool", "measuring Instruments". In the words of one author (Amselek, 1986, p. 92), "*the norm is a measurement tool of mentally"*.

The fundamental difference between "text" and "norm" is reflected by the fact that "disposition ("text") is a statement "not yet interpreted", while the norm is a statement "already interpreted" (Di Manno, 1997, p. 50). Interpretation is the operation that allows "extraction" of the texts of the rules which are in them the latent, an activity called suggestive of doctrine (Pierandrei, 1961, p. 182) "maieutics", reminiscent of the method used by a famous philosophe.

Ultimately, the distinction between "text" and "norm" is not a matter so difficult, but the issue of relations between the two concepts is more complex and nuanced[1].

5.2. Relations between "Text" and "Norm"

Once established the conceptual framework, a question arises why such a distinction is important and what role it has in explaining the interpretative function of the European judge.

Naturally, between "text" and "norm" would be a perfect correlation, meaning that a "norm" applied to a "text" and vice versa. Of course it is a goal which is rather ideal plan of legislative technique, in fact, as shown in an author, "there are no rare occasions when such correspondence is shattered" (Zagrebelski, 1988, p. 279). From this point of view, Di Manno (1997, p. 52) distinguishes besides situation "one disposition, one norm" that reflects the full correspondence between the two terms, the existence of other four hypotheses: a) "a disposition, several norms"; b) "a norm, several dispositions"; c) " norms without dispositions"; d) "dispositions without norms".

Next we will analyze the relationship between "text" and "norm" which, following and amending the aspect of terminology model proposed by Di Manno (Cimpoeru, 2010, pp. 67-74), fall into the following assumptions:

[1] Literally, "maieutics" is the art of acting as midwifery. Socrates uses this method with his disciples to bring to light their thoughts from hiding. Such a thought brings to light is the "birth" of him, and this because the thought (idea) already exists in the subject (as www.ro.wikipedia.org)

a) "a text, a norm";
b) "a text, several norms";
c) "several texts, a norm";
d) "norms without texts";
e) "texts without norms."

a) Hypothesis "a Text, a Norm"

This case represents the typical situation when there is a match between "text" of the law and the "norm" that it contains. In this case, it is only one possible interpretation, that the text under review is likely only one meaning, which may be in accordance or not with the rules of Community law.

b) Hypothesis "a Text, Several Norms"

The hypothesis implies that a Community act can text me extract more rules or otherwise, the text has multiple meanings. A mandatory feature is separability rules contained in text, which allows the elimination of a rule that does lead to suppression of the text.

There are two situations: a) due to ambiguity, its obscurity, the text into question can reveal a polysemy conducive to expression of multiple norms, it is what is called "dubious interpretation" when the interpreter operates a "screening" of the possible rules contained text; b) the text can comprise several distinct rules which all added, give meaning of the text (in the same sense, Zagrebelski, 1988, p. 280).

c) Hypothesis "Several Texts, a Norm"

We encounter this situation when the norm results from several different provisions at the same time. This is the case of rules which are deducted by a type of argument such as *per a contrario*, by analogy, by systemic interpretation, etc.

d) Hypothesis "Norms without Texts"

Modern legal order is based primarily on the written law. There are other sources of law such as customs or habits that generate legal rules. So in this category is included the customary rules (common law).

There are authors who include in this category also the principles of law (Guastini, 1989, pp. 27-28). We cannot agree with this claim because, in reality, the principles of law arising from the interpretation of a set of laws. It would be at least hazardously a contrary view that the principles of law, which are basically a general rule, do not have any "textual support" while these govern branches of law. From this point of view, the principles are different from other rules of law because of the degree of generality.

Regarding the relevance of customary law in the European legal control plan it is required some clarification.

From the European Community law it is not apparent, explicitly as the quality of source of custom, but this is not expressly denied. Present among the sources of international law, customary law is practically almost non-existent in Union.

Can be listed some arguments to highlight the considerable obstacles exist to the formation of such sources. First, it is the existence of special procedures for amending treaties. Another obstacle would be that the validity of any action of the institutions is checked against the treaties and not their practice, which means that from the point of view of treaties, customary law, in any case, cannot be created by the Community institutions.

However, any repeated practices that are in line with European texts as primary sources may have intended to form long term customary rules. Thus, it is noteworthy that at the community level, for now, is in the process of developing a custom: it is the practice of using increasingly more often in informal agreements established between institutions. Another example is the custom that the Secretaries of State which, although not members of the government, however, have the right to attend meetings of the ministers instead.

In no case, however, the CJEU will not analyze whether a Community customs because it was not recorded in any text, may not be subject to review of validity.

e) Hypothesis "Texts without Norms"

Hans Kelsen (1962, p. 6) states that "the norm expresses the idea that something must or may occur in particular that a man should behave a certain way" or otherwise "the norm is not a statement it does not describe an object, it is a prescription".

Starting from this classical definition, we can admit that there are normative texts prescribing certain conduct also non-normative texts lacking this element prescriptive. In this last hypothesis there are included a number of texts name by doctrine "rhetorical" (Comanducci & Guastini, 1987, pp. 39-40), such as: statements of principles and intentions, political programs that are usually found in the introduction of laws and not containing a prescription. According to an Italian author (Crisafulli, 1984, p. 199) in this category are included: a) "merely formal" laws; b) "repealing formulas" that are found at the end of such laws "shall repeal any other provision to the contrary"; in this case, the interpreter is the one who specifically determined which texts are repealed.

6. Conclusions

Returning to the issue in question, to those facts, we wonder if we can say categorically that the subject of the jurisdictional activity of the European judge in the preliminary ruling procedure is always "text" of the Community act also not the "norm".

In connection with this matter, but in terms of the national constitutional control, Di Manno proposes an *"intermediate"* or *"à l'italienne"* approach (1997, pp. 69-72)[1], which is applicable in the case of European preliminary ruling.

According to this theory, during the constitutional control, the constitutional judge shall conduct a constitutional analysis, not only the "text" of the law in relation to the "text" of the Constitution, but also on the "normative content" of that law compared to "norm" constitutional. This theory, with the amendments that we will do next, it can also apply to the activity of the European judge who has a similar interpretation function as a constitutional judge.

The "intermediary" theory proposed by Di Manno is undoubtedly worthy of interest and explains many of the mechanisms of the jurisdictional activity of the judge, even if we observe a certain terminological imprecision.

In our view, the object of interpretation is still "text" of the law and its purpose is to find its significance, namely the "norm" contained. The main limitation of the theory of "intermediate" by Di Manno is that it does not explain why the constitutional court has the right to examine and decide on the "norm", not just on the "text", while, in principle, the "norm" is the preserve of the legislature.

In our opinion, we believe that the explanation of this as possible from that prerogative is any judge, namely *iurisdictio*. Under his *iurisdictio* judge has the right to "say" (to "choice", to "indicate") which "norm" (sense, meaning) contained of "text" of a law is applicable to a particular case to a judge. In the case of preliminary ruling procedure, iurisdictio mechanism manifests itself in different ways depending on the type of litigation:

6.1. In the case of "litigation of interpretation" of the EU Treaties, because his original privilege - iurisdictio - the European judge is authorized to o "say" (to "choice", to "indicate") a certain "norm" from "text" as the Treaty relevant. Note that in this case the CJEU has an absolute and native competence to interpret officially Union treaties.

[1] The solution proposed by the author is based on the Italian Constitutional Court's practice, hence the name "à l'italienne". This theory is called "intermediate" to distinguish it from another current expressed radical doctrine that denies the right of the constitutional judge to determine the constitutionality of the „norm" which is included in the „text" of law under review (the exponent of the current, see in this regard Chiarelli, 1969, p. 283, Pierandrei, 1961, p. 177).

6.2. In the case of "litigation of interpretation" of EU derivatives acts (acts adopted by the institutions, bodies, offices or agencies of the European Union), the situation is more nuanced.

In this case, the interpretation becomes a dual aspect: the European judge will interpret both "norms" contained by of the derivative act (lower rank act) and "norms" from "text" EU Treaties (higher rank act) also, eventually, under the empire of *iurisdictio* will "choose" only the norm that is consistent with the "text" of Union treaties.

6.3. In the case of "litigation of legality" of EU derivatives acts (acts adopted by the institutions, bodies, offices or agencies of the European Union), the situation is similar to that presented in section 6. 2. Comparing the normative content of the derivative act with the higher act one, the judge can establish whether that the act is "valid" or "invalid" in relation to the EU Treaties.

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