

TELEOLOGICAL INTERPRETATION AS A METHOD OF ENSURING THE EFFECTIVENESS OF LAW IN PRACTICE OF THE EUROPEAN COURT OF JUSTICE

Teleological interpretation of law consists in ascertaining purpose of a legal norm and in further determination of conformity of a legal text with that purpose. The actual method of interpretation has not yet gained full recognition in the post Soviet legal science, which still shows a strong preference for such ways of interpretation as literal, historical, system ones etc¹. According to Legal Theory, teleological interpretation is accepted only at the stage of understanding law (the stage of so-called 'sympathetic interpretation') but any other applications at the stage of justification of law as a part of authentic interpretation² are usually paid no attention to³. A limited range of the methods of legal interpretation by the courts and authorities while they give authentic construction, no doubt restrains the process of securing the effectiveness of law. It has particular significance for application of the norms of International law. For example, adverse economical situation in Ukraine highlighted the problem of integration into regional economical unions. However, failure of integration efforts of our neighbours from the former Soviet Union pointed out a considerable shortcoming of all suchlike entities, namely the lack of elaborate and worked out mechanism of the effective implementation of the provisions of treaties entered into to the effect of such entities.

Nowadays, a wide experience of the European Community (hereinafter the EC) in implementation and enforcement of the fully effective provisions would stand in good stead for the states of the Commonwealth of Independent States (hereinafter - the CIS), especially regarding the EC being the greatest state-like entity which has transformed from a purely regional economical organisation to the solid common internal market featuring a close inter-governmental co-operation in the fields of justice, home and foreign affairs and security.

The present aim has been attained by means of, firstly, direct enforcement of EC law by individuals and, secondly, intensive application of broad teleological interpretation of provisions of the Rome Treaty (hereinafter - the Treaty) by the European Court of Justice (hereinafter - the ECJ) in the course of authentic construction of legal norms at the stage of justification of law. The ECJ under Article 164 of the Treaty shall "ensure that in the interpretation and application of this Treaty the law is observed". The ECJ clearly proved by its case law that application of broad teleological interpretation of provisions of the Treaty gives a considerable advantage in attaining the ultimate aim of the Community, namely the formation of a common internal market as provided for in Article 3a of the Treaty and therefore a power to exert a direct influence upon acceleration of the process of the European integration.

The EC has chosen reliance solely upon national authorities and courts as the most appropriate way of enforcing its provisions. This choice was justified by the fact that Member States have acquired greater powers in the field of legal regulation than the Community itself, therefore it was very logical to combine the great potential of national exclusive powers with the necessity of effective EC law. At the same time it was understood that if individuals may enforce their own rights under EC law and, specifically, claim remedies for violation of these rights directly before national courts, it could provide successful enforcement and implementation of the EC objectives.

There is no direct provision in the Treaty which may give a legal base for the possibility to exercise the right to claim remedies under the EC law before national courts. Nonetheless, broad teleological interpretation of Article 5 has allowed the ECJ to develop

the principle of state liability through the implementation of direct and indirect effects of the Treaty provisions as well as secondary legislation⁴. Unsurprisingly, Article 5 represents an example of vague statement, which has become an excellent soil for the ECJ's innovations in integration design: "Member States shall take all appropriate measures...to ensure fulfilment of the obligations arising out of this Treaty ...They shall facilitate the achievement of the Community's tasks.."

In the opinion of experts⁵, Article 5 constitutes the boundary between the EC's and Member States' powers provides for the possibility of carrying out EC policy through the national authorities. The construction of the Article was the proper tool in the hands of the ECJ for the development of the protection of individuals' rights under EC law.

The case law of the ECJ has established the scope of basic duties of Member States under the EC law. According to the leading authors on the matter, there are two basic duties of Member States: a duty to implement the EC law and ensure its full effectiveness as well as a duty to observe provisions which constitute fundamental rights rules and "general principles of law"⁶. These duties therefore proved to be able to provide effective application of the EC law for individuals with further transformation into the principle of state liability, duty of co-operation⁷ and duty of loyalty⁸.

Therefore, the wording of Article 5 contains the possibility for the implementation of the full effectiveness of the EC law in national legal systems, and as a consequence, the possibility to protect the rights of individuals under EC law before the national courts.

Effectiveness of EC law would be open to question had it lacked uniform application by all Member States. Consequently, new-established European legal order necessarily pursues an end of uniform application of EC law by national authorities⁹. This aim could be achieved exclusively through two principles. The first principle is that of uniform interpretation of EC law by national courts according to Article 177 and the other one is that of effective enforcement and implementation of the EC law in national legal orders, according to the duties of national authorities under Article 5. The concept of direct effect has been developed by the ECJ¹⁰ due to the necessity to grant the possibility to individuals to enforce rights under EC law before the national courts.

The ECJ established the precise test for justifying the direct effectiveness of a Treaty provision in the *Van Gend en Loos* case¹¹. Indisputably, this case was a real breakthrough in the establishment of the public enforcement mechanism of EC law provisions, by enforcing individuals rights either to invoke EC law against the public authority in a Member State or to invoke EC law against another individual or in order to invoke EC law against an individual by the Member State¹². The EC provision could be directly effective if it complies with the following criteria: a) the provision must be clear and unambiguous; b) it must be unconditional; c) its operation must not be dependent on further action being taken by Community or national authorities.

Unfortunately, the enforcement of the rights of individuals under the EC law through the application of directives shows a gap due to the absence of direct effect of directives, according to the considered concept of directive in Articles 189 of the Treaty and Article 161 of the Euroatom, which states that directives are binding only "as to the result to be achieved" and leaves "the choice of form and methods to national authorities". Furthermore, the ECJ has promulgated the possibility of directives' direct effect in the *Van Duyn* case, where stated that "...it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked"¹³.

However, the scope of individual's rights protection under directives remained limited. The ECJ finally declared in *Marshall*¹⁴ and *Faccini Dori*¹⁵ that directives have only vertical but not horizontal direct effect and "may not ..impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a

person"¹⁶. The ECJ substantiated its decision on the ground that under Article 189 of the Treaty directives are addressed, and therefore binding, upon exclusively Member-States. Nonetheless, the ECJ has tried to solve this legal conflict by the broadening of the national authority's scope, in the *Foster* case this scope was broadened to "organisations or bodies which are subject to...control of the State"¹⁷.

Moreover, having applied the principle of broad teleological interpretation the ECJ held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee, and is not sufficient to ensure the full and complete implementation of the Treaty. Thus, the second alternative to the very limited scope of Article 189 and, consequently, protection of individuals under the directives, was the development of the indirect effect doctrine.

The actual doctrine has been developed through broad teleological interpretation which established the obligation to construe national law under Article 5 in a way that gives effect to EC law in order to improve the effectiveness of the EC law in particular directives¹⁸ and interpret national law in conformity with EC law in spite of the absence of direct effect. The principle of construction has formed the duty of sympathetic interpretation¹⁹ or doctrine of indirect effect. This doctrine was a pure innovation of the ECJ in order to provide direct effect to directives which can not impose obligations and confer rights to individuals under EC law. The *Von Colson* case has established the doctrine of indirect effect in the following wording: "However, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation"²⁰.

It was a very significant approach to use Article 5 as a base for enforcement of EC law for the effective application of the EC law for individuals. Subsequently, this case has established the duty on national courts to interpret national law in light of the EC law. In the opinion of the ECJ, all duties of national courts to apply EC law in such way as to achieve the EC's objectives flows directly from the wording of Article 5.

The *Von Colson* formula was extended in the *Marleasing* case. Article 5 was again used in the legal reasoning: "In applying national law, whether the provisions concerned pre date or post date the directive, the national court asked to interpret national law is bound to do so in every way possible in the light of the text and the aim of the directive to achieve the results envisaged by it"²¹.

However, the requirement to interpret national law in conformity with EC law was a rather ambiguous obligation. It was understood that the necessity to read national law "in so far as possible in conformity with relevant directive was too broad and ineffective"²².

Nonetheless, *Marleasing* has strengthened the obligation on national courts to comply with the duty of solidarity and the duty to provide effective enjoyment²³. Herein, the duty of solidarity becomes the requirement of effective enjoyment in order to maintain and enhance the protection of individual rights across the Community.

Therefore it is clear that broad teleological interpretation of the wording of Article 5 of the Treaty by the ECJ significantly contributed to proper functioning of the indirect effect doctrine.

The establishment of state responsibility for breaches of EC law in the *Francovich* judgement constituted a further step of the ECJ in applying broad teleological interpretation. This case, on the one hand represents new stage in the protection of individuals rights under EC law, on the other hand it is "nothing more than a logical development of previous case law"²⁴.

The applicant insisted on the liability of the State for payment of compensation either by virtue of a directly effective provision of directive or on the grounds of liability for a failure to act. Finally, the ECJ provided the possibility of uniform remedies against a

Member State for breach of its own obligations under EC law in the absence of a directly effective provision of the EC law. The ECJ held the State liable and substantiated his decision on the grounds that: as long as "...the full effectiveness of Community provisions would be affected ...if individuals were not able to recover damages when their rights were infringed by a breach of Community law..." and regarding that "the possibility of obtaining damages from the State is particularly essential where...the full effect of Community provision is conditionally the State taking certain action ...in the absence of such action being taken, individuals cannot rely on the rights accorded to them by Community...", "...principle of liability of the Stateis inherent in the scheme of the Treaty"²⁵.

Francovich significantly evaded the role of Article 5 as an instrument of individual rights protection and recognition of the supremacy of the EC law, and noted the importance of the nature of the breach of EC law as a significant condition in determining liability in damages: "The obligation on Member States to make good the damage is also based on Article 5 of the Treaty, under which the Member States are bound to take all appropriate measures ...to ensure fulfilment of the obligations arising under Community law".

According to the ECJ's decision, *Francovich* specifies and creates two types of the state liability. The first relates to breaches of express duties conferred by the Treaty and secondary legislation. The second type of liability concerns claims, such as breach of an obligation created by general principles recognised by the ECJ under Article 5²⁶. It creates the excellent capacity for an action for damages by an individual for any breach of Article 5 by Member State.

In further case law the ECJ has extended the scope of the application of state liability. In the *British Telecom* case the principle of State liability has been applied in the case of incorrect partial implementation of a directive²⁷, in *Hedley Lomas* this principle has been applied in the case of an individual decision on the part of a national administration which was in breach of a directly effective Treaty provision²⁸, subsequently in *Factorame III* in the case of a legislative act and a legislative omission in *Brasserie du Pecheur*.

Therefore, the *Francovich* judgement has maximised the effectiveness and supremacy of EC law as a response both to its failure to give full direct effect to directives and to the distinction between vertical and horizontal effects of directives and laid down the foundations of state liability in damages²⁹.

Teleological interpretation of Article 5 for the possibility of the substantive and effective enjoyment of directly effective EC rights was extended in *Brasserie du Pecheur and Factorame III*³⁰. It was stated there that in spite of the absence of express provisions of the Treaty to provide States liability in damages, this liability is a vital element for the complete effectiveness of the EC law, and in addition, that the obligation to provide a remedy is a part of the Member State's duty under Article 5.

The *Francovich* judgement used Article 5 as the legal base for the transfer of individually oriented rights into fundamental rights, guaranteeing the right of compensation for breach of the EC law by national authorities. Consequently, any claim on behalf of the individual could be based on the breach of Article 5 by the Member State³¹.

The full effectiveness of EC law is based on correct implementation, enforcement and compliance with the EC law³². In case of derogation from duties under Article 5 by Member States, it may constitute a legal base for the following sanctions: 1) taking its own decision to use direct effect for more effective transposition of EC law into national law; 2) declaring the national law incompatible with EC law; 3) issuing injunctions.

The ECJ has ensured in its case law that full effectiveness of EC provisions entails complete judicial protection of individuals³³. The reasoning of the ECJ, as a justification of the judicial protection of individuals, was based on the duties of national authorities under Article 5, *inter alia* the duty to adopt all necessary measures to implement the directive or general obligation in Article 5 in order to ensure the proper implementation of the EC law.

The development of the principle of state liability by the ECJ has shown the progressive approach, by providing direct effect and indirect effect to the Treaty provisions and establishment of effective judicial protection of individuals under EC law³⁴.

Therefore, the present example of providing for supremacy and effectiveness of the EC law within the territories of all Member-States by means of teleological interpretation of Article 5 of the Treaty is called upon to stress a special position of the ECJ among other Community institutions. Its competence flowing from the wording of Article 164 of the Treaty enabled extensive application of the method of teleological interpretation of the Treaty provisions as well as secondary legislation of the Community in the course of authentic construction at the stage of justification of law. All the above-mentioned factors made for gaining by the ECJ the firm hold as a guardian of the supremacy and effectiveness of the Community law at the territories of Member-States.

Thus, vesting extensive powers in a supreme judicial body as to teleological interpretation of provision of treaties on establishment of inter-state custom unions or other forms of international integration seems to be one of the key-points of successful functioning of such a union. Supremacy and effectiveness of provisions of a treaty like that would be secured only if all main purposes of establishment of an economical union as well as clear competence of a court as to applying a method of teleological interpretation are stipulated for in a treaty.

¹ Other methods of interpretation envisage judicial and logistic ones. For more details see: Общая теория государства и права / Под ред. М.Н. Марченко: Т.2. - М., 1998. - С. 327; Шляпчиков А.С.. Толкование советского уголовного закона. - М., 1960. - С. 150-237; Фаткуллин Ф.Н.. Проблемы теории государства и права: Курс лекций - Казань, 1987. - С. 242-

² However, the English legal terminology on the matter is not settled and translation proposed by the authors is rather literal than contextual, pertinent to English law itself. See, for example: Marmor A. Interpretation and legal theory. - Clarendon Press Oxford. 1992. - P. 71.

³ See: Теория права и государства / Под ред. В.В. Лазарева: М., 1997. - С. 202.

⁴ Traditionally the distinction is drawn between on the one hand the treaties on creation of the EC as the Rome and Maasricht Treaties which laid down fundamental principles and developed main rules of the Community and so are considered to be the main legislation of the EC; and on the other hand the rest of acts namely directives, regulations, decisions, recommendations and opinions which are considered to be the *secondary* legislation.

⁵ Lang T. Community Constitutional Law: Article 5 EEC Treaty 27 Common Market Law Review (hereinafter referred to as CMLRev). 1990. - P. 645.

⁶ See, for example, Temple Lang J. The Duties of National Authorities under Community Constitutional Law. DELI, European Law Lecture, - 1997. According to Temple Lang there are, firstly, a duty when necessary to make Community laws to work the way they are intended to work" and a second duty "not to interfere with that way that they are intended to work".

⁷ The duty of cooperation requires national authorities to facilitate the achievement of the Commission's goals under Article 155 and providing of any requested information.

⁸ The duty of loyalty has mutual character and requires both national and the EC authorities to assist in achieving common goals, like provision of information and other forms of

- assistance // Case C- 2/88 *Imm Zwartveld* [1990] ECR I-3365 and case C-234/89 *Delimitis v. Henninger Brau AG* [1991] ECR I-935.
- ⁹ Shaw J. Law of the European Union. 2nd edition. - Macmillan, 1996. - P. 232.
- ¹⁰ Петров Р. А. Пряма дія та труднощі механізму застосування права Європейського Союзу // Правничий часопис Донецького університету, - 1997. - № 1 - С. 23-26.
- ¹¹ Case 26/62 *N. V. Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963], ECR I.
- ¹² Hartley T. C. The Foundation of European Community Law. Clarendon Press, Oxford, 1994, P.195.
- ¹³ Case 41/74, *Van Duyn v. Home Office*, [1974] ECR 1334.
- ¹⁴ Case 152/84, *Marshall v. Southampton*, [1986] ECR 723.
- ¹⁵ Case C-91/92 *Faccini Dori* [1992] ECR I-3325.
- ¹⁶ Ibid.
- ¹⁷ Case C-188/89, *Foster and Others v. British Gas plc* [1990] ECR I-3313.
- ¹⁸ Clive Lewis and Sarah Moore, Duties, Directives and Damages in European Community Law, Public Law, (1993), p.131-170.
- ¹⁹ Shaw J. Supra work. - P. 230.
- ²⁰ Case 14/83, *Von Colson and Camann v. Land Nordrhein-Westfalen*, [1984] ECR 1891.
- ²¹ Case C- 106/89, *Marleasing v. La Comercial Internacional de Alimentacion* [1990] ECR I-4135.
- ²² Lewis Clive and Moore Sarah. Supra note.
- ²³ Ross M., Beyond *Francovich* MLR 56 (1993).
- ²⁴ Van Gerven M. Non Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a view to a common law of Europe // MJ 1. - 1994. - p. 6 at 12. See cases: 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595, 6/60 *Jean Humblet v. Belgian State* [1960] ECR 559 at p.569, case 60 / 75 *Russo v. ALMA* [1976] ECR 45.
- ²⁵ Joined cases C-6/90 та C-9/90 *Francovich and Others v. Italy* [1990] ECR I-5357.
- ²⁶ Ross M. Beyond *Francovich*.
- ²⁷ Case C-39/93 *R. v. Her Majesty's Treasury, ex parte British Telecommunications*, [1996] ECR I-1631.
- ²⁸ Case C-5/94 *Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas*, [1996], ECR I-2553.
- ²⁹ Lewis C., Moore S. Duties, Directives and Damages in European Community Law.
- ³⁰ Joined cases C-46/93 та C-48/93, *Brasserie du Pecheur v. Germany and The Queen v. Secretary of State for Transport, ex parte Factortame* [1996] ECR I-1029.
- ³¹ Emiliou N. State Liability Under Community Law: Shedding More Light on the *Francovich* principle?
- ³² Ibid. It was reiterated in a Declaration on the Implementation of Community law, annexed to the Maastricht Treaty.
- ³³ Barav, A. State Liability in Damages for Breach of Community Law in the National Courts//*Henkins T./ McDonnell A., The Action for Damages in Community Law, 1997, T.M.C. Asser Institute.*
- ³⁴ Van Gerven W. Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies? // CMLRev, 32. - 1995. - P. 679-703.