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EVOLUTION OF THE SCHOLARSHIP ON THE TELEOLOGICAL METHOD OF LEGAL INTERPRETATION BY THE COURT OF JUSTICE OF THE EU: SOME OF THE MOST PROMINENT VOICES REVIEWED[2]

Abstract

This paper reviews in a chronological order two seminal works of the distinguished authors from a considerably rich scholarship dedicated to the teleological method of legal interpretation of the CJEU. The purpose is to highlight how the research on this subject evolved over time. Writing extra-judicially, the authors of the reviewed papers are Advocate General Nial Fennelly as well as the Vice-President of the Court of Justice of the European Union Koen Lenaerts and the Legal Secretary at the Cabinet of the Vice-President José A. Gutiérrez-Fons, which once read together takes the shape of a thought-provoking dialogue and gives a profound insightful insight from inside the Luxembourg Court about the place of teleological interpretative method in 90s and almost a decade later.

Key words: Methods of legal reasoning, CJEU/ECJ, teleological interpretation, normative significance of the method, combined application of legal interpretative methods

Introduction

The landmark decisions of *Van Gend en Loos* and *Costa v ENEL* by ECJ in early 1960s ruled that the EU (EC that time) 'constitutes a new legal order of international law' and that in contrast with ordinary international treaties', 'the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply." This created the new reality, which made it unequivocal that the constitutional autonomy of the regional organization of economic integration had been created in an unprecedented manner through teleological method of legal reasoning.

This paper reviews in a chronological order two seminal works of the distinguished authors from a considerably rich scholarship dedicated to the teleological method of the CJEU. The authors of the reviewed papers are Advocate General (AG) Nial Fennelly as well as the Vice-President of the Court of Justice of the European Union Koen Lenaerts together with the Legal Secretary at the Cabinet of the Vice-President José A. Gutiérrez-Fons, which once highlighted side by side, takes some form of a thought-provoking dialogue and gives a profound insight about their perceptions, as of the distinguished and authoritative representatives of epistemic communities, regarding the teleological interpretative method in 1990s and belatedly, almost a decade later. Hence, the purpose is not only to outline how the research and approaches on this subject evolved over time. But rather, the question also is whether the approach of a normative significance attached

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to the teleological method of legal reasoning and it's apparent superiority across other interpretive methods as highlighted in the early years of the court decisions, is supported by the prominent authors who, even if wrote their articles in an extra-judicial capacities, still provided a very unique personal experience-based reflections that could be considered as an indirect insight from inside the Luxembourg Court.

I. The insight from inside the court– the Irish Advocate General on the teleological method of interpretation of ECJ

In 1996 Nial Fennelly, the Advocate General from Ireland at ECJ at the moment of writing of his article on "Legal Interpretation at the European Court of Justice"[3] (belatedly a Judge of the same court), considers the ECJ's approach to the legal interpretation from the prism of the importance of the readiness of any lawyer to go beyond the 'plain words' perspective and instead to take a bold enough-approach in order to explore both the purpose as well as the context of the legal provisions. It is not difficult to guess that a teleological method or as he puts it - the 'true intention of the lawmakers'[4] exploited by the Luxembourg court is the main concern of his essay.

Author is drawing on three 'preliminary' points that influenced the interpretative character of the ECJ: 1. A French law impact on extracting the legal principles and procedures, which is significant if one takes into consideration its practice of judicial review of administrative action at the Conseil d'Etat/Council of State; 2. The very fact that against all odds the accession of the common law countries affected only the style and not the substance of opinions of the court composition, which facilitated the 'crossing of Rubicon' by carving out the essence of the principle of interpretation in the seminal 1963 decision *Van Gend en Loos,* which stipulated a necessity of consideration of the "spirit, general scheme and the wording" of the provision*;* And, 3. The tricky nature of the principle of 'Equal authenticity of all official languages of the union', which even if well elaborated under CILFIT decision (Case 283/81, 1982), still puts French (as a working language of the court)- in a somewhat superior condition.

Two other general observations by the author, pin to the point that during the search of the meaning of the legal text, it is important to identify, - firstly, the guiding interpretative principle and only after that to go for the individual techniques and practices (such as comparison of different language versions). With this statement, one can get an impression that the author tried to establish a certain type of a hierarchy across the interpretative methods. Furthermore, he specified the meaning of a 'guiding principle' in the next subsection of his article, by making reference to the earliest decisions of the Court in 1950's: - when anchoring on Article 215 of EC Treaty, a method of a comparative analyses of the laws of the Member States, he says, which would wrap up in the restatement of the synthesis of it's results as an 'autonomous principle of Community Law' - was a common exercise during the adjudicative process.[5]

Fennelly puts a teleological method of legislative interpretation at the center of the stage by labeling it as the 'interpretive principle' which could be considered by the reader as a claim about it's superior nature *vis-a vis* other approaches. He says, that on the one hand, the case law on ambiguity - related to the linguistic divergence, as well as the inaccessibility of national courts of more than three foreign languages during the interpretative exercises, on the other, - demonstrates the dangers of relying on pure 'wording' and the risks related to a strict textual analysis; hence, when this kind of scenario emerges before the court, he says a purposeful approach could create a more reliable environment and could be easily justified, irrespective of the fact that it does not create an undisputable precondition for the reference to the teleological interpretation.

Teleological interpretation – as a preferred method of adjudication of the court since the very early stages of it's development, he says, became an acceptable methodology partially due to the influence of the French courts, but at the same time no one should ignore that this 'permissive consensus' was a result of the ends-driven processes: it emerged due to the need of facilitation of the achievement of the key objectives of the founding Treaties related to the successful economic integration of the community members. Hence, as the author mentions, this particularity creates the ECJ's unique stance: " it's role is distinct from that of a neutral

[3] Nial Fennelly, ***Legal Interpretation at the*** European Court of Justice, ***Fordham International Law Journal,*** Vol. 20, Issue 3, 1996, pp.656-679.

[4] ***Ibid.*** p. 657.

[5] Ibid. p. 663.

arbiter played by the normal court in a Member State whose task is to hold the scales of justice evenly between parties or between citizens and state."6

This was the reason, as Fennelly says, why the groundbreaking *Van Gend en Loos* formulation on necessity of consideration of "the spirit, the general scheme and the wording" or "the general scheme and the purpose of the regulatory system of which the provisions in question form part"- was expanded later by supplementing to it the need for consideration of "the system and objectives of the Treaty" as well as the context. Taking into consideration how all these developments evolved the teleological method over time, Fennelly takes an umbrella term and calls it a 'broad interpretative principle', which leads him to describe the actual process of how in practice the court "extracts the aim and purpose of the treaties": In this part, author makes us to understand that the court cannot dig into the *'travaux preparatoires'* of the founding treaties for the simple reason of it does not exist, however, whenever there is an access to other material, such as the *Declarations* of the Members States, legislative history of the communities' supranational institutions, the intended legislative proposals or even the draft *aquis* "where it sees those texts as being intended to ensure that a particular regulatory regime is compatible with the EC Treaty" – the court may place its reliance during interpretation of the provision.

If there had not been the effect related to the establishment of the constitutional autonomy, all of the above mentioned would not make it vividly distinct from the traditional principles of interpretation of international law, as envisaged under Article 31.1 of 1969 Vienna Convention on the Law of Treaties (VCLT) that provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose," which, as author explains it, had been applied by the ECJ several times for the purposes of interpretation of international agreements concluded by the communities as well as the third countries; However, unlike the Community Treaties, those do not lay ground neither for any transfer of sovereignty or sovereign rights, nor does it establish a 'new legal order' as stated under *Van Gend en Loos*. Therefore, he says, it would be a mistake to consider a teleological interpretation as an invention of the ECJ, because, as Fennelly puts it, we witnessed merely an 'adoption' and 'employment' of already existing interpretive method, which was pedestalled and provided with a solid scaffold of the procedures and the legal remedies such as the 'preliminary reference mechanism' - for the purposes "to secure a uniform interpretation of Community law throughout all the Member States by assigning to the Court a monopoly of final interpretation."[7]

Herewith, it is to be mentioned that the doctrine of 'effectiveness'/ '*effet utile'* is considered by the author as a principal corollary to the teleological method, which is applied only after the 'purpose' of the legal provision is already identified and once the only task left is to facilitate that the provision retains it's effectiveness, consistency and uniformity in application of the community *aquis* – a method of legal reasoning of the Luxembourg Court that extended the community law rights to individuals, filled in the *lacunae* (occasionally also supplementing by the "principles of law derived from the laws and constitutions of the Member States and the European Convention of Human Rights") as well as demonstrated that the court was serious on its intentions to "construct a complete system of judicial protection of individual rights in those areas governed by Community law."

In a summary, the author underlines that the due account given to the teleological method of legal reasoning is determined by it's *sui generis* particularity, through which the priority was given to the key proclaimed objective - the European integration of the EC treaty, which was interpreted as a "treaty establishing a new legal order going beyond an international agreement between sovereign states."

II. Teleological method of legal interpretation beyond the 'primus inter pares' frame of thinking of the Luxembourg Court

Almost a decade later after AG Nial Fennelly published his article, the epistemic communities witnessed that the Vice-President of the Court of Justice of the European Union Koen Lenaerts and Legal Secretary at the Cabinet of the Vice-President José A. Gutiérrez-Fons made an extensive review of the methods of legal

6 Ibid.

7 Ibid.

reasoning of the Luxembourg Court, which was first revealed within the frames of the EUI distinguished lecture series.8 The authors allocated the discussion on the Teleological method of judicial reasoning among the classic methods of interpretation; namely, after textualism and contextualism, they discussed their perspective on how the teleological method is to be comprehended. Afterwards they went into the review of the method of the consistent interpretation (both - its external and internal dimensions), which facilitates interpretation of the EU law in light of International Law and in the light of the Constitutional Traditions common to the Member States.9

The authors underline a very important and at the same time quite a difficult assignment for the Court to find a right balance during exercising jurisdiction, where avoiding intrusion in the prerogatives of legislative branch via 'judicial activism' and the risk of a broad decisions that could lead to the Treaty amendments is at stake. From this standpoint, they suggest, that scrupulous approach is undertaken: on the one hand, the Court should not restrain itself from interpreting the obscure provisions in order to meet the principle of effective judicial protection envisaged under Article 19 TEU and Article 47 of Charter. While, on the other hand, it is important to take into account the principle of inter-institutional balance and the principle of mutual sincere cooperation enshrined under Article 13.2 TEU: "to say what the law of the EU is, involves a complex balancing exercise which must be struck in a pluralist environment where the mutual exchange of ideas is of the essence." By making reference to the salience of a combined reading of *Les Verts* 10 and *UPA*11 decisions, they come to the important point that leads to their main conclusion: "The different methods of interpretation to which the ECJ has recourse operate as a means of achieving that delicate balance."12

The authors recognize the 'specific normative importance' and a significant role of the teleological method of interpretation in the legal reasoning of the ECJ. At the same time, they substantiate profound counter-arguments against the famous prejudices, which claim that this is the method, which horizontally encroaches upon political process, undermines the principle of democracy, affect national sovereignty or results in a competence creep. Contrary to the view of some scholars, Koen Lenaerts and José A. Gutiérrez-Fons, demonstrated that actual compliance with article 19 TEU obligates the court to fill in the normative gaps of the Treaties, while the Constitutional traditions common to the Member States had always been respected. Besides, they say that filling the normative lacunae does not necessarily mean the increased scope of the legal provision (as a response to the 'under-inclusive' provisions), but contrary to this assumption, it also can result in the reduction of the scope of it's 'over-inclusive' meaning (so called 'teleological reduction') where it becomes obvious that the 'founding fathers' of the EU *aquis* had something different on their minds (i.e. the broad or the narrow interpretation of the EU legal act depends on the objectives pursued by it13). At the same time, they claim that because this method is engaging judges to elaborate the extensive reasoning and the sound justifications about the objectives/'*telos*' of the legal provisions which are subject to judicial interpretation, the authors believe that this exercise is resulting into the increased judicial accountability and a more profound public scrutiny, thus contributing to the input legitimacy or in other words into the increased democratization of the EU court system.

However, at the same time they make clear that they do not believe in a 'purpose-driven functionalism' because, as they explain, except for the Charter of Fundamental Rights[14], there is no provision in the Treaties

[8] Koen Lenaerts and José A. Gutiérrez-Fons, ***To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice***, 2013, EUI Working Paper AEL 2013/9 , European University Institute , Academy of European Law, Distinguished Lectures of the Academy, Distinguished Lecture delivered on the occasion of the XXIV Law of the European Union course of the Academy of European Law, on 6 July 2013.

[9] For more information about the methods of legal interpretation of CJEU please refer to the following literature: Ch. 14 'Methods of Interpretation' in L. Neville Brown and Tom Kennedy, ***The Court of Justice of the European Communities,*** Fifth edition, Sweet and Maxwell, 2000; Elina Paunio, ***Legal Certainty in Multilingual EU Law, Language, Discourse and Reasoning at the European court of Justice,*** 2016, Routledge, Taylor & Francis Group, Law, Language and Communication; Gerard Conway, ***The Limits of Legal Reasoning and the European Court of Justice,*** Cambridge University Press, 2012, etc.

[10] ***Parti écologiste "Les Verts" v European Parliament***, Action for annulment - Information campaign for the elections to the European Parliament, Case 294/83, Judgment of the Court of 23 April 1986.

[11] ***Unión de Pequeños Agricultores v Council of the European Union***. Appeal - Regulation (EC) No 1638/98 - Common organization of the market in oils and fats - Action for annulment - Person individually concerned - Effective judicial protection - Admissibility. Case C-50/00 P, Judgment of the Court of 25 July 2002.

[12] Koen Lenaerts and José A. Gutiérrez-Fons, ***Supra note***.

[13] ***Ibid.*** p.26, p. 47.

[14] Authors define that "Unlike the Charter itself, the explanations relating to it – which were originally prepared under the

that gives precedence to any method of legal reasoning of ECJ. Based on these arguments, the authors demonstrate that they credit a non-dogmatic approach and a holistic stance. In their case it means that- every time the need of shedding the light to the legal provisions of ambiguous, obscure or incomplete nature emerges before the court, – it allows ECJ either to choose freely any method that best serves the EU legal order, or alternatively, to try a 'combined application of methods', which paves the way to operate in a 'mutually reinforcing relationship'[15]. With this approach, it becomes obvious that unlike AG Fennelly, the authors - Lenaerts and Gutiérrez-Fons do not put any excessive weight to the teleological method, but at the same time do not deconsecrate it totally either. And for this latter approach of theirs, they had been criticized for example by Soroga and Mercesc[16], who said that, even if Lenaerts and Gutiérrez-Fons provided a doctrinal classification of teleological method while drawing extensively on the analyses of Bengoetxea[17] (who says that there are three types of teleological interpretation in the practice of the ECJ: 'functional interpretation', 'teleological interpretation *stricto sensu*' and 'consequentialist interpretation'), it did not help to make clear what is the justification of the Court's selective use of this method, concluding that "purposive interpretation may be viewed more as a tool to justify the Court's choice of outcome, rather than a constraining legal reasoning tool on which the result is based".[18] However, they had not been criticized for their main claim that teleological method should not be given precedence over other methods of legal reasoning and depending on a nature of a legal issue in the case, it might be used in a combined manner.

Conclusion

When one thinks of what accounts to the relevance of the teleological method of interpretation, no-one can underestimate the role the ECJ played in early years of European integration via adopting this particular interpretive method not only for the 'gap-filling' of the existing regulatory framework but also for using it extensively for the purposes of the establishment of the constitutional autonomy of the EU Law (that time EC law). With the help of the purpose-driven/ teleological interpretive method the European integration through EC Treaty had been cemented as a 'new legal order'; at the same time, the Luxembourg Court ensured the uniform interpretation of community law across Member States as well as secured a monopoly for itself to make the final interpretation. As we could observe above, through adoption of the teleological method of interpretation the ECJ made obvious that its stance became distinct from that of the ordinary national courts who had to be just a neutral arbiter or to put in another words- a mere technical institute responsible for settling disputes. This was foremost because of the fact that the establishment of the constitutional autonomy of the EU Law (EC Law) was an ends-driven process, because it had to facilitate the achievement of the key objective of the founding Treaties, which was the successful economic integration of the EU.

In a summary, while Fennely embraced the image of the all-mighty nature of the teleological method of Court's reasoning (enough to mention his famous phrase that 'the characteristic element in the ECJ's interpretative method is ... the so-called "teleological" approach'[19]) - we witnessed a somehow downgraded reference to its actual place across other interpretative methods in the article co-authored by Lenaerts and Gutiérrez-Fons. However, their proposed re-classification of the teleological approach from the 'grand' interpretative method placed at the top of the hypothetical pyramid into a middle–range tool, which can be used as one from many or in combination with other methods, - did not put under the question mark it's role played in the past for the integrative purposes, for which a deserved tribute had been duly paid. Additionally, Lenaerts and Gutiérrez-Fons provided a well-elaborated arguments against those scientists who have a radically deferential stance against any use of it, which demonstrates that still, some hypothetical potential is left that a normative significance attached to the teleological method of legal reasoning might obstinate at certain moment in the future.

authority of the Praesidium of the Convention which drafted the Charter –'do not as such have the status of law'. However, 'they are a valuable tool of interpretation intended to clarify the provisions of the Charter' " ***Ibid.,*** p. 41.

15 ***Ibid.***

16 Sorina Doroga and Alexandra Mercesc, ***A Call to Impossibility: The Methodology of Interpretation at The European Court of Justice and The PSPP Ruling***, EJLS 13(2), November 2021, 87-120.

17 Joxerramon Bengoetxea, ***The Legal Reasoning of the European Court of Justice***, Oxford, Clarendon, 1993 in Doroga and Mercesc, Supra note.

18 ***Ibid.***

19 Fennelly, ***Supra note***, p. 664.

Irrespective of my intention to outline the differences in the opinions on the teleological interpretative method between Fennely, on the one hand and Lenaerts and Gutiérrez-Fons on the other, my aim was not to ignore the objective reality that two works belong to two different periods of integration history. Understanding the role of the ECJ in the integrative process via using teleological method of interpretation cannot be considered separately from the overall context of integration history as well as the particularity of the momentum. Hence an attempt to put these authors in a 'dialogic mode' might seem a bit controversial, but I hope, still interesting for the purposes of assessing at least partially- the place of the teleological method of interpretation in the mindset of some prominent members of the ECJ.