

HISTORICAL INTERPRETATION IN THE ECJ PRACTICE

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Historical interpretation of law is considered by the legal theory to concentrate on analysis of documents connected to the process of creating a relevant legal text. This too narrow understanding is sometimes complemented by an opinion saying the historical interpretation is based on making the sense of legal norm clear taking into consideration the goal followed by its promulgation and reflecting upon social conditions under which the act came into force. This approach combines teleological and historical interpretation. Best description of historical interpretation would probably be the one according to which legal norm is being created in a specific situation given by many different factors of social and historical development, influencing the content of the norm. Comparative method comparing the prior and later legal regulation has its place here as well. However, neither this definition is perfect.

In the (Czecho-)Slovak judicial practice, historical argumentation is used by judiciary as:

- negative historic experience serving as an argument for the importance of current regulation,
- making the origin of a legal institution clear in the context of universal (world) legal history,
- historical context of Slovak legal regulation setting the legal norm into the historic context of its creation,
- denying or putting in question a historical legal institution or legal interpretation under new conditions,
- using historical law in practice,

- simple declaration of historical development and formal declaration of using historical interpretation without further elaboration.

As historical interpretation in a broad sense one can understand all the abovementioned ways of using history (historical argumentation) with the exception of simple usage of past (historical) law and of simple declaration of historical development.

Using the method of searching in electronical database of European Court of Justice decisions by key word „historical“ or by the root of the word – „histor“ one may come across a number of decisions, opinions or other materials connected to the ECJ practice, where historical argumentation is used.

Historical context of legal regulation setting a legal norm into the historical context of its creation is represented for instance by the Judgment of the Court (Grand Chamber) from October 23, 2007 in Case C-112/05, where the Commission of the European Communities was an applicant and Federal Republic of Germany a defendant. This decision deals in detail with the history of passing so called Volkswagen Law.

Denying or putting in question a historical legal institution or legal interpretation under new conditions can be found in the Opinion of Advocate General Kokott delivered on September 7, 2006, in Case C-284/04 T-Mobile Austria GmbH and Others v. Republic of Austria where evolutive interpretation was sought by the T-Mobile Austria arguing that in the new conditions the legislator would have intended and decreed otherwise.

Simple declaration of historical development and formal declaration of using historical interpretation without further elaboration is to be found in the Judgment of the Third Chamber from October 11, 2007 in Case C-460/06 Nadine Paquay v. Société d’architectes Hoet + Minne SPRL, where the historical argumentation of national court is mentioned without further elaborations on the level of European Court of Justice.

Declaration of missing historical argumentation was pronounced for example in the Opinion of Advocate General Sharpston from March 8, 2007 in Case C-434/05 Stichting Regionaal Opleidingen Centrum Noord-Kennemerland/West-Friesland (Horizon College) v. Staatssecretaris van Financiën where because of lack of any materials on the new provision no historical interpretation could have been made.

Making the origin of a legal institution clear in the context of universal legal history was probably the goal of a short overview on the development of insolvency and bankruptcy offered in the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-1/04 *Susanne Staubitz-Schreiber*.

To conclude, from the abovementioned number of ways of using historical argumentation in the practice of Slovak and Czechoslovak courts one can find only some in the practice of European Court of Justice. These are:

- Historical context of legal regulation setting a legal norm into the historical context of its creation
- Denying or putting in question a historical legal institution or legal interpretation under new conditions
- Simple declaration of historical development and formal declaration of using historical interpretation without further elaboration
- Making the origin of a legal institution clear in the context of universal legal history

Past (historical law) is not being applied, just like the negative historical experience to stress the necessity of a certain institute. On the other hand, one may find another type of historical argumentation – declaration of missing historical argumentation. These differences are most probably to be explained by the negative experience of post-communist countries of Central Europe on one hand and by the relative modernity of European law without any obvious tight bonds with the previous historical regulations on national levels.

In general, the attitude of European Court of Justice towards the historical interpretation is rather negative, prioritizing literal or grammatical interpretation. Research in the circumstances of approval of certain legal regulation is allowed only in case of legal norm explicitly addressing certain materials, deliberations or minutes from the process of preparatory works. This is the viewpoint of the ECJ for instance in Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18, according to which one can not invoke statements pronounced in the deliberations of Council unless the provision of the norm does not invoke these deliberations or declarations.

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