МЕЖДУНАРОДНОЕ ПРАВО

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MODERN METHODOLOGICAL TRANSFORMATIONS OF INTERPRETATION IN INTERNATIONAL LAW

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SUMMARY

The article analyses modern methodological transformations of interpretation in international law interpretation. It is proved, that the question of interpretation became for modern international law, which in a globalized world and virtualization of reality should help to eliminate legal and political conflicts at the international level, to ensure compliance of human rights.

The problem is complicated by the fact that in international law there is no single author of a legal act that is subject to interpretation, hence the question arises: the intentions of which author to prioritize. It is a question of the possibility of methodology that would provide the maximum possible objectivity of interpretation. On the basis of the investigation, it is claimed, that the evolutionary approach is becoming increasingly important in international law interpretation, although it cannot and should not oust the others. The main feature of the evolutionary approach in the "new" history of interpretation is its focus on a human being, his interests, rights and freedoms. The confirmation of the updated evolutionary approach in interpretive activity is evidence of deep transformations of international law methodology.

Key words: interpretation in international law, methodological transformations, evolutionary approach to interpretation, classical and post-classical approaches to interpretation, the Vienna Convention on the Law of Treaties.

СУЧАСНІ МЕТОДОЛОГІЧНІ ТРАНСФОРМАЦІЇ ІНТЕРПРЕТАЦІЇ У МІЖНАРОДНОМУ ПРАВІ

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АНОТАЦІЯ

У статті аналізуються сучасні методологічні трансформації інтерпретації у міжнародному праві. Доводиться, що питання інтерпретації в умовах глобалізації світу та віртуалізації дійсності має сприяти усуненню юридичних та політичних конфліктів на міжнародному рівні, забезпечувати дотримання прав людини. Проблема ускладнюється ще й тим, що у міжнародному праві немає одноосібного автора правового акту, який підлягає інтерпретації, отже, виникає питання: намірам якого автора надавати пріоритет? Тому йдеться про можливість методології, яка б забезпечувала максимально можливу об'єктивність інтерпретації. На основі дослідження робиться висновок, що еволюційний підхід набуває дедалі більшої ваги в інтерпретації міжнародного права, хоча й не може, та і не має витіснити всі інші. Головною особливістю еволюційного підходу в «новій» історії інтерпретації є його спрямованість на людину, її інтереси, права і свободи. Утвердження оновленого еволюційного підходу в інтерпретаційній діяльності засвідчує глибинні трансформації методології міжнародного права.

Ключові слова: інтерпретація у міжнародному праві, методологічні трансформації, еволюційний підхід до інтерпретації, класичні та посткласичні підходи до інтерпретації, Віденська Конвенція про право міжнародних договорів.

Introduction. The question of interpretation has always been relevant and not easy for the theoreticians and philosophers of law, but it has become especially acute for modern international law, which, in the conditions of globalization and virtualization of reality, should continue to promote the elimination of legal and political conflicts at the international level, to ensure the observance of human rights. In an effort to achieve the maximum possible objective interpretation of both the international law and various international legal acts, scientists are quite fruitfully working on the question of methodological interpretive activity principles, and much attention is paid to the evolutionary approach. Its analysis shows that, although it is already known from Roman law, it radically differs from the previous variants by the fact that in modern conditions it is axiologized, aimed at ensuring the freedoms, rights and interests of every individual. And, actually, a properly "new" history of interpretation begins with the above mentioned processes.

A brief overview of publications on the topic. The analysis of scientific literature shows that the debates on the methodology of international law interpretation during the past two

decades significantly enhanced and experts in international law gradually gain leadership positions in them, which is associated with serious methodological transformations and specificity of this law sphere. Among the authors who comprehensively analyse the transformations of interpretation theory and practice in the field of international law, it is necessary to note the publications of such interpreters in international law as Chang-fa Lo [7] and A. Orakhelashvili [9], in particular, they consider the question of "legal activism". A rather radical position on the possibility of an interpretation methodology was argued by Sondre Torp Helmersen [11]. An analysis of individual approaches in interpretive activities was carried out by Chang-fa Lo [7] and V. Goncharov [3]. V. Goncharov proposed also to divide the history of interpretation into "old" and "new" [2]. Erik Bjorge [6] and O. Gaidulin [1] reveal the classic genesis and the essence of the evolutionary approach. The evolution of the evolutionary approach effectiveness is carried out by Theil Stefan [10]. A comparative analysis of legal and other interparations is carried out by Artur Żurawik [13].

The purpose of the article. The aim is to analyze the tendency of evolutionary approach domination as a sign of profound methodological transformations of modern international law interpretation.

Results and discussion. Today, new approaches to the methodology of interpretation in the field of law are clearly traceable, for example, such quite controversial thoughts that while we are interpreting we find out that interpretation is not connected with methodology and interpretation does not cause any methodology. Moreover, not only the methodology cannot arise from the concept of interpretation, but the rules or methodologies of interpretation cannot fulfill the role they attributed and in this sense they are not useful for finding the meaning of the text, and in such a way they limit the interpretation [12, p. 2]. To understand the interpretation, you need to understand that the language is a social construct and serves as a means of communication. In order to realize the communication, the only one who can give meaning to the expression is its author, otherwise we would not communicate, rather speak. In this sense, the content of the statement, the act of speech has only one meaning, and it never changes as it is provided by the author [12, p. 5]. The problem does not appear when we ask what the expression means, since it means what the author implied, the problem occurs when we want to understand the intentions of the authors [12, p. 6]. The problem is complicated by the fact that in international law there is no single author of a legal act that is subject to interpretation, hence the question arises: the intentions of which author are in priority. Also problematic questions are what may serve as the evidence of intent: memoirs of a diplomat, government declarations attached to the treaty interpretative provisions, scientific and newspaper articles, the text of the agreement, etc. [12, p. 17]. In the end, the question of credibility and correctness of interpretation is empirical. The Vienna Convention and the comments to the Convention are trying to answer this question formulating the rule of interpretation, but the choice of the drafters of the Convention does not affect how we interpret (comprehend the meaning of the text), rather the acceptance of our interpretation [12, p. 17].

But such an approach to the methodology of interpretation is not dominant among international lawyers. Rather it is the question of the possibility of a methodology that would ensure the greatest interpretation objectivity. During the history, many interpretive approaches and schools have been formed in the theory and practice of legal activity.

Analyzing classical and postclassical approaches to legal norms' interpretation one can accept the following classification: originalistic and nonoriginalistic subjective and objective approaches. The first approach is inherent in American legal literature, the second – continental, between them there is a meaningful difference [3, p. 65]. Originalism combines the doctrines that proceed from the fact that the legislative act at the time of its creation has a certain fixed meaning and this meaning should be applied in the process of resolving a case. Nonoriginalism, by contrast, proceeds from the fact that the meanings of legal regulations are flexible. Subjective theories of interpretation proceed from the fact that the content of the legal norm is related to the will and purpose of the norm-maker. Objective interpretation theories believe that the content of the legal norm does not depend on the intentions of its creator.

One can agree with the idea that such divisions in fact are not very useful, since the groups contain such heterogeneous phenomena that those, in turn, need division as well. For example, subjective approaches can be guided by the stable and dynamic values of the norm. Originalistic approaches as well combine the movements aimed to clarify legislator's intention and those focused on the primary objective meaning of the word [3, p. 66]. It turns out that one feature is not enough to make a well-grounded division of interpretive approaches. It is worth to distinguish the following approaches to the official interpretation of legal norms: originalistic-subjective (primary-subjective), original-objective (primary objective), non-originative-subjective (contemporary-subjective), neoriginalistic-objective (modern-objective), as well as mixed (non-synthetic) and synthetic [3, p. 67–68].

Analyzing them according to the contractual interpretation, we will see that there is a problem of unifying the differences between them. The most well-known schools of contractual interpretation are the following: "textualism", "intentionalism", "teleological approach" [7, p. 63–65]. The representatives of the first school of contractual interpretation prefer the text itself, paying less attention to other aspects, for example, the context of the interpreted term. Textualism can be regarded as an objective approach, taking into consideration the objective side of the treaty provision text. However, textualism as contextualism can already be evaluated as a subjective approach; in the latter various parts of the whole text are considered to find the right content of interactive positions, to take into account the context.

Intentionalism is not considered as the main approach of the treaty interpretation, it takes into account the intentions of those, who negotiate about the treaty. The literature draws attention to the fact, that textualism is more important for multilateral treaties, due to the fact that such agreements are not necessarily discussed by all participating countries. Conversely, in the bilateral agreements, the intentions of the participants can be clearly followed. The teleological approach provides an opportunity to see the purpose of the interpreted treaty. Often in practice, these schools are not the ones that exclude each other, they are rather complementary, but give priority to one element over another.

To study modern methodological transformations of international law, it is expedient to divide the history of interpretation into "old" and "new" [2, p. 1–18]. The so-called "old" history trusts the text, because only it has the real true meaning [2, p. 5]. "New" history disagrees with this postulate, pure textualism is supplanted by a dynamic approach. The best example of this is the activity of the European Court of Human Rights. But we must note that not all experts in international law welcome unambiguously the growing tendency of the dynamic evolutionary approach domination. These approaches are related with the problem of undesirable "judicial activity", which consists in the fact, that the interpreter of the treaty respects the text wording, context and its object-specific purpose and doesn't create the law; "judicial activation" mainly concerns the interpretation of rules governing disputes; the term "judicial activation" applies not only to national courts, but also to international ones; international referees should have restrictions on the exercise

of their powers of peace, such limits include a fair interpretation of the text of the treaty, which is applied and executed with plausible and convincing arguments, while the text of the treaty is understandable, the interpreters should respect the text wording; the interpretation of treaties should not be limited to the interpretation of the text of the treaty, the function of filling the gap of the contract should be provided, if necessary, in order for the treaty to operate; regardless of whether the interpretation can be regarded as judicial activation, it is closely connected with the very text of the treaty [7, pp. 74–75].

Frequently the question is asked what place of evolutionary interpretation within the framework of the rules of treaties interpretation is codified in the Vienna Convention on the Law of International Treaties. And some authors generally believe that the evolutionary interpretation of treaties is not a separate method, but rather a result of the proper use of conventional means of interpretation as a means, establishing the intentions of the parties [6, p. 2]. Also, questions arise if there are many methods of interpreting treaties in legislation or actually one [6, p. 3], whether to interpret different types of contracts by different methods [6, p. 4] and the answer is: evolutionary interpretation fully corresponds to the approach applied to the interpretation of treaties in the classical law of treaties [6, p. 8], evolutionary interpretation is a natural part of the classical canons and, consequently, also the rules confirmed in Articles 31–33 of the Vienna Convention [6, p. 10]. It is difficult to completely deny this position, indeed if we consider this issue in the context of the correlation between the letter and the spirit of the law then in reality it is not new. The letter of the law can be correlated with radical textualism and static approach, the spirit of the law with dynamic, evolutionary approach. At the same time, modern understanding of the spirit on the value-semantic level has undergone serious transformations in comparison with the previous centuries within the limits of European culture: the interests of an individual become priority, and his freedom and dignity of higher values.

Even Roman lawyers clearly distinguished "Strict right" (jus strictum), that is, what is not admits deviations from accepted norms and "fair right" (jus aequm et bonum), focused on the ideal first-line bases. And though the search for "fair law" complicated legal practice, but it was for it, that the law enforcement astivities should have been subordinated, according to the ideas of those times. The use of "strict law" without taking into account social goals to which the right is directed, has caused condemnation in the Roman legal culture [4, p. 4].

The fundamental distinction between evolutionary interpretation in the "old" interpretation history and the "new" one must be sought on the axiological plane. In modern international law and the steadily increasing proportion of the principles and norms oriented on a person, the most striking manifestation of international law humanization is the principles and norms of international human rights law [5, p. 171]. The text interpretation and interpretation of the originals is blind to contemporary events and unjustifiably ignores the latest threats to human dignity, freedom and equality in the twenty-first century. The appearance of the Internet, the change in the attitude towards sexuality and sex, change the understanding of human rights [10, p. 32]. In general, one can state that the contemporary interpretive activity is axiologized and anthropologised, refuses binary classical approaches, becomes flexible and multivariates, trying to take into account as much human existence diversity in society, as possible.

It is difficult not to agree with the idea that the change in interpretive practices is primarily due to not sophisticated theoretical investigations, but above all, the general socio-cultural changes in interpretive strategies. Among such strategies in modern open and informative, virtualized world, one can distinguish the following: the displacement of a textual approach to the interpretation by contextual; replacement of monologic discourse by dialogic one; the change of the main landmarks of mutual understanding from abstract general concepts-absolutes to the principles of universal human sense, which are more suitable in specific situations of intercultural, intercorporate and interpersonal interaction [1, p. 11].

To our mind, regardless of the discussions on the importance of absolute novelty of evolutionary approach -it is an area of historians of international law research, more relevant to the theory and practice of interpretation is to study the nature of its current use.

In fact, all legal texts need to be interpreted, and among other approaches, evolutionary interpretation is of great practical importance. Agreements that were once concluded, as a rule, remain formally static. Amendments are always possible, but in practice they can be complex, at the same time, the reality in which contracts are in force, is in constant dynamics. The economic, political, cultural and technological realities are changing; in most areas, the law must be flexible in order to remain relevant and effective; on the other hand, flexibility must be constantly balanced with stability [11, p. 128–129].

It is also worth noting, that evolutionary interpretations are usually made possible by the evolution of the linguistic meaning of the term, being interpreted, but this is not always the case, the interpretation of treaties is largely a subjective process if the parties intend to develop this term, it does not matter whether it also develops linguistically [11, p. 128–129].

In the context of evolutionary interpretation, one can distinguish the terms which cannot be interpreted without evaluative judgments and those, whose values remain outside the assessment, and they can evolve or not. It is clear, that the easiest and most expedient is to apply evolutionary interpretation to those linguistically evolving terms, which are axiologized [11, p. 139].

Consequently, is the evolutionary approach always effective, should it completely oust the others? If we take into account the fact, that in order to preserve the rule of law principle it is necessary to find the "golden section" between statics and dynamics, between textual and evolutionary approach, then one must take into consideration the notion that evolutionary interpretations can help to solve the problems of uncertainty, but not the problem of ambiguity [11, p. 148]. Contracts, like all other sources of law, consist of symbols, that may either be ambiguous or fuzzy in the sense that they change over time, in this case it is likely that the text will develop, and hence the evolutionary interpretation will be relevant [11, p. 143].

In addition to the tendency of the evolutionary approach domination in interpreting international law, a "new" history interpretation is also characterized by a special attention to other interpretational practices, such as philosophy, art, literature. Scientists state the fact of similarity of legal and other interpretations, at the same time notice differences. Both, in the sphere arts and in the field of law all principles of hermeneutical method are implemented: linguistic, historicity of understanding, the principle of hermeneutic circle, preliminary understanding of the interpreter, dynamic understanding of the interpretation, which permits the change of reality context [13, p. 30].

The main difference is connected with practical function of the law. Legal interpreters, in particular judges, should choose only one possible interpretation of a norm or statute, while for literary interpretation it is not necessary. The similarity of these two interpretations is that they have certain linguistic problems, such as uncertainty and ambiguity of words [14]. It should be noted, that linguistic interpretation is more fundamental than most others, because we, people, are plunged into verbal universe, so many other interpretations are conceivable only because they occur in language or through language [15, p. 2].

Conclusions. On the basis of the study one can affirm, that the evolutionary approach becomes increasingly important in international law interpretation, although it cannot, and should

not oust the others. It is adequate in relation to international law, which is extremely dynamic and which cannot keep its dynamism through the means of legislative institutions. The main feature of the evolutionary approach in the "new" history of interpretation is its focus on a human being, his interests, rights and freedoms, the understanding of which in modern conditions has changed significantly in comparison with even the first half of the twentieth century. The approval of the updated evolutionary approach in the interpretive activity testifies to the profound transformations of international law methodology.

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ІНФОРМАЦІЯ ПРО АВТОРА

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