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European Citizen in Front of the Courts - A Framework for Analysis

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Comments are welcome

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Summary

The paper analysed the ways in which Community law influences national laws in order to ascertain effective and uniform protection of individual Community rights. Two levels of influence were examined: first, the one at which the techniques and principles of bestowing the rights on individuals were developed, and second, the one at which national provisions on remedies and judicial procedures are influenced. The theoretical context within which the analysis was placed was the Hohfeld's analysis of legal rights. Placed within this theoretical context, the inconsistencies in Community principles bestowing rights on individuals were found. The differentiation between vertical and horizontal effects of Directives cannot be justified from the Hohfeldian perspective. Apart from this inconsistency, it is concluded that the doctrine of direct effects developed as a criterion for justiciability of individual rights in national courts. At the level of remedies and procedures, it is concluded that the legal framework developed by the European Court which limits national procedural autonomy is capable of providing for the effective protection of individual Community rights. However, this framework does not guarantee the uniformity in judicial protection. In order to achieve the equality of European citizens before the courts, it is suggested that Community legislation harmonizing national laws is necessary.

European Citizen in front of the Courts - A Framework for Analysis¹

by Tamara Capeta

Introduction

The aim of this paper is to present the framework within which the analysis of the judicial protection of the rights enjoyed by individuals under the Community legal order may be conducted.

Each analysis of the Community law raises methodological problems, as the Community legal order, although autonomous, is at the same time interlinked and dependent on the national legal orders.² This is even more so when the question under analysis concerns the judicial protection of the individuals, in which the two levels of the legal orders (Community/national) and of the institutions concerned (Community courts/national courts) are unavoidably involved.

In order to avoid any methodological confusion, this paper shall analyse the position of the individual in front of the courts, as it is or as it should be from the aspect of the EC law, and not from the aspect of different national laws. Thus, the national legal orders and judicial institutions are put in the function of the Community law.

In its scope, the analysis is restricted only to rights arising under the Treaty establishing the European Community.³

¹ This work was supported by the Research Support Scheme of the OSI/HESP, grant No.: 162/1996.

² See Dehouse, R., *Comparing National and EC Law: The Problem of the Level of Analysis*, *The American Journal of Comparative Law*, 1994, p. 761.

³ The legal order created under the ECSC Treaty differs slightly from the EC legal order, and the new areas of EU competence (CFSP and JHA) do not fall under the European Court's jurisdiction.

Long back to the Van Gend case⁴ has the European Court made it clear that the objective of the Community order is to ensure the legal protection of individuals as direct subjects of its legal rules. The organization of this, judicial task of the EC law has to satisfy two other requirements of the Community legal order: its effectiveness and its uniform application.⁵

The first one - effectiveness, is the condition that any order needs to satisfy in order to be "legal". Effectiveness means in the first place the voluntary respect of the legal rules of a legal order by its subjects. However, this request is in no legal order completely fulfilled. Thus, the legal order must assure its secondary effectiveness, *i.e.* organize the judicial protection of the rights violated by non-observance of its legal rules. If developed further, the effectiveness principle asks that the judicial protection is such that it provides for the adequate remedies to the persons whose Community based rights are violated.

The second requirement - uniformity, is also the basic requirement of any legal order which respects the democratic principle of equality before the law. However, in the federal-type legal orders the implementation of this principle becomes more complex. This is even more so in a polity, such as the European Union, which is not organized as a federal state, but represents the political and legal novelty in the organization of relations among still sovereign states pertaining to the same region. In such a polity, where the law-making power in a number of areas is transferred to another entity, the uniform application of the law enacted on the common level, becomes a *conditio sine qua non* of the maintenance of a newly created legal order. If applied differently in each Member State the Community law would cease to be common.

⁴ Case 26/62 N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration (Nederlandse administratie der belastingen) (1963) ECR I.

⁵ Compare Shaw, J., Law of the European Union, 2nd ed., MacMillan, 1996, at. p.256.

This paper, therefore, aims to develop the analytical framework for the assessment of the level of legal protection of individual Community rights guaranteed by Community law. Its aim is to contribute to the search for the answers on the following question: in which way and to what extent the Community law, in fulfilling its objective to protect legal rights of the individuals as its subjects, meets the requirements of effectiveness and uniformity? As the administration of justice is in the majority of cases left to the national courts whose judicial function is governed by national legal rules, in order to achieve these two requirements the EC law must necessarily influence and shape national legal orders. As explained by Jo Shaw, there are three different levels at which one may analyse the impact of the EC law upon national laws: the level of constitutional qualities of the EC law, the level of techniques for individual protection, and the level of principles governing the organization of the judicial function of the national courts when they exercise their function of protecting the Community based rights.⁶ The objective of this paper is analysis of the EC law/national law interrelation on the third level. However, as the justiciability of individual Community rights in national courts depends on the techniques developed at the second level of analysis, the paper will first evaluate the present state of Community law in this field.

The starting point of the analysis is individual (physical or legal person) as subject of the EC law. Thus, the preliminary question to be answered before going further with analysis is in which way an individual becomes a holder of a legal right based in the Community law.

⁶ Ibid.

Individual as holder of a Community based right

One of the characteristics which differ the Community law from traditional international law⁷ is that a big number of its rules is capable of directly bestowing rights on individuals.

The source of the individual Community right may be legal rule entailed in any form in which Community law exists. Thus, it may be the rule of the founding Treaty, any international treaty which binds the Community or the norm contained in the secondary, legally binding Community acts: Regulations, Directives and Decision. The source of the legal individual rights are also the general principles of law common to the Member States which became the principles of Community law. The condition for the Community right to be created is that the intention (explicit or implicit) of the Community rule was to create a right for individual.

As the Treaty was silent on how the individuals become subjects of Community legal rules, the principles and techniques of bestowing the rights on individuals were developed through years in the case law of the European Court.

In order to assess these principles, I shall apply Hohfeld's analysis of fundamental legal conceptions to individual Community rights.⁸

For the difference from the usual approach to rights as a two-term relations: between a person and a subject matter (A's right to 100\$), Hohfeld approached to the problem as a three-term legal relation: between two persons and an act of a certain type (A's right to be paid 100\$ by B).⁹

⁷ For the opposite opinion see Wyatt, *New Legal Order or Old?*, 1982, *ELRev.*, p. 147.

⁸ Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Greenwood Press, Publishers, Westport, Connecticut, 1964. Although the Hohfeld's analysis was applied only to the legal relations in private law sphere, I find it equally valid for the relations under the public law (if, today, it is at all possible to make a clear distinction between relations belonging to private or public law).

⁹ According to Hohfeld, each legal relation contains three elements: one person having a right (in generic sense), or more precisely right, privilege, power or immunity, the other person having a correlative obligation (in generic sense), or more precisely duty, no-right, liability or responsibility, and an act which second person (B) must perform or refrain from performing in relation to the first *durability*

Analysed in this context, a Community rule whose intention is to bestow right¹⁰ on individuals may create a number of different legal relations, in which the holder of legal right is always the same person, while the holder of the correlative legal obligation is not. The third term in the three-term relation: an act of a certain type, is neither the same.

Before entering into further discussion, I shall try to identify which kind of legal relations a Community rule is capable of creating. I shall try to explain this with example:

Article 5 of the Directive 76/207 in question in first Marshall case¹¹, was prohibiting sex discrimination in relation to working conditions, including the conditions governing dismissal. The directive was not transposed to the UK law. Ms Marshall was working for the Health Authority, and was dismissed at the age of 62. This was based on the Health Authority policy which, among other, provided that retirement age will be the age at which social security pensions become payable. According to British legislation this meant 60 years for women and 65 for men. Although the benefit of earlier retirement for women was allowed under Community law, the compulsory earlier retirement of women was prohibited by Article 5 of the Directive.

If we now apply the above-explained analysis, Article 5 of the Directive created several legal relations in all of which Ms Marshall was holder of a legal right. Thus, she was given the immunity in relation to Health Authorities (or any other employer), divesting the Health Authorities from the power to retire her at earlier age than her mail colleagues (or in Hohfeld's terminology, the Health Authorities were under a disability to retire Ms Marshall at earlier age than her mail colleagues). She was also given a right in relation to state legislature which put

(A), or expressed from the point of view of the holder of right, an act which A is entitled to request B to perform or refrain from performing.

About the difference between the Hohfeldian approach to legal relations as a three-term relations, and the approach to the legal relations as a two-term relations, see in Finnis, J., *Natural Law and Natural Rights*, Clarendon Press, Oxford, 1993, at p.201.

¹⁰ Throughout this paper the term right is used in its generic sense, together with the term legal benefit as a synonymous. Likewise, the terms duty and obligation are used as synonyms to express the correlative to right in generic sense.

¹¹ Case 152/84 M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority, (1986) ECR 723.

national legislative authorities under a duty to adjust national law to be in accordance with the rule of Directive.

Therefore, the same Community rule created (at least) two types of legal relations in which (every) Ms Marshall was holder of a legal benefit, but the holder of the correlative legal obligation was different, and the act this other subject had to perform was different: in the first case, the holder of correlative obligation (disability) was employer who, due to Ms Marshall's immunity, was left without the power to retire her at the age of 62; in the second case, the holder of the correlative obligation (duty) were national legislative authorities which, due to Ms Marshall's right were under a duty to change national law.

The Frankovich judgement¹² confirmed that each Community rule which intends to create a right for an individual and requests the state to implement the rule into national legal system, creates a legal relation between that individual and the state, in which the individual is holder of a right, a state a holder of a duty, and the content of right/duty in this legal relation is the request on the state to enable the performance of firstly intended right under national law.

Doctrine of Direct Effects

A right, in the Hohfeld's concept, may be violated only by a subject possessing correlative obligation. Or in other words, the right is violated if the holder of the correlative obligation does not perform the act requested by legal relation. Accordingly, Health Authorities and the legislative authorities may violate their obligations to Ms Marshall in different way: former by not complying with its disability, latter, by not performing its duty.

¹² Joined cases C-6 and 9/90 Andrea Frankovich and Danila Bonifaci v. Italian State, (1991) ECR-I 5357.

In case of a violation of right, a legal order must by force ensure that its rules are obeyed by its subjects. Thus, it needs to provide for a possibility that they are applied by judicial organs designated for this function.

However, in order for a rule to be judicially applicable, certain conditions have to be satisfied. These conditions are known in Community law as principle of direct effects.¹³ According to Hartley,¹⁴ in order to be directly effective a rule has to satisfy two conditions. It, first, has to be part of the law which national courts apply. The European Court has consistently held, that not only provisions of the Treaty and of Regulations, but also provisions of international agreements which bind the Community and of Directives¹⁵ may make part of the law which national courts must protect.

The second condition for direct effect is that the terms of provision of Directive need to be clear, unambiguous and unconditional. If expressed in the context of Hohfeld's analysis, direct effect means that only a rule on the basis of which it is possible to ascertain all three elements of legal relation may be applied by courts. Directly effective rule is thus a rule which clearly enables the court to assess who is a holder of right, who is a holder of correlative obligation and what kind of act a holder of obligation must perform (or not perform) or inversely what kind of act a holder of right is entitled to ask for. If a rule fulfils these conditions it is said under Community law to be directly effective.

Therefore, if consistently applied (in combination with the principle of supremacy of Community law over national law), the principle of direct effects should mean that all Community rights created by directly effective Community rule should be enforceable by the individuals in

¹³ Compare Pescatore, P., *Direct Effect - An Infant Disease of Community Law*, 8 (1983) *ELRev.*, p. 155.

¹⁴ Hartley, T.C., *Foundations of European Community Law*, Second edition, Clarendon Press, Oxford, 1989, pp. 183-195.

¹⁵ Case 41/74 *Yvonne Van Duyn v. Home Office*, (1974) ECR 1337.

front of the courts. However, under present Community law, this is not so. An individual is not in position today to rely on the clear and unconditional rule of Directive against another individual.

To return to Ms Marshall's case, the rights in both legal relations mentioned above were justiciable rights. In both legal relations all three elements (holder of a right, holder of a duty, and the content of right/duty) were clear and unconditional. If we change slightly circumstances of the case and imagine that Ms Marshall was employed by the private employer, she would not, under present Community law, have possibility to vindicate her right in the national court. This position, which the Court expressed for the first time in First Marshall case, remained unchanged by today. In the most recent case in which the Court was given the possibility to reverse its position, it refused to do so.¹⁶

What is the Court's explanation for such a situation? A Directive is, according to the Treaty an act addressed to the state, and is binding as to the result to be achieved, but leaves the choice of form and methods.¹⁷ However, although a Directive is addressed to states, the Court accepted the possibility that its rules could also have the individuals as its subjects.¹⁸ Thus, even without the intervention of the state, a Directive may directly reach an individual. However, an individual may rely in courts on a rule of Directive against the state, but not against other individuals. In Community terminology, Directives may produce vertical, but not horizontal direct effects.

The main argument used in favour of justiciability of the directly effective right of Directive against the state is estoppel principle. The main argument used against horizontal direct effect of Directives is that it may not directly impose obligations on individuals. I shall try to assess both arguments in the context of the Hohfeldian analysis of rights.

¹⁶ Case C-91/92 Paola Faccini Dori v. Recreb Srl, (1994) ECR-I 3325.

¹⁷ Article 189 of the EC Treaty.

¹⁸ First case in which it was admitted that individuals may rely on the rules of Directives in national courts was case 41/74 Yvonne Van Duyn v. Home Office, (1974) ECR 1337. One of the earlier cases is also case 148/78 Pubblico Ministero v. Tullio Ratti (1979) ECR 1629.

Estoppel principle means that a state may not rely on its own failure to transpose Directive into national law. Such argument may be used in the legal relation individual - state as legislator, in which the obligation of the state was to implement a directive. However, the same argument could not be used in the legal relation individual - employer (be it even a public body), because the obligation in this legal relation is not the same. However, the Court applied the same argument in the relation in which the obligation to transpose Community law did not exist. In the legal relation individual - state as employer, the obligation which employer had to perform was different: not to retire female employees at earlier age than male employees. Therefore, the estoppel argument is suitable for allowing the justiciability of Frankovich type of right. This right has as a correlative a duty of a state to introduce Community provisions into national law, and results, if violated, in a remedy in damages. Such remedy may be obtained in the national courts from the state, because the state cannot plead its own wrong in its defence. Thus, the estoppel argument is wrongly used as a justification of the vertical direct effect of Directives.

The main argument used against horizontal direct effects is that a Directive may not directly impose duties on individuals. If this were not so, it is argued, the difference between Directive and Regulation existing under Article 189 of the Treaty will disappear.¹⁹ The reason why a Directive should not reach directly an individual is that its application, according to the wording of Article 189 of the Treaty, depends on the implementing measures of the state. However, it was exactly this difference which the Court has already denied by allowing, what is called, the vertical direct effects of certain rules of Directives. After the expiration of transposition period, Directive becomes by itself a part of the law of the land. Consequently, those provisions which are unconditional, *i.e.* do not depend on the further action of either Community or national authorities,

¹⁹ In *Facini Dori* the Court repeated this argument: "The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.", (1994) ECR-I 3325, para 24.

should be applied by national courts for the benefit of the person who acquired a right on the basis of such provisions. Directly effective rules of Directives thus become equal to directly effective rules of Regulations, because for neither of them additional explanation is necessary in order to penetrate in national law and become part of the law which national courts apply.

The estoppel argument was used to justify vertical and deny horizontal effects of Directive in following way: Directive does not bestow right on individuals directly. This right arises as a consequence of the duty imposed on the state. However, the duty imposed on the state is not only a duty to implement Directive (I shall call it a Frankovich type of duty), but also a duty implied in the rule of Directive in question (I shall call it here a Marshall type of duty). If it is admitted that Marshall type of duty is created directly on the basis of the rule of Directive, this means under Hohfeld's analysis, that the first type of legal relation is created by the Directive (I shall call it a Marshall type of legal relation).

This brings into discussion the question on how rights and duties are created by the legal provisions.

One approach to this question, which is not necessarily the correct explanation of Hohfeld's theory, is the discussion of the priority of rights to duties or *vice versa*. Thus, in the first case, what is created is a right which then gives the reason for the establishment of duties. In the second case, the rule imposes a duty, from which one may conclude who possesses a right and which kind of rights he possesses. In one of his recent articles, Jason Coppel²⁰ argued within the framework of such approach, that with the Frankovich judgement the Court's preference shifted from the priority of duties over rights to the priority of rights over duties, which allows for the abandoning of Ms. Marshall distinction.

According to my opinion, Hohfeld never intended to give priority to either rights or duties. Hohfeld simply argued that a right cannot exist without a correlative duty, and likewise, the duty cannot exist without the correlative right. They have to exist simultaneously. The question of priority arises because legal provisions use different techniques to describe legal relations. They may either expressly grant the right (for example, each Community citizen has a right to cross internal borders without being asked to show identification documents), in which case a duty, although not expressly mentioned is implied (nobody may ask a Community citizen to show identification papers when crossing the internal border). The provision may, which is more often the case, impose a prohibition on certain activity, in which case it expressly states a duty, but the existence of duty means that there must exist also a right on the opposite side. The legal provision thus, does not create a right or duty. It creates entire legal relation, which, by its very nature must contain both a right and a duty.

Such a view is not in contradiction either with a view that there is not a closed, in advance defined number of duties correlative to a given right.²¹ But, also *vice versa*. Thus, the changing social environment may bring to a different interpretation of which rights or duties are implied in the abstractly formulated legal rule. Thus, the guarantee of free movement of persons may at one time imply the duty on border police officers to allow the person to cross the border after checking his/her documents, while, with the completion of the single market, it may impose a duty not to even check the documents.

Therefore, if it is admitted that Directives penetrate, after the expiration of transposition period, directly into national legal orders, then their clear and unconditional rules should be capable to create legal relations, which imply both rights and duties simultaneously, and which national courts should apply notwithstanding the existence of contrary rule of national law, due to the supremacy of Community over national law.

²¹ Ibid, at pp. 864-866.

If the denial of horizontal direct effect of directives is interpreted as if the individual right in horizontal relation is not at all created, even if all three elements of the relation are clearly and unconditionally determined, there would be no difference between the position of an individual in horizontal situation under clear and unconditional rule of a Directive, and the position of an individual under not-directly effective Community rule, *i.e.* a rule which does not clearly define all three elements of legal relation.

The difference, however, appears to exist, even if it is for the moment only of theoretical significance. A not-directly effective rule, in which at least one element of the legal relation may not be determined by way of the judicial analysis, but depends on further legislative clarification either by Community legislator or by state, may not be applied by a judge because he does not know all the elements of legal relation. Therefore, from his point of view, the right such rule intended to create is not yet a right, but a prospective right. Namely, according to Hohfeld, the right exists only in a three-term relation; if one element is missing there is no right.

On the contrary, the reason why a judge may not apply a clear and unconditional provision of Directive in order to enable performance of the right of an individual as against the other, is not the non-existence of right, but the special rule developed by the Court which does not allow the court to apply Directive in horizontal situations. Thus, a right exists, but is not justiciable.

To say that a non-justiciable right is also a right, implies the acceptance of the theory which detaches the substantive right from its justiciability (or from the corresponding procedural power to take appropriate remedial action at law if the right is violated). Or in other words, it means that the existence of substantive right is not dependent on the possibility to enforce this right. In my opinion, there are several arguments in support of such view. If a duty correlative to a right not accompanied with the procedural power, was performed by the holder of that duty, this performance was legal because the correlative right existed. In a way of example, if B owned to A 100\$, but the procedural limit to institute proceeding has elapsed and therefore a right to 100\$ of

A towards B was not justiciable, B is still in position to legally pay his debt to A. He won't be paying a non-debt, because a right to be paid 100\$ by B existed without the procedural power to enforce it. A's substantive right did not disappear because of the change in procedural field. Another argument which upholds this view is that the procedural power exists independently of a substantive right. A person may institute proceedings only claiming the existence of a right. The proceedings may end in the finding that alleged right did not exist. Therefore, by way of argument *a contrario*, if procedural power exists independently of a substantive right, a substantive right may also exist independently of a procedural power.

The reason why the Court did not accept the horizontal effect of Directives is not its opinion on priority of rights or duties. Such a decision was more probably motivated by other policy considerations. Firstly, there was a lot of resistance on the part of the states to accept even a vertical direct effect of Directives. Thus, allowing a horizontal effect could have as a consequence a complete refusal to accept direct effect of Directives at all. The resistance exists still. In *Facini Dori*, six intervening states (Germany, Italy, France, Denmark, the Netherlands and the United Kingdom) and Commission were against allowing the horizontal effects of Directives. Only Greek government supported the change of the case-law. Advocate General Lenz also considered in his opinion in the case *Facini Dori* that the time has come to allow horizontal direct effects, although, for the sake of legal certainty, the new interpretation should only be applied to future cases.²²

The Court did not deny the horizontal direct effect of Treaty provisions, of which many are also addressed to states and require implementing measures by their organs. The best example is Article 119 of the EC Treaty. Thus, if the rule bestowing a right in *Ms Marshall* case was not a rule of a Directive, but a rule of the Treaty, her right in relation to private employer would be

²² See opinion of Advocate General Lenz in case C-91/92 *Faccini Dori*, (1994) ECR-I 3328-3346.

justiciable. The ignorance of Treaty provision would not be allowed to the private employer as a means of defence. It is said that the legal uncertainty would be created if the same is applied also to Directives. However, there is no much reason to say that the legal uncertainty is greater if the provision is a provision of a Regulation, of a Treaty or of a Directive, which was not *expressis verbis* introduced to national law. If a person does not read the Official Journal of the EC, he will not be aware of these provisions. The argument of legal certainty loses its strength even more since the entry into force of the Maastricht Treaty which introduced the obligation to publish Directives in the Official Journal.²³

The reason which motivated the Court to allow judicial enforcement of the right in the vertical situation under Directive was to ensure the effectiveness of Community law. If such policy consideration is to be given priority in Community law, the result should be acceptance of justiciability of rights in first (Marshall) type of legal relation as against both public and private holders of correlative obligation. If the effectiveness argument is not, on the other hand, strong enough to justify such result, then the justiciability of rights in first relation should not be admitted against public and private persons alike.

Both solutions would be acceptable from the point of view of the Hohfeldian analysis of rights. But the result which exists today under Community law is only confusing and it opens another possibility for non-uniformity in its application. The distinction between private and public will differ from state to state notwithstanding the existence of Community definition of the notion "emanation of state"²⁴

²³ Article 191 of the EC Treaty. In practice, Directives were published even before this provision was introduced in the Treaty.

²⁴ In case C-188/89 *Foster v. British Gas*, (1990) ECR-I 3313, the Court defined bodies against which the Directives may be invoked by individuals as "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and (or?) has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals..."

Community rule which is not directly effective in the legal relation it intended to create, may create only one type of right for an individual: the Frankovich type of right which has as a correlative a duty of state to implement Community law (in order to give effect to primarily intended right). This right results, if violated, in Community remedy in damages. But, the right of individual in relation to state as legislator, can also be judicially enforced only if the rule is directly effective in that legal relation, even if it is not in the legal relation it primarily intended to create. This will be so if in the relation individual - state as legislator, it is clear which category of individuals has a right, and what is the content of the state's legislative obligation.²⁵ If, due to not performance of this obligation by a state a damage was suffered, a state is under a duty to pay damages, but not because it violated the obligation in the first legal relation (in the example, the obligation not to discriminate between female and male employees), but because it violated its obligation in second legal relation (to adjust national law in a way which enables equal treatment of men and women in relation to conditions of retirement).

Thus, direct effect may be said to be a condition for justiciability of any kind of Community right. The only exception is the right based on the clear and unconditional rule of Directive, which although fulfilling the requirements for direct effects, may not be invoked in courts against the individual holder of correlative obligation.²⁶

Doctrin  of indirect effects

The fact that all Community law, and not only directly effective one, prevails over national law, gave the opportunity to the Court to develop a doctrine of indirect effects²⁷ and thus alleviate

²⁵ This is how the second condition in Frankovich case may be interpreted. "The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of Directive." Joined cases C-6 and 9/90, (1991) ECR-I 5357, para 40.

²⁶ The same doctrine applies also to a Decision addressed to a state.

²⁷ Case 14/83 Sabine Von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, (1984) ECR 1891; case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, (1986)

the consequences which denial of horizontal effects of Directives had for judicial protection of individual rights.

The principle of indirect effects requires from national courts ceased with the case under Community law, to interpret, whenever possible, national law in consistence with the Community law. This obligation encompasses not only the national law enacted in application of Community rule, but all national law covering the same field.²⁸ In this way, the obligation which was primarily the obligation of state legislative authorities, was transferred in the case of the failure of the latter, on the state judicial organs, although within the limits imposed by the possibilities of judicial interpretation.

What does this mean for the improvement of protection of individual Community rights? Firstly, the doctrine of indirect effects opened the possibility for the judicial enforcement of the right of Directive in the horizontal situation. Such right, although existing, is not justiciable until properly implemented. If national provision may be construed by the judge as imposing the same kind of obligation as the one imposed by the rule of Directive on a private person, the result would be the same as if the Directive in question was properly transposed into national law. Consequently, the individual whose right was violated would gain the possibility for the violation to be judicially remedied.

Secondly, it opened the possibility of transformation of not-directly effective into directly effective Community law. Namely, if it is possible to clarify, by way of judicial interpretation of a national norm, the element of legal relation which was unclearly defined by the rule of Community law, the result would be the creation of the right of individual, and consequently the opening of the possibility of its judicial enforcement. The result would be the same as if the national legislator implemented the Community provision.

ECR 1651; case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion, (1990) ECR-I 4135.

²⁸ Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion, (1990) ECR-I 4135.

Although improving to a certain degree the position of an individual in front of the court, indirect effects doctrine has its clear limits imposed by boundaries of judicial interpretation, which should not amount to legislative power. Another limitation to the obligation of conform interpretation are, as stated by the European Court, general principles of law which form part of Community law, such as principles of legal certainty and non-retroactivity.²⁹

Difference between horizontal and vertical effects of the rules of Directives, opened the possibility, operating already at the second level of influence of Community law upon national law, for not-effective and not-uniform judicial protection of individual Community rights. Such possibility exists also at the third level - the level of principles which govern the organization and judicial function of national courts in protection of Community based rights.

National legal orders are in principle autonomous in determining remedies and the procedural rules by which the violated Community rights may be vindicated. Community law created by today only a fragile, partial legal framework which influences the role of national courts in their role of Community courts.

Thus, the possibility that the Community law does not fulfil the requirements of effectiveness and uniform application arises in the case when the proceedings for enforcement of Community right are taking place in national courts. If the proceedings are instituted in front of the Community courts, the individuals will be treated equally, as the proceedings in these *fora* are governed by the same legal rules. This, still does not mean that such protection is effective, especially because the standing of individuals in front of Community courts is very limited. However, in following chapters, the paper will deal only with the means and lacunas of Community law in ensuring effective and uniform protection of individual Community rights in

national courts. Therefore, I shall firstly identify and systematize situations in which proceedings will take place in national courts.

When will proceedings take place in national courts?

A right bestowed on an individual by a substantive rule of Community law may be violated by the Community, by the Member State or "emanation of state" or by another individual. The choice of the *forum* competent for the protection of violated right and the choice of the available remedies and procedures will depend on the answer who has violated the right. Violation is committed when an individual is prevented to exercise his/her right by an act or non-act of the holder of correlative obligation.

Violations by the Community

The violation of the substantive Community right of an individual may be committed by an act (or failure to act) of the Community institutions. The act should be of such a nature as to prevent the exercise of the right by the individual. The acts of the Community institutions might be of legislative (of general application) or administrative (of individualised application) nature. Usually, by mere enacting of the legislative act which is contrary to a higher norm of Community law, the violation will not yet take place. It will happen if the newly enacted law is applied to an individual by way of an administrative decision which directly influences his/her legal position (whether or not addressed directly to him/her). Such decision may be illegal in itself (based on the legal higher norm) or may be in conformity with higher law, which is in turn, contrary to higher Community law.

In such a situation, an individual will be given standing in front of the European Courts under Article 173 procedure to challenge the decision which prevents the exercise of his/her Community

right. If the Court finds that the action is well founded it will declare the act in question void, and the individual will vindicate the possibility to exercise his/her right. The similar possibility will exist if the Community institution has failed to act after two months of so being asked, in which case an individual will have the possibility to complain to the Court that the respective institution has failed to address to him/her a requested act (Article 175, paragraph 3 of the EC Treaty).

However, due to the very restrictive interpretation by the European Courts of meaning of the expression "direct and individual concern", the *locus standi* of the private plaintiffs in Article 173 actions is very limited.

If the claim of the plaintiff in Article 173 proceedings was upheld, and the possibility to exercise the Community right restored, he/she will still have the possibility to claim damages, if they occurred, according to the rules on non-contractual liability of the Community (215, paragraph 2 of the EC Treaty).

If, however, the violation occurs because of the act of the state which is based on the illegal Community act, the individual will not have the possibility to institute the proceedings in front of the European Courts. European Courts do not have jurisdiction to hear claims of non-privileged applicants against the state. The individual will in such cases have to institute the proceedings in front of the domestic courts. This situation will be examined under following title, although the violation is in fact attributable to the Community.

Violation by a state

Violation of the Community right by a state may be committed by the act of its organs or by the conduct of an "emanation of state". However, the cause of a violation may be either on the Community or on the national level. I will try to delimit these situations.

1) A state may enact an act which prevents the individual in exercising his/her right or an emanation of state may violate the right of an individual acting on the basis of the Community act which is illegal. For example, a state may charge a custom duty to an importer, basing its decision on the (hypothetical) Community Regulation which provided for a charge of such duty, but which is in itself contrary to Article 12 of the EC Treaty. Or a public company may refuse to employ a national of another Member State basing its decision on the (hypothetical) Council Directive providing for such exception to freedom of movement of workers, but in violation of Article 48 of the EC Treaty. In these cases, the individual whose Community right (right to customs free import or right to be employed in another Member State) is violated will have the possibility to sue customs authorities in the first example or the public company in the second, in the national court, basing the claim on the indirect challenge of the illegal Community act. However, the only Court which is competent to decide that a Community act is illegal is European Court.³⁰ Therefore, the national court will have to wait for the decision of the European Court in the preliminary reference procedure on validity, before being able to remedy the violation of individual right.

2) A state (or its emanation) may, again by an act or conduct, violate the right of an individual, basing its decision on the national law which is not in conformity with Community law (primary or secondary). Although the enactment or not-repealing of the law contrary to Community law, or not-enactment of law requested by Community law is in itself a violation of Community law by the state, individuals may not institute an Article 169 proceedings. In order to challenge such acts, within the scope of Community law, they have to wait until the violation of their concrete Community right takes place. Yet then, do they have the possibility to challenge national law for not conformity with the EC law in front of the national courts.³¹

³⁰ Case C-314/85 Foto-Frost v. Hauptzollamt Lubeck-Ost, (1987) ECR 4119.

³¹ In such case national law must provide for the possibility of judicial review of the acts of states. Case 222/86 Unectef v. Georges Heylens and Others, (1987) ECR 4097.

3) The third case of the violation by a state is when the individualised act or conduct of a state is contrary to Community law without the intermediary of the illegal Community or national law.

In all three cases mentioned above the appropriate *forum* for vindicating a Community based right is national court. The success of the claim by an individual in all three cases will depend on whether the Community rule on which the right is based is directly effective or not. If it is, and the defendant is a state (or its emanation), the individual will be able to rely in front of the court on his/her Community based right.

Violation by another individual

One individual may violate the other's individual Community right by his/her conduct. Here also, there are several possibilities of where the cause of a violation lies.

1) An individual may act in accordance with a Community rule, which is contrary to a higher directly effective Community norm.

2) An individual may act in accordance with national law which is contrary to directly effective Community law.

3) An individual may act contrary to directly effective Community law which did not need to be transposed into national law, or contrary to national law which properly implemented a Community rule.

Only in the third situation the individual is not respecting the law. In the first two situations he/she may be acting in accordance with the law, not knowing it was illegal. However, Community law does not accept an individual's ignorance of law, except in the case when the violated right is based in a Directive, although it was accepted that Directives may be also directly effective if the

time-limit for their transposition into national law elapsed. Individual who violated a Directive based Community right will not have a passive procedural legitimation to be sued in national court by another individual.

From all the above-mentioned follows that the proceedings for vindication of individual Community based right will take place in national courts in all the situations in which a defendant is either a state or another individual. Community may be defendant only in European courts, although its acts may be indirectly challenged also in national courts, which are obliged to refer the question of validity of Community acts to the European Court.

Community rules influencing remedies and process in national courts

According to Hohfeld, in case of a violation of primary substantive right arises secondary substantive right.³² It determines in which way the violation of primary right is to be remedied: or in a way of example, whether the Community citizen who was denied the right to work in another Member State is entitled to damages from employer or may judicially force employer to employ him/her. Thus, the content of paucital right/obligation in the secondary legal relation which was created by the violation of obligation in primary relation, may, but does not necessarily correspond to the content of right/obligation in the primary legal relation. The primary substantive right should be detached also from the character of the proceedings by which this right (and the secondary right arising from its violation) may be vindicated.³³

³² "A multital primary right, or claim (right in rem), should regarding its character as such, be carefully differentiated from the paucital secondary right, or claim (right in personam), arising from a violation of the former." Hohfeld, op. cit., p. 101.

³³ Hohfeld, op. cit., p. 102.

Within the Community legal order, primary substantive right arises under Community law. However, the question of remedies (secondary substantive rights) and conditions under which these rights arise are, in principle, a matter of national law. The same is with the procedural means and rules governing the process by which a violated right may be vindicated in courts.

However, with the development of Community law, some remedies were created as Community remedies and standards determining conditions under which remedies are granted as well as influencing national procedural rules emerged. They were result of the Court's endeavour to ensure that judicial protection of individual rights satisfies requirements of effectiveness and uniformity.

Standards emerging from the requirement for effectiveness

The first condition for the judicial protection to be effective is that the possibility to bring a case to the court exists. Does the Community law guarantees such possibility when Community right is violated?

The answer to this question seemed affirmative already since the Van Gend judgement. But it was in the case 222/84 Johnston³⁴, that the European Court confirmed this, by declaring that "*the requirement of judicial control is a general principle of law which underlies the constitutional traditions common to Member States*".³⁵ In this way a "right to obtain judicial determination"³⁶ or as called by some commentators "right to judge" (*droit au juge*)³⁷ was raised to the level of

³⁴ Case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, (1986) ECR 1651.

³⁵ Ibid, para. 18.

³⁶ Expression of Advocate General Darmon in case 222/84 Johnston, (1986) ECR at p. 1656.

³⁷ Barav, A., La plénitude de compétence du juge national en sa qualité de juge communautaire; Greive, F./Bonichot, J-C., Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les États membres, both in: L'Europe et le droit, Mélanges en hommage à Jean Boulouis, Daloz, 1991, at p. 15 and 304.

principles of Community law. Thus, individuals whose Community rights were violated, draw their right to judicial protection directly from Community law.

Judges who are to give protection to Community rights are the same judges who give protection to rights under national law, and whose function is regulated within the national legal system. Do these judges derive their competence directly from Community law when they are deciding about the Community rights of individuals? Answer to this question again seems to be affirmative, because national courts competence, and indeed duty, to give protection to Community rights arises as a correlative to the right to judicial protection which individuals have under Community law. In other words, the requirement for effective judicial protection brought to a "*communautarisation du titre qui fonde les competences juridictionnelles du juge national*"³⁸

In principle, national legal orders enjoy institutional and procedural autonomy in regulating the judicial function. The European Court stated in case 45/76 Comet³⁹, and repeated in numerous later cases, that in the absence of Community rules, "*it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law...*" This autonomy is based on the presumption that national rules ensure effective judicial protection.⁴⁰

However, the standard of effective judicial protection is a Community standard. Therefore, "the decision as to whether the protection afforded by national systems is in conformity with the

³⁸ Simon, D., *Les exigences de la primauté du droit communautaire: continuité ou métamorphoses?*, in: *L'Europe et le droit, Mélanges en hommage à Jean Boulouis*, Daloz, 1991, p. 485.

³⁹ Case 45/76 Comet v. Produktschap voor Siergewassen, (1976) ECR 2043, at p. 2053

⁴⁰ This was pointed out in Advocate General Jacobs opinion in cases C-430/93 and C-431/93 *Joren van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, (1995) ECR-I 4705: "The underlying premise is that States based on the rule of law will organize their national legal systems in such way as to ensure proper application of the law and adequate legal protection for their subjects.", point 30 of the opinion, at p. 4717.

requirements of Community law is a matter for the Court of Justice".⁴¹ The effective protection must be afforded in every case, which means "even in cases where no remedies in that respect are available under national law."⁴² Thus, through interpretation of the meaning of the requirement for effective protection in concrete cases, the Court started to define the content of competences of the national judge in his function of Community judge. In the absence of Community legislative provisions, the Court has, answering the national judges the questions referred through preliminary rulings procedure, created a framework which limits national procedural autonomy.⁴³

There are two general rules from which further more specific rules concerning remedies and procedure were developed. Community law requires, in the first place, that the rules regulating judicial protection of Community rights are not less favourable than those relating to similar action of a domestic nature.⁴⁴ The first requirement is, therefore, requirement of non-discrimination.

Even if national rules are not discriminative as regards actions under national and those under Community law, they should not be such as to make it virtually impossible or excessively difficult in practice the exercise of the rights which the national courts are bound to protect.⁴⁵ If national rules are, in the opinion of the Court, of such a nature, the fact that the same rules apply also to a national case may not validate them under Community law.

⁴¹ Tesouro, G., *The Effectiveness of Judicial Protection and Co-operation between the Court of Justice and the National Courts*, Yearbook of European Law, Vol 13, 1993, p.1, at p. 7.

⁴² Ibid.

⁴³ Professor Simon characterised this process as "*encadrement communautaire du droit procedural national et de la fonction communautaire du juge national*", Simon, op. cit, p. 485

⁴⁴ See for example case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftshammer fuer das Saarland*, (1976) ECR 1989, para 5; or case 45/76 *Comet v. Produktschap voor Siergewassen*, (1976) ECR 2043, para 13.

⁴⁵ See for example case 130/79 *Express Dairy Foods Ltd v. Intervention Board for Agricultural Produce*, (1980) ECR 1887, para 12; case 68/79 *Hans Just v. Danish Ministry for Fiscal Affairs*, (1980) ECR 501, para 25; case 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio*, (1983) ECR 3595, para 12 and 14; or cases 331/76 and 378/85 *Les Fils de Jules Bianco SA and J. Girard Fils SA v. Directeur general des douanes et droit indirects*, (1988) ECR 1099, para 12.

The application of these two requirements to concrete cases led to the development of new, Community remedies, to the imposition of conditions under which remedies are granted, and to the changes in national procedural rules.

Although the Court, basing its decision on the presumption of availability of effective national remedies, declared in the case 158/80 "Butter-buying cruises"⁴⁶ that Community law is not intended to create new remedies in national courts, this proved not to be always true.⁴⁷ There are situations in which there are no comparable national laws, or situations in which existing national remedies are clearly inadequate or do not exist at all. In these situations, Community law which is supreme to national law, requires national courts not to apply remedy provided for by national law, but to apply an effective remedy. In certain cases, the Court itself has given instructions to national courts which remedies are requested under Community law. In others, it left to the national courts alone to apply an effective remedy, even if such is not available under national law.⁴⁸

The best covered area by the case law is situation in which an individual has paid charges which were, however, levied contrary to Community rules. In these cases, the primary substantive right which an individual enjoyed on the basis of Community law, was his privilege not to pay charges, which had as correlative obligation, a no-right of different national financial authorities to request the payment of such charges. However, in most cases the holders of rights were not able to perform their economic activity unless they paid the charges required. When they were made obliged to pay charges, their primary substantive right (privilege) was violated. The question which arises consequently, is which secondary substantive right arises in case of a violation of a

⁴⁶ Case 158/80 Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel, (1981) ECR 1805.

⁴⁷ See also Barav, *op. cit.*, at. p. 14.

⁴⁸ John Temple Lang wrote in a recent Article that "In effect, a national court has a legal duty under Community law to create an effective remedy, both procedural and substantive, if one does not

primary right, and at which level of law this right arises. It is clear from the case law, that secondary right in such cases is right to repayment of charges, and that this right arises under Community law. The best example is case 199/82 San Giorgio, in which the Court stated: "... entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence, and adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having equivalent effect to customs duties ..." ⁴⁹

However, conditions for reimbursement (both substantive and procedural) are matter of national law, providing that there is no Community law on this subject and that national law does not make virtually impossible or excessively difficult the exercise of right to reimbursement. ⁵⁰ Thus, in cases 68/79 Hans Just, 130/79 Express Dairy Foods and 199/82 San Giorgio, the Court considered that there is nothing in Community law to prevent national judge to take into account, when deciding on the right to reimbursement, the rule of national law according to which there is no right to reimbursement if the charge has been passed on other traders or consumers. ⁵¹

However, if the burden of proof that the charge has not been passed on another person is on a person claiming repayment, this would, according to the Court, make the exercise of his right to reimbursement virtually impossible. Therefore, such rule is not in conformity with the requirement of effective protection, and must not be applied by national judge when he is deciding the case under Community law. ⁵²

already exist". Temple Lang, J., *The Duties of National Courts under Community Constitutional Law*, 22 (1997) ELRev 3, at p.6.

⁴⁹ Case 199/82 Amministrazione delle Finanze dello Stato v. San Giorgio, (1983) ECR 3595, para 12. See also case 240/87 C. Deville v. Administration des impôts, (1988) ECR 3513 at para 11: "... the obligation of the Member State in question to reimburse him follows from the direct effect of the Community provision which has been infringed."

⁵⁰ See case 240/87 C. Deville v. Administration des impôts, (1988) ECR 3513, para 12.

⁵¹ Case 68/79 Hans Just v. Danish Ministry for Fiscal Affairs, (1980) ECR 501, para 26; case 130/79 Express Dairy Foods Ltd v. Intervention Board for Agricultural Produce, (1980) ECR 1887, para 14; case 199/82 Amministrazione delle Finanze dello Stato v. San Giorgio, (1983) ECR 3595, para 13.

⁵² Joined cases 331, 376 and 378/85 Bianco, para 13.

In cases 33/76 Rewe⁵³, and 45/76 Comet⁵⁴, in which the national time-limits for bringing an action for reimbursement were in question, the Court after applying the effectiveness test considered national time-limits in question to be in conformity with Community law. It, however, left open the possibility to decide contrary in different national situation. Thus, in case 240/87 Deville, it considered national procedural rule enacted after the judgement of the Court from which it follows that certain national legislation is incompatible with the Treaty, and which by determining time-limits reduced the possibility for instituting proceedings for recovery of taxes, incompatible with the Community law.⁵⁵

In the case C-208/90 Emmott, the Court considered that the national time-limit for instituting proceedings for vindication of rights granted by Directive cannot start until a Directive was properly transposed into national law.⁵⁶

In cases concerning discrimination on the grounds of sex, the Court did not, as in the above-mentioned cases, consider that the type of secondary right is determined by Community law. It left to national law to determine whether a woman who was discriminated in relation to conditions of employment, by either being retired earlier than mail employees, or refused a job on the basis of her sex, had the secondary right to be (re)employed or she was only entitled to damages. But, if national law chooses damages as appropriate remedy, then compensation must be adequate in relation to damages sustained in order to satisfy Community effectiveness test.⁵⁷

⁵³ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftshammer fuer das Saarland*, (1976) ECR 1989.

⁵⁴ Case 45/76 *Comet v. Produktschap voor Siergewassen*, (1976) ECR 2043.

⁵⁵ Case 240/87 *C. Deville v. Administration des impots*, (1988) ECR 3513, para 13.

⁵⁶ Case C-208/90 *Theresa Emmott v. Minister for Social Welfare and the Attorney General*, (1991) ECR-I 4569, para 21-24.

⁵⁷ Case 14/83 *Sabine Von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, (1984) ECR 1891, para 23.

If the exercise of Community individual right is prevented by national (legislative or administrative) decision which is contrary to Community rule granting a right (which is often the case), the possibility of judicial review of such decision of national authority is essential for the protection to be effective. Therefore, national rule allowing the delivery of decision which does not state reasons, is unacceptable from the point of view of Community law, because it does not enable the judicial review of conformity of such decision with Community law.⁵⁸ Likewise, the provision under which a certificate signed by competent national authority is conclusive evidence that an act was enacted with some legal purpose is contrary to Community law because it disables judicial review of such act for conformity with Community law.⁵⁹

By judgement in Frankovich case⁶⁰, the European Court created yet another Community remedy. Namely, on the basis of any Community rule intended to create a substantive right for individual and requesting states to act in order to enable the exercise of such right, the individual has a primary right to request states to act. If the correlative duty is not performed by a state, the secondary substantive right to damages arises under Community law. The Court made it clear already in previous case law that the liability of states in damages for breach of Community law may arise in such cases, but referred back to the "*provisions of national law on the liability of the state.*"⁶¹ After Frankovich judgement, a state became liable in damages on the basis of Community law, whether or not such possibility existed under national rules. Some conditions under which a secondary right to damages arises were clarified by the Court already in Frankovich. Thus, the intention of provision must be to confer right on individuals; the content of

⁵⁸ Case 222/86 Unectef v. Georges Heylens and Others, (1987) ECR 4097, para 14.

⁵⁹ Case 222/84 Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, (1986) ECR 1651.

⁶⁰ Joined cases C-6 and 9/90, Andrea Frankovich and Danila Bonifaci v. Italian State, (1991) ECR-I 5357.

⁶¹ Case 60/75 Ruso v. AIMA, (1976) ECR 45, at p. 56.

right must be definable on the basis of provision in question (which is in fact the requirement that the rule is directly effective in legal relation individual - state as legislator, explained earlier); and there must be a causal link between the violation of state and damage suffered by individual (which is the necessary condition for any remedy in damages). Some other unclear points were raised in subsequent references for preliminary ruling, and in the writings of legal commentators.⁶² It now seems clear that liability of state may arise whether or not the provision which was not implemented was directly effective in the legal relation it primarily intended to create, and that it does not arise only in a case of failure of state to transpose a Directive, but also in case of a breach of any Community rule in whatever form, intended to bestow right on individuals.⁶³ New questions relating to conditions of state liability in damages under Community law will certainly emerge, and will probably in a number of areas refer for answers back to national rules, under limitation that judicial protection to which individuals are entitled is effective and accessible in practice.

The effectiveness principle requires that national rules regulating the judicial protection pass not only the test of non-discrimination and practical adequacy, but also that the judicial protection must be direct and immediate. Two of the leading Community cases are result of the application of these requests. In *Simmenthal* case⁶⁴ the national judge was obliged by Community law not to apply national procedural rule (of indeed constitutional significance for the separation of powers in Italy) which requested him to submit any question of legality of national legislation to a Constitutional court. On the basis of the effectiveness principles, national judge is bound to do everything necessary to give effect to Community law "*at the moment of its application*".⁶⁵ Even

⁶² Steiner, J., *From direct effects to Frankovich: shifting means of enforcement of Community law*, in: 18 (1993) *ELRev.* 3.

⁶³ Shaw, J., *Law of the European Union*, MacMillan : London, 1996 (2nd ed.), at. pp. 279-282.

⁶⁴ Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, (1978) ECR 629.

⁶⁵ *Ibid*, para 22.

if reference to Constitutional court would create only a temporary impediment to the application of Community law, the rule imposing on judge such procedure was held inconsistent with the Community law.

In case *Factortame*,⁶⁶ the judge was empowered by Community law to grant interim injunction against an Act of the Parliament, even if under national law such remedy did not exist. This was necessary in order to provide direct and immediate protection of individual Community rights, or as always in cases of interim protection, of putative Community rights, pending a clarification by the European Court in another case. It is interesting that as a consequence of this judgement, English courts were empowered to grant interim injunction against the Crown also in a purely national proceedings.⁶⁷ This is an excellent example of the interrelation of Community and national law, in which Community law in its development relies on the already existing solutions in national laws, but also influences and initiate changes in national legal systems.

Above are only some examples of influence which Community law had on national laws in order to ensure the effective judicial protection of rights which individuals enjoy on the basis of Community provisions. The list is not exhaustive. In future, other national rules, substantive or procedural, may be considered as inadequate for ensuring effective judicial protection by national courts. The development of law in such way, *i.e.* through principles and rules which emerge in the case law, and are therefore dependent on the real cases brought before the Court has its positive and negative sides. On the negative side is in the first place the legal uncertainty created by such situation. The Community rules, although only declared by the Court, are not known in advance by the subjects of legal relations for whose benefit or disadvantage they are explained.

⁶⁶ Case C-213/89 *R v. Secretary of State for Transport ex parte Factortame Limited and Others*, (1990) ECR-I 2433.

⁶⁷ See opinion of Advocate General Jacobs in joined cases C-430/93 and 431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, (1995) ECR-I 4705, point 21 of the opinion.

The other disadvantage of the case-by case method of development of law is that it has as a consequence a non-uniform application of Community law throughout the whole Community (of which more will be said under following title). This concern was expressed by the European Court in case 130/79 Express Dairy Foods in following terms: "*In the regrettable absence of Community provisions harmonizing procedure and time-limits the Court finds that this situation entails differences in treatment on a Community scale.*" The Court continued by saying that "*It is not for the Court to issue general rules of substance or procedural provisions which only the competent institutions may adopt.*"⁶⁸

Thus, both for the reasons of legal certainty and the assurance of uniform application of Community law, the Court and some legal commentators,⁶⁹ pleaded for Community legislative action in the field of judicial procedure.

However, enacting an abstract code of procedure is not suitable for assuring at the same time the respect of the traditions enshrined in the Member States' legal systems which cannot and should not be swept away over night. Here, the case-by-case approach has a clear advantage. When deciding a concrete case, the Court is in position to take into consideration national legal traditions and to assess existing national rules according to their purpose in both national and Community legal system. Such teleological approach to the problem is best suited to find the necessary balance between the need to respect national legal diversity and the imperative of effective judicial protection of Community rights, although it is sometimes harmful to the request for uniformity. The need for assessing national rules in accordance with their purpose in the entire system was declared by the Court in the following terms: "*... each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure,*

⁶⁸ Case 130/79 Express Dairy Foods Ltd v. Intervention Board for Agricultural Produce, (1980) ECR 1887, para 12.

⁶⁹ Bridge, J., Procedural Aspects of the Enforcement of European Community Law through the Legal System of the Member States, 19 (1984) ELRev 28.

*its progress and special features, viewed as a whole, before the various national instances. In the light of the analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."*⁷⁰

To conclude this part, let me express the view that assessed in terms of effectiveness Community law as it stands today is capable of guaranteeing effective judicial protection to individuals whose Community rights were infringed. The guarantees developed on a case-by-case basis are best suited to provide for the effective protection on the one hand, and take into consideration legal traditions in the concrete Member State, on the other. However, the development of Community rules and principles on a case-by-case basis results in the legal uncertainty and is not consistent with the requirement for legal uniformity.

Fulfilment of the requirement for uniformity

The first condition for the law to be uniformly applied to its subjects is that the content of the substantive rules is uniformly interpreted. This presumes that there is only one institution which has competence to give authoritative interpretation of legal provisions. Within legal orders of the Community Member States this problem is solved in two principal ways. One is the system of appellate proceedings, in which the highest court's decision on the points of law is final in the concrete case. In these systems, even if the highest court's interpretation does not bound lower courts in the subsequent cases, the parties always have the possibility to appeal to the highest court in order to have their rights and obligations interpreted in uniform manner. The second way of ensuring uniformity of interpretation, pertinent to common-law systems, is based on the

⁷⁰ Cases C-430/93 and 431/93 *Joren van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, (1995) ECR-I 4705, para 19. See also case C-312/93

doctrine *stare decisis*, according to which interpretation of law given by the higher court binds that court and lower courts in all subsequent cases.

Within the European Community, the procedure which guarantees uniform interpretation of substantive legal rules is a mixture between the two systems. The European Court is not the appellate court in relation to the national courts. It does not even pertain to the same hierarchy of courts. The system guaranteeing uniform interpretation of law in the Community is, rather based on the cooperation between national courts and the Court of Justice, which is regulated by Articles 5 and 177 of the EC Treaty. It empowers all national courts to refer a preliminary question on the interpretation of Community law to European Court, and bounds the courts whose judgement is final in a given case according to the national hierarchy, to request preliminary judgement in all cases in which there is doubt as to the interpretation of some point of Community law. Thus, even if lower courts do not use their discretion to refer the question to the European Court, national appellate structure in combination with Article 177 ensures that unclear point of Community law is settled in uniform manner.

The Treaty itself does not regulate the effects of the Court's judgement on interpretation. The ruling of the Court on interpretation is not a precedent in a common law sense. But by virtue of the fact that Court's interpretation only declares the law as it was (it has the effects *ex tunc*), and in combination with Article 5 of the Treaty, national courts are, however, required to follow European Court's interpretations. This does not prevent referral of the question on the interpretation of the same rule by another national court.⁷¹ Within such system, the Court's interpretation becomes a sort of precedence, which may be altered only by a new interpretation by the European Court, following the repeated preliminary reference on the same issue by the same or different national court.

Peterbroeck, Van Campenhout & C SCS v. Belgian State, (1995) ECR-I 4599, para 14.

⁷¹ Case 28-30/62 Da Costa en Schaake NV, (1963) ECR 31.

Thus, the system as envisaged under Articles 5 and 177 of the Treaty guarantees to a high degree the uniform interpretation of the substantive provisions of Community law.

However, the uniformity of substantial Community rules is not sufficient for ensuring uniform protection of individual rights by national courts. It is true that national courts are bound, on the basis of the primacy and direct effect of Community law, to apply Community law in the cases which concern protection of individual Community rights brought to them. However, the uniformity of access to those courts (in a broad sense, including all the pertinent procedural rules) is not guaranteed by the Community law. As shown under previous title, Community law did influence national procedural rules to some extent, but the harmonized Community procedural law does not exist.

National rules which satisfy Community effectiveness test (they are not discriminative and do not make exercise of rights virtually impossible or excessively difficult) may still differ from state to state. A good example are time-limits for bringing the action for restitution of charges collected contrary to Community law. In case 33/76 Rewe, German limitation periods for bringing the action to administrative courts were one month, or in certain circumstances, one year. In almost identical case 45/76 Comet, Dutch limitation period was 30 days. As pointed out by John Bridge, in respect of the same unlawfully imposed charges, a trader in Germany could claim reimbursement within a maximum of one year whereas a trader in the Netherlands would have only 30 days. This illustrates "the scope for inequality of treatment which is inherent in the Community's reliance on national procedural rules".⁷²

This inequality exists in relation to other rules of procedure or rules closely connected to procedure. Working group chaired by professor Marcel Storme, which engaged in proposing

⁷² Bridge, J., *op. cit.*, p. 33.

harmonization of rules of civil procedure, showed for example that the costs of proceedings vary considerably from state to state.⁷³ It is, therefore, possible that after a cost/benefit analysis a holders of Community rights may decide not to institute proceedings in some countries. Likewise, the length of proceedings in some countries may be the motivation not to even engage in judicial enforcement of rights.

The existence of inequalities is, with regret, recognized also by the Court.⁷⁴ But, as Advocate General Warner pointed out "Court cannot create Community law where none exists, that must be left to the Community legislative organs."⁷⁵

It seems, therefore, that the only remedy for inequality in judicial protection is Community legislation. As already pointed out, disadvantage of the legislative method is its inability to find the appropriate balance between the need for harmonized general procedural rules at the European level and the respect for differences in legal traditions of Member States. However, having already a number of rules and principles developed through the case law of the European Court, harmonization of procedural law may be accomplished in phases, through a kind of adjusted codification of the existing principles. For the differences from certain parts of substantive law, unification of procedural law may be conducted in phases.⁷⁶

Which are appropriate legal bases in the Treaty for harmonization of procedural law? In the Report on approximation of judicial law, the working group mentioned Articles 5, 3(h), 100, and 100A of the Treaty.⁷⁷ I would like to add Article 235 to this list.

⁷³ *Approximation of Judiciary Law in the European Union*, Marcel Storme (ed.), Kluwer, Martin Nijhoff Publishers, 1994, at p. 46.

⁷⁴ See the quotation in the text above the note 68. There are also commentators who are of the opinion that "interest in preserving the integrity of Community legal order and proper protection of rights of individuals under Community law can be adequately met by the principles already developed by the Court." - opinion of Advocate General Jacobs in cases C-430/93 and 431/93 *Joren van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, (1995) ECR-I 4705, para 48 of the opinion.

⁷⁵ Opinion of AG Warner in case 265/78 *H. Ferwerda B. V. v. Produktschap voor Vee en Vlees*, (1980) ECR 617, at p. 640.

⁷⁶ See General introduction of Marcel Storme in *Approximation of Judiciary Law in the European Union*, op. cit., at p. 54.

⁷⁷ *Approximation of Judiciary Law in the European Union*, op. cit., pp. 58-59.

Thus, given the legal possibility to legislate, the uniformity of judicial application of Community law in national courts will depend on the willingness of Community legislator to regulate this field. There are already some examples of such legislation,⁷⁸ but not much has been done.

As was already mentioned, the harmonization of the rules of procedure, may be achieved in phases, thus respecting the already existing case-law and the principles which shall be developed in future. However slow this process might seem, in the end of the day a harmonized Community procedural law seems as an achievable project.

In the meantime, the inequality of treatment of Community citizens will still exist. But, Community law, with all its achievements by now, is still an emerging legal order. Therefore, the occasional lack of uniformity in the judicial protection of the rights of individuals, may be seen as yet another "infant disease" of Community law.⁷⁹

Conclusions

It is clear today that Community law is capable of bestowing rights directly on individuals, and that one of the tasks of the new legal order is to enable judicial protection of these rights. This protection has to be effective, and has to be uniform throughout the Community. However, Community law, although being an autonomous legal order, is in its judicial application dependent on the national courts and national laws. Therefore, in order to assure its effectiveness and uniform judicial application, Community law has to influence national legal orders.

⁷⁸ See the examples given by Denis Simon in his article "Les exigences de la primauté du droit communautaire: continuité ou métamorphose", *op. cit.*, footnote 26, at p. 488.

⁷⁹ Although the direct effect, called by Piere Pescatore the infant disease of Community law, proved to be quite persistent infant disease. See Pescatore, P., *Direct Effect - an Infant Disease of Community Law*, *op. cit.*

This paper analysed two levels at which the Community law influences national laws.

First level examined, is the one at which the techniques and principles of bestowing the rights on individuals developed. The theoretical context within which the analysis was placed was the Hohfeld's analysis of legal rights. The results of this analysis showed inconsistencies in certain solutions of Community law, and the use of wrong justifications for them. Direct effect, which was developed as a condition for justiciability of Community rights, was not consistently applied to all the situations in which the right might be violated. From the Hohfeldian perspective, differentiation between vertical and horizontal effects of Directives as developed under Community law, cannot be justified. The estoppel argument used for the justification of vertical direct effect was wrongly used in the type of legal relation which does not encompass the duty of state to transpose Directive into the national law. On the other hand, the justification for not allowing horizontal effect because Directives cannot impose obligations directly on individuals cannot be justified any more after the direct penetration of Directives into the national legal orders was admitted by accepting the possibility of vertical effects. From the Hohfeldian perspective, two solutions are possible. First is that Directive may create the legal relation between the individual and state as legislator, in which a state is obliged to transpose a Directive (Frankovich type of relation), but cannot create the other legal relation in which a holder of the correlative obligation is subject pointed out by the rule of directive (public or private), and the content of his obligation is to perform or refrain from performing the act described by the same rule of directive (Marshall type of relation). Second solution is that a Directive is capable to create both, the Frankovich and the Marshall type of legal relation, in which case the right in the Marsall type of relation should be enforceable against public and private holders of correlative obligation alike.

With the exception of Directives, direct effect represents under Community law, the condition for justiciability of Community rights in national courts. Expressed in Hohfeldian way, it means that in order to be suitable for application by the courts, legal provisions need to enable a judge to

determine all three elements of legal relation: holder of right, holder of duty, and content of right/duty. This is also true for the justiciability of Frankovich type of right.

Due to the differentiation between vertical and horizontal effect of Directives, the possibility for the not-effective and not-uniform judicial application of Community law exists already on this, firstly examined level of inter-relation between Community and national law.

Second part of paper dealt with fulfilment of the requirements for effectiveness and uniformity at the third level of influence of Community law on national laws. It assessed which rules and principles were developed in the area of remedies and procedures in proceedings which are taking place in national courts.

Although substantive individual Community rights are created by the Community law, and although European Court is the only court competent for the authoritative interpretation of the content of these rights, their final judicial application happens in national courts. They, in turn, function within a different, national legal orders to which they pertain. Thus, remedies and procedural rules are, in principle a matter of national law.

Article 5 of the EC Treaty requires Member States, including their judicial branch, to take or abstain from any measure which may jeopardize the attainment of the objectives of the Treaty. Thus, in providing judicial protection to Community based rights, national courts must do everything necessary to make the protection of individual Community rights effective, this being one of the Treaty objectives. This may sometimes put them in the conflicting situation if they are, in protection of Community rights, requested to do something not allowed by the national legal system to which they pertain. The way out from such a conflicting situation was to separate the two functions of national courts: the one under national law, and the other under Community law. The first step in this direction was to say that the competence for judicial protection of Community rights is derived directly from the Community law. If the competence is a Community competence, then the content of the competence is also a matter of Community law. And as Community law is

supreme to national law, conflicting national rule may not prevent the exercise of Community competence.

This concept was, indeed, developed through the case law of the European Court. It created a sort of judicial dualism, in which national courts perform double role: they are at the same time national courts and Community courts.⁸⁰

Within such framework, the European Court was able to develop certain principles which guarantee, from case to case, the effective judicial protection of individual Community rights by national courts. Two basic rules imposed on national courts are requirement of non-discrimination and requirement that national law does not make the exercise of Community rights excessively difficult or virtually impossible. Through application of these two requirements to concrete cases, the Court was able to define more concrete rules, thus imposing new Community remedies, stating conditions for their award, and initiating changes in national procedural rules. Such legal framework satisfies to a high degree the request for effective protection of individual rights. It enables the Court to develop necessary rules on a case-by-case basis.

Such case-by-case approach is suitable for respecting diversities in national legal traditions when developing Community law. However, as the law is known to the interested parties only *ex post*, it creates a situation of legal uncertainty. It is also not suitable for assuring the uniform judicial application of Community law throughout the whole Community, as two national rules which both satisfy Community effectiveness test in the context of the particular national case, may still differ considerably, thus placing the individuals in unequal position.

The only method which can rectify the state of not-uniformity is legislative harmonization of procedural rules. This method, however, cannot at the same time take into consideration all particularities of national legal orders, which on the basis of long traditions, have their purpose in the system. Thus, the compromise between the two methods: case-by-case creation of law and

⁸⁰ See Grevisse, F./Bonichot J., op. cit., at. p. 310 "dualisme juridictioneel".

legislation should be found in order to satisfy the requirement for uniformity. Those parts of procedure which are already influenced by the Court's case law, may be harmonized on the basis of different Community legislative techniques. Other fields should firstly be submitted to practice, and when the case-made law is rounded enough, may also be codified. This, of course means, that in the meantime, the inequality of treatment of Community citizens⁸¹ in front of the courts will continue to exist. But, given the youth of Community law, this may also be regarded as yet another, curable infant disease of Community law.

This state of immaturity of the Community legal order is exactly what makes the research exciting. Different actors which participate in the development of the new legal order can all claim a part of glory of its success. Among them, European Court has had the biggest part. National courts, which were ready to cooperate, refer the questions and accept the solutions made their contribution. But, one should not forget that were there no individuals as Ms Marshall or Mr Frankovich, who realized what the new order offers them, the Community law would not be what it is today. Therefore, it is the individual who is to be admitted an important role in the development of Community law.

⁸¹ The Union citizenship was introduced by the Maastricht Treaty (Article 8 of the EC Treaty). It may increase the need for the uniform solutions regulating the judicial protection of the rights of Community citizens. This argument was put forward by Advocate General Lenz when he was arguing for the need to allow horizontal direct effect of Directives in case *Facini Dori*. See para 53 of the opinion.

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