On the Rule of Law Turn on Kirchberg – Part II

Tomasz Tadeusz Koncewicz 2019-08-04T11:07:33

In memory of Professor John A. Usher

Know your strengths, and limits too

While the dangers of over-politicization of the judiciary are duly noted here, the times of constitutional crisis call for a more robust approach to institutions and their respective spheres of competence and expertise. Courts of law are in the business of enforcing the rule of law. This is what they do, and this is what they do best. Of course, it does not mean that they are the only players in the rule of law domain. There are other institutions that have their own distinct mandates and competences. Sometimes for an action by one player to be fully effective, a follow-up will be needed. In other situations, a judicial actor will be able to bring about a change through his actions only.

In its capacity to de-block the political stalemate by offering alternative legal avenues, the Court of Justice must continue to tread cautiously. In the evocatively titled paper "The European Court of Justice: Do all roads lead to Luxembourg?", Judge A. Rosas has argued forcefully that the Court's role, important as it might be, must be seen as part of the overall institutional structure of the Union. He stressed that the Court is not in charge of deciding what will come before it and the cases that do come before the Court concern specific questions that do not "solve" the problems facing the Union. This must mean that the existential jurisprudence as understood here must be seen as an exercise of balancing three elements and as such poses a formidable conceptual challenge for the Court.

First, judges must at all times be aware of the political context in which they operate and which in the end will impact on how the jurisprudence will operate. Jurisprudence which mis-construes the context and fails to tailor its message to the environment, will be short-lived. Again, as M. Shapiro has rightly pointed out, "*[i]n the realm of judicial behaviour, what judges say, what rules they announce and/or threaten to announce is often a more significant aspect of their behaviour than how they vote".* The margin for error in highly sensitive cases is thin. It takes a judicial diplomat to draw the principled line and avoid alienating the political environment in which the Court operates.

Second, judges must never stray too far from the consequences of their decisions. Given the ever-growing shadow of the case-law, this consideration is of utmost importance. The consequentialist element in the reasoning must not only be determined by "here and now", but to larger extent by "what next". The Court and its incremental policy-making must anticipate the future consequences of its rulings

and possible constellations in which they will be applied. This is not an easy task and requires a combination of judicial diplomacy, institutional awareness, political finesse and judicial self-restraint. In other words, the Court-tactician must have a long-term plan for its constitutional document.

Third, the Court is bound by art. 19 TEU and then some more. Unless it wants to be guilty of committing *per non est*, it must at all times adhere to the basic values in art. 2 TEU and translate them *judicially* and *judiciously* into enforceable doctrines. This where the challenge of converting a legal text (constitution) into principled and non-opportunistic case-law comes to the fore and poses the biggest challenge of all to the Court: one of constitutional imagination and self-understanding. Article 2 TEU forms part of the EU law *senso largo* in the same way the Court has interpreted the term "law" in art. 19 TEU, once called the treaties' most important legal provision. In the light of an *acquis jurisprudentiel* of fifty years,there is still untapped remedial potential in art. 19 TEU. The Court of the 1960s and 1970s always spoke of the law's authority that binds together the union of "states, institutions, and individuals". Writing with his usual farsightedness and lucidness, Professor John A. Usher commented on the ways the Court has been using art. 164 (the precursor of what is now art. 19 TEU) of the original EEC Treaty:

> "In fact, […] the Court would appear to have granted a new remedy not expressly foreseen in the Treaties, by virtue of two general provisions of the Treaty, Article 5 and 164 […] The door appears to have been opened to the exercise of new sorts of judicial control in the complex relationship between Community institutions and Member States, going beyond the broad interpretation which the Court had already given under the treaties".

With the existential jurisprudence on the rise and with the Court growing more and more confident, the door has been thrown wide open to a new brave world of enforcing constitutional essentials of the EU legal order and of reminding Member States of their core commitments accepted on the Accession Day.

Epilogue or a new prologue?

M. Foley has argued that a written constitution is not all that it documents and the "written" part of the constitution may be its least important part. He locates a third profoundly fundamental dimension that goes beyond the "written-unwritten" distinction. This dimension rests upon the recognition that in both written and unwritten constitutions, there remains an undisclosed component upon which the stability of a constitution's meaning and authority depends. Such a component remains obscure and compulsively unwritten – no matter how elaborate the rest of the constitution may be. Its significance lies not just in the fact of it being unwritten, but in its need to remain unexpressed and unfathomable, in order for it to maintain its "essential character". The intermediate layer of obscurity represents not just a difference in scale to the other two layers, but a difference in kind. The layer "[…] accommodates those implicit understandings and tacit agreements that could never survive the journey into print without compromising their capacious meanings and ruining their effect as a functional form of genuine and valued ambiguity".

Such “understandings” only remain understood as long as they remain sufficiently obscure to allow them to retain an approximate appearance of internal coherence and clarity, while at the same time accommodating several potentially conflicting and unresolved points of issue. The resolution of conflict in such cases is that of suspended irresolution – either consciously secured or, far more probable, unconsciously and unintentionally acquired. Such understandings are referred to by the term “constitutional abeyance” which reflects the dormant suspension implicit in what appears to be quite explicit constitutional arrangements.

Foley’s conceptualization of constitutional abeyances is helpful in understanding the constitutional stakes behind, and risks hidden in, the existential jurisprudence of the Court of Justice. The decision to set up the European Communities back in the 1950s was based on the implicit consent to abide by certain constitutional essentials. The rule of law was always embedded in the legal order of the EU and thought of as a break with the lawless past and a move away from the power politics of nation states. It meant to frame and civilise. The consent in turn flowed from the shared understanding that such implicitness indeed existed. No one questioned this. Tacit agreement sufficed as there was an expectation that the implicit would never be questioned in principle. The system would be best served by the existence of the implicit “hanging” between the written and unwritten. It was believed that the integration would be best served by such an approach.

“The Rule of Law crisis” calls for “the implicit” to be elucidated, developed and ultimately protected – to be spelt it out explicitly. Such spelling-out is an uneasy process of expressing what was always taken for granted at the level of the unwritten. While this does not call into question the shared value of implicit understanding it changes the level of specificity as the contours of “the implicit-explicit divide” are now to be mapped out and defined for all. Filling out the implicit understanding with its explicit content has now begun and it might disturb the delicate balance of the constitutional document: either the shared element, now elevated to the explicit core, will prevail as part of the consensus *or* disruptive forces will continue to call into question the shared element of our union and in the end, they will bring the consensus down.

Treaty objectives and design explicitly drew on the implicit understanding of the law and legal order that was to be put in place. The implicitness deferred the discussion of the core and content. All parties involved assumed that the rule of law was an essential part of the original consensus that was never to be called into question. The rule of law crisis exposes the volatility of the implicit understanding(s). The journey within the implicit understood as shared understanding of essentials was present in the past but as the Community grew, evolved and differentiated, “the shared” became contestable. Seen from that perspective, the rule of law crisis brings to light the misunderstandings and calls into question the avowed shared dimension of the implicit core of the Union. The rule of law crisis has the potential to play both an explicatory and revealing role. It might bring to the surface essential elements of the constitutional bargain and open the discussion on the final contours of what was presumed as fundamental yet implicit in the parties’ decision to join the Communities back in 1951. The crisis is elevating constitutional abeyances to the mainstream

constitutional discourse and testing the limits of acceptance. The ambiguity and obscurity that defined constitutional abeyances is now replaced by open and critical bargaining over the explicit and the states' limits of acceptance. Tacit understandings are turned into loud misunderstandings and the Court of Justice finds itself caught in the middle of this critical axiological juncture.

The Court has always been recognized as a powerful political player that is capable of casting its judicial shadow on all the actors in the governance structure. The imagination and courage the Court showed in the string of cases starting with the logging case and *Portuguese Judges* case and more recently in the Polish Supreme Court controversy, reminds us of what Niamh N. Shuibhne called "responsibilities of constitutional courts." She argued that a constitutional court has a responsibility to protect and to further the objectives and values enshrined in the constitution to ensure that the rights and protections promised by the constitution are realized.

The Court of Justice is not only rediscovering old precedents, but first and foremost building on the spirit of what Judge Kakouris called "the mission of the Court". Respect for, and trust in, the rule of law are existential components of the original consensus on which all other commitments of the parties are built. The moment these principles start to crumble, so will fragile European consensus. When read in the light of Van Gend en loos and Simmenthal, the „existential jurisprudence" is firmly anchored in and tailors it to the rule of law crisis. Although the courtroom must not be seen as the place to solve all problems, it offers one powerful mechanism against "exit" mechanisms. As more and more rule of law cases make their way to the Court, existential jurisprudence must be seen as a an exercise in constitutional balancing that will be shaped by the *context* (the Court's institutional and political awareness in reading the political consensus), *consequences* (judicial diplomacy), *mandate* (adherence to the basic values and defending Union legality as expressed in art. 19 TEU) and finally the *interaction* as the mandate keeps reinforcing and informing the interpretation of the competences. Such balancing will in the end determine the success (or failure) of the Court. A blind court decoupled from political reality will harm its own legitimacy, as politics will increasingly oppose its rulings.

With the *First Principles* slowly taking shape, the Court will be faced with the equally difficult challenge of smoothing the rough edges of these principles. The Court must be aware of both the opportunities and limitations that the new constitutional politics in Europe entail. One can clearly see the various trajectories and risks involved in the existential jurisprudence. The trajectory which might be conveniently called "*Back then"* was built on the *First Principles* as constitutional abeyances. The "*Here and Now*" trajectory moves us now from implicit understanding to explicit expression. The possible trajectory of "*Tomorrow*" will reconstruct and enforce the rule of law as an essential precondition for all parties' deferral to one another and to the Union they had created. Rule of law, separation of powers, judicial review, and judicial independence are slowly emerging from the shadows of constitutional abeyances and start operating as procedural benchmarks of the European constitutionality. Even though the contours of the existential jurisprudence are still in the process of being rediscovered, this jurisprudence has already started playing its important systemic role. It determines the rules of the game and enforces them against the foul

players. These essential principles ordain the game that is played on the integration field under the watchful eye of the Court.

President Lenaerts poignantly argued: "*Cases which put courts at distress provide good evidence from which one may determine whether the judiciary enjoys legitimacy. indeed, it is in complex cases that courts often prove what they are (and are not) capable of".* While the uneasy question of "how far" always remains, the Court's trajectory has already been set. But this is only the beginning. The time of *mega-politics* has arrived.As Polish populist authoritarians are here to stay, so is the constitutional challenge in front of the Court. No doubt then that the journey and the many tests the Court will be put to, will continue. This must be so, because after all the Court is a court of law, and the Union is a community of law and, as eloquently expressed by Advocate General F. Mancini, in Les Verts:

> "[T]he obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission".

I am very grateful to my fellow 2019 Braudel Fellow at the European University in Florence Professor Jeffrey Dunoff of Temple University for our constant and lively exchanges on the problems and ideas presented here. EUI has provided a dream environment to think through the concept of the existential jurisprudence and some more. Needless to say, all errors and omissions remain my sole responsibility.
