

## THE ESSENTIAL (AND WOULD-BE ESSENTIAL) JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE: LIGHTS AND SHADOWS TOO

by

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### A.

In a public speech not long before the Treaty establishing a Constitution for Europe 'bit the dust,' Valéry Giscard d'Estaing opined: "The word 'constitution' implies not only a legal system, but more than that....One single text would create the legal existence of Europe."<sup>1</sup>

The word 'constitution' indeed implies more than a mere legal system. But, many would contend, legally Europe has existed for some time and in a manner which was far more than a mere legal system. A remarkable constitutional *acquis* had become embedded in the Union long before the ill fated saga of the Convention and its aftermath. The phrase 'Constitutional Architecture' to describe the legal order of the Union has become not merely *orthodoxy* – it is 'doxy' itself.

For a long period I have been in an uncomfortable position: One of those rather few Euro-Constitutionalists who publicly and repeatedly called into question the need for, and the wisdom of, the formal constitutional project. Europe's basic Constitutional Architecture, one argued, was not only functionally sound it was noble and original, fashioned in accordance with Schumann's astute step-by-step approach in a remarkable consensual multilogue among Europe's courts, high and low. This collaborative judicial-political exercise was not only procedurally expedient, it was a reflection of Europe's substantive Grundnorm and its most striking contribution to transnational statecraft: The Principle of Constitutional Tolerance. What is more, the constitutional architecture enjoyed a high index of political and legal legitimacy, ratified repeatedly by all Member States' Parliaments in accordance with their constitutional provisions through regular IGCs and Treaty revisions.

This is not a formalistic argument. There have been over the years calls and even formal proposals at IGCs to undo foundational building blocks of the constitutional architecture. These were almost always roundly defeated for lack of consensus. Indeed, part of the genius of European constitutional evolution has been to render the

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1 Second Annual Emile Noel Lecture, NYU School of Law [www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org)

constitutional foundation the default position, requiring a consensus to overturn it – this genius apparently forgotten by the Convention’s *nouveau-architects*.

I have never been persuaded by those who argued that Europe suffered from a Constitutional deficit or that its legitimacy crises were rooted in constitutional defects.<sup>2</sup> What, instead, had become functionally unsound, and dramatically so with Enlargement, was not the constitutional but the Institutional architecture. Institutionally, in the ever growing (growing in size and complexity) European body, purred and then ticked and then stuttered and then strained an institutional engine designed in the 50s, modified through the 60s, 70s and 80s but essentially stuck there with the institutional technology of the Single European Act put in place to propel the so-called Single Market. Institutionally Europe had become like a large, shining Fiat Chroma of the 90s, powered by the tried but tired Fiat 128 engine of the 70s.

Europe certainly needed a major institutional overhaul. In fact the Institutional content of the Constitutional Treaty is sound and sensible and largely non-controversial; in some respects it might not even go far enough in meeting European needs and potentialities. But there is nothing in these sensible institutional provisions of the Constitutional Treaty which could not have comfortably been affixed to the extant constitutional chassis. Indeed, if one were to shut one’s eyes and imagine the Constitutional Treaty without the word constitution among its 154,183 words (English Versions), what we would have had would be what the Nice Treaty should have been. It is also most likely that if presented as just that, Nice *bis*, the habitual, run-of-the-mill latest installment in the series of Treaties amending and adapting Europe in its ever evolving political narrative, it would appropriately and legitimately, not have pushed all the buttons which the loaded word evoked.<sup>3</sup>

2 See *Mancini v Weiler: Europe—The Case for Statehood ... And the Case Against: An Exchange* Harvard Jean Monnet Working Paper No. 6/98, Cambridge, MA (1998); also *Europe: The Case for Statehood* 4 *European Law Journal* 29 (1998) (Federico Mancini) and *Europe: The Case Against the Case for Statehood* 4 *European Law Journal* 43 (1998) (J.H.H. Weiler). The ill-fated constitutional project of the European Parliament in the early 90s underscores, I believe, the point made in the text. Even Altiero Spinelli, one of Europe’s true Greats, understood the wisdom of Europe’s choice hence his Draft Treaty for European Union.

3 One should not, of course, forget that the so-called constitution was ratified in about half the Member States, with resounding approvals in Member State parliaments and two popular plebiscites. And yet I would argue that the Dutch and French results reflect something more than an aberrational and idiosyncratic choice in but two Member States. The Spanish Referendum was distinguished by a large majority and small turnout, so small that in Italy the result would be considered constitutionally invalid. The massive Ceausescu-like votes in several national parliaments hardly reflected similar sentiment in their own public piazzas. And it is likely that had the process not been hastily aborted, there would be some rejections and some very close votes in some of the other Member States scheduled for a referendum. Ultimately a majority of European citizens in a majority of Member States would have given their support to the Constitution had the process taken its course. But a constitution rejected (in all likelihood) by two founding Member States, by two of the large Member States (if we assume as one safely can that the UK would have voted No) by a combination of large and small Member

*B.*

I mention all this not to indulge in a smug *I told you...! fest*. This background has, I shall argue, important implications for our assessment of that which is (or rather was) essential in the jurisprudence of the European Court of Justice and that which would now become essential.

Much, perhaps all, that was constitutionally critical in the so-called Constitution which was submitted to the European peoples for ratification and was subsequently rejected, was codificatory in nature – one did not legally need the Supremacy Clause in the Constitution to establish or even validate the principle of Supremacy, to give the most banal example. Thus, from a strict legal perspective the failure of the Constitution has no legal consequence for its codificatory provisions. If supremacy was constitutionally mandated before, it remains mandatory now despite the failure of the constitutional project. That is legal logic.

But as a famous American jurist once commented, the life of the law is not logic but experience. In that grey zone, quite expansive in public law, where constitutional theory meets political praxis, one will not be able to revert so blithely to the constitutional *status quo ante*. Once the proverbial toothpaste is out of the tube, it is quite messy to try and pack it back in again. Imagine a tomorrow in which, in a not so fanciful scenario, a Member State government, say of France, decides to break ranks and go it alone in a matter of the Common Commercial Policy in violation of both majoritarian decision making rules and legal compliance. Formally, it would be an easy-case constitutional violation with well established remedies. But can anyone doubt that the public discourse would be quite different to that which the European polity had slowly become acculturated in the decades leading to the present. There will surely be those to claim: ‘Is not that discipline exactly what [we][was] rejected when the Constitution failed?’ And make no mistake: That argument will not be confined to France and the Netherlands. And make no further mistake: It will, alas, not be confined, to popular politics. It will embolden those constitutional organs in some Member States who have shown signs of chaffing at some of the existing constitutional discipline. And make no final mistake: All explanations as to why the Constitution was rejected, (including the most shameful – taking us back to the heady days of the Marxist false-consciousness claim that ‘the people did not understand and that “we” failed to explain it to “them”’) arguing that they really did not reject the constitutional provisions et cetera, will be to no avail. What will eventually remain is the collective memory of popular rejection. The European Defense Community was, in European public ethos rejected (with profound consequences on

States and probably by one or maybe two of the new Member States is not one that could be said to enjoy the kind of legitimacy which those who advocated the shift from Europe’s “common law” constitution to a formal document, had imagined and hoped for.

the subsequent strategy of European integration). Who, apart from professionals recalls, that it was rejected by one Parliament by a bare majority?

One should not over dramatize the issue; but the extant constitutional *acquis* has, at least to some extent, been undermined by the constitutional adventure that engulfed Europe's political class, especially undermining its meta-claim that, in the language of the European Court of Justice, the Treaties establishing the European Union and the interpretation given them, constitute the Union's "Constitutional Charter."

Be that as it may, the new *status quo* of post-rejection may be useful in how we understand and reconstruct the constitutional past and future of the Court's essential jurisprudence.

### C.

What, then, was essential? Each of us, in a gathering such as this, will have our pet choices and iconoclastic configurations. But at times the conventional serves. Doctrinally I think that most would locate the essential jurisprudence in two or perhaps three areas:

- The way in which the Court(s) constituted and Constituted the Union's legal order;
- the jurisprudential construction of the common marketplace;
- and, I would add, though it could be included in the first item, the Court's human rights jurisprudence.

It should be added that the overall impact of the essential jurisprudence has been cumulative, the interaction of, say, its legal order construct with its common marketplace case law.

It is not necessary, to this audience, to make a list of the landmark decisions through which the Court fashioned the components of the so-called new legal order: Direct (and indirect) effect, supremacy, implied powers, preemption and exclusivity, its remarkable attention and bold doctrines ensuring effective remedies.<sup>4</sup> And I do not, likewise, think it is fruitful to rehearse a similar list in the fashioning of its market doctrines, be it the initial move to an obstacle rather than discrimination based

4 From a doctrinal point of view, I have for long argued that the truly constitutionally innovative and differentiating in the New Legal Order jurisprudence has not been so much direct effect, supremacy implied powers and other such doctrines familiar from the tool box of international law, but the radical refashioning, in my view virtual elimination, of the heart of public international law, namely the classical doctrines of State Responsibility in far less prominent cases such as *Essevi* and the equally bold jurisprudence of exclusive competences notably in the area of external economic relations and common commercial policy.

jurisprudence, *exigences imperatives*, functional parallelism (sometimes erroneously referred to as mutual recognition), the ups and downs in the drive to equate in market terms the four freedoms et cetera. The same applies to the human rights jurisprudence.

Instead, then, of rehearsing the core and (heatedly no doubt) arguing about the periphery of such doctrinal jurisprudence, I want to highlight some less central features the essential nature of which comes into sharp relief in the light of the current circumstance of the constitutional failure.

In the traditional narrative it is the European Court which fashioned Europe's constitutional architecture. Wrong. The European Court surely deserves all its accolades from the so-called "heroic" period, but it is critical to remember that national courts (and other European Institutions, notably the Commission) played a critical role both in making the gambit to which the European Court responded (in *Van Gend en Loos* itself!) and in following faithfully the lead given by the European Court. There was also, in critical cases, quite remarkable awareness by one national court of what brethren in other Member States were doing.<sup>5</sup>

The European Court has historically been quite attentive to position itself as a *primus inter pares*, to insist of a functional division of adjudicatory tasks with national courts, and with, at times, remarkable subtlety fashion its doctrines so as to empower national courts its principal and indispensable interlocutors.<sup>6</sup>

In similar fashion, in all three doctrinal areas spelt out above (legal order, marketplace, human rights) the Court empowered popular constituencies within the Member States.

More controversial jurisprudence (at least in the eyes of some Euro-purists) but, in my eyes, having all the virtues of jurist's prudence, has been that which has known when to shy clear of the constitutional *coup de grace*, such as the resistance of the Court to the cries from the faithful in the matter of horizontal direct effect of directives, and equally and even more impressively the Court's dynamic and contextual understanding of constitutional hermeneutics which enabled it totally appropriately to change tack in one direction (e.g. *legitimation active* of the European Parliament) but also in another (*Keck*). Indeed, the entire human rights jurisprudence is part of such dynamic and contextual approach.

5 I often ask a "trick question" of my students: When was supremacy established in the Community hoping that some hapless soul will triumphantly say *Costa v ENEL* 1964 so that I can have the opportunity to correct such an answer and point to the crucial role of national courts. The European Court could preach from the top of the Mount the virtues of supremacy from here till further notice. Failure to convince its national counterparts would render such jurisprudence just that, preaching.

6 Think, e.g. of the jurisprudence concerning individual challenges ex (as it was then) Article 173 and 177b.

Why do I consider these, more silent virtues, of the European Court to be an indispensable part of any narration of the “Essential Jurisprudence” alongside the more notable instances of “activist” and “integrationist” jurisprudence? Because by design or accident (and probably both) they display a deep understanding of the importance of collaboration, of mobilization of interests, leadership which shares rather than dictates and of the politically intricate and normatively challenging tight rope of rigidity and flexibility in constitutional hermeneutics. In his trenchant critique of the Court’s jurisprudence, Hjalte Rasmussen raised a host of hermeneutically and normatively powerful arguments why many of the fundamental jurisprudential holdings were questionable and hence illegitimate. The most effective reply to such critique was not on the level of hermeneutic theory – it was empirical: The remarkable success of the ECJ in persuading the key constituencies in the Member States.

These will all be virtues which the Court will need as it moves to heal the ruptures of the recent constitutional saga. I want to make one point abundantly clear: I am not calling for the Court to revisit its foundational constitutional doctrines such as supremacy and direct effect. These need to be confirmed resolutely; I am calling on the Court to understand that these doctrines found slow acceptance because of the virtuous methodology in which they were developed. The Court today will have to call on similar virtuous skills.

*D.*

We must now turn to the dark side of the jurisprudential moon. This also holds important lessons for the future.

It is quite common when assessing the essential jurisprudence to cast the court, in a praiseworthy narrative, in a dialectical relationship with (a typically stalling) political process. The following has been told in many, many variants over the years:

In the face of political stagnation and stasis in the late 60s and a lack of ‘political will’ (favorite, meaningless phrase) the Court steps in and compensates by its remarkable constitutionalizing jurisprudence, virtually salvaging European integration

In the face of a growing democratic legitimacy, the Court develops its human rights jurisprudence. Community (and Union) norms might suffer from democratic deficiencies, but at least they will be protected against violation of fundamental human rights

In the face of the failure of the harmonization process in constructing the common market place, the Court steps in with its highly innovative doctrine of functional parallelism (Mutual Recognition) in Cassis providing a jurisprudential breakthrough to move ahead.

Et cetera.

There is more than a grain of truth in all the variants, more and less sophisticated, of this narrative. But, grant me, they are also very self-serving and partial. In all of them, the political problem is extraneous to the Court, which, within the limits of its powers, steps in, Knight in Shining Armour, to correct that which politics and politicians are unable to do. According to this view – the Court cannot (and should not) solve all the problems but it is always cast as part of the solution rather than part of the problem.

I want to argue now that the Court is, inescapably, part of the problem. That the very essential jurisprudence which we are discussing, inescapably and inextricably implicates the Court in the very issues of democratic and social legitimacy which are at least partially at the root of current discontent. And that being so implicated places a particular responsibility on the Court in its future jurisprudence.

But before I explain this thesis I want to state clearly what I am not arguing:

My critique is not part of ‘the Court has no legitimacy,’ *gouvernement des juges* and all that. Nor is it an attack on the “activism” of the Court or its hermeneutics. I do not think we have a *gouvernement des juges* nor do I find fundamental fault with the hermeneutics of its essential jurisprudence. Finally, my critique is not of the “Court, legitimate as its jurisprudence may be, has gone too far” and/or there is too big a discrepancy between legal integration and political integration etc. After all, I began my career by explaining the virtues and equilibrium encapsulated at those contrasting paces and I have not renounced entirely my earlier work. Finally, and importantly, this critique does not have as its purpose to argue that the essential jurisprudence was a normative mistake, a road which should not have been taken.

What, then, is the essence of my critique? It is, I think, by refusal to see the way in which the essential legal order constitutional jurisprudence is part and parcel of the political democratic legitimacy crisis; how the essential market integration is part of the social legitimacy crisis, and how certain elements in the human rights jurisprudence mask and impede the most essential in the human rights agenda of the Union.

One can, and some do, take the view that the Union suffers from neither democratic nor political deficit. If that is your view then the following critique of the jurisprudence will have no persuasive pull on you. But if you do believe that the Union continues to suffer from serious democratic deficiencies in its system of governance the following may be of interest.

Our starting point can be, the fountainhead of this part of the essential jurisprudence, *Van Gend en Loos* itself. In arguing for the concept of a new legal order the Court reasoned in the following two famous passages as follows:

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. *Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.* (Emphasis added)

The problem is that this “cooperation” was extremely weak. This is, in truth, a serious “dumbing down” of democracy and its meaning by the European Court. At the time, the European Parliament had the right to give its opinion – when asked and it often was not asked. Even in areas where it was meant to be asked, it was well known that Commission and Council would tie up their bargains ahead of such advice (a practice which the Court eventually put a stop to). But can that level of democratic representation and accountability, *seen through the lenses of the normative political theory* truly justify the immense power of direct governance which the combined doctrines of direct effect and supremacy placed in the hands of the then Community institutions?

The implication of the Court of Justice in the democratic travails of the Union is easily stated even if usually uncomfortably discussed. The late Federico Mancini in his *Europe: The Case for Statehood* forcefully articulated the democratic malaise of Europe. There were many who shied away from Mancini’s remedy: A European State. But few quibbled with his trenchant and often caustic denunciation of the democratic deficiencies of European governance.

But could the Court distance itself from this malaise so trenchantly and caustically denounced?

It is precisely on these occasions, I argued, that I rejoice most that I am not a judge on the Court. What would I do if I felt, as Mancini did, that the European Community suffered from this deep democratic deficit which he described so unflinchingly and which according to him could only be cured by a European State? Would I want to give effect to a principle which rendered the Community’s undemocratic laws—adopted in his words by ‘numberless, faceless and unaccountable committees of senior national experts’ and rubber-stamped by the Council—supreme over the very constitutional values of the Member States? If democracy is what I cared about most, would I unambiguously consider much of the Community

edifice a major *advance*? Whatever the hermeneutic legitimacy of reaching supremacy and direct effect, the interaction of these principles with the non-democratic decision making process is, to put it mildly, highly problematic. I feel even happier that I am not a judge on one of the Constitutional Courts of a Member State. As a Member State Judge, I would, I am sure, take the views of my brother on the European Court very seriously. What would I feel as my duty in a case which challenged, for example, the ‘Communauterisation’ of certain aspects of the Third Pillar on the grounds that European law lacked the basic legitimacy which real, rather than *presumed*, democracy bestows and which it was my duty as a guarantor of the national Constitution’s commitment to democracy to ensure? I imagine I would say and do what some Constitutional Courts have already said, albeit in more elegant ways: that until the European Union becomes a State which according to Mancini, barring a miracle, is its only way of becoming democratic, the ultimate repository of legitimate authority which flows from democracy must, after all, be the Member State; that supremacy cannot but be a contingent and limited concept subject to Member State control; that if too much power has been transferred to the Union so that national controls, as Mancini argued, have become ineffective, then it would be my duty to declare unconstitutional any *new* transfer of power and maybe even to claw back some powers already transferred. After all, when it comes to democracy, better late than never.<sup>7</sup>

The paradox is thus that the legitimacy challenge to the Court’s constitutional jurisprudence does not rest as often has been assumed in its hermeneutics – a good outcome based on a questionable interpretation. But quite the opposite: An unassailable interpretation but an outcome which underpins, supports and legitimates a highly problematic decisional process.

A similar critique, which for reasons of space, I will just state without elaborating may be made in relation to the Market jurisprudence. Based, in my view, on unassailable hermeneutics, it sets in constitutional concrete the disciplines of an open and competitive single market. But it becomes, inescapably part of a far more problematic decisional and political process, which has yet to find the socio-economic counterbalance to the discipline of free trade. The free market which the Court so dramatically helped fashion, comes with a social cost about which the Court remained mostly silent. The ironic expression of this implication is manifest in the recent flap over the Directive on Services, large parts of which do no more than codify the Court’s jurisprudence.

The story of the creation almost *ex nihili* of a robust jurisprudence of judicial protection of fundamental human rights has been told many times. And it is to this jurisprudence which must revert with the rejection of the Charter. The real problem of the Union in the matter of human rights is not judicial protection, charter based or otherwise. It is, instead, the absence of a human rights policy with everything this

<sup>7</sup> See Mancini v Weiler *supra*.

entails: A Commissioner, a Directorate General, a budget and a horizontal action plan for making those rights already granted by the Treaties and judicially protected by the various levels of European Courts effective. Much of the human rights story, and its abuse, takes place far from the august halls of courts. Most of those whose rights are violated have neither knowledge or means to seek judicial vindication. The Union does not need more rights on its lists, or more lists of rights. What is mostly needed are programs and agencies to make rights real, not simply negative interdictions which courts can enforce.

The best way to drive the point home is to think of competition policy. Imagine our Community with an Article 81 and 82 interdicting Restrictive Practices and Abuse of Dominant Position, but not having a Commissioner and a Directorate-General (DG) Competition to monitor, investigate, regulate and prosecute violations. The interdiction against competition violations would be seriously compromised. But that is exactly the situation with human rights. For the most part the appropriate norms are in place. If violations were to reach the Court, the judicial reaction would be equally appropriate. But would there be any chance effectively to combat Anti-Trust violations without a DG Competition? Do we have any chance in the human rights field, without a similar institutional set up?

One reason we do not have a policy is because the Court, in its wisdom, erroneously in my view, announced in Opinion 2/94 that protection of human rights is not one of the policy objectives of the Community and thus cannot be a subject for a proactive policy.

Far more important than any Charter for the effective vindication of human rights would have been a simple Treaty amendment which would have made active protection of human rights within the sphere of application of Community law one of the policies of the Community alongside other policies and objectives in Article 3 and a commitment to take all measures to give teeth to such a policy expeditiously. Not only was such a step not taken, but Article 51(2) made absolute that such a development would be even more difficult to take in the future.

Now, of course, we are back to the Court's court with the still extant ruling in Opinion 2/94. The human rights saga is typical. The jurisprudence of the Court is, to be sure, a solution to political stagnation. But we cannot blind ourselves to the uncomfortable truth that in all these areas, legal order, market, and human rights, that very Jurisprudence is deeply implicated in a series of new political and social issues which at least in part are part of the current European mood of discontent and defiance.

*E.*

Let me just by way of brief hint explain how I believe the Court may discharge the responsibilities, heavier than ever, in the light of the collapse of the Constitution and the implication of its essential jurisprudence in the Community process.

As far as the legal order is concerned and the consequences for the democracy deficit, the Court should not, as I stated emphatically above, renounce its foundational doctrines. But the Court has repeatedly stated that European Citizenship is destined to become the fundamental status of its individual members. But it has steadfastly limited its jurisprudence to the realm of free movement and to an a-political concept of citizens. There is much scope for a new essential jurisprudence in this area. The Treaty speaks of essential procedural requirement for the legality of Community acts. Why not incorporate into this concept essential democratic procedures as a requirement for legality? After all, it was in relation to the then Article 173 and the equally Delphic provision general principles of law relating to its application that the Court developed its creative human rights jurisprudence? Here too there is scope for a new essential jurisprudence. In similar creative fashion the Court can take a new hard look at the social implications of some of its single market jurisprudence (a boldness already displayed in *Keck*) as well as a more Access-to-Justice oriented approach to its human rights jurisprudence. How these new approaches might look will be developed in a future article.