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## *“To Ensure that the Common Values and the Law are Observed”*. What to make of the value turn in the case law of the Court of Justice?

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*“The 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”.*

Advocate General F. Mancini in Case 294/93 *Les Verts*

*In memory of the late Professor John Usher*

Faced with the unprecedented and persistent backlash against its own authority coming from Poland, the Court of Justice finds itself in a delicate position: it is trapped between what is now clearly a counter-factual assertion (“common values”), on the one hand, and the pragmatic judicial path and mandate that binds the Court to the “community based on the rule law” mast against all odds, on the other. As the Court searches for the optimal positioning, and calibrates its judicial doctrines in today’s less than perfect Union, we in turn face a challenge of making sense of the paradigmatic jurisprudential shift(s) that ultimately affect the heart and soul of “an ever closer union among the peoples of Europe” and challenge the Member States’ continuing fidelity to it. This analysis argues that the mega questions of belonging are on the line here since “the values contained in Article 2 TEU define the very identity of the European Union as a common legal order”. Two important (and still underappreciated) questions lurk behind these words: who “we Europeans” are and what continues to keep us together in these turbulent times.

## The "Law" of Integration

Article 19(1) TEU mandates the Court to ensure that in the interpretation and application of the Treaty, "the law" ("*le droit*" / "*del diritto*" / "*del Derecho*" / "*recht*" / "*des Rechts*" / "*prawo*") is observed. In light of a 70-year strong *acquis jurisprudentiel*, there is an untapped axiological and argumentative potential in Article 19 TEU (formerly Article 220 EC and Article 164 EEC). From the Court's perspective, the reference to "the law" has always played a fundamental role in developing the law of integration. The institutional trajectory of the Court clearly shows that Article 19 TEU has always played a systemic ordaining function. *First*, it has moved the governance from power-oriented to rule-oriented politics. *Second*, it has stood for "the supranational legality". *Third*, it has both empowered and delimited the Court. *Fourth*, it has expressed the fundamental idea of judicial protection which has allowed the Court to interpret the jurisdictional clauses in a manner that is coherent and constructive. *Fifth*, it has defined normative space within which the Court exercises its judicial power. *Sixth*, it has underscored that the courts of the Union – both national and EU – are courts of law and that the Union is governed by law.

And yet, despite all this accumulated wisdom, the importance and reformative potential of the "law" seems to be continuously overshadowed by the effective judicial protection part of Article 19 TEU.

### What do we know already?

Since the foundational Portuguese Judges case, the case law of the Court has steadily moved towards rediscovering the importance and centrality of the "law" of Article 19 TEU when read in conjunction with Article 2 TEU. The Court has read Article 2 TEU as forming part of EU law *sensu lato* in the same way it has interpreted the term "law". The supranational legality built on and around Articles 2 and 19 TEU, becomes a key concept that not only defines the EU's supranational design and governance structure, but also makes for the most distinctive feature of the supranational overlapping consensus. The combination of Articles 2 and 19 TEU has led to a novel reading of the substantive commitments of Member States. In particular, it has clarified the meaning of the EU's commitment to the rule of law by connecting it to the provision of effective judicial protection and the safeguarding of judicial independence as the essence of the fundamental right to a fair trial (Article 47 CFREU). The very existence of effective judicial review is of the *essence* for the rule of law. For effective judicial protection to be ensured, it is *essential* that judicial independence must be maintained. Article 19 TEU is a constitutional basis for *a shared judicial mandate* and responsibility. The right to a fair trial and judicial independence functions as a guarantee for the effectiveness of all EU-derived rights and for the safeguard of EU values.

## What do we still need to grasp? On the core of the common EU legal order

Often neglected is the fact that when searching for a way to incorporate the values into EU law, the Court sees Article 19 TEU in its totality as the fundamental bridge between the values and EU law. This was spelled out quite unequivocally by the Court in C-357/19:

“... compliance by a Member State with the values enshrined in *Article 2 TEU* is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State. A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, *Article 19 TEU*” (para. 162, emphasis added).

Notably, it is not any one given section of Article 19 TEU that serves as the point of reference, but the totality of Article 19 TEU. More recently, in C-430/21, the Court stressed: “[a]s regards the obligations deriving from *Article 19 TEU*, it should be noted that that provision gives concrete expression to the value of the rule of law affirmed in *Article 2 TEU*” (para. 39, emphasis added). In this way, “the law” of Article 19 TEU and the duty to ensure its observance as well as its effective judicial protection flesh out the bare bones of the EU’s core values. And finally, in the most recent C-204/21 *Commission v Poland*, the Court asserted its authority in the strongest possible terms by proclaiming that, “the review of Member States’ compliance with the requirements arising from Article 2[...] TEU falls fully within the jurisdiction of the Court” (para. 62), and that Article 2 TEU is not merely a statement of policy guidelines or intentions, but rather “contains values which are an integral part of the very identity of the European Union as a common legal order”, which are “given concrete expression in principles containing legally binding obligations for the Member States” (para. 67).

Article 2 TEU should not only be read in light of this case law (*element of continuation and anchoring*) but also as adding a new legal and political layer to the judicial development of core features of the EU legal order (*element of opening*). There exists a core layer of values and principles that defines the identity and essence of the Union membership, and provides the terms and conditions for belonging to the common legal order. The Court chooses a superior principle to resolve the cases, and establishes brick-by-brick (or in President Lenaert’s words “stone by stone”) an internal hierarchy between various Treaty norms and values. Some are technical, others have a fundamental importance. In case of conflict, the most important provision, the principal rule, must be followed. The resulting super-constitutionality becomes a governing mechanism for ordaining the norms and values within the Treaty framework.

From the combined reading of the old precedents *Simmenthal* (primacy of EU law), *Les Verts* (a community based on the rule of law), *Opinion 1/91* (the Court's function of ensuring the observance of the law) and *Kadi* (primacy and respect for human rights and fundamental freedoms as a foundation of the Union), the "the very foundations of the Union" (fr. "les bases mêmes de la Communauté"; *Simmenthal*, para. 18), "the very essence of Union law" (fr. "les exigences inhérentes la nature même du droit communautaire"; *Simmenthal*, para. 22) and "the very foundations of the Union legal order" (fr. "Fondements mêmes de l'ordre juridique communautaire"; *Kadi*, para. 304) comprise today:

- a) the primacy of the EU law that undergirds the autonomy of the law of integration;
- b) institutional balance established by the Treaties;
- c) the judicial review and the Court's function of the guardian of Union legality under Article 19 TEU;
- d) the protection of fundamental rights;
- e) liberty;
- f) democracy;
- g) rule of law.

While one can certainly think of a more structured and categorically clearer list of the essentials, one thing is beyond doubt: these elements make up the constitutional fabric of the EU legal order to which all Member States have committed. Articles 2 and 19 TEU anchor the concept of "the very foundations of the common legal order" by giving it a sense of axiological identity of its own. This is truly a paradigmatic shift that affects the very core of the Union, its design and legality. The noun "foundations" used by the Court and the verb "founded on" used in Article 2 TEU with the overarching duty to ensure the observance of the law of integration in Article 19 TEU make a perfect match.

### **The jurisdiction of the Court: How far?**

The uneasy and delicate question looms large whether and how Article 19(1) TEU and the task of ensuring the observance of the law affects the scope and nature of the jurisdiction of the Court which is defined by the principle of *competence d'attribution*. While it is clear from the Court's case law that the law must be observed by both the Member States and EU institutions, this alone does not say much about the jurisdiction of the Court. The value turn in the case law of the Court contains important signposts that Article 19(1) indeed plays a crucial jurisdictional role. It serves as an independent, albeit of a particular nature, head of jurisdiction (power) of the Court. On the basis of this provision, the Court enjoys an implied jurisdiction (what A. Arnall called "the inherent jurisdiction"), reserved for exceptional situations when the core (the essence) of the common EU legal order is in danger. Writing with his usual lucidity, John Usher has already argued in 1992:

"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 [Article 5 EEC (principle of loyal cooperation) is now contained in Article 4 (3) TEU] and 164 [today Article 19 TEU] ... 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".

One would be wrong, however, to assume that such a resort to the implied jurisdiction has become a daily occurrence. The fact that the Union is based on the rule of law constitutes the premise on which the Court is ready to modify (the critics' view) or enrich (the proponents' view) its jurisdiction to ensure a complete system of legal remedies and procedures within which the Union itself and its legality (today also comprising "the values") are safeguarded and enforced.

The simple identification of a gap in a system so conceived is not enough for the Court to fill it by relying on its implied jurisdiction. In every case before it, the Court will have to evaluate whether the need to fill a gap is justified by some pressing factors worthy of protection (respect for institutional balance, effective cooperation with national courts, coherent system of legal protection, etc.) and now also safeguarding the core of the common legal order. If the scales fall in favour of such judicial intervention, the implied jurisdiction comes into play. Thus, the most crucial point is to understand that adjudicating supranational controversies is not an automatic process. The Court's jurisdictional choice is always preceded by some difficult trade-offs between competing interests and principles. In the trail-blazing *Białowieża Forest* case, the Court poignantly remarked that,

*"once the matter is before it, the Court hearing the application for interim measures must satisfy itself that the measures that it is minded to order are sufficiently effective to achieve their aim. It is specifically for that purpose that Article 279 TFEU grants the Court a broad discretion, in the exercise of which it is empowered, inter alia, having regard to the circumstances of each case, to specify the subject matter and the scope of the interim measures requested, and also, if it deems appropriate, to adopt, where necessary of its own motion, any ancillary measure intended to guarantee the effectiveness of the interim measures that it orders"* (para. 99 of the Court's Order on 20 November 2017, emphasis added).

The part *"once the matter is before the Court"* is crucial for my argument. It serves as a powerful reminder of the courtroom's logic where "the law" reigns supreme. In this sense, the command to ensure the observance of the *law* empowers the Court to interpret a

specific jurisdictional attribution accordingly. It is only through a case-by-case, contextual analysis that we can try to understand how far, in any given case, the Court is willing to follow the command of ensuring that the law is observed. This leaves us with the fundamental question:

### **"What's next?"**

The law of integration constrains and must be constrained at the same time. The courtroom not only has its promises but also operates within important limits. When a constitutional court addresses constitutional issues, it typically must choose a principal decision-maker among the various institutions of government, including the judiciary itself. It considers the relative strengths and weaknesses of these institutions to address the (social) issue involved. The power to choose works as a tool and imposes great responsibility. As the former President of the Court, the late Gil Carlos Rodriguez Iglesias said:

"Every judge in a supreme or a constitutional court is sometimes confronted with jurisprudential options that do not simply offer an opportunity, but impose an obligation, to choose. The choice among such options can contribute to the development of the law. And such choices often have important social and, hence, political consequences".

For constitutional courts it is not simply about the identification of flaws in the legislative process and overcoming the presumption of constitutionality. The identification of such flaws should not be conclusive but rather must be comparative. The legislature has defects and advantages when compared to the judiciary. Whether and to what extent the court takes the decision away from the legislature should reflect this reality.

One can clearly see the various trajectories, promises, and yes, also risks, involved in the existential jurisprudence developed by the Court. The "*trajectory back then*" was built on the first principles as constitutional abeyances which were assumed but not spelled out explicitly at the moment of founding the Community. The "*now trajectory*" moves us from explicit understandings to explicit expressions of what was once implicit. A possible "*trajectory tomorrow*" will enforce the rule of law as an essential precondition for all parties' deference to one another and to the Union they had created. Rule of law, separation of powers, and judicial independence have been emerging from the shadows of constitutional abeyances and are starting to operate as procedural benchmarks of European constitutionality.

The Court must always adhere to the basic values in Article 2 TEU and translate them judicially and judiciously into enforceable doctrines. This is where, as brilliantly argued by M. Shapiro, the challenge of converting a legal text (constitution) into a 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. The existential jurisprudence anchored in Articles 2 *and* 19 TEU must be seen as 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 the legality of the supranational legal order as expressed in Article 19 TEU), and, finally, *interaction* as the mandate keeps reinforcing and informing the interpretation of the competences. Such balancing will determine the success (or failure) of the Court.

The most important message behind the Court's case law and its most enduring contribution "to the ever-closer union among peoples of Europe" is that Articles 2 and 19 TEU set out the binding parameters of the common legal core of the European public space. The value discourse in the supranational context must tread a fine line and needs conceptual framing and re-framing that steers clear of a sentiment that some values are imposed or not shared at all. Agreeing on the core that binds us should never be seen as imposing uniformity but rather as enforcing these basic features of the EU legal order and the consensus that are essential to its functioning, and more broadly, to its survival. This is not "imposed uniformity" but rather the acceptance of being bound by the essential principles that make up the core of the common legal order. After all, if we cannot agree on the core of our commitments, then the whole political community – and the EU is undoubtedly a political community – loses much of its credence. The choice of words – *enforcing* credible commitments, *not imposing* uniform standards – is particularly important as it frames and orders our discourse about the shared values as a universally binding framework within which political parties to the European consensus operate and make their own choices. As an EU Member State, you have joined the common legal order because you *first* expressed your resolve to align yourself to the supranational discipline and, once inside, you commit yourself *pro futuro* to improve and not regress.

As the Union moves forward, ponders, and narrates its myths, the memory of why the states came together as a community in 1952 is of the fundamental importance. In the post-war era, Europeans trusted that Europe could be rebuilt not only by forging a market (*pragmatism*), but also by anchoring it in the law and the values that were believed to be shared (*idealism*) and that would transcend the urges of the moment. After all, the law of integration was always predicated on the idea of "an order determined by the existence of common values and interests". Fear of authoritarianism and "never-again constitutionalism" drove the integration at its inception and must be rediscovered now.

The Court of Justice has not only been rediscovering old precedents, but first and foremost building on the spirit of what Judge Kakouris in his 1994 essay published in the *Revue des affaires européennes*, 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 the fragile European consensus. When read in the light of *Van Gend en Loos* and *Simmenthal*, the newer "existential jurisprudence" anchored in Articles 2 and 19 TEU discussed above, belongs to the category of supranational mega politics of belonging and identity. While the uneasy question of "how far?" always remains, the law (Article 19 TEU) and the values (Article 2 TEU) will continue to serve as guiding stars for the Court's trajectory. With this, the subtle promise and aspiration of Article 2 TEU and the command of Article 19 TEU are back and so are many conceptual challenges to frame and understand the momentous jurisprudential shift happening on the plateau of Kirchberg right before our eyes.