Review

William Phelan: Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period

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The monograph 'Great Judgments of the European Court of Justice: Rethinking the Landmark Decision of the Foundational Period' was written by William Phelan, associate professor and Jean Monnet Chair of EU Politics and Law at Trinity College Dublin.[1] The monograph promises a new approach to the jurisprudence of Court of Justice of the EU (hereinafter: the Court). The scope of the book is limited as the analysis concentrates on a number of fundamental cases, leading 'precedents' which are familiar to anyone who has ever studied European law. These judgments have been the topic of many analyses and comments, therefore obviously the question arises: what novelty can a fresh analysis offer to the understanding of those famous judgements. Generally speaking, if a text was published then it has its own fate as it becomes open to interpretation and reinterpretation. We see the content through different contexts and approach with divers purposes. This is true regarding court decisions as well, so although there is lengthy legal literature on the cases chosen by the author, a new approach can widen our understanding or highlight important new aspects which had been previously neglected.

Phelan's approach compares the 'new legal order' established by EEC Treaty to ordinary international trade agreements admitting that the intent of the founders was more than just to conclude a simple trade treaty, albeit the core of the treaty was always to function a common market among member states. Therefore – as the author emphasises – his analysis differs from many scholars' interpretation who investigate these issues within a public law framework. According to his approach, which he calls a comparativist one, the main difference between the EEC Treaty and international trade agreements can be found in the respective powers of states concerning the rules laid down by them. In an 'ordinary' international trade treaty it is allowed for the state to act unilaterally, to introduce trade barriers under extraordinary circumstances, market failures or for retaliation of another state behaviour so the main enforcement method is self-help. Sometimes those agreements provide remedies for these unilateral acts but tipically as a *post facto* legal consequence. Opposite to that, the EEC Treaty and the jurisprudence of the Court rejected such opportunities for the member states.

The starting point requires some support and the author finds that in some extra-judicial writings of the lawyers involved in those early cases. The fact that in the Court's judgments there is no place for concurring or dissenting opinions coupled with the secrecy of deliberation also constitutes a significant barrier. Apart of these hardships Phelan explains that the aforementioned approach is

[1] William Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decision of the Foundational Period,* Cambridge University Press, Cambridge 2019.

due to the influence of former justice and president of the Court Robert Lecourt, whose monograph on European law and previous dissertations shows that he was conscious of the problems of self-help and unilateral acts in law. Considering the difficulties these references provide a solid ground for Phelan's hypothesis.

The method of analysis chosen is to re-examine fundamental cases from a text-based perspective. For each case the first step is to evaluate the factual background, then follows the opinion of the advocate general and finally the judgment, frequently contrasting with the opinion of the advocate general. Related cases are also mentioned before the detailed analysis which puts the merits of the case in the context of the hypothesis. At this point the author also refers to legal literature concerning the case in question and proceeds to draw his conclusions.

The first fundamental case which is investigated is *Pork products*[2] with the subtitle 'No Unilateral Safeguards'. The subtitle summarizes the significance of that case as for to decide the case there was no serious hardship to make the conclusion. In deliberating there was no need to use creativity, no need for "going beyond the provisions of the Treaty", so the significance can be found in fixing a principle, apart from ascertaining the weakness that a pure declaration of the breach of obligation is not really an efficient legal instrument.

Next, the author looks at the well-known *van Gend en Loos* case[3] which introduced the doctrine of direct effect. Legal literature emphasizes the consequences of this and subsequent cases on direct effect for individuals and national courts, however according to the author, in European law the interests of individuals and the European institutions can be the same therefore the essential novelty of this case was to supplement available law enforcement instruments. As a result, the direct effect doctrine even made the infringement procedures of secondary importance. Weakness of infringement procedures in the investigated period lies in the nature of declaratory judgment allowing a member state to resist to the decision.[4] Thus the individual has become an important actor in the enforcement of rules opposite to an ordinary trade treaty where only states can be parties to dispute resolution. Therefore the direct effect doctrine in fact restructured the relations among member states.

Costa v. ENEL[5], the next landmark case analysed famously established the principle of primacy and thus gave the power to national courts to scrutinize state legislation in light of EU law. The alternative of that doctrine would have been the international responsibility of states which would have reduced the Treaty of Rome to an ordinary international trade treaty. According to the opinion of the author, the argumentation on behalf of the Court was a functionalist one, maintaining that the relegation of sovereignty was final. State sovereignty was the issue in Dairy Products[6] as well where state acts regulating the market were found as a breach of obligations even in the absence of Community regulations. Concerning the powers of national courts a further step was to declare that any kind of court can enforce Community rules independently from the fact whether the national law in question was declared to be void or not.[7]

In International Fruit[8], the Court denied the direct effect of GATT rules. That debated conclusion

[2] Case 7/61, Commission v. Italy [EU:C:1961:31]

[3] Case 26/62, van Gend en Loos v. Nederlandse Administratie der Belastigen [EU:C:1963:1]

[4] Case 232/78, Commission v. France (Sheep Meat) [EU:C:1979:215]

[5] Case 6/64, Costa v. ENEL [EU:C:1964:66]

[6] Joined cases 90, 91/63, Commission v. Luxembourg and Belgium [EU:C:1964:80]

[7] Case 106/77, Amministrazione delle Finanze v. Simmenthal SpA [EU:C:1978:49]

[8] Joined cases 21-24/72, International Fruit Company v. Produktschap voor Groenten en Fruit [EU:C:1972:115]

can be defended on the ground that GATT was an ordinary international trade agreement with its peculiar safeguard mechanism. The frequently criticized direct effect of directives[9] within that comparative approach is not a policy motivated doctrine, but the disclosure of state reluctance to fulfil obligations by the aid of law enforcement through member state courts. Here the main difference between EEC Treaty and international trade treaties provides the explanation to deny direct effect.

Internationale Handelsgesellschaft[10] in a constitutionalist approach represents a widening of individual's rights, but not in the comparativist aspect presented in the book, which views those fundamental rights not as a purpose, but as an instrument to maintain the unity and efficacy of Community law. In order to prevent national constitutional courts from adjudging the constitutionality of Community measures based on fundamental rights, the Court had to incorporate those rights into the Community legal order. Thus control over Community law could remain in the hands of Court in this aspect as well.

The author argues in the closing chapter that the comparativist approach offers a new aspect of understanding European law and the jurisprudence of Court, explaining fundamental differences among EEC Treaty and ordinary international trade treaties. The doctrines above gave a structure of the relations of the member states. In the Common Market the states and influential business circles have a serious interest as to how obligations are fulfilled. Therefore the development of individual rights were not aims in themselves – but their role in the enforcement of law gave an incentive to that process. The consistent denial of unilateral safeguard measures for states has become a decisive feature of European law which differentiates that legal system from other international trade agreements. The interests of litigants vindicating their rights before national courts was compatible with long-term state and business interests resulting in a reliable Common Market.

The comparativist approach taken by Phelan is certainly interesting for those who have doubts over the continuous development of individual rights explanation of European law. The monograph presents a comprehensive alternative approach to the formative times of Community Law. But it is also useful for constitutionalists to debate and perhaps rethink the evaluation of the nature of European Law.

[9] Case 41/74, Van Duyn v. Home Office [EU:C:1974:133]

[10] Case 11/70, Internationale Handelsgesellschaft v. Einfur- und Vorratstelle für Getreide und Futtermittel [EU:C:1970:114]