The Paradox of Compliance

It is a truism that, in most contemporary legal systems, the primary function of the courts and tribunals is to apply already established rules: to state the law and not to create it. This, however, is largely a fiction: judicial organs, by their very nature, necessarily carry out a creative task, particularly when they have to apply a text of a general nature, which is evidently the case for most constitutions.

Be that as it may, this fiction fulfils an important social function. In a system which sees itself as democratic, it is no easy task to find a justification for judicial creativity. This undoubtedly explains why it is rare to find a court which openly declares its creativity: limiting itself to an apparently much more modest role contributes to the legitimacy of its decisions. There can be little doubt that the fiction of literal interpretation plays an important role in legitimating the role of judges.

Casting an eye over the ECJ’s jurisprudence it is difficult to escape the conclusion that it has been capable of playing a much more important role than that played by the majority of supreme courts at national level. Even accepting that the latter have also been increasingly called upon to fill constitutional lacunae, they have not had to create a comprehensive constitutional structure, as the ECJ has done. Its achievement is even more remarkable when we consider that it possessed relatively weak legal foundations upon which to build. The ‘constitutional moment’ was singularly limited. The Treaty of Rome was not preceded by a real institutional debate on how a would-be integrated Europe should be governed; rather its provisions were inspired by a functionalist strategy which...
laid emphasis on medium-term objectives and how they should be achieved. Yet, using these meagre resources the Court was to construct its jurisprudential edifice, assuming for itself a role as innovator unparalleled in national supreme courts – not to mention international judicial fora.

This evidently raises a certain number of issues. If it is difficult for national courts to assume a creative role, the same should hold true – if not truer – in a less integrated international grouping such as the European Community. How then did the ECJ manage to pull it off?

The question relates mainly to the reception given to its case law: why was it that its audacious interpretations did not encounter greater resistance from its principal interlocutors? The question relates less to the formal legitimacy of the Court’s work, which has merely made use of the instruments placed at its disposal in the Treaty of Rome, than to its social legitimacy. Given the hostility which greets any tendency to confer a political role on the judiciary, one might have expected the Court’s innovative solutions to have been countered with fierce resistance by the majority of the principal institutional actors affected. Yet this has not been the case. Leaving to one side occasional critiques of its work, up to the late 1980s (see, for example, Rasmussen, 1986), the ECJ’s case law edifice was given a positive – even enthusiastic – welcome, and, in most cases, its judgments have been faithfully applied. More generally, the institutions which could have had an interest in setting their faces against the Court have not offered any real resistance.

Governments and national parliaments could have rebelled against a discipline which reduced – sometimes considerably – their margin of manoeuvre. True, overruling the ECJ is difficult, as it often requires a treaty amendment, which must be approved by all state parties. Yet, member states, had they wanted to put a curb on judicial activism, were certainly not short of means to apply pressure: they might have decided not to comply with certain rulings, packed the court with appointees more sensitive to states’ rights, or even curtailed the Court’s powers, to mention but the most widespread techniques used to counter judicial influence (Stone Sweet and Caporaso, 1996, p. 8). However, until the Maastricht Treaty, episodes of resistance were isolated. Sporadic critiques of the ECJ were made by member state representatives, and certain governments exhibited ill-will in complying with some