Ralf Dahrendorf Taskforce on the Future of the European Union

Working group I "Reform of the EU institutions – re-Democratisation of the EU"

The European Court of Justice as an ally in reforming the EU

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We can all agree that the European Union needs further institutional changes. When everybody proposes what they should be, most forget about the other question: how? This short paper will present a potential way of reforming the European Union in a way that is very often hidden and not widely discussed. It can be seen as controversial but it exists and has played a very important role in the past. I am referring here to the judicial reforms of the Union that happened because of the activism of the European Court of Justice.

The current stage of the Integration

Integration is a long-term process and European integration is an especially complicated process that is hard to describe in a few words, as hard as it would be to describe its final result. The European integration process has had its ups and downs, various periods symbolized by spectacular successes and iconic failures. The current period of European integration is not easy to pin-point on the dichotomous scale "success-failure".

The European Integration process is in crisis at the moment. The level of integration cannot be seen as satisfactory for European liberals, but the current situation does not give many hopes for a quick change. The EU has just overcome the global economic crisis; its consequences being deeper than expected. The consequences went far from being purely economic: the stagnation, high rates of unemployment and radical fiscal reforms in some countries woke up anti-European demons. The EU is seen by many politicians and public opinion as responsible for the crisis. The last elections of the European Parliament proved that nationalistic sentiments are growing across the continent and institutional changes will be even harder to implement.

Many European liberals still see federalization as the best medicine for European problems. I use "federalization" here instead of "a federation" on purpose. First of all the F-word is still very unpopular and bringing it back to the political agenda can be suicidal. Second of all, the term "federation" in a European context can be misleading since it's not precise. On the other hand, federalization defines a process of reforming the EU in the direction of more simple institutions that can work more efficiently representing the citizens of Europe. Federalization does not point at a precise goal of creating the United States of Europe - at least not as a copy of the United States of America. Even if the American experience should not be erased as a guideline for Europe, since the USA is the most powerful modern federation in the world, the final outcome of the European integration process will be different than the American one.

But how can the EU push forward integration in the current political circumstances when deep institutional reforms and Treaty changes look almost impossible? In the following paper, I would like to point at one more possibility.

The European Court of Justice (ECJ) and European integration

In the public opinion, the integration was designed and construed by a handful of statesmen backed by governments of the most powerful member states. I believe this is not the full picture, as it looks like this realistic approach has been accepted by some lawyers, including the most meritorious ones. In his famous "The Making of a Constitution", Judge Mancini described ECJ's strategy of influencing the integration as follows: "the national judge is thus led hand in hand as far as the door; crossing the threshold is his job, but now a job no harder than child's play." He praises the ECJ judges' cleverness in choosing a fortunate plan of fashioning its decisions in a way that its logic and autonomous power would be embraced by unaware national judges. Therefore, Mancini exposes his colleagues and forces us to reflect more deeply on the role of the judiciary in the integration. I believe that it is essential to look at the ECJ from different angles, casting aside the theory of absolute truth of legal orthodoxy.

The European Court of Justice played a primary role in the integration process. But it never played by itself. The Court works not in a vacuum and its decisions are always the consequence of interplay with other actors. The Court placed itself in the middle of European integration; it understood its role as the *European* Court of Justice in the process of realising the Treaty's objectives. It represented the Community as an entity and not as the sum of the Member States. The Court clearly wanted to accelerate integration and was using the principle of effectiveness as a main tool. It had an agenda that was driven by the objective of an "ever closer Union". Nevertheless, it had to use an adequately planned strategy to follow the agenda. Thus, it could not speed it up too much, to protect its own authority and use this authority in the future.

The Court's agenda

During the 1960s and 1970s the Court was expanding its role and developed a substantial set of legal doctrines that was crucial for the progress of integration, deciding on issues traditionally reserved to the Member States. With the cases *Costa v. ENEL*, *Van Gend*, *Van Duyn*, *Stauder*[1], *ERTA* the ECJ changed the political and institutional landscape in the Community. Those decisions mark the transformation of the ECJ from just a mere institution of the Community into something new and dynamic with a clear understanding of its particular role. And the Member States accepted that role and complied with its decisions.

After *Costa* and *Van Gent,* we should also mention the *Internationale Handelgesellschaft*[2] here. The ECJ ruled that not even a fundamental principle of national constitutional law could be invoked to challenge the supremacy of directly applicable Community law. This decision was another step forward in the constitutionalisation of the Treaty. In 1974 *Nold*[3] was decided and an autonomous system of protection of fundamental rights began to be built in the Community.

The best way for the Court to further this agenda is through the gradual extension of case law. The Court used the period of Eurosclerosis[4] to anchor the doctrine of implied powers. It was over a decade of perceived stagnation in the European integration. Just as in the previous period, during this time of political stagnation the ECJ took some very important decisions for European integration. It is enough to list the most important ones to understand the ECJ's strategy: *Dassonville* (recognition of the direct effect of Article 119 of the Treaty of Rome on equal pay)[5], *Simmenthal* (another recognition of the principle of supremacy even when it comes to national legislation adopted at a later date than the Treaties)[6], *Cassis de Dijon* (establishment of the so-called principle of mutual recognition)[7], *CILFIT* (definition of the duty for national courts to bring preliminary questions concerning Community law before the Court of Justice with instructions as to the way in which EU law should be the interpreter)[8], *Les Verts* (inclusion of the European Parliament in the constitutional framework and reference to the Treaty as "the basic constitutional charter" of the Community)[9], *Wachauf*[10] and *ERT*[11] (both on the human rights regime in the Community).

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[1] These two decision, according to Antoine Vauchez "appear today as the de facto Constitution of Europe encapsulating in themselves all the successive development of EU polity" (Antoine Vauchez, "Integration-through-Law' Contribution to a Socio-history of EU. Political Coommonsense' (2008) 10 EUI Working Papers)
[2] Case C-11/70 1974 [ECR] 1125
[3] Case 4/73 *J Nold, Kohlen- und Baustoffgrosshandlung v the Commision* [1974] ECR 491
[4] A term introduced by German economist Herbert Giersch referring to the political and economic stagnation in the 1970s and early 1980s in the European Community.
[5] Case 43/75 *Defrenne v Sabena* [1976] ECR 455
[6] Case 106/77 *Amministrazione Delle Finanze dello Stato v Simmenthal Spa* [1978] ECR 1871
[7] Case 120/78 *Rewe-Zentral v Bundesmonopolverwaltung* [1979] ECR 649
[8] Case C-283/81 [1982] ECR 3415
[9] Case C-294/83 [1986] ECR 1339

The period of the Court's strong activity ended with the Single European Act (SEA). The signature of the SEA treaty marked the start of an upward surge culminating in the establishment of the European Central Bank (ECB) and the single currency. The Treaty of the Single European Act re-launched dynamics of European integration by abolishing all barriers relevant to the movements of products (Single market) and financial services and by providing freedom for the establishment of credit institutions (the European financial area). The Member States were strengthened and took the initiative in the integration. The SEA was later followed by the Maastricht Treaty. The latter embodies a determination on the part of the Member States to limit the Court. It was excluded from two of the three pillars and a number of specific articles were drafted to prevent judicial manipulation. The Court responded with judicial restraint.

The next shift in the Court's tactics converged with the crisis in the European Union after the collapse of the constitutional project. The negative results of the French referendum on 29 May and the Dutch referendum on 1 June 2005 made it virtually impossible for the Constitutional Treaty to come into force. In June, the European Council declared a kind of cooling-off period, a time of reflection symbolizing the weakness of the integration process and the lack of ambitious vision for the future. It resulted in a drastic shrinking of public support for the European project in many member states. A Eurobarometer survey of July 2005 produced rather devastating outcomes: only 46% of all EU citizens expressed their confidence in the Commission, only 52% in the Parliament. Somehow, this era has lasted until today.

The ECJ played a very important role moderating and facilitating between the actors participating in the debate over the powers in the European Union and placed itself in the middle of the debate playing an active role in it. The Court facilitated the discussion but at the same time it sided with one of the parties. The Court took its Treaty position as a Community body, instead of an intergovernmental one, very seriously and felt responsible for the integration. It favored solutions that were better from the standpoint of the development of integration, of building a closer union between the citizens of Europe. In this task it still had to stick to its standards as a judicial body, as it is rooted in the continental system, and be careful not to overstep its position, that could be undermined by the opponents of a stronger Union, especially the Member States. This equilibrium was maintained by the Court according to the changing political situation within the Union. The Court perfectly interpreted the current relations between the actors and because of that was able to adjust its agenda. Nevertheless, this agenda was always progressive and pushed the Union forward, closer to a federal model.

Conclusions

Consequently, the European Court of Justice is an important ally for those who support European integration. The European Commission and the European Parliament should stimulate the Court's activities that may result in decisions pushing integration and federalization forward. The Court has proven that it is consequent in developing its integrationist agenda and some of the crucial aspects of European integration were formulated by the Court. This mechanism can be used in the future - especially now, when the process of Integration has slowed down and needs a strong political impulse to be reactivated.

The most pro-integrationist actors have many instruments to cooperate with the Court and support its agenda. Among others are: the Commission and sometimes the Parliament can start proceedings for failure to fulfill obligations, actions for failure to act and direct actions. An additional action - a powerful one - is submitting written observations in a preliminary ruling procedure.

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[10] Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Fortswirtschaft* [1989] ECR 2609
[11] Case C-260/89 *Elliniki Radiophonia Tileòrassi et. v Dimotiki Etairia Pliroforissis et al* [1991] ECR I-2925

Some people may say that this solution is anti-democratic and would result in protests from the Member States. Those observations are not correct. The European Court of Justice and its role was accepted in a complicated super-majoritarian procedure of European treaty making. All Member States agreed in a complicated procedure to grant very specific authority to the Court and had to bear in mind the consequences. What is more, during the past sixty years when the Court was formulating new doctrines that looked revolutionary, the Member States did not protest forcefully; they accepted them, including the most controversial one.

The European Court of Justice is an important player on the European scene. Its authority can be still a powerful weapon in the process of strengthening integration and the Union. Its clear integrationist agenda is an ally of all those who believe in further federalization.

Published by the European Liberal Forum asbl with the support of the Friedrich Naumann Foundation for Freedom. Co-funded by the European Parliament. Neither the European Parliament nor the European Liberal Forum asbl are responsible for the content of this publication, or for any use that may be made of it. The views expressed herein are those of the author(s) alone. These views do not necessarily reflect those of the European Parliament and/or the European Liberal Forum asbl.