The Key Role of the Court of Justice in European Integration

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'What would [European] law have been like without the judgments of 1963 and 1964?' So wondered one of my predecessors as President of the Court of Justice, Robert Lecourt, in an article published in 1991. As someone who himself sat as a judge in both *Van Gend en Loos* and *Costa v Enel*, he imagined what might have happened if those rulings had never been made, thereby providing us with a fascinating insight into an alternative reality, totally at odds with the one with which we are familiar today.

In that alternative reality, individuals would not have played the central role that they have in fact played in the process of European integration, since national courts would not have been regarded as the Union's courts of general jurisdiction. Moreover, in the absence of the principles of direct effect and primacy of EU law, established by those landmark rulings, the preliminary ruling procedure would have withered, if not died, and hopes for genuinely uniform application of EU law throughout the Union would have foundered. Robert Lecourt therefore concluded that the Treaties of Rome would have been 'just another free trade agreement, like so many others', thus turning hopes for a 'Community of peoples and States, endowed with its own

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institutions and powers, operating with the guarantee of an effective rule of law' into mere castles in the air.

The principle of the autonomy of EU law is, amongst other things, an expression of that centrality of individual rights in EU law and, as such, it has played an essential part in the process of European integration. The Court of Justice has based that principle on the fact that those rights, developed and enhanced by successive Treaty amendments, were originally provided for in the Treaties of Rome themselves, since EU law 'is characterised by the fact that it stems from an independent source of law, the Treaties'. The EU Treaties, as interpreted by the Court of Justice, have thus established a legal and institutional framework in which individuals are considered to be subjects of the laws through which European integration is realised, yet each Member State nevertheless retains its legal and constitutional identity. As the Court made clear in its Opinion number two of 2013, the autonomy of EU law follows from the creation of 'a new kind of legal order, the nature of which is peculiar to the EU', endowed with 'its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation'.

That autonomous system of law, established by the Treaties of Rome, has developed enormously in the past six decades as the European Economic Community, focused – as its name suggests – primarily on

the purely economic aspects of integration, became first the European Community and ultimately the European Union. The story of that evolution – from a Europe of markets to a Europe of citizens – and of the role of the Court of Justice in that process, is a fascinating one, but there is no time to recount it in detail here. Instead, I would therefore like to concentrate on the part played by the Court of Justice in three key aspects of that story: the creation of the internal market, the establishment of democracy and the rule of law at EU level, and the institution of EU citizenship.

The creation of the common market – later known as the single market and now the internal market – is arguably, in economic terms, the greatest single achievement of the European Union and still lies at the heart of the European project. That market, now comprising around half a billion consumers, is described in Article 26 TFEU as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. The objective of creating a common market was, of course, set out in the original EEC Treaty signed in Rome in 1957, as were those four freedoms, which have provided the building blocks for the construction and completion of that market. By applying and interpreting the four freedoms, in close collaboration with Member State courts through the preliminary ruling procedure, the Court of Justice has played a significant role in the process of European economic integration, turning those freedoms from high-

minded aspirations into an everyday reality, a reality that is now taken for granted throughout the Union and on which the continued prosperity of our continent depends. Yet we should not forget that this was not always the case.

In that regard, I would like to focus on one particular ruling from the 1970s concerning the free movement of goods, which marked a giant step forward in the creation of the then common market. I refer to the judgment of the 20th of February 1979 in Case 102/78, *Rewe-Zentral*, better known as '*Cassis de Dijon*'. The facts are well known and concerned the importation of a French-made fruit liqueur, Cassis de Dijon, into Germany. Under German law, such drinks could only be put onto the market if their alcohol content was no less than 25 per cent, a condition which the French product did not satisfy.

Until *Cassis de Dijon*, the Court of Justice had generally analysed such situations in terms of discrimination between imports and domestic produced goods. In this case, however, it found the German law at issue to be in breach of the principle of free movement of goods simply on the basis that the French product, which was lawfully produced and marketed in France, could not be placed lawfully on the market in Germany.

Clearly, what was true for alcoholic beverages was true for other goods and the *Cassis de Dijon* ruling was quickly identified as a

landmark decision. Its significance for the establishment of the internal market – as clarified in the later *Keck and Mithouard* ruling – lay in the fact that it established an overarching principle that all goods that satisfy the requirements for them to be lawfully marketed in one Member State must, in principle, be able to be marketed in any other Member State. It was no longer for an exporter to explain why his products *should* be allowed onto the market of another Member State but rather for that Member State to prove that they *shouldn't*. The analytical framework used in *Cassis de Dijon*, focusing on the existence of a restriction before examining potential justifications and proportionality, has become the standard way for the Court of Justice to examine potential violations of the four freedoms generally.

Legislation has played a vital role in completing the EU internal market, particularly following the adoption of the Single European Act in 1986, in harmonising standards throughout the Union in a broad range of fields including the environment, workers' rights and consumer protection, standards which the Court of Justice has subsequently applied and interpreted. That said, without the paradigm shift in the approach to free movement undertaken by the Court of Justice in *Cassis de Dijon*, the establishment of that market in its present form might not have been possible.

Ever since it became clear in the 1960s that the Treaties of Rome had created an entity vested with significant political and legislative

power, as well as the autonomous legal system to which I have referred, the European Union has faced a challenge: how can the power pooled in a supranational Union by like-minded, democratic Member States, be exercised collectively in a democratic fashion? Indeed, some scholars argued that the European institutions suffered from a 'democratic deficit'. The EU and its Member States have responded to that criticism in two ways. First, they have enhanced the role played in the political life of the Union by national parliaments, in accordance with the provisions of Article 12 TEU. Second, they have transformed the European Parliament, over time, from a consultative assembly, whose members were delegates appointed by national parliaments and whose role was described in the original EEC Treaty as being to exercise 'powers of deliberation and of control', to become a democratic legislative chamber elected by direct universal suffrage in a free and secret ballot, with power to enact almost all EU legislation jointly as an equal partner with the Council of the European Union.

That transformation of the European Parliament was essential for the democratic legitimacy of the EU and the Court of Justice has made an important contribution to its empowerment by ensuring scrupulous judicial protection of the Parliament's prerogatives under the Treaties, in cases such as *Roquette Frères v Council*, *Chernobyl*, and *Titanium Dioxide*. In so doing, the Court of Justice has not only invoked the principle of institutional balance, but has also sought explicitly to

enhance ‘the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly’.

Yet democracy is about more than direct elections to a legislative body, indispensable though such elections are. It also encompasses other forms of governance, in particular the active participation of civil society and the achievement of consensus by social partners. As the Court of Justice has indicated, the optimal functioning of the EU’s political institutions requires the implementation of other mechanisms designed to reinforce democracy: the principle of transparency, for example, which was first developed at EU level by the Court in its case law. The purpose of such mechanisms is to enhance the democratic legitimacy of the EU by providing sufficient means for EU citizens to hold their representatives accountable. The ruling in *Access Info Europe* is of particular interest in this context. It involved a challenge brought by an NGO dedicated to promoting public access to information against a decision of the Council of the European Union refusing access to a document disclosing the positions taken by various Member States during discussions in Council concerning a legislative proposal for a new regulation regarding access to documents of the EU institutions. The General Court annulled that decision and, in upholding that annulment on appeal, the Court of Justice noted that transparency in respect of Council documents is particularly important where that institution is acting in its legislative

capacity, since it ‘contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act’, which ‘is a precondition for the effective exercise of their democratic rights’.

In that connection, the unswerving commitment of the Court of Justice to the rule of law has also played an essential role in reinforcing the democratic and constitutional values of the Union. It was in 1986 in its seminal *Les Verts* judgment that the Court first explicitly affirmed the principle that the EEC, as it then was, ‘is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.

Respect for the rule of law has become one of the cornerstones on which the EU legal order is based and has been reaffirmed by the Court on many occasions since then. Notably, whilst the EU’s political institutions may enjoy a margin of discretion in certain circumstances, the judgments in the *Kadi I* and *II* cases illustrate that no matter that falls within the scope of EU law is immune from judicial review by the EU courts. In the same vein, the Court of Justice ruled in *Rosneft*, just last month, that it has jurisdiction to give judgment, by way of a preliminary ruling, on the validity of an EU act adopted under the EU’s common foreign and security policy, provided

that the questions referred relate either to that act's compliance with the provisions contained in Article 40 TEU – which states that the implementation of that policy should not affect the powers conferred on the EU institutions for the exercise of Union competences under the TFEU – or to the review of the legality of restrictive measures adopted against natural or legal persons.

I would like now to turn to EU citizenship, first created when the Maastricht Treaty entered into force in 1993. Since then, the Court of Justice has stated on many occasions that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'. Some commentators have expressed the hope that EU citizenship might act as the gateway to a new paradigm in the history of European integration under which the Treaty provisions on EU citizenship would provide an appropriate constitutional path that could, in time, transform the European Union into a more equal, united and politically integrated supranational society. That said, those provisions may not be interpreted in a way that would change the constitutional balance sought by the authors of the Treaties and it is important to underline that, as both Article 9 TEU and Article 20 TFEU expressly state, EU citizenship is additional to and does not replace national citizenship. However, in a Union where individuals are free to cross borders at will and to live and work in a Member State other than their own, EU citizenship provides them with the

guarantee that they must be treated equally in every Member State, whether or not they are nationals of that State.

The rights conferred by EU citizenship may even be invoked against the Member State of which the EU citizen concerned is a national in situations that are not purely internal. This may perhaps be best illustrated by reference to the recent line of case law of the Court of Justice, beginning with the *Ruiz Zambrano* judgment. In that case, the Court of Justice applied the concept of EU citizenship where there was no physical movement across borders and held that a Member State cannot, in the absence of a valid justification, adopt a decision which would have the effect of obliging one of its own nationals, who is, as such, a citizen of the Union and who is a family member of a third country national, to leave the territory of the Union altogether. The case related to the refusal of a right of residence to a third country national upon whom his minor children, who were nationals of that Member State and thus EU citizens, were dependent. The Court found that a decision refusing that right was contrary to EU law to the extent that it was liable to deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen by having to leave the territory of the EU altogether. In that judgment, and in the rulings that have followed it in cases such as *Rendón Marín and CS*, *O., S. and L* and *Alopka*, the Court of Justice has sought to strike a careful balance in recognising both the legitimate interests of Member States in taking measures to protect public order and public

security, as well as their public finances, and its firm commitment to upholding the essential right of all EU citizens, conferred on them by the Treaties, to reside on the territory of the Union.

Finally, in this context, I would like to make reference to the judgment of 6 October 2015 in *Delvigne*. In that case, the Court of Justice was confronted with a question concerning the scope of the obligations that EU law imposes on the Member States with regard to the right to vote in elections to the European Parliament. In 1988, Mr Delvigne – a French national residing in France – was sentenced to twelve years' imprisonment for murder. As an ancillary consequence of that sentence, Mr Delvigne was deprived of his right to vote in accordance with French criminal law. In 2012 the French authorities excluded Mr Delvigne from the electoral roll. He challenged that decision before the referring court which asked, in essence, whether Article 39 of the EU Charter of Fundamental Rights had to be interpreted as precluding such exclusion.

The Court of Justice made two key findings. Firstly, it held that the relevant provisions of French law on the basis of which Mr Delvigne was excluded from the electoral roll 'implemented EU law' within the meaning of Article 51, paragraph 1, of the Charter of Fundamental Rights since, although the Member States are competent to determine who is entitled to vote and to stand as a candidate in elections to the European Parliament, they must, when exercising that competence,

fulfil their obligations under EU law, and in particular Article 14, paragraph 3, TEU according to which '[t]he members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot'. The Court reasoned that a Member State is fulfilling its obligations under those provisions when it adopts legislation to that effect, even where the latter deprives an EU citizen of his or her right to vote in European Parliament elections. Secondly, the Court found that the French legislation at issue constituted a limitation on the exercise of the right to vote in European Parliament elections as provided for in Article 39, paragraph 2, of the Charter of Fundamental Rights and then went on to determine that the limitation in question did in fact comply with the requirements laid down in Article 52, paragraph 1, of that Charter since the exclusion was provided for by law, respected the essence of the citizen's right, pursued a legitimate objective and complied with the principle of proportionality.

Delvigne is an important development in the case law. It has helped to make explicit the link between EU citizenship and the democratic governance of the EU, whose importance to the European integration project I highlighted earlier. It shows that the political dimension of EU citizenship is not limited to Articles 20 to 25 TFEU, but also involves other provisions of EU law which impose obligations on the Member States whose objective is to ensure that the principles inherent in a democratic electoral system are applied at EU level.

The European Union faces numerous challenges, in particular the after-effects of the financial crisis and the refugee crisis, the resurgence of terrorism and the forthcoming departure from the Union of one of our Member States. Populism, it is said, is on the march and the values of liberalism and openness on which the European Union is based are feared, by some, to be under existential threat. It is particularly important, therefore, at this key moment in European history – without in any way underestimating the difficulties that we face – to reflect, and indeed to marvel, as we mark the 60th anniversary of the Treaties of Rome, on what has been achieved in the past six decades.

The European Union may not be perfect but, when examined in their proper historical perspective, its achievements are truly breath-taking. In 1957 Europe was still recovering from the ravages of the most brutal war ever fought, largely on its territory. Many European nations, both on the Iberian peninsula and in the centre and east of our continent, were ruled by entrenched, totalitarian dictatorships and there seemed very little prospect that this state of affairs might change. The genius of Europe's founding fathers, Jean Monnet, Robert Schuman, Konrad Adenauer and Alcide De Gasperi, to name just a few, was to focus on what was possible. By establishing first a practical and effective Community based on the integration of national markets and free movement of products and services as well as the

factors of production, they laid the foundations for an optimistic, outward-looking future in which the embryonic Economic Community that they created might prosper and grow.

Our Union has indeed grown, both geographically – through successive waves of accession – and also through its expanding remit, in keeping with the spirit of the original EEC Treaty signed in Rome in 1957, whose preamble expressed the determination of its signatories to establish 'the foundations of an ever-closer union among the peoples of Europe'. That deepening of the Union was, it should be stressed, agreed at every stage by common consent of all the Member States because they saw the benefits of pooling more sovereignty in order to enhance the prospects of their populations, now the beneficiaries of EU citizenship as I have described, not only economically but also in terms of the greater personal, social and cultural opportunities which integration opened up to them. The best antidote to populism is, I would submit, to reaffirm our commitment to that forward-looking, open Europe that we have worked hard to create over the past sixty years.

The Court of Justice has, as I have outlined, played a full part in ensuring that the EU remains grounded in the common European values of its Member States, not least the respect for fundamental rights, democracy and the rule of law. In these troubled times, the Court must continue, as in times past, to serve as the guarantor of

those values, by judging each case strictly on its merits and by refusing to give in to the siren calls of those who say that, in response to the challenges we face, we must have recourse to expedients that, although they may appear helpful for resolving a particular problem in the immediate term, in themselves undermine our way of life and our values. Those values, which are the essence of our shared European civilisation, are the values of the Treaties of Rome whose signature we are celebrating. On behalf of the Court of Justice and all its members, I pledge that we will continue to do our duty to 'ensure observance of law and justice in the interpretation and application of the [Treaties]', just as Article 164 of the original EEC Treaty instructed us to do all those years ago. As these historic treaties now enter their seventh decade, I am confident that we shall succeed in that task.

Thank you very much.