Neglected Actors at the Conference on the Future of Europe

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30.06.2021 doi: 10.17176/20210701-015914-0

Judges are prominent actors with a significant impact on European integration. Yet, no references to them appear in the Joint Declaration on the Conference authored by the Commission, Council and the Parliament. This corresponds to a view, unsustainable in the age of extensive access to information, that judges sit in ivory towers and speak exclusively through their decisions that other actors then explain to the broader public. Moreover, the exclusion artificially reduces the relevance of judges in shaping the future of the EU and the potential of impactful interactions between the Conference participants on the status quo and development of judiciaries in the EU.

The ambition of the Joint Declaration to 'strengthen[.] the link between Europeans and the institutions that serve them' via the Conference is, however, compatible with including judges alongside other stakeholders who are explicitly mentioned, such as regional parliaments, social partners, and academics.

Judges matter for the future of the EU

Through the lens of a traditional model of the separation of powers, the judiciary represents the 'third branch' in addition to the executive and the legislature. Clearly, the EU is not a state, but the rise of judicial power and the judicialization of politics has been no less significant at the EU level than within states. Today, judges both of the CJEU and in the member states are at the core of discussions on upholding democracy in the EU, developing or expanding policies and advancing Europeanization. Virtually all fundamental questions of the EU's future are open to adjudication and judicial decisions are difficult to be ignored in further decision-making process.

Judges can contribute to a closer alignment between differentiation and democracy in the EU, ensuring that collective decisions and new policies are authorised and subject to review and corrections. Moreover, executive dominance may be the norm in the EU, but judges offer a safeguard against unrestrained manifestations of power by the Commission or the European Council.

There are three tentative explanations for the neglect towards judges in the Conference: their remoteness from the public, their irrelevance for normative debates and the fear of excessive judicial power. However, neither of them can be sustained as a reason against including judges in the deliberations of the Conference.

The myth of the 'ivory tower'

Judges, unlike politicians elected through public campaigns, are seen as more remote (if at all political) actors: they are required to possess legal expertise and develop complex justifications to support their verdicts in complicated cases. Their judgments may be long and inaccessible to the broader public (not unlike academic articles), generating the image of a remote 'ivory tower' from which they adjudicate.

There is some truth to this view, with some (especially high court) judges aspiring to being political theorists. However, because of the magnitude of the issues they decide and the growth of tools of online interaction and participation, judges cannot entirely isolate themselves from public communication. High-court judges in particular frequently appear at conferences and public events, presenting their decisions and approaches in a more accessible form but without the intermediary of journalists or commentators reporting on the decisions they read.

A 21st century approach to judiciaries requires them to avoid the framing of ivory towers, and the Conference offers an opportunity to contribute to the understanding of judges as public actors responding to difficult questions while listening to a plethora of arguments.

(Mis)understanding how judges decide

Related to the image of judges as sitting in ivory towers is that they are less commonly seen as direct participants in a public debate with an essentially normative question: what should the EU become? If judges are merely neutral arbiters of disputes, then it seems counterintuitive to invite them to discuss such a normative question. Yet, judges already see this connection, at least in their more sophisticated decisions, and verdicts have the potential to bring about a new policy reality in the EU. They may advance various (and competing) conceptualizations of democracy and advocate for or against differentiation in the EU. An example is the German Constitutional Court's (FCC) judgment that argued democracy had been undermined through extensive competences for the ECB.

If citizens had more opportunities to talk to the judges, they would be empowered to gain an appreciation for the complexity of judging. Normative perspectives may be inevitable but the way they are invoked needs to be justified so that even those without sharing the same opinion can understand how the court reached its conclusion.

In addition, there is another core judicial constituency joining the public debate, at least in part because their judicial systems are not conducive for thoroughly reasoned and justified decisions regardless of whether their outcomes are favourable to the ruling power: judges who retain their internal independence and do not let partisan pressures jeopardise their capacity to undermine their government's position. These judges, particularly when facing trials and prosecutions for their independent judging, have become European public figures regardless of their personal preference.

The prevalence of a confrontational perspective

Finally, judges may be neglected as partners for debate because judicial power can be a source of fear of powerlessness by other institutions, and judges seen as competitors for the last word—even dominance—over decisions on the EU's future.

Confrontation seems to be norm even among judges, with the tug-of-war between the CJEU and the FCC being a case in point. If judges seem unable to talk to each other, why would we expect that they can talk with other institutions and the public at large? The Commission seems to have opted for the same position with its initiation of an infringement proceeding against Germany due to the FCC's decision from last May.

Yet, a plurality of opinions, while it may signal a struggle for recognition of legal positions beyond the jurisdiction a particular court is embedded in, does not have to come with conflict. So-called constitutional pluralists have since long advanced arguments that highlighted the absence of hierarchy between the domestic and European level of legal decision making. Dialogue and communication promised by the Conference have been challenged as strategies for addressing autocratic tendencies in the EU, but that does not suffice as a reason to exclude judges from discussions, the results of which have no legally binding effects.

European Union judges as public figures

To be sure, the Conference declaration does 'invite other institutions and bodies to join in this European democratic exercise', so there is nothing formally stopping judges from stepping up and getting involved in the debate. However, such a position would neglect that judges are primarily reactive institutions; they respond to incentives (such as petitions) they receive, and, to avoid popular charges of undemocratic judicial activism, they need to carefully calibrate their public engagement (including the presentation of the judges' opinions and policy positions).

The view that judges only speak via their decisions can be seen as outdated in the digital age where such a constraint would be detrimental to the capacity

to reach out to the broader public. Representatives of the judiciary can and should be invited to join relevant events associated with the Conference in which representatives of other institutions will be present.

How should this unfold? Judges do not have a role envisioned in the Executive Board of the Conference, but the Conference Plenary is explicitly envisioned to encompass the representation of 'key stakeholders', and so the inclusion of judges here would not require a structural overhaul. Of course, similarly to the randomly chosen citizens, individual judges are not in a position to represent the average voice of the EU judiciaries. However, because of the considerably different competences and for the purpose of facilitating interaction, the judges of the Court of Justice should not be invited without national judges receiving a complementary level of access, and vice versa. At the national level, judges of general courts advance equally relevant voices to constitutional court judges, as all contribute to shaping the understanding of the EU legal order in their respective constituencies.

If invitations are extended to national judicial councils or other representatives of the national judiciaries, 'dissident' judges from member states, where judicial independence is under partisan pressure, are unlikely to get a seat at the table. Still, the deliberations at the Conference could attain a greater focus on the developments in the judicial systems thanks to judges' recognition as stakeholders in the debate. They could cover the understandings of judicial independence and emphasise the public demand for judges free of partisan constraints when considering cases before them.

While invitations extended to judges to participate would not resolve the conundrum of the overall ambiguity of the purpose of the Conference, they would provide an opportunity to demystify EU judiciaries and engage in dialogue with them to the benefit of the Union's democratisation.

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SUGGESTED CITATION

Steuer, Max: Neglected Actors at the Conference on the Future of Europe, Verfassungsblog, 30.06.2021, doi: 10.17176/20210701-015914-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20210701-015914-0.