**The fundamental rights doctrine of the Court of Justice of the European Union**

A „meta-principle of political morality“?

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**Exposee**

The Court of Justice of the European Union (CJEU), has developed into the superior authority in the legal order within the European Union (EU). One of the main aspects that factored into accomplishing that mission, was the Courts instrumentally use of “meta-principles of political morality”, like e.g. the principles of rule of law and/or democracy. This paper claims that the fundamental rights doctrine of the CJEU is also used as such a meta-principle of political morality and highlights several reasons for its development.

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# Introduction

The Court of Justice of the European Union (CJEU) has developed into the “most influential international legal body in existence“[[1]](#footnote-1) and has established itself through its own case law as the one superior authority in the legal order within the European Union (EU).

The Court’s instrumental use of “meta-principles of political morality”[[2]](#footnote-2) helped it achieve this prominence. Such principles, for example the rule of law and democracy, have an arguably settled and widely respected core and therefore serve as„basic legitimating factors for EU polity and for EU law“.[[3]](#footnote-3)

This paper argues that the Court’s fundamental rights doctrine is one such meta-principle of political morality. This claim is contrary to Conway’s position[[4]](#footnote-4), which initially introduced that term concerning the jurisdiction of the Court only in regard to the rule of law and democracy. He expressively excluded the fundamental rights doctrine, because the concept of human rights would still be too contested for such use.

The first chapter illustrates the historical evolution of the fundamental rights doctrine, highlighting the landmark cases that introduced and established the CJEU as a fundamental rights court.

The second chapter focuses on the background and potential reasons for the judicial activism of the Court and discusses the Court’s judicial activism in the context of the legal and political circumstances at the time of its establishment.

In addition, there is not a single answer that can explain this remarkable phenomenon. The arguments stated in this paper are just a few amongst others that all have contributed to the “legally driven constitutional revolution”[[5]](#footnote-5) in Europe.

# Historical evolution of the fundamental rights doctrine of the CJEU

In order to understand its present role and to discuss the future of fundamental rights in EU law, one has to understand its past. The importance of developments in the 1950s and 60s in Europe cannot be overstated as it „conditioned all subsequent developments”[[6]](#footnote-6) in the EU and even beyond. This chapter considers the development of the fundamental rights doctrine in the case law of the CJEU by examining the case history establishing the current state of fundamental rights doctrine.

## A new legal order on the rise: the doctrines of direct effect and primacy

The evolution starts with the claims made in *Van Gend en Loos*[[7]](#footnote-7) (*VGL*) and *Costa v ENEL*[[8]](#footnote-8) (*Costa*) that “EU law is an autonomous legal order which limits national sovereignty.”[[9]](#footnote-9) Even though these cases did not concern any fundamental rights questions specifically, all aspects of European law share their origins in the principles of direct effect and primacy entrenched by those two mentioned landmark cases.

The doctrine of direct effect provides the presumption that clear, precise, and self-sufficient legal norms of EU law are directly applicable to all EU citizens and can be invoked by individuals in national courts. With two autonomous legal orders (national and EU law) in direct effect, conflicts between these laws are bound to happen. The doctrine of primacy resolves this problem by setting aside national law in favour of EU law. Both these doctrines apply to all EU law, including fundamental rights. If EU human rights were neither directly applicable nor overriding national law, it would have been impossible for the CJEU to develop its fundamental rights doctrine.

Prior to *VGL,* “it was widely assumed that the traditional model of international law, marked by state sovereignty, would apply to the European Union.”[[10]](#footnote-10) The status of international legal rules within national legal systems was therefore determined only by national constitutions.[[11]](#footnote-11) The respective constitutional provisions and traditions across EU member states were diverse. There are two schools of thought regarding the status of international law within the national legal order. The Monistic theory is based on the idea that there is only one legal order, which contains both, national law and international law and one of these items prevails over the other. The issue of supremacy is traditionally resolved in the national constitution. The Dualistic theory claims that both, national law and international law, represent separate system of equal value. In order to apply directly in its internal order, a state needs to implement the international law to the national legal order first. Such transformation usually happens through national legislation.

Out of the six member states at that time, four (France and the Benelux states) had a monistic view incorporated in their constitution, while only two (Germany and Italy) followed a dualistic approach. While the concept of monism describes the idea that self-executing international legal norms are directly received within national legal order, the concept of dualism requires national legislation to incorporate international law into national law in order to be applicable.[[12]](#footnote-12)

On May 18, 1962, the Dutch Supreme Court made the first ever preliminary procedure reference under EU law regarding the *VGL* case, raising the question: “whether article 12 of the EEC Treaty has direct application within the territory of a member state, in other words, whether nationals of such a state can, on the basis of the article in question, lay claim to individual rights which the court must protect.”[[13]](#footnote-13) The background to this case was an import of chemicals from Germany into the Netherlands, which was charged with an import duty that has been raised since the EEC Treaty had come into force and allegedly was a breach of Article 12 EEC Treaty (Article 30 TFEU). The governments of Belgium and the Netherlands intervened to argue that this question could not be answered by the CJEU, but by the national constitutions alone. They argued the question was outside the jurisdiction of the CJEU “since it does not relate to the interpretation but to the application of the Treaty” and that the reference is “a problem of constitutional law, which falls exclusively within the jurisdiction” of the national court.[[14]](#footnote-14)

The CJEU famously stated that the Community aims to establish a “new legal order of international law for the benefit of which the states have limited their sovereign rights”.[[15]](#footnote-15) This legal order regulates not only a Community of states “but also of peoples and persons” and therefore “individuals must be visualized as being subjects of Community law.”[[16]](#footnote-16) The idea of individual rights and their protection was at the heart of *VGL*.

This judgment is often referred to as the introduction of the concept of direct effect to Union law. That is however not the case, because the direct application of Union law was already clearly mentioned in the EEC Treaty in regard to regulations. It was rather the question “whether specific provisions … had direct effect was to be decided centrally by the Court of Justice”[[17]](#footnote-17) alone, as the CJEU postulated in its judgment. Because Article 12 was a sufficiently clear and unconditional prohibition, the provision was deemed of having direct effect. Over the following years, the Court expanded this doctrine in two ways: On the one hand the requirements that are needed were subtly loosened and on the other hand the effect was extended to secondary Union law as well.[[18]](#footnote-18)

Closely connected to the doctrine of direct effect enshrined by *VGL* is the doctrine of primacy, which was established by the CJEU in *Costa*.

The question of primacy of EU law was not raised in *VGL*, because the Dutch constitution was clear on that subject, as Article 66 (94 today) stated that self-executing provisions of international law prevail over conflicting national law.

In Costa, the company refused to pay what was owed to the national electricity company. Instead, Costa challenged the Act of Parliament, by which electricity had been nationalized, as being in violation of the EEC Treaty. The local court referred the matter to the CJEU. The Italian government intervened before the CJEU and called the reference “absolutely inadmissible”, because no local court had power to set aside national law regardless.[[19]](#footnote-19) “This open challenge to its jurisdiction encouraged the Court of Justice to formulate its doctrine of the primacy of Community law”[[20]](#footnote-20) and to enforce EU law when it conflicts with national legislation.

The Court affirmed that the EC Treaty was no ordinary international treaty anyway since the consent of all national parliaments – a rarity in governmentally driven international law – made EU law its “own legal system which … became an integral part of the legal systems of the Member States and which their courts are bound to apply.”[[21]](#footnote-21) The limitation of their own sovereign rights in limited fields “created a body of law which binds both their nationals and themselves.”[[22]](#footnote-22) Therefore it was necessary for both the legitimacy of EU law and for the creation of a uniform common market that national legislation could not undermine the integration. EU law is supreme to national law, which the national courts must set aside when in conflict.

These are relatively weak arguments because they lack any legal foundation in the Treaty and because of the generally “mixed response”[[23]](#footnote-23) from many legal scholars. Nevertheless it is remarkable how easily, albeit slowly,[[24]](#footnote-24) most national authorities[[25]](#footnote-25) followed the Court’s doctrines.

## The Clash of the Titans: The Battle of Constitutional Supremacy

Next in line were the *Internationale Handelsgesellschaft*[[26]](#footnote-26) and the *Simmenthal*[[27]](#footnote-27) judgments, which extended the primacy of EU law to national constitutional law as well.

In *Internationale Handelsgesellschaft* a German export firm obtained an export license for maize. The firm consequently had to pay a deposit as a guarantee for complying with certain conditions. Since those conditions were not fulfilled, the deposit was forfeited in accordance with EU law[[28]](#footnote-28). The firm claimed that such a system was not legal in the light of the fundamental rights laid down in the German constitution. The administrative court referred the question to the CJEU.

The Court stressed that EU law was an “independent source of law”, so it could not be “overridden by rules of national law … without being deprived of its character as Community law and without the legal basis … itself being called into question.”[[29]](#footnote-29) Such recourse to legal rules, “would have an adverse effect on the uniformity and efficacy of Community law.”[[30]](#footnote-30)

The Court, however, also stated that “respect for fundamental rights forms an integral part” of EU law and that their protection “must be ensured within the framework of the structure and objectives of the Community.”[[31]](#footnote-31) The Court ruled that the deposit system was not viewed as a breach of fundamental rights.

In *Simmenthal* a company imported beef to Italy from France and was charged for a veterinary inspection at the border. The company claimed that such fees were incompatible with EU law. In a preliminary ruling, the CJEU agreed. The Italian government however refused to accept this decision and to repay the money. It demanded that the national Constitutional Court had to confirm the CJEU´s ruling before rescinding the national law. The national court again asked the CJEU for guidance. The CJEU ruled that “every national court must […] apply Community law in its entirety and … set aside any provision of national law which may conflict with it”[[32]](#footnote-32) as otherwise it would “imperil the very foundations of the Community.”[[33]](#footnote-33)

Consequently, the Italian court had to not obey the national government`s order to wait for the confirmation of the Constitutional Court of Italy. Instead it had to set aside the conflicting provision of national constitutional law.

In *Simmenthal*, The CJEU has therefore explicitly claimed primacy over national constitutional law and that way positioned itself as the highest court in the EU. This did not bode well with the some national courts, like the federal constitutional courts in Germany, Italy and Spain, which commonly challenged the CJEU and its (in)ability to protect fundamental rights. The stage was set for a serious showdown between the leading courts in legal Europe.

## The Introduction of Fundamental Rights as a source of EU law

The national courts` upcoming reactions were “a brutal blow”[[34]](#footnote-34) the CJEU consequently had to react. To be challenged, in particular by the German Federal Constitutional Court, over its inadequacy in protecting human rights, the Court was compelled to develop a fundamental rights doctrine. Due to the absence of any human rights provisions in Treaty law, in a first step it needed to establish fundamental rights as a source of EU law.

For that purpose the Court used the idea of general principles as a source of Union law. It had mentioned that idea in *Stauder[[35]](#footnote-35)* in 1969. In that case the CJEU acknowledged *in obiter* that “the fundamental human rights are enshrined in the general principles of community law and protected by the Court“.[[36]](#footnote-36) Hence, the Court stated to „interpret EU measures in the light of fundamental rights instruments.“[[37]](#footnote-37) It was not until *Nold[[38]](#footnote-38)* in 1974 that it finally identified certain fundamental rights as common constitutional traditions of the member states as general principles and therefore as sources of EU law. It did so to “convince the national courts […] to embrace unconditional supremacy”[[39]](#footnote-39) of EU law.

In *Nold*, a mining company in Germany did not meet recently enhanced requirements, which were introduced by EU legislation. Consequently the company was not allowed to buy its resources directly from the national coal-producer anymore. Nold claimed this requirement was a breach of its rights of freedom of property and profession and argued that the regulation be struck.

The Court reiterated its position that fundamental rights are “an integral part” of EU law. Additionally the Court stated that it “is bound to draw inspiration from constitutional traditions common to the Member States” as well as from “international treaties for the protection of human rights”, which can “supply guidelines”[[40]](#footnote-40) to EU law. Moreover the Court called the rights of freedom of property and profession as examples of such common traditions, as all the member states’ constitutions feature respective provisions. All those provisions, however, are also subject to limitations in regard to the public interest. Therefore it was not only the extent of protection, but also the conditions of a justified interference that are part of these common traditions. That way the Court did not nullify the regulation, because the regulation was necessary because of economic changes and therefore its interference with fundamental rights justified.

In *Rutili*[[41]](#footnote-41), the Court finally referred explicitly to the European Convention on Human Rights (ECHR) for the first time and enshrined its status as being superior to other international treaties concerning human rights.

With those two judgments the CJEU established a rather complex and ambiguous fundamental rights regime. On one hand it introduced the common constitutional traditions of the Member States as general principles and therefore legal sources of EU law. Primary sources were both the common national constitutional traditions and shared international human rights agreements, with particular significance to the ECHR.[[42]](#footnote-42) On the other hand fundamental rights were subject to the autonomy of EU law and yet “not entirely independent of the legal cultures and traditions of the Member States.”[[43]](#footnote-43) Thus, the CJEU frequently stressed that both sources were only viewed as sources of “inspiration” and that there is no legally binding effect on its jurisdiction. Thus, the fundamental rights doctrine offers a great amount of argumentative discretion for the Court, making it a great tool for future judicial activism.

## The European Union Charter of Fundamental Rights

Most of the principles established by the Court in its fundamental rights doctrine have since been introduced into EU law through legislation, most prominently in the form of the European Union Charter of Fundamental Rights (EUCFR). At first this was merely an “authoritative statement of the rights considered to be fundamental”[[44]](#footnote-44), but today the Charter is finally legally binding under the Lisbon Treaty. The rights of the EUCFR are largely taken from the human rights sources recognized in the case law of the CJEU, namely common constitutional traditions of the Member States and the international human rights treaties concluded by the Member States.[[45]](#footnote-45)

# Reasons for the fundamental rights doctrine

In developing its fundamental rights doctrine, the CJEU has acted “as a constitutional court, in fact though not in name.“[[46]](#footnote-46) In this way the Court “has originated some of the key features of the constitutional structure of the EU, including … a human rights jurisprudence”[[47]](#footnote-47). In essence, the Court shaped “constitutional law without politics”.[[48]](#footnote-48)

Its highly active jurisprudence has put the CJEU in a delicate position facing both harsh critics as well as cordial consent all across the Union. Why did the Court manoeuvre itself in such troubled waters? Why did it expose its own credibility to potential sabotage?

This chapter contains an analysis of various reasons for the Court’s active jurisprudence in human rights matters.

## The impact of the *German Federal Constitutional Court* – “Solange” I and II

It was the discourse with one national court in particular that greatly impacted the CJEU and its jurisdiction, not only but especially in fundamental rights matters. The Federal Constitutional Court of Germany, the *Bundesverfassungsgericht* (BVerfG).

Germany’s highest court has proven to be one of the most influential institutions in the field of constitutional review worldwide[[49]](#footnote-49), especially in the field of fundamental rights protection.[[50]](#footnote-50) Its highly active jurisprudence has paved the way for other courts[[51]](#footnote-51) to change their style of jurisprudence and therefore practically establish themselves as active players in various fields of politics.[[52]](#footnote-52) There are several reasons why the BVerfG has such wide competencies, but most of them are a product of the specific historical, political and philosophical background that shaped modern legal culture.[[53]](#footnote-53) This leading role led to various conflicts with other public institutions. One of these is the still ongoing disagreement with the CJEU over their claims on supremacy in constitutional matters respectively.

When the CJEU innovatively promoted and established the doctrines of direct affect and supremacy of EU law in constitutional matters, it automatically challenged the competences and the leading role of the BVerfG in the legal system of Germany. The highest authority in deciding how to interpret and apply the German Constitution, the *Grundgesetz* (GG), suddenly was no longer the BVerfG. This had to be a serious issue for a traditionally powerful and confident court like the *Bundesverfassungsgericht*.

In order to understand the following development, it is necessary to have some understanding of the evolution and the meaning of the constitution not only in the legal, but also in political and social life in Germany. After the Second World War and the numerous crimes of the Nazi regime, Germany needed a clean and fresh start both as a society and a nation. The adoption of a new constitution was the final centrepiece of this transformation in embodying a new identity. In this light, the new Constitution (the *Bonner Grundgesetz*) is highly respected by the citizens and has a particular high standing in the legal order as well as in in politics.

The Constitution itself starts of with its famous confession that the “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.“[[54]](#footnote-54) The following provisions[[55]](#footnote-55) all outline individual fundamental rights of citizens.

The great principle of human dignity, used as a *pars pro toto* for fundamental rights in general[[56]](#footnote-56), hence stands in the centre of the *Grundgesetz*. In the light of all the cruelty and injustice suffered during the Nazi regime, the people of Germany line out that the protection of everybody’s basic rights is a main task of any form of government, which is acting under the *Grundgesetz*. In order to be able to successfully live up to this task, the Federal Constitutional Court is granted extensive competences in Art. 93 GG.

Those competences were challenged by the constitutional integration of the European Union, as discussed above. In 1974 in a first reaction[[57]](#footnote-57), the BVerfG therefore rejected the principle of supremacy of EU law and the jurisprudence of the CJEU over national constitutional law and the jurisprudence of the German constitutional court. It is a fair conclusion that a legal system recently empowered by the doctrines of direct effect and primacy should not be left unchecked.[[58]](#footnote-58) The competence to review any case on its compatibility with the GG, remained reserved with the BVerfG. so long (“Solange”) as the CJEU and Union law in general are not able to guarantee a level of fundamental rights protection that is viewed as equivalent to the fundamental rights regime established in the *Grundgesetz*. It additionally demanded a further democratization and enhancing of the European Parliament in order to accept the supreme jurisdiction of the CJEU in constitutional matters.

After correlating changes to the primary law of the EU had been made, the BVerfG had to make sure that the level of fundamental rights protection does not take any harm by the establishment of Unions law supremacy. In 1986, in its so called “Solange II” judgment[[59]](#footnote-59), it stated that so long as there is an equivalent level of fundamental rights protection by EU Law and particularly the jurisprudence of the CJEU, the BVerfG accepts the doctrine of supremacy and will not rule on any specific cases.[[60]](#footnote-60)

In all, the CJEU directly challenged the *Bundesverfassungsgericht* with its doctrine of supremacy of EU law over national constitutional law. On one hand, the BVerfG reluctantly accepted that doctrine, on the other hand however it remindingly pointed out the limits of its acceptance. Since then, the BVerfG has been a respected player in the game of reforming the constitutional fundament of the EU, as it proved to stand firm with its competences and responsibilities and not to shy away from controversy with any institution of the EU.

## The German Federal Constitutional Court as a role model for judicial activism

The *Bundesverfassungsgericht* has influenced the fundamental rights doctrine of the CJEU in another way, i.e. by leading as an example for the great potential of judicial activism by a constitutional court.

Fundamental rights, like most aspects of constitutional law, are typically expressed in general and abstract wording. That way they are uncontested and yet contested. They are uncontested as provisions guaranteeing freedom and liberty to everyone, which are widely accepted. Yet they are contested in regard to their meaning *in concreto* in contemporary society, as such general and abstract provisions need to be interpreted in order to gain actual affect. It is this dichotomy that makes fundamental rights such an intriguing and potent tool for any form of law making. They provide both, a great sense of legitimacy for your proposal and yet a great amount of creative leeway what actually to propose. It basically comes down to having the persuasive or institutional authority to convincingly draw the own ideas upon fundamental rights.[[61]](#footnote-61)

The one public institution that usually resembles those two characteristics best is the constitutional court. Firstly, because of the nature of its work, it contains all the knowledge necessary to bolster their judgments with the persuasive authority needed to use fundamental rights successfully. Secondly, as an institution, constitutional courts, like supreme courts in general, traditionally enjoy a great sense of authority within the citizens and the other public institutions.[[62]](#footnote-62)

As already mentioned above, the German Constitution enjoys a particular high standing within society and politics in Germany. It embodies the values the people of Germany stand for and has played a key role in shaping German identity since its introduction after the Second World War.[[63]](#footnote-63) A similar significance is attributed to the guardian of the *Grundgesetz*, the *Bundesverfassungsgericht*.

An extraordinary great amount of trust was put into the BVerfG early on, when the citizens of Germany hoped for a fresh start in the light of liberty and justice secured by the Court after the dark years under the legal system of the Nazi-Regime. It proved to be impossible to replace all NS-afflicted judges due to practical[[64]](#footnote-64) and ideological[[65]](#footnote-65) reasons.[[66]](#footnote-66) Therefore the competence and duty of the Constitutional Court initially was to effectively implement a new legal spirit to the judiciary. In those early years, most public institutions had to resolve questions about the institutional hierarchy within the newly constituted state, with the judiciary being no exemption. Jurisdiction was claimed, challenged and denied.[[67]](#footnote-67)

It is this background that explains the jurisdiction of the *Bundesverfassungsgericht* in its early years, when it became a famous example and role model for judicial activism. It did so mostly by using its own fundamental rights doctrine, most prominently in its “Lüth”-judgment[[68]](#footnote-68) that marked the first ever horizontal application of fundamental rights and therefore introduced the so-called third party effect of fundamental rights to the legal world.

Even though the CJEU does not directly resort to the fundamental rights doctrine of the BVerfG, the *Bundesverfassungsgericht* undeniably has had a great impact on the CJEU. Firstly, the BVerfG has greatly influenced the understanding of fundamental rights worldwide. Secondly, it has shown the political potential of a judicial activism based on a fundamental rights doctrine. Thirdly, the established level of human rights protection has led to the “Solange” conflict in the first place, as mentioned above.

## (Lack of) Constitutional Reform – The Empty Chair Crisis

Constitutional law can be amended/updated in two ways, either through legislation or through interpretation. If one method fails (e.g. because of lack of political consensus within the legislative branch), the other traditionally steps in and fills the void.[[69]](#footnote-69) Reasons for judicial activism therefore are lack of political consensus over constitutional issues and constitutional reform or a legislative procedure that makes them unlikely to happen.[[70]](#footnote-70) One prominent example is, again, Germany after the Second World War, when any legislative action needed consent of the four countries that occupied Germany at that time.[[71]](#footnote-71) Due to grave ideological differences between the communist Soviet Union and the other western countries, constitutional issues could rarely be resolved successfully. Consequently it was the Constitutional Court that had to step in and keep the constitution up to date.

A similar situation occurred in the 1960s within the European Union.[[72]](#footnote-72) Newly elected French President Charles de Gaulle ushered in new age of European politics. His nationalistic ideology caused arguably the second[[73]](#footnote-73) significant bump in the road of the development of the EU. Instead of an enhanced form of supranationalism within the Union, as proposed by the Commission, de Gaulle promoted his own plans, called the “Fouchet Plan”, in 1961. He feared a loss of French national influence in European politics and consequently expected the sovereignty of France to be in danger. His plan proposed that the decision making power should maintain with the national governments instead of further empowering the European institutions.

France was in a politically powerful position in the early years of European integration. The rejection of the EDC proved that the consent of France is vital for the success of any plan of deeper integration and cannot be taken for granted by its peers.[[74]](#footnote-74) In the 1960s the initial “readiness of France´s partners to accommodate French needs” as they “continued to fear Drench withdrawal from the Community”[[75]](#footnote-75) finally faded and so they dared to challenge the French leading role.

Yet still despite consensus within the other Member States against this plan, De Gaulle indeed successfully torpedoed any progressive legislative action or Treaty reform by ordering French representatives to just not show up at the meetings of the European institutions. This so-called “empty chair crisis” resulted in a permanent lockdown of any progression of the project of European cooperation as De Gaulle boycotted any progress towards a further supranationalistic integration. He instead heavily insisted on an intergovernmental solution with the right to veto any proposal for every Member State. In January 1966 this conflict was finally settled by agreeing on the so-called Luxembourg Compromise, which, at least in the eyes of Robert Marjolin, confirmed the victory of the Gaullist conception in European integration.[[76]](#footnote-76)

Despite the lack of political consensus within the European legislative actors, the rapidly evolving economic cooperation demanded legal adaption of EU secondary and primary law. *Costa* and *Van Gend* marked one way of constitutional evolution of Community law through the case-law of the CJEU. During this period it was the Court of Justice that “stepped it to hold the construct together.”[[77]](#footnote-77)

The lack of political consensus on how the future of European cooperation should look like aided the Court`s activism in another way: the lack of effective resistance. There are two ways the legislator can restrict a Court: Changing or clarifying the law that the Court (miss)interpreted and/or limit the Courts competences.

The jurisdiction of the CJEU contains how EU primary and/or secondary law should be interpreted. Member States cannot change the interpretation itself, as this is solely up to the Court to decide. The Member States, alongside the other EU institutions, therefore need to change the law itself, if they want to “correct” EU law and the understanding of it by the Court of Justice. The lack of political consensus and the numerous national interests on various aspects of the Courts activism prevented a credible threat to the Courts authority.[[78]](#footnote-78) Such challenge against any Supreme Court is politically difficult enough, as highest courts traditionally enjoy an inherent legitimacy, which makes their decisions hard to contest.[[79]](#footnote-79) The ambiguous political situation made it virtually impossible.

The state of affairs looked even more grimly in regard to an institutional downgrade of the Court itself. Reversing the competences of the CJEU demands a Treaty amendment, which is even harder to reach under EU law. The same applies to reversing the Courts rulings on the interpretation of primary EU law. Especially at that time the small states had a vital interest in a strong CJEU and a strong EU legal system. After a period of French domination it were again the other big Member States Germany and Italy that led the challenge against French leadership in Europe[[80]](#footnote-80) in front of the CJEU however, “political power is equalized, and within“ the CJEU, „small states have disproportionate voice, since each judge has one vote, and decisions are taken by simple majority.“[[81]](#footnote-81)

Weiler[[82]](#footnote-82) raises an interesting idea arguing that legislative inactivity and judicial activism is an interdependent phenomenon. Not only does legislative deficiency aid judicial activism, but also does judicial activism amplify political discord and scepticism within the legislative branch. Political parties (or, on a federal level, national governments) feel threatened by an active Court challenging their legislative competences. Such atmosphere consequently enhances existing differences and therefore hampers legislative activity.

I want to highlight one aspect Weiler is not mentioning at that point. For his theory to be true, the Court and the judicial system in general need to be effective in implementing its judgments. Such power is usually granted the Courts by the Constitution. Constitutional Courts, however,, are “uniquely situated to undermine the rule of law … while ultimately responsible for its fulfilment”[[83]](#footnote-83). Based on considerations regarding the principles of Rule of Law and separation of powers, Constitutions usually greatly limit the Constitutional Courts power to enforce its own judgments. Hence are Constitutional Courts heavily dependent on their own authority and acceptance by citizens and government.

The Court of Justice did not enjoy such high level or long practice of acceptance within the institutional hierarchy at that point in time. Nevertheless it is a reasonable speculation[[84]](#footnote-84) that the rise of nationalistic policies, like under De Gaulle, was at least partly caused by bold signals from Luxembourg, especially considering that after all the Courts success proved its authority to be respected enough.

It was the judiciary that guaranteed the needed progress in EU (constitutional) law at that time. In order to succeed every actor of the EU judicial system had to contribute to this task. Therefore one key aspect for the Courts activism are provisions on how the European Court enforces its judgment through interaction with the National Courts in its preliminary ruling procedure.

## The Preliminary Ruling Procedure System and Judicial Activism – Correlation or Causation

At first it is noticeable that most of the Courts ground-breaking landmark-decisions took place through the preliminary ruling procedure. The procedure has been “pivotal to EU legal integration” as it sets “an historical record of legal integration.”[[85]](#footnote-85) *Costa* is an early and salient example of national courts having such a strong position in the preliminary ruling procedure.[[86]](#footnote-86) Which questions they ask (and which questions they do not ask) can greatly influence the ruling and impact of the CJEU. There are two explanations for this fact.

### The Quantitative Dimension

Firstly, it is quantitatively reasonable, as the vast majority of the Court`s cases come to it through the preliminary ruling procedure. In 2012 64 per cent of the Courts cases were preliminary references.[[87]](#footnote-87) Therefore also most landmark-cases statistically should originate in preliminary references.

### The Qualitative Dimension

Secondly, and more interestingly, there might be a qualitative aspect as well. The preliminary ruling procedure system enshrined in Article 267 TFEU tends toward policy-makingjudgments.

The decision of when und what to refer to the CJEU is “heavily in the control of Member States”[[88]](#footnote-88) or, more precisely, the national courts, as it “depends entirely on the national court´s assement”[[89]](#footnote-89), with the exception on highest national courts, which are obliged to refer the matter to Luxembourg. The impact of the exclusive power to decide what to ask and therefore what not to ask as well as how to formulate the question, is already pointed out above, in regard to *Costa*. In order to be able to give influential rulings, the CJEU, consequently, is contingent on the National Courts cooperation.

Moreover, by complying with the Courts judgments, the national judges lend their own credibility they – generally speaking – enjoy in their home countries to Luxembourg.[[90]](#footnote-90)

The National Courts however do have their own interests in using preliminary references frequently. Wisely used, the preliminary ruling procedure can help in particular lower courts “to break free from national judicial hierarchies.”[[91]](#footnote-91) In Member States that do not know constitutional courts (France, UK), the compatibility review even introduces some “powers of legislative review.”[[92]](#footnote-92) Judges of lower courts, who are still in the early stages of their respective careers, tend to use such mechanisms to earn prolific reputation supporting their own claim for promotion. [[93]](#footnote-93)

The Court`s rulings bind the referring national court.[[94]](#footnote-94) A study claims that the compliance of National Courts is indeed high, calculating that in 96.3 per cent of the cases studied, the national judge followed the preliminary ruling.[[95]](#footnote-95)

On the one hand the frequent and intense discourses between CJEU and various National Courts help to encourage participation before and compliance after the rulings.[[96]](#footnote-96)

On the other hand, there is the Courts instrumentally use of teleological interpretation, which is particularly typical in preliminary procedure rulings and a main reason why the CJEU is in such “an extremely powerful position”.[[97]](#footnote-97) In its daring judgments the Court often refers back to the main purpose of the preliminary ruling procedure: to preserve the unity and effectiveness of EU law.[[98]](#footnote-98) This guarantee requires “an autonomous and uniform interpretation throughout the European Union.”[[99]](#footnote-99) As the CJEU is “the only court which can provide authoritative guidance on the interpretation and validity of EU law”[[100]](#footnote-100), the Court`s decisions usually are widely accepted within the Union. In *Simmenthal* the Court argued that without primacy over all national legislation “the very foundations of the Community”[[101]](#footnote-101) would be imperilled and in *Internationale Handelsgesellschaft* he warned that Union law is in danger of “being deprived of its character as Community law … and … the legal basis … itself being in question.”[[102]](#footnote-102)

Such “tendency to meta-teleological or broad, system-level purposive interpretation aimed at enhancing integration”[[103]](#footnote-103) might partly originate from the very nature of the preliminary ruling procedure. The tendency to legitimate its bold rulings with such radical reservations most definitely puts the Court`s judgments in a “quasi-sacrosanct” position. Some scholars therefore accuse the Court`s variation in approach “as strategic”[[104]](#footnote-104). For example Conway calls the Court out for focusing its “attention on outcome, rather than process.”[[105]](#footnote-105) Bredimas even claims, “the only consistent and overriding principle of interpretation, which can be traced throughout the case law, is interpretation promoting European integration.”[[106]](#footnote-106)

The role the system of preliminary ruling procedure plays in EU law makes Article 267 TFEU the “jewel in the Crown“[[107]](#footnote-107) of the CJEU´s jurisdiction.

# Conclusion

The CJEU has played an integral role in shaping and establishing EU constitutional law. That way the Court has firmly established itself as one of the leading constitutional courts in Europe. One tool the Court instrumentally used in that regard is fundamental rights protection.

The first chapter illustrates the evolution of the fundamental rights doctrine in the Court`s case law. It shows a linear development of the doctrine, which leads to the conclusion that the Court was determined to position itself as a constitutional court. Moreover the timely reaction to the challenges of national constitutional courts and governments suggests that the Court was aware of the legal and political issues with such judicial activism. The Court did not shy away from controversy, rolled the dice and in the end came out on top[[108]](#footnote-108) of the legal order in Europe.

Europe is well known for its high level of fundamental rights protection on both a national and international level. Most national constitutions implement a comprehensive system of human rights protection. The European Court of Human Rights (ECtHR) guarantees an additional external revision on grounds of alleged human rights violations. Such highly effective system of enforcement highlights the great level of appreciation regarding the concept of fundamental rights in Europe. This consensus is the reason why fundamental rights are used as a meta-principle of political morality, not only, but also by the CJEU.

This marks a prime example for the political and legal potential of a well orchestrated used fundamental rights doctrine. The Court`s activism has since been subject to as much heavy criticism as strong support. In the end it is about the personal stance towards judicial activism by constitutional courts in general and the structurally necessary tension between the democratically elected legislation and the by the government(s) appointed constitutional court. Such tension is a core element of any institutional structure based on the separation of powers and checks and balances.

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Cs 29/69 Erich Stauder v City of Ulm – Sozialamt (1969) ECR 419.

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2. Conway, Legal Reasoning, p. 90. [↑](#footnote-ref-2)
3. Conway, Legal Reasoning, p. 90. [↑](#footnote-ref-3)
4. Conway dismissed this thought because of the more „contested“ nature of fundamental rights as a concept. See Conway, Legal Reasoning, p. 90. [↑](#footnote-ref-4)
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20. De Witte, Direct Effect, Primacy and the nature of the legal order, p. 328. [↑](#footnote-ref-20)
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25. E.g. the UK has struggled to align those doctrines with their traditional principle of sovereignity of parliament. The Federal Constitutional Court of Germany demands a high level of fundamental rights protection. [↑](#footnote-ref-25)
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34. Mancini, The Making of a Constitution of Europe, 26 CML Rev. 1989, p. 609. [↑](#footnote-ref-34)
35. Cs 29/69 Erich Stauder v City of Ulm – Sozialamt (1969) ECR 419. [↑](#footnote-ref-35)
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37. Chalmers, European Union Law, p. 251. [↑](#footnote-ref-37)
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47. Conway, Legal Reasoning, p. 1. [↑](#footnote-ref-47)
48. Shapiro, Comparative Law and Comparative Politics, p. 538. [↑](#footnote-ref-48)
49. Rosenfeld, Comparing Constitutional Review, p. 48. [↑](#footnote-ref-49)
50. Böckenförde, Zur Lage der Grundrechtsdogmatik nach 40 Jahren. [↑](#footnote-ref-50)
51. One prime example is the Constitutional Court of Austria, which fundamentally changed its jurisprudence at least partly in light of the judicial activism displayed by the Bundesverfassungsgericht; see Eberhard/Öhlinger, Verfassungsrecht, p. 37. [↑](#footnote-ref-51)
52. Rosenfeld, Comparing Constitutional Review, p. 48. [↑](#footnote-ref-52)
53. As explained underneath. [↑](#footnote-ref-53)
54. Article 1 GG. [↑](#footnote-ref-54)
55. Article 1-19 GG. [↑](#footnote-ref-55)
56. Nowak, Brauchen wir eine Europäische Grundrechtscharta, p. 177. [↑](#footnote-ref-56)
57. BVerfGE 37, 271 ff.; The so-called “Solange I” judgment. [↑](#footnote-ref-57)
58. Weiler, The Transformation of Europe, p. 2417. [↑](#footnote-ref-58)
59. BVerfGE 73, 339. [↑](#footnote-ref-59)
60. Among others: Hesse, Grundzüge, p. 47f.; see also Conway, Legal Reasoning, p. 86. [↑](#footnote-ref-60)
61. This marks an idea I drew inspiration upon on Stelzer, Grundzüge des öffentlichen Rechts, p. ???. [↑](#footnote-ref-61)
62. Weiler, The Transformation of Europe, p. 2428. [↑](#footnote-ref-62)
63. Wahl, Lüth und die Folgen, p. 385. [↑](#footnote-ref-63)
64. The required level of education and practical experience to work as a judge makes it difficult to replace many judges in a short period of time. [↑](#footnote-ref-64)
65. One main feature of any rule of law concept is the independence of the judiciary branch and its actors, including the protection of replacement of judges. [↑](#footnote-ref-65)
66. Metzler, Die Bundesrepublik in den 50er Jahren, p. 39. [↑](#footnote-ref-66)
67. Henne, Lüth, p. 199f. [↑](#footnote-ref-67)
68. BVerfGE 34, 238ff. [↑](#footnote-ref-68)
69. Gamper, Staat und Verfassung, p. 62. [↑](#footnote-ref-69)
70. So-called “hard” constitutions are constitutions that are difficult to alter. A prominent example for a country with a hard constitution is the United States of America, which features a very active Supreme Court. A soft constitution can be found in Austria, which Constitutional Court was an example for judicial restraint, even though its jurisprudence has changed over the last decades; see Gamper, Staat und Verfassung, p. 62f; Eberhard/Öhlinger, Verfassungsrecht, p. 35ff. [↑](#footnote-ref-70)
71. Hesse, Grundzüge, p. 37f. [↑](#footnote-ref-71)
72. A solid summary of the historical background and actual sequence in Ludlow, Challenging French Leadership in Europe, p. 231-248. [↑](#footnote-ref-72)
73. The first one was arguably the rejection of the European Defence Community by the French Parliament in 1954. [↑](#footnote-ref-73)
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82. Weiler, The Transformation of Europe, p. 2426f. [↑](#footnote-ref-82)
83. Conway, Legal Reasoning, p. 115. [↑](#footnote-ref-83)
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93. See Holzleithner/Mayer-Schönberger, Das Zitat als grundloser Grund rechtlicher Legitimität, p. 318. [↑](#footnote-ref-93)
94. Cs 52/76 Benedetti v Munari (1977) ECR 163. [↑](#footnote-ref-94)
95. Nykios, The Preliminary Reference Process, p. 410. [↑](#footnote-ref-95)
96. De la Mare/Donnely, Preliminary Rulings, p. 386. [↑](#footnote-ref-96)
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99. Cs C-281/09 Commission v Spain (2011), [42]. [↑](#footnote-ref-99)
100. Chalmers, European Union Law, p. 179. [↑](#footnote-ref-100)
101. Cs 106/77, [18]. [↑](#footnote-ref-101)
102. Cs 11/70, [3]. [↑](#footnote-ref-102)
103. Conway, Legal Reasoning, p. 3. [↑](#footnote-ref-103)
104. Conway, Legal Reasoning, p. 26. [↑](#footnote-ref-104)
105. Conway, Legal Reasoning, p. 26. [↑](#footnote-ref-105)
106. Bredimas, Methods of Interpretation, p. 179. [↑](#footnote-ref-106)
107. Craig/De Burca, EU Law, p. 442. [↑](#footnote-ref-107)
108. The primacy of EU law over national constitutional law is widely accepted in the EU. The extent of the primacy however is still highly contested today. The Bundesverfassungsgericht has developed an “ultra vires” doctrine, which excludes essential provisions of the *Grundgesetz* from the primacy of EU law. The Czech constitutional court has famously used this doctrine in its so-called “*Slovak Pensions decision”* (US 405/02) to reject a ruling of the CJEU. [↑](#footnote-ref-108)