

The European Court of Justice's growing role in the domain of fundamental rights is not a sign of judicial activism, but political insufficiencies.

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*A common criticism of the European Court of Justice (ECJ) is that it engages in 'activist' rulings aimed at increasing its own power as an institution. **Andreas Grimm** argues that many of these criticisms fail to put ECJ rulings within the context of wider EU integration. In the field of fundamental rights, for instance, the ECJ is required to make rulings due to a number of conflicts between different EU objectives. Moreover, many EU decisions are deliberately left politically unclear on the assumption that the ECJ will 'fill in the blanks' at a later date. These examples reflect problems with the overall nature of EU decision-making, rather than simply the ECJ's rulings.*



Fundamental rights have long been portrayed as a “soft” and rather insignificant field of European Union law. This picture has radically changed in the last few years. The adoption of the Charter of Fundamental Rights and debates surrounding the concrete meaning of EU citizenship have brought questions over the prevalence and scope of the Community's fundamental rights sharply into focus.

More importantly, fundamental rights also play an ever increasing role in the judgements of the European Court of Justice (ECJ) and constitute one of the most dynamic fields of jurisdiction today. Cases like [Viking](#) (2007), [Laval](#) (2007), [Rueffert](#) (2008), [Kadi](#) (2008), [Kadi II](#) (2013), [Santos Palhota](#) (2010), [Kücükdeveci](#) (2010), [Brüstle](#) (2011), [Test-Achats](#) (2011), [Melli Bank](#) (2009, 2012), [Åkerberg Fransson](#) (2013) or most recently, the two joined cases on the validity of the [Data Retention Directive \(2006/24/EC\)](#) in light of Articles 7, 8 and 11 of the [Charter of Fundamental Rights](#), represent just the most prominent examples.

Many of these cases have not only been the focus of particular attention, but also the subject of severe criticism. Of course, for critics of the [activist nature of the Court's rulings](#) this engagement in the field of fundamental rights comes as no surprise. Does the ECJ's growing engagement in the domain of fundamental rights not simply open a new chapter in a long story of ECJ self-empowerment, which now has reached, with the ever growing fundamental rights jurisdiction, the core of the modern constitutional state?

As easy and convincing as this explanation might seem at first, it falls short on closer inspection, since the trigger for all these cases have been acts or omissions in the political domain. More importantly, to suspect mere judicial activism behind this development detracts the attention from the real locus of the community's most pressing challenges and problems in the EU's legal constitution today.

To understand why there are ever more fundamental rights cases reaching the ECJ, it must be recognised that in recent years the EU's fundamental rights increasingly collide with other objectives of the European Union. However, as these tensions have not been resolved adequately by political means and have persisted partly in the form of legal uncertainties, but also partly as glaring loopholes, they sooner or later became subject to legal proceedings.

Retrospectively, this was the case, for example, in the much-criticised legal matters on the relationship between market freedoms and social rights, such as [Viking](#), [Laval](#), [Rueffert](#) or [Santos Palhota](#). It was far from a secret that the eastern enlargement in the years 2004 and 2007 and the opening of the European market to low-cost labour would sooner or later result in conflicts over the nature of a “social Europe”. Similarly, in the much discussed [Kadi](#) and [Melli Bank](#) cases, the “outsourcing” of political and administrative decisions to the international level gave rise to gaps in the protection of individual rights (namely the right to be heard and the right to effective judicial review) that appeared imminent due to the adoption of so-called “smart sanctions” by the [UN Security Council](#) to fight against

terrorism. In other words, legal proceedings in these and similar cases do not normally emerge overnight, but after years of simmering legal uncertainty.

At the same time, these cases are symptomatic of a general tendency in EU law that goes beyond the field of fundamental rights. What is apparent here is a general and continuing tension between the requirement for the complete and self-contained legal order that the EU is required to be in principle, and the many legal uncertainties that still exist in practice. In cases in which EU politics does not resolve these tensions in an appropriate amount of time, the underlying questions often shift to the legal domain – they are raised in national law cases and are then carried on to the ECJ in preliminary ruling procedures.

This was most notably the case for [Brüstle](#), [Kücükdeveci](#) and [Test-Achats](#), where either the imprecise nature of the directives, or their insufficient application led to legal loopholes and preliminary references by national courts. In [Brüstle](#) the central definition of a “human embryo”, that was necessary for the practical application of the [Biotechnology Patents Directive](#), was simply missing, since there was apparently no political consensus on such a definition. In [Kücükdeveci](#) and [Test-Achats](#), the European Court was called into action due to an insufficient implementation of the Directives [2000/78/EC](#) and [2004/113/EC](#).



Vassilios Skouris, President of the ECJ (Credit: Greek Ministry of Foreign Affairs, CC-BY-SA-3.0)

What merits the most urgent criticism in this context is the fact that EU politics today has increasingly adapted to the Court's obligation to deliver binding decisions – there is quite simply no denial of justice of admissible cases or preliminary references. In Brussels and Strasbourg judicial clarifications are already taken into account and legal provisions in the law-making-process will be left deliberately unclear knowing that the Court will make sense of it some day. Or as an ECJ judge describes it: “[T]he Union legislator is on occasions vague in what it has done. The legislation may lack precision such that the provisions of law may be very unclear. This may result from the fact that the decision reached at the political level is a compromise and no one wants to be too prescriptive in regard to how the legislation should be understood. Those negotiating may agree on the basic statement of law, but they may not wish to commit themselves further and hope that the judges one day or another will come down in one direction or another to support their own views in interpreting the legal text that results from the political decision”. In other words, political decisions in the EU become legal ones on a regular basis today.

It is true that this practice of politics-law-shifting is not unknown within national legal systems; however it is exacerbated at the European level through the multiplicity of perspectives and interests, and the complicated structures of decision-making, to the extent that it has reached a level that exceeds what is democratically tolerable. The Court is confronted today with numerous cases in which the underlying questions are simply too fundamental in nature to be finally decided by a High Court on a case by case basis. These have to become part of the democratic process again and have to be subject to proper deliberation.

The Greek poet Sophocles is attributed the saying “do not kill the messenger!” Certainly, the ECJ's role is not to deliver messages, but its decisions can only be as good as the legal provisions on which they are based. Put another way, the Court is very much dependent on factors that lie outside the application of the law and are therefore explicitly not subject to any legal rationalisation. Most frequently, it is political impasses and the withdrawal to the

principle of “constructive ambiguity” that sooner or later leads to preliminary rulings by the European Court.

To understand “integration through law”, and the genesis of fundamental rights in the EU by judicial means as nothing but politically motivated, is to blame the Court for these political insufficiencies and deficits. It is reminiscent of the unjustified conviction that Sophocles once warned of, since a substantial portion of the criticism that hits the European Court is the result of the discontent with the political problem-solving ability and shortcomings of the Community’s legal constitution.

This article is based on a research project entitled “Judicial Lawmaking in the Context of Law: Constitutionalizing Europe’s Legal Order after the ‘Constitutional Compromise’”.

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