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**POWERS OF THE COURT OF JUSTICE OF THE EUROPEAN UNION: THE RISE OF
INFLUENCE**

Master thesis

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INTRODUCTION

This topic originated from various academic experiences of the author during his study and professional life. Having studied, worked and practiced in international legal and political environment for several years, the author observed contesting opinions towards the Court of Justice of the European Union (from here on, the CJEU or the Court). Academics in the United Kingdom had one point of view¹ which was completely opposed by people working in Brussels, in the European Parliament². During post-graduate studies in Mykolas Romeris University, visiting French professors Platon S. and Dubos O. introduced even more unique perspective of treating the CJEU in French legal doctrine.

Such a huge difference in opinions indicated that the topic is relevant in today's legal science and the subject is far from exhausted. This led to prolonged academic research by the author in years 2012-2013. The research only confirmed the point, there is no single accepted doctrine that would define the role of the CJEU in full. Legal scholars from the US, Germany and France have completely different approaches when analyzing the CJEU. In this thesis author will combine and analyze academic scholarship of many, sometimes opposing, points of view, combine that with his own academic and practical experiences and unravel how and why the CJEU takes concrete decisions and what influence it has on the European Union and the EU Member States.

The ambiguous title of the thesis itself calls for a bit more attention. To fully understand the problem we need to ask few atypical for lawyers questions. How should term *influence* of the court be defined in context of the European Union? Is it political, legal or economical term? How do we measure such thing as influence of the court at all? What objective criteria of measurement can be used so it does not become meaningless argument of different social sciences? Can we even be in situation where too much power and influence is given to the single institution?

Answering all these questions requires complex research which, while based on legal science, can not ignore political point of view as well.

¹ Author of the thesis studied European Union law and International law in the University of Leicester; lecturers included M. Shaw, A. Cygan and R. White, who are authors of the related scholarships: Cygan, A., (with Erika Szyszczak) *Understanding EU law* (London: Sweet and Maxwell, 2008, (2nd edition)) and Robin C A White, 'The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?' in A Arnall, P Eeckhout and T Tridimas, *Continuity and Change in EU Law. Essays in honour of Sir Francis Jacobs*, (Oxford: Oxford University Press. 2008.)

² During his stay in the European Parliament author had a chance to familiarize with the work of the Spinelli Group which main interest is full federalisation of the EU

Relevance of the topic. In times when national Constitutional courts face attacks for overstepping their powers from both press and members of legislation³, while in other countries the Parliament tries to strictly limit powers of the Constitutional courts⁴, in Lithuania the topic of the CJEU powers still lays largely in shadow. As the European Union rapidly develops in scope, the CJEU becomes, or some might argue, has already become⁵, the Constitutional court of the European Union. This was affirmed even more when the Charter of Fundamental Rights of the European Union became equivalent in power to the Treaties themselves⁶. Because of this, the CJEU was given powers that closely resemble the ones of the national Constitutional courts.

The topic of the powers of the CJEU lacks spotlight in Lithuanian legal community and only a few authors specialize in the CJEU, Vėgėlė, I., Ravluševičius, P., Daukšienė, I. and Kūris, P.⁷ to name a few. On the international scope quite a few authors have researched it⁸. The works of Karen Alter⁹, Miguel Poiares Maduro and Alec Stone Sweet¹⁰ gave particularly useful contributions to this thesis. However, even these studies sometimes lack unbiased comparative analysis that would not give superiority to their own scholarship. Hence, this research combines American and European approach when assessing the power and influence of the CJEU to bring something new to the table.

Originality of the topic. Majority of the American authors focus on politically-centred model of approaching the Court's powers. Deep analysis of the Court's relation to the Member States and institutions of the European Union using *principal-agent* theory is given in these scholarships. The continental European doctrine is more centred on traditional legal point of view, emphasizing legal principles of constitutional and international law, rights and democratic idea of division of powers.

³ Official Site of Lithuanian Radio and Television [accessed 19-21-2013].

<http://www.lrt.lt/naujienos/ekonomika/4/29475/seime_sklando_ideja_apriboti_konstitucinio_teismo_galias>.

⁴ Official Site of Human Rights Watch [accessed 19-21-2013].<<http://www.hrw.org/news/2013/09/18/hungary-constitutional-change-falls-short>>

⁵ Baquero Cruz, Julio (2006) "The Changing Constitutional Role of the European Court of Justice," International Journal of Legal Information: Vol. 34: Iss. 2, Article 7.; Francis G. Jacobs, *Is the Court of Justice of the European Communities a Constitutional Court?*, in Constitutional adjudication in European Community and national law: essays for the Hon. Mr. Justice T. F. O'Higgins (Butterworths 1992);

⁶ Koen Lenaerts (2012). Exploring the Limits of the EU Charter of Fundamental Rights. *European Constitutional Law Review*, 8, pp 375-403.

⁷ Kūris, E. Europos Sąjungos teisė Lietuvos Respublikos konstitucinio teismo jurisprudencijoje: sambūvio algoritmo paieškos [The EU Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania: Search for the algorithm of Coexistence]. In: Teisė besikeičiančioje Europoje. Mykolo Romerio universiteto Leidybos centras, 2008.

⁸ Primary source enumerating scholars specialising in this field is Alec Stone Sweet article "The European Court of Justice and the judicialization of EU governance", *Living Rev. Euro. Gov.* 5, (2010), 2.

⁹ Alter, K. J. *The European Court's political power: selected essays*, Oxford: University Press, 2010; Alter, K. J. *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe*. Oxford: University Press, 2001,

¹⁰ P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford University Press 2011);

Aforesaid doctrine can be said to derive Hans Kelsen's principles¹¹. The author seeks to combine these two models and cover the topic in a new light. Also, the newly introduced principle of integration which explains the activities of CJEU can be seen as a complete novelty to the European Union law.

Utility of the topic. With further deepening integration of the European Union, concrete role of the main court of the EU needs to be defined clearly. All the actors in the complicated supra-national system, particularly the EU institutions and the Member States, have to know each other's roles and limits of power. If one actor gains too much power or its power derives from sources unknown to others it can cause needlessly defensive actions and threaten to break status quo and stability of the system. This is particularly tense between different judicial actors, national and international courts as they have their own doctrines of understanding law and these doctrines can clash. To avoid this kind of situation in national setting, the roles of actors are entrenched in the constitutional. The Treaties and the CJEU try to do that in the EU context¹². However, because of the limits of the Treaties and fast development of the EU, the CJEU tends to deviate from the wording of the Treaty and apply broad teleological interpretation. This way the "outdated" Treaties can be applicable to new circumstances without hasty change. Later on, after reaching grounded consensus of all the Member States, the Treaties can be changed to reflect the times. This ability of the Court to interpret freely is not an issue as long as the Court's actions are predictable and signatories of the Treaties support them. However, as some examples will show¹³, in the past some decisions were both surprising and hard to explain using traditional legal principles and even opposed by some Member States. Also, with the European project nearing critical point of evolution, the issue of *Kompetenz-Kompetenz*¹⁴ of the Court becomes highly important. The material of this thesis explains both to what extent the Court is likely to act and what is the main factor binding the Court. This understanding can enhance the trust between institutions of the EU and the Member States and strengthen the image of the Court as protector and not the adversary.

Sources. We will use existing primary and secondary legislation of the EU to indicate legal will of the signatories and the EU institutions. We will use the CJEU case law to demonstrate the Court's relation to the legislation. We will use academic works, monographs and articles to describe opinions

¹¹ Hans Kelsen, *Pure Theory of Law* (University of California Press 1978)

¹² Treaty of the European Union. Official Journal of the European Union C 83/13, 30. March 2010. and Treaty on Functioning of the European Union. Official Journal of the European Union C 83/47, 30. March 2010.

¹³ Chapter 1.1 of this thesis

¹⁴ We will use definition of *Kompetenz-Kompetenz* as adopted by P. Craig as an answer to which court has the competence to finally judge on the question of supremacy of a given European rule over national law as used in P. Craig, "Report on the United Kingdom", in: A.-M. Slaughter/A. Stone Sweet/J.H.H. Weiler (eds.): *The European Court and National Courts - Doctrine and Jurisprudence* Oxford: Hart Publishing, 1998, p. 206

of different legal authors on how the CJEU and other actors correlate with each other. Couple of more significant sources that advanced the logical progression of the thesis must be mentioned. Antoine Vauchez's study on the factual circumstances in the European legal academia during the early years of the Communities strengthened the idea of the importance of outside actors in the effective working of the Court¹⁵. Karen Alter's theory on the efficiency of the Court helped to introduce the interdisciplinary aspect to the research¹⁶. Alec Stone Sweet's scholarship tied these arguments about effectiveness into modernised version of *principal-agent* functional theory¹⁷. Scholarship of Gráinne de Búrca was particularly useful for providing insights on the CJEU cases.

Problems of the research. The Court has materialized quite many legal principles in last fifty years, direct effect, and primacy to name a few. However, these principles do not fully explain the course of actions the CJEU takes in each case and the fact that the CJEU does not have to explain its decisions unless it chooses to¹⁸ can leave one wishing to understand the logic of the CJEU in uncertainty. This is particularly noticeable in first major cases of the Court where first key principles were entrenched into doctrine of European law. Since its establishing, the Court's relation to the EU institutions and the EU Member States has changed, whole institutional order and Treaty regime of the EU shifted many times. After carefully scrutinizing some key decisions of the CJEU and its relation to other national and international courts these problem questions arise:

- 1) What is the relation between the CJEU, the EU institutions, the EU Member States, and outside actors, is it properly expressed in the Treaties and the CJEU doctrine? ;
- 2) What aims does the CJEU seek to achieve in its decisions, is there a dominant meta-objective that the Court follows?

Objects of the research:

- 1) The relation of the CJEU and other actors in the European integration project: EU institutions, the Member States, private sector and the European legal society;
- 2) Forming of the Constitutional system of European Union by the CJEU jurisprudence;
- 3) Core legal principle driving the CJEU decisions.

¹⁵ Vauchez, A. 'Integration through law: Socio-History of EU Political Common Sense'. In European University Institute (EUI), Robert Schuman Centre of Advanced Studies Working Paper. Fiesole 2008.

¹⁶ Supra note 9

¹⁷ Supra note 10

¹⁸ K. J. Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe. Oxford: University Press, 2001,

Objective of the research – after analysing the genesis of EU law and the CJEU’s role in it, to find out what *new principle* can be derived that would help to further improve European legal system and the efficiency of the CJEU.

The tasks of the research:

- 1) To explain how the CJEU has evolved since its foundation and what factual circumstances and key decisions have shaped its development as a key actor in European integration;
- 2) To analyse what factors are necessary for the CJEU decisions to be effective and explain the CJEU’s relation to other power-actors;
- 3) To analyse how the CJEU interacts with national constitutional and international courts;
- 4) To establish what could enhance the effectiveness of EU law further in the future.

Hypothesis – the CJEU is the main driving force of the European integration project and the Court slowly but steadily promotes increasing powers of the European Union, at times even against the wishes of the Member States - and that all this can be explained by the *core principle* enshrined in the Treaties which determines such actions of the Court.

Methods of the research. We will use these qualitative and comparative methods for collecting and analysing of the information in this thesis:

- 1) descriptive-analytical method;
- 3) systematic method;
- 4) comparative method;
- 5) analysis of legal documents;
- 6) analysis of scientific literature.

Due to interdisciplinary nature of some parts of this thesis these methods from political methodology will also be used:

- 5) Comparative Historical Analysis;
- 6) Theoretical sampling.

All the aforementioned methods are also used in making of conclusions of the each chapter, at the end of the thesis and for summarising purposes.

Keywords: European Union Constitutional law, principles of EU law, CJEU, integration theory, agency theory, supremacy

The structure of the Thesis. This thesis is comprised of three chapters that consistently show the genesis of European constitutional law and the CJEU. In the first chapter we will analyse how the Court grew naturally with the EU. Then we will go over the first key decisions of the Court. In the second chapter will discuss how the Court purposefully introduced new constitutional understanding of EU law in a sequence of its cases. Then legal scholarship on the area of our research will be presented. Ideas of two modern authors will be followed more closely, the *spillover* and *trusteeship* theories. Lastly in second chapter we will display the relation between the CJEU and other national and international courts. Examples of the dialogue of the UK, Germany and Lithuanian Constitutional Courts and the CJEU will be given as well as introduction of the *Doctrine of Equivalent Protection* by the ECtHR. In third chapter we will propose the idea of a *new principle* that could accompany the next stage of European constitutional evolution. Conclusions drawing on all the chapters are given. List of literature, summaries in English and Lithuanian are submitted at the end of the research.

Explanation of main terms and abbreviations.

The European Union – The EU – The Communities

European Union law – EU law – The European legal order

The European Union Court of Justice – The CJEU – The Court

These core terms are used throughout the thesis interchangeably to define the European Union, the CJEU and system of EU law. It is presumed that the reader is familiar with the historical changes in the naming nomenclature of both the Communities and the Court. For ease of use we will use latest iterations of the terms. Other commonly used terms and abbreviations:

The European Court of Human Rights – The ECtHR

The Federal Constitutional Court of Germany – the Bundesverfassungsgericht – the BVerfG

The International Federation for European Law - Fédération Internationale pour le Droit Européen - FIDE

I. GENESIS OF GROWTH, A NATURAL CHANGE OF THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

In order to explain various advanced connections of the CJEU's influence and evolution into the constitutional court of Europe, one has to understand where from the whole system of today's European Union courts has started. That is, the factual context in which the Court emerged. Without this understanding, whole purpose of this research is lost as there is no way to specify the *rise* if there is no pivot. In first section¹⁹ we will talk about the European Union and the CJEU growth in general terms, further sections²⁰ will cover particular stages of the CJEU's early evolution using key decisions.

1.1 Growth of the Court – natural causes

The Court of Justice of the European Union, or the European Court of Justice at that time²¹, was established in Luxembourg in year 1952. Initially it was an institution that handled disputes which were limited by inner workings of the European Coal and Steel Community (ECSC). At the time the ECSC was composed of only 6 states but the potential of it, looking from today's perspective, was already quite clear. It was first supra-national organisation ever²². Such organisations can transcend the interests of the states and sometimes even borrow some aspects of their sovereign rights²³. In time, the countries of Europe decided to move towards even closer economical cooperation. In 1957 they established two more organisations – the Euratom and the EEC. The Court that had to solve disputes concerning all these international organisations stayed the same. There was, however, quite clear limits of the powers of the Communities at the time:

*In accordance with the principle of the allocation of powers, however, the Communities and their institutions act within the limits of the powers conferred on them and the objectives assigned to them by the treaties establishing them. It is, therefore, always a matter for the Member States to decide whether to extend Community powers to new fields of activity by reforming those treaties.*²⁴

¹⁹ Section 1.1 of this thesis

²⁰ Sections 1.3.1 to 1.3.4 of this thesis focus on most influential early CJEU cases

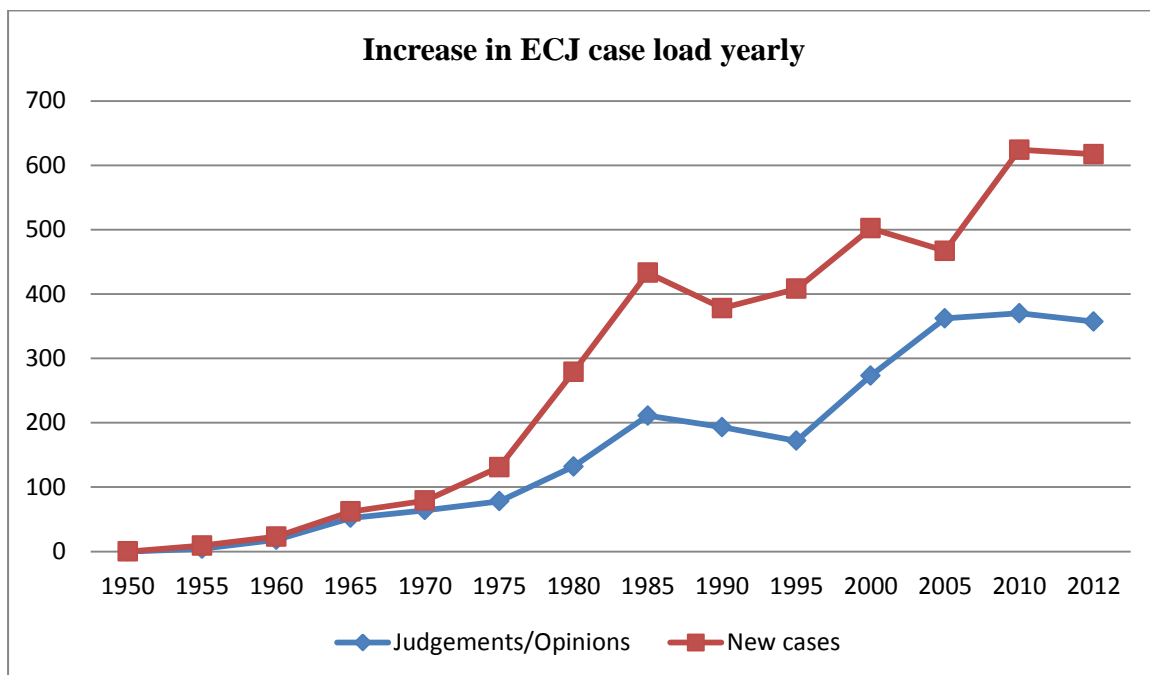
²¹ We will be using most modern title of the Court to cover previous generations as well, i.e. the ECJ

²² Capotorti F. Supranational Organizations, *EPIL* 5 (1983), p. 262-269.

²³ Shaw M. N. International Law. Cambridge University Press, 2008., p. 1288.

²⁴ Official Site of CVCE, an interdisciplinary research and documentation centre [accessed 19-21-2013]. <<http://www.cvce.eu/viewer/-/content/3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4/en>>.

This proposition, in theory, is applicable even nowadays. However, what at first was three quite specific economically-centered communities, in time morphed into wide-ranging European Union. As economical integration, scope and size of EU grew, it became less like economically-based international organisation and started moving towards closer social and political cooperation. Specific fields of activity that limit functioning of EU are harder and harder to tell. Again, during all that change the Court which has to handle all the legal disputes arising from the system stayed largely the same. Naturally it also led to rapidly widening range of cases that the CJEU had to handle. *Figure 1* shows how workload of the CJEU increased exponentially over years as the EU developed.



*Figure 1*²⁵

So first and main reason that led to the current power-level and practical importance of the CJEU is natural growth of the original European Communities themselves. Later on these Communities merged into one single unit that was named the European Union. The EU competences now are much more than protection of common market and free trade. In year 2013 it is under EU competence to watch over the wellbeing of its economically inactive citizens²⁶.

Influence of the Court that is main dispute-settling institution of such wide-ranging supranational organisation cannot be small by any means. The problem could be that, after initial

²⁵ Based on Annual Report, 2012, The Court of Justice of the European Communities, p. 110-111

²⁶ C-434/09 Shirley McCarthy v Secretary of State for the Home Department. Reference for a preliminary ruling: Supreme Court of the United Kingdom - United Kingdom.

foundation in 1952 the backbone of the Court stayed the same and some developments were not led by will of the Member States but by Court instead²⁷. Of course the main ideas about CJEU's duties are entrenched in the Treaties drafted by shared will of the all Member States, but these are quite broad and it's the CJEU stays the main interpreting body²⁸.

*The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*²⁹

This declares the CJEU as the main official interpreter of meaning of the Treaties. Such situation can lead to a state where the Court becomes self-developing and self-limiting institution which can chose on its own when and how to use its powers while adapting to constant development of the European Union³⁰. The CJEU has shown that it is not afraid to unearth even some directly unwritten propositions from the Treaties that could have very crucial effects on the working of the Union³¹.

Legal authors who specialize in the CJEU use terms *activist activities* of the Court³² and *judicialisation* of the European Union³³. These two concepts lead to the same idea, the Court using its powers to enhance the European integration and its own powers through case-by-case decisions that influence the political will.

Next sections will show how the Court gradually enhanced the field it can work in as well as legal potency of the European Union law during the first period of European integration. In some cases this was done even against the wishes of some treaty signatories and only after some time the Member States accepted the Court's doctrine.

²⁷ G de Burca and JHHH Weiler (eds), *The European Court of Justice* (OUP, 2001) 217-218

²⁸ Article 267 of TFEU

²⁹ Article 1 of TEU

³⁰ K. J. Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe. Oxford: University Press, 2001, p. 184-185

³¹ Most illustrious examples are cases *Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*) and *Case 6/64, Flaminio Costa v. E.N.E.L. - Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy, ECJ, 15 July 1964*. where principles of direct effect and supremacy of the EU law were established; these cases will be further analysed in the next section;

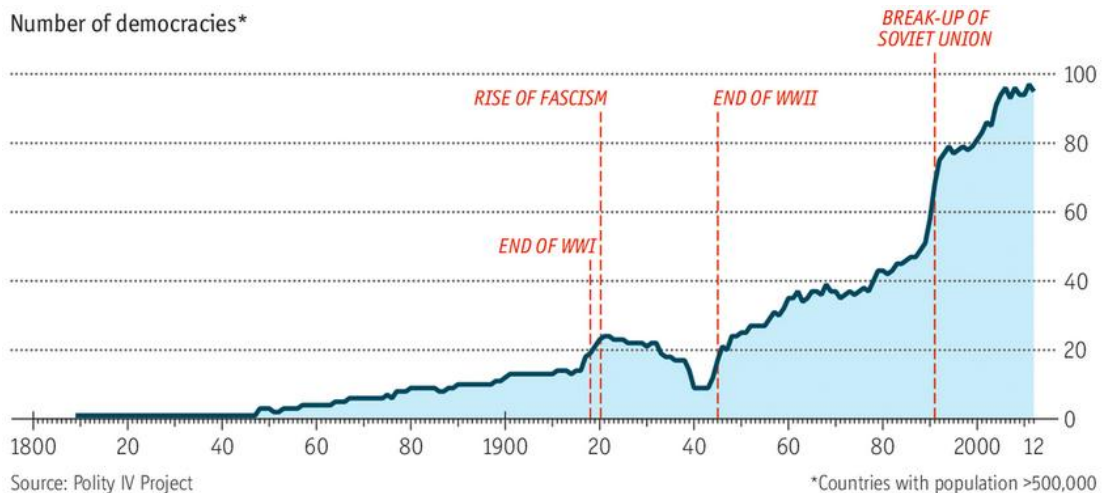
³² Alter, K. J. *The European Court's political power: selected essays*, Oxford: University Press, 2010, p. 4

³³ *Evolution of EU law*, p. 145

1.2 Treaty of Paris to Single European Act

After the forming of the European Coal and Steel Pact, the European integration project slowly but steadily morphed into much wider reaching union of countries with broader interests. When the European Communities were established, the ECSC itself became unimportant³⁴. The system gradually grew but there was still a lot of ambiguity about the legal force of the acts produced at the Community institutions. The question what would happen when a national act directly contradicted an ECC act was unanswered in the Treaties themselves³⁵. Hence, the whole legislation of the Communities could simply be ignored by the Member States if they chose to. In fact, in 1960s and 1970s states more often departed from the Communities rules than followed them word for word³⁶.

The main political goal of the ECSC, to stop the arms race before it has started and prevent possibility of next World War in Europe, was accomplished³⁷. Another goal, to create a strong democratic rival to a communist regime of the Soviet Union, was still far away. For that, the ECC had to grow and widen. *Figure 2* shows that it took more than 30 years for the world to turn to democracy. Only after break-up of the Soviet Union, the goal to promote democracy was secured.



*Figure 2*³⁸

It was clear that the ECC was growing but there was no clear compromise how much power it should have over single countries and in which direction it should proceed³⁹.

³⁴ Alter, *The European Court's political power: selected essays*, p. 49

³⁵ Alter, *Establishing the Supremacy of European Law*, p. 17-20

³⁶ Alter, *The European Court's political power: selected essays*, p.79

³⁷ Craig, P. and de Burca, G. *EU law: Texts, cases and materials*, 5th ED (Oxford University Press 2011), p. 5

³⁸ Being in charge is hard work, but it has its perks. (2013, November 23). *The Economist*.

The majority of caseload of the Court at the beginning was related to technical questions regarding inner workings of the Community apparatus referred to the Court by the national courts⁴⁰. No cases of constitutional importance were in reach of the Court. This was regarded as normal operation of the Communities legal system at the time. In years 1961-69 only 75 cases were referred to the Court⁴¹. This number increased to 674 in 1970-79 and to 1256 in 1980-89 as shown in *figure 3*⁴².

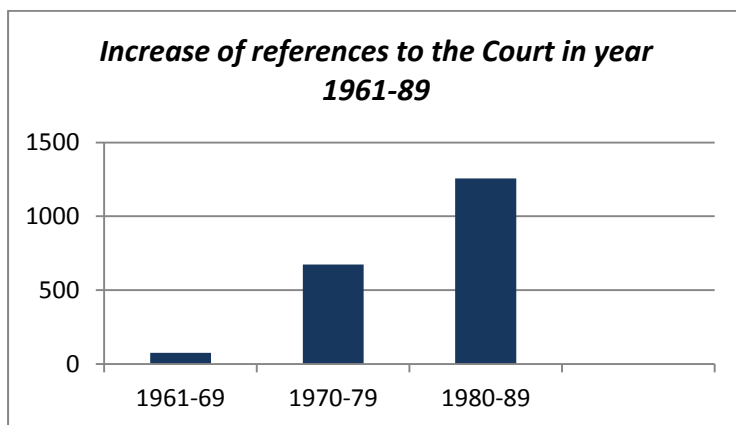


Figure 3

The political will to change the Treaties themselves and give more powers to both the Communities and the Court was hard to gather as most countries had various, sometimes opposite, economic interests⁴³. National judges were not willing to pass the most important decisions to the Court. The Court simply had no access to essential cases where it could adopt substantial decisions shaping the legal system of the Communities⁴⁴.

Due to actions of newly born Euro-Law Advocacy Movements, particularly foundation of the FIDE (Fédération Internationale pour le Droit Européen) - the International Federation for European Law⁴⁵, few important cases finally managed to reach the Court. These cases allowed the court to decide on critical topics for the European legal order.

³⁹ Craig, P. and de Burca, G. *EU law: Texts, cases and materials*, 5th ED, p. 7

⁴⁰ Alter, *The European Court's political power: selected essays*, p. 73

⁴¹ 1997 annual report of the ECJ; also note Figure 1 in part 1.1 of this work for long term statistics.

⁴² *Ibid.*

⁴³ Alter, *The European Court's political power: selected essays*, p. 53

⁴⁴ *The past and future of EU law : the classics of EU law revisited on the 50th anniversary of the Rome Treaty / edited by Miguel Poiares Maduro and Loïc Azoulai. Oxford ; Portland (Or.) : Hart Publishing, 2010, p. 28*

⁴⁵ Wider analysis on the topic of the Euro-Law Advocacy Movements and their significance in the European integration will be given in further chapters that focus on the effectiveness of the Court's activities.

These cases signify how the Court began to develop as one of the main actors in the European integration movement. The necessity to analyze them can be summarized by Miguel Poiares quote:

*The 'classic' judgements in the jurisprudence of a Court are those that survive the passing of time but also those which, even when their concrete legal answer has become obsolete or has even been overturned, have lived on through their multiple effects in other areas of the law. They are judgments of systematic impact, embodying a broader normative lesson about the legal order in which the Court operates*⁴⁶.

We will now analyze some of more influential early cases. In them the Court gradually created new model of EU law, one further from law arising from international organisations and closer to constitutional law.

1.2.1 Van Gend en Loos – establishing of direct effect and the new legal order

Direct effect is now considered one of the main principles of the European legal order. Before *Van Gend en Loos* the question of using legal norms of the Community in by national courts was grey area. The Communities law at the time was no different from any legal system established by an international treaty. That means, the status of the international legal norms, including EEC rules, was matter of national constitutional rules of each country⁴⁷. There was no united system of law in Europe and there were even more differences between monist and dualist countries⁴⁸.

Van Gend en Loos case is sometimes mentioned as the most famous of all of the Court rulings⁴⁹. In 1962, Dutch national court asked for the Court's opinion in case between a Netherlands customs agency and an import firm from Denmark. This was the first time the Communities law was used for defense by private party⁵⁰. Private party used the Article 12 of the EEC treaty in its defense⁵¹. Karen J. Alter notes that *Van Gend en Loos* was a clever idea by the European legal fraternity to provide the Court with test cases to develop far-reaching legal doctrine⁵². The test case was produced

⁴⁶ The past and future of EU law, p. xiii

⁴⁷ The Evolution of EU Law, 2nd ED, p. 324

⁴⁸ Ibid., p. 325

⁴⁹ Craig, P. and de Burca, G. EU law: *Texts, cases and materials*, 5th ED, p. 182

⁵⁰ Margaret McCown. 2005. Judicial Law-Making and European integration: The European Court of Justice. In *European Union: Power and Policy Making*, edited by Jeremy John Richardson. London: Routledge, p. 172

⁵¹ Treaty establishing the European Economic Community and connected documents. Luxembourg: Publishing Services of the European Communities, [s.d.]. 378 p.

⁵² Alter, K. J. *The European Court's political power: selected essays*, p. 73

by L. F. D. Ter Keile who was member of the working group established in 1961 by the Dutch Euro-law association⁵³.

The choice of the Dutch system was also not a coincidence. The Dutch legal system offered the most hospitable environment for European law because the 1953 Dutch constitution allowed for the supremacy of international law⁵⁴ and in Dutch law international rules are self-executing and can be applied by the domestic courts⁵⁵. This flows from Article 66 of the Constitution of Kingdom of the Netherlands:

*Article 66: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons*⁵⁶.

In *Van Gend en Loos*, Dutch national court asked the Court for an interpretation of the Article 12. Of the EEC Treaty. The first and main question was:

*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 courts must protect;*⁵⁷

Governments of Belgium and Netherlands entered the case and argued that the Court did not have the jurisdiction ‘on the ground that the reference relates not to the interpretation but to the application of the treaty’. When discussing *Van Gend en Loos* case, Bruno de Witte presents the opposition of these Member States at the time, ‘apparently, the states parties to the EEC Treaty had not intended to lay down any obligations as to the domestic effect of its provisions, so that this matter was left for determination by national authorities and courts according to their respective constitutional rules or judicial traditions’⁵⁸.

⁵³ Vauchez, A. ‘Integration through law: Socio-History of EU Political Common Sense’. In European University Institute (EU), Robert Schuman Centre of Advanced Studies Working Paper. Fiesole 2008.

⁵⁴ Alter, K. J. The European Court's political power: selected essays, p. 73

⁵⁵ Cleas, M. and B. De Witte. ‘Report on the Netherlands’. In *The European Courts and National Courts*, ed. A. –M. Slaughter, A. Stone Sweed and J. Weiler (Cambridge: Hart Publishing, 1998).

⁵⁶ Art 66 in the 1953 Constitution, repeated as Art. 94 in the new Constitution in year 2005; Official English translation of the Constitution of Kingdom of the Netherlands; Published by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division in collaboration with the Translation Department of the Ministry of Foreign Affairs. Boekje Grondwet 2008

⁵⁷ Judgment of the Court of 5 February 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: *Tariefcommissie - Netherlands*. Case 26-62.

⁵⁸ *Evo* p. 326

The Court successfully ignored this opposition. In answering the question the Court escalated system of the EEC from other international organisations⁵⁹ interpreted the Treaty broadly and proclaimed:

*The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*⁶⁰

This statement not only answers the question of the Dutch court about using the Treaty as a mean of self-defense in this particular case. It as well establishes the EEC as a *new legal order* and declares the doctrine of *limited sovereign rights* as well as establishing the principle of *direct effect*. Bruno de Witte emphasizes that ‘the Court did not try to reconstruct the actual, subjective, intention of the drafters of the EEC Treaty, but rather chose to base itself on “the spirit, the general scheme and the wording” of the EEC Treaty’⁶¹. Ex-judge of the Court and one of the ‘founding fathers’ of the Treaty, Pierre Pescatore argues that the decision is in fact strongly based on legal doctrine of State succession, and ‘there has rarely been a legal argumentation as well developed as this one, and presented to individuals and their judges with such elegance and persuasive power’⁶².

Using *Van Gend en Loos* and later *Costa v ENEL* decisions as foundation, whole new wave of European constitutional scholarship can was established⁶³. Pierre Pescatore notes that this decision was ‘highly political idea, drawn from a perception of the constitutional system of the Community, which is at the basis of *Van Gend en Loos* and which continues to inspire the whole doctrine flowing from it’⁶⁴.

⁵⁹ To this date, the status of the EU and its comparison to other international organisation is matter of many debates; At the time of the judgement the Netherlands government argued that the EEC is no different from any other international organisation and that direct effect status of the provisions was not intended by the Treaty signatories.

⁶⁰ *van Gend & Loos*

⁶¹ The Evolution of EU Law, 2nd ED, p. 327

⁶² The past and future of EU law, p. 6

⁶³ Alter, K. J. The European Court's political power: selected essays, p. 73

⁶⁴ P Pescatore, The Doctrine of ‘Direct effect’:An infant Disease of Community Law (1983) 8 ELREV 155, 158

Also, in this judgement by adding nationals of sovereign states as subjects of the Communities legal order, the Court, looking through constitutional point of view, made a first break towards the status of the Constitutional Court of the Europe⁶⁵. Analysis of the Court as a protector for *fundamental rights* will be given in the next chapter of this thesis.

And last but not least, the decision in *Van Gend en Loos* effectively gave a path for the Treaty signatories to follow in the European integration project. With this case the Court took the role of standard-bearer not only in legal but in policy matters of deeper integration as well. This at first was not taken without opposition by the policy makers of the Member States, however national legal systems received new doctrine without much harsh resistance⁶⁶. Bruno de Witte indicates that countries which opposed the decision at the time failed to establish any strong opposition to *Van Gend en Loos* decision simply because at first it was seen as ‘lawyer’s business’ and later on became advantageous to the MS governments⁶⁷.

1.2.2 Costa v ENEL – establishing primacy

A year after *Van Gend en Loos* ruling was released, new fundamental case, *Costa v ENEL*⁶⁸ reached the Court. It was closely related to *Van Gend en Loos* and based its decision on new concepts established in it, namely *new legal order of international law* and *transfer of sovereign rights*. This time, however, the new key principle in question was the one of *primacy*⁶⁹. The doctrine of primacy as we know it today was later expanded in number of cases, but *Costa v ENEL* was the foundation.

Some factual circumstances of the case relevant to the thesis will be given.

Italian citizen Flaminio Costa refused to pay the bills of 1925 lire (~1 Euro or 3.5 Litas) to the national electricity company ENEL, which was established after recent nationalisation of electricity industry. Costa maintained position that the law which nationalized this industry in Italy is contrary to

⁶⁵ The Evolution of EU Law, 2nd ED, p. 127

⁶⁶ P Craig, ‘Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law’ (1992) OJLS 453.

⁶⁷ The past and future of EU law, p. 13-14 and p. 30

⁶⁸ Case 6-64, Flaminio Costa v. E.N.E.L. reference for a preliminary ruling: Giudice conciliatore di Milano –Italy, ECJ, 15 July 1964

⁶⁹ The terms *primacy* and *supremacy* are used as synonyms in most legal scholarship and in the CJEU’s texts. There are some scholars that argue that the terms should be differentiated. Namely, *primacy* is not excluding concept while *supremacy* is excluding. This argument, however, is not essential to this thesis and will not be elaborated upon. Deeper analysis of the differences can be found in Avbelj, M. ‘Supremacy or Primacy of EU Law - (Why) Does it Matter?’, European Law Journal, Vol. 17, Issue 6, pp. 744-763, 2011 and Ravluševičius, P. *The Enforcement of the Primacy of the European Union Law: Legal Doctrine and Practice. Jurisprudence*. 2011, 18(4): 1376

the EEC treaty. With the help of some liberal lawyers⁷⁰, the claim eventually reached the Italian Constitutional Court. The decision was that while ‘the Italian Constitution allowed for the limitation of sovereignty for international organisation like the EEC, it did not upset that normal rule of statutory interpretation that where two statutes conflict the subsequent one prevails. As a result the Treaty of Rome which was incorporated into Italian law in 1957 could not prevail over the electricity nationalisation law which was enacted in 1962⁷¹’. Ignoring the decision of the Constitutional court, a request for a preliminary ruling to the European Court was made by a bold judge⁷². Italian government declared the position that the national court had no power, under Italian law, to set aside the Electricity Act for breach of EEC law, its questions about the interpretation of EEC law could not serve a valid purpose⁷³.

The Court decided that Mr. Costa had no right to challenge national act as the Treaty provision on which the challenge was based had no direct effect.

The position of the Italian government in this case gave the Court basis to form principle of *primacy*:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves⁷⁴.

This line of argumentation by the Court continues the thread started in *Van Gend en Loos*, however now *legal order of international law* is supplemented by the notion of *own legal system* distinguishing legal framework of the Communities even further from legal systems traditionally

⁷⁰ The lawyers did not belong to any pro-European legal movement like ones from the FIDE in *Van Gend en Loos*, however they were against the unreasonable intervention by Italian government into electricity sector; Vauchez, A. ‘Integration through law: Socio-History of EU Political Common Sense’. In European University Institute (EUI), Robert Schuman Centre of Advanced Studies Working Paper. Fiesole 2008, p. 17

⁷¹ The Evolution of EU Law, 2nd ED, p. 328

⁷² Alter, The European Court's political power: selected essays, p. 75

⁷³ The Evolution of EU Law, 2nd ED, p. 328

⁷⁴ *Costa v Enel*

created by international treaties⁷⁵. Bruno de Witte argues that the arguments based on distinguishing the EEC Treaty from *ordinary international* treaties are not ‘particularly convincing’⁷⁶. The Court then proceeds to put the Communities laws above national laws:

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.⁷⁷

We will now go over opinion of different authors on the arguments of the Court. The arguments of the Court are both attacked and defended. While the arguments of the Court are based on the unique status of the Communities, Bruno de Witte notes that the one legal point which should be emphasized here is ‘simple *effet utile* argument: if states accept legal duties at the international level, they should be prepared to allow for the translation of those duties into daily practice, by means of judicial and other instruments’⁷⁸. This can be linked to contractarian argument indicated by G de Burca which is that the EEC laws should be allowed primacy because it flowed from the agreement made by the Member States when they joined the Community⁷⁹. B de Witte smirks at the Court’s argumentation in *Costa v Enel* and underlines that the main distinguishing point of the Communities, unlike other and equally ‘worthy’ international treaties, the EEC Treaty provided for the ingenious judicial mechanism which allowed the Court of Justice to state its primacy doctrine and to request national courts to follow suit⁸⁰. According to David T Keeling, if supremacy was not a principle of the European law, the Treaty

⁷⁵ The past and future of EU law, p. 20

⁷⁶ The Evolution of EU Law, 2nd ED, p. 329

⁷⁷ *Costa v Enel*

⁷⁸ The Evolution of EU Law, 2nd ED, p. 329

⁷⁹ P. Craig and G de Burca, EU law: Texts, cases and materials, 5th ED., p. 258

⁸⁰ The Evolution of EU Law, 2nd ED, p. 329

would, ‘rapidly have become a dead letter and all in all probability the Community would have been dissolved long ago’.⁸¹

It can be said that the Court cleverly overcame much of the resistance from Italian national courts and politicians by establishing this important principle in case where Italian law was determined not to be contrary to the Treaties⁸². There was simply nothing to argue from the side of Italy.

50 years after the decision was taken, basis of some legal arguments in this case are still highly criticised, yet the practical implications can not be devalued. The decision’s effect on the system could have been much less if not for the pro-integration advocates of the time. They managed to ‘situate the *Costa* reference into the context of a handful of recent adverse national court rulings, suggesting a dangerous trend of national courts finding limitations to the effect of European law within national system. Framed this way, the need to assert EC law supremacy seemed more pressing’⁸³. Having understood that the message coded in *Costa v ENEL* decisions is endangered, the judges of the Court in their further writing and speeches used more direct approach and specified what they meant exactly in the text of *Costa v ENEL* judgement and to what degree supremacy should be applied⁸⁴.

The position of the courts of the Member States of the Community of the time of the decision towards the principle of primacy will now be given in order to reflect the practical weight of the Court’s decision⁸⁵:

- 1) Netherlands and Luxembourg had already accepted the primacy before the *Costa v ENEL* so no further actions were needed.
- 2) Belgian Constitution did not mention primacy, however Supreme Court of Belgium (*Cour de Cassation*) used broad interpretation and introduced principle of primacy exactly as it was proclaimed by the European Court in *Costa v ENEL*⁸⁶.
- 3) French constitution already had a clause of primacy of signed international treaties over national laws, however the decision to apply it and follow *Costa v ENEL* in practice was not swift. France has dual system of courts, ordinary courts (*ordre judiciaire*) and

⁸¹ David T Keeling, ‘In Praise of Judicial Activism. But what does it mean? And has the European Court of Justice ever practiced it?’ *Scritti in Onore di Giuseppe Federico Mancini, vol II* (Milano, Dott. A. Giuffrè Editore, 1998.)

⁸² Alter, K. J. The European Court’s political power: selected essays, p. 119-121

⁸³ *Ibid.*, p. 75

⁸⁴ Vauchez, A. ‘Integration through law: Socio-History of EU Political Common Sense’. In European University Institute (EUI), Robert Schuman Centre of Advanced Studies Working Paper. Fiesole 2008.

⁸⁵ Based on The Evolution of EU Law, 2nd ED, p. 349

⁸⁶ *Cour de Cassation* (Belgium), 27 May 1971, *S.A. Fromagerie franco-suisse “Le ski”* (1971) RTD eur 495.

administrative courts (*ordre administratif*) with respectively two Supreme Courts - *Cour de cassation* and *Conseil d'État*. It took ordinary courts more than 10 years to accept the primacy doctrine. It was done in 1975⁸⁷. Administrative branch took even longer. *Conseil d'État* accepted the primacy principle when 25 years have passed since original *Costa v ENEL*, in 1989⁸⁸.

- 4) Germany and Italy had substantial constitutional doctrine on the matter of primacy of laws so principle of primacy was particularly difficult to implement. *Solange II* (1986) is the case where the German Constitutional Court accepted the principle of primacy for the first time, even though the exceptions are there to this date⁸⁹.
- 5) The Italian courts have grounded such acceptance on Article 11 of the Italian Constitution, which provides that 'Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations' and not the ECJ's communautaire reasoning in *Costa v Enel*.

So from the original six member states which were part of the Communities at the time of *Costa v Enel*, only Belgian courts promptly changed its legal position about primacy. To the new countries which eventually joined the Communities this principle became *acquis communautaire* of the Treaties and they were forced to accept it⁹⁰.

Even considering this very difficult implementation of the new principle over non-constitutional national acts, there is no common consensus about status of the national Constitutions when compared to the Communities law and that is still a huge legal issue. Yet, cases *Van Gend en Loos* and *Costa v Enel* managed to change, even if not instantly, whole legal order of the Communities. Michael Dougan goes as far as calling these these two cases a key in 'creation story' of the EU that transformed the Treaty of Rome from a traditional international agreement into the 'new legal order'⁹¹.

⁸⁷ *Cour de Cassation* (France), *Jacques Vabre*, 23 May 1975 (with conclusions Touffait), (1975) *Revue trimestrielle de droit europeen* 336; also see chapter 2

⁸⁸ *Conseil d'État, Nicolo*, 20 October 1989 (with conclusions Frydman), (1989) *Revue trimestrielle de droit europeen* 771, note by G Isaac.

⁸⁹ *Re Wuensche Handelsgesellschaft*, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225,265

⁹⁰ Ravluševičius, P. *The Enforcement of the Primacy of the European Union Law: Legal Doctrine and Practice. Jurisprudence*. 2011, 18(4): 1374

⁹¹ *The Evolution of EU Law*, 2nd ED, p. 409

1.2.3 International Handelsgesellschaft – the meaning of supremacy over national constitutions

The next case we will analyze continues the chain of Communities growth through the decisions of the CJEU. Just like in previous cases, here the Court has not only resolved situation at hand, but also presented new approach towards the legal system of the Communities law. Some authors criticize the Court's actions in *International Handelsgesellschaft* for taking too bold position which created long-term opposition with constitutional- courts, only because it wanted to forcefully enhance its influence⁹². Others protect the Court's position and argue that there was no better suitable decision at the time⁹³. Nevertheless, we will perform more profound analysis to find out how and why the decision was so radical.

G de Burca summarises the position of the applicant in the case:

*The applicant argued that a Community regulation under which a deposit would be forfeited if the goods were not exported within the period of time set was contrary to principles of national constitutional law, including freedom of action and of disposition, economic liberty, and proportionality.*⁹⁴

The position of the Court then introduces two critical points which we will discuss:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such

⁹² J Coppel and a O'Neill, 'The European Court of Justice: taking rights seriously?' (1992) 29 CML Rev 669.

⁹³ i.e. Takis Tridimas opinion in *The past and future*, p. 98-101

⁹⁴ Craig, P. and de Burca, G. EU law: Texts, cases and materials, 5th ED, p. 261

*rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.*⁹⁵

The critical points derived from this quotation are these:

- 1) The Court expanded the *primacy* principle formed in *Costa v ENEL* to national Constitutions;
- 2) The Court takes the idea of *protection of fundamental rights* from constitutional law and proclaims it as new core value of the Communities law⁹⁶.

By doing that, the European Court effectively robs national Constitutional courts from part of their ability to protect fundamental rights while “promising” to protect those rights equally well in their stead.

Full primacy which includes national Constitutions gives the Court and the European Communities more direct power over the Member States. This decision directly influences working of the system.

Inclusion of fundamental rights into the European law continues to increase the distance of the European law and “regular” international law. Fundamental rights in constitutional law are one of the core values of a democratic order. Arguably, inclusion of these rights anticipates the change and allow the Communities to move towards more integrated order. At the start of the Communities, and later, when establishing the EEC and Euratom, any reference to fundamental rights in the Treaties was purposefully eliminated because of the conflicting positions of the Member States, particularly France⁹⁷. The aim on which all the countries could agree was to deepen economic cooperation and not try to establish supranational organisation just yet. The Court followed this logic and refused to accept arguments based on fundamental rights in its early cases⁹⁸. The inclusion of fundamental rights into the

⁹⁵ Case 11/70 *International Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125

⁹⁶ The *International Handelsgesellschaft* is not the first case where fundamental principles are attributed to the Communities’ legal system, however compared to previous case, the attribution is much more concrete. Due to space restraints analyzing previous, less significant, cases is considered unseemly. The first case where the Court first acknowledged fundamental rights as part of its legal order was Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

⁹⁷ Craig, P. and de Burca, G. EU law: Texts, cases and materials, 5th ED, p. 362

⁹⁸ Case 1/58 *Stork v High Authority* [1959] ECR 17; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 419.

order of European law in *International Handelsgesellschaft* announces that the Court is willing to take the risk and attempt to accelerate the integration of the Communities.

In his analysis of the decision, T Tridimas does not try to avoid talking about the Court as a clever political leader of the Communities. He argues that the *International Handelsgesellschaft* decision was just at the right time. The conditions for this decision were laid out in previous *Van Gend en Loos* and *Costa v ENEL* cases and next natural step for the integration of the Europe was moving towards constitutionalisation of the European order⁹⁹. Before these conditions were in place, the Court was afraid that the Communities law would be influenced by rights deriving from national Constitutions and refused to acknowledge fundamental constitutional values. If the decision would not have been taken, the national constitutional courts would eventually had had to undertake the role of protection of human rights in the European order and that would have, ‘lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community’¹⁰⁰. This is further supported by accounts about political situation in the Community institutions after *Costa v ENEL* decision was released. There were escalating notions that new doctrine of primacy might pose a threat to the protection of the fundamental rights as there was no (at that time) protection of these rights by Communities legal system¹⁰¹.

Tridimas gives reasoning of what would happen if the Court had taken the decision to communicate amiably with the national courts and proclaim that the national Constitutions are above the Communities legal norms (it could be logically explained, as the whole legal order of the Communities flows from them)¹⁰². That would have allowed any national court with access to the powers of interpreting national constitution to effectively ignore the duties to the Community. And, as each national constitutional interpreters have different viewpoints, the system of the EEC could, in time, break apart because of discrepancies in this interpretation.

There are two reasons why healthy relationship between national Constitutional courts and the European Court was possible after *International Handelsgesellschaft*. First of all, the Court tries to follow and respect the jurisprudence of all the Constitutional Courts in Europe. On the second hand, the national courts respect the political decision of their respective countries to be in the Communities and

⁹⁹ The past and future of EU law, p. 100

¹⁰⁰ Case 44/79, *Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727, para 14

¹⁰¹ Fernand Dehousse, Report on the Supremacy of EC Law over National Law of the Member States, Eur Parl Doc 43 (1965-66), [1965] JO (2923) 14.

¹⁰² The past and future of EU law, p. 100

so far have abstained from critical decisions¹⁰³. Question what will happen if Europe decides to move towards federalism and what would be national constitutional courts take on it, remains open¹⁰⁴.

1.2.4 After effects of Van Gend en Loos, Costa v ENEL and International Handelsgesellschaft

Now, with the Charter of Fundamental Rights of the European Union¹⁰⁵ and Declaration No. 17 concerning primacy both having equal value to the Treaties, it can be argued that the Court was ahead of the times and anticipated the growth of the Communities. However, it can also be said that with *International Handelsgesellschaft*, *Costa v ENEL* and *Van Gend en Loos* the Court purposefully chose a path that only later on Member States decided to follow. Whatever answer we choose, it is clear that the Court has been visionary of the European Integration for more than 50 years. Chapter 3 will suggest us a strong point on why the Courts actions were such.

Practical implications of the decisions are twofold. As mentioned, fundamental rights have become integral part of the European Communities and become accepted by both the Member States and the institutions of the Communities. Primacy of the Community law over regular (non-constitutional) law was established and acknowledged by national courts. Number of references to the CJEU by national courts increased nearly tenfold in 70s¹⁰⁶. This is also in part due to new principles of direct effect and supremacy.

At the same time, supremacy of the Communities' laws over national constitutions was not so easily accepted. *International Handelsgesellschaft* led to long term conflict of the European Court with national constitutional courts. Especially the Federal Constitutional Court (*Bundesverfassungsgericht*) of Germany¹⁰⁷. The issue here is that of *Kompetenz-Kompetenz*¹⁰⁸, sovereignty of the state and constitutional law. The courts are conservative in these matters since proclamation of absolute supremacy of the European law could be considered as a bold step towards federalisation of Europe¹⁰⁹. The courts have to be very clever to allow absolute supremacy to the CJEU and keep basis of the national sovereignty unspoilt. This was done by national courts of the United Kingdom in long

¹⁰³ The past and future of EU law, p. 101

¹⁰⁴ European Court of Justice Eventually supreme? (2000, Mar 23). *The Economist*.

¹⁰⁵ Charter of Fundamental Rights of the European Union (Official Journal of the European Union, 30.3.2010, C 83-389).

¹⁰⁶ Take note at *Figure 2*

¹⁰⁷ For comprehensive analysis of the conflict of the courts please refer to Craig, P. and de Burca, G. *EU law: Texts, cases and materials*, 5th ED, p. 272-283

¹⁰⁸ Gunnar Beck, *The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor*, 30 EUR. L. REV. 42 (2005).

¹⁰⁹ Kwiecien Roman, 2005, 'The Primacy of European Union Law Over National Law Under the Constitutional Treaty', in *German Law Journal*: 1479-1496;

Factortame litigation which we will cover in chapter 2. David Edward, British lawyer and former judge of the CJEU defends the Court from the claims that it overstepped its original role and was promoting federalism:

Its (the CJEU's) agenda is set by EU treaties, which talk of an ever closer union and make clear that EU law is directly enforceable through national courts. The supremacy of EU law over national law is also implicit in the treaties. Nor could the court's powers be repatriated, by Britain or anyone else, without a country leaving the Union altogether¹¹⁰.

1.3 Conclusions of the first chapter

The goal of first chapter was to show how the Court acted in particularly difficult political circumstances of the 60s and 70s and still managed to push the European integration project further on. The cases we examined serve as a constitutional basis of the future development of the European Communities and later on, the European Union. By introducing principles of *direct effect* and *primacy* the Court chose to boldly propose new paths for the Member States to take in developing the Communities. As analysis of the implications and response to the cases showed, the decisions were not always easily accepted. For example, the doctrine of *supremacy* is questioned by some national constitutional courts to this day. However, actions of the Court in these first decades of the Communities undoubtedly created some ideas that the signatories of the Treaties later followed and included in legislation.

Now that we have established how the Court changed the course of development of the European order in its early days, in Chapter 2 on we will analyze problems of constitutional and international law deriving from the concept of *supremacy* of the European law. Also, in the beginning of the second chapter we will also commit more attention to reviewing legal scholarship on the CJEU and theories of relations between the CJEU and other actors.

¹¹⁰ European Court of Justice, Biased referee? (2007, May 15). *The Economist*.

With *figure 4* we will conclude chapter one. It shows how the role of the Court changed together with the role of Communities. Graphic presentation should help to understand the logic behind such choices of presenting information in this thesis and where in the current chain of events we are. That is, just after first big arrow.

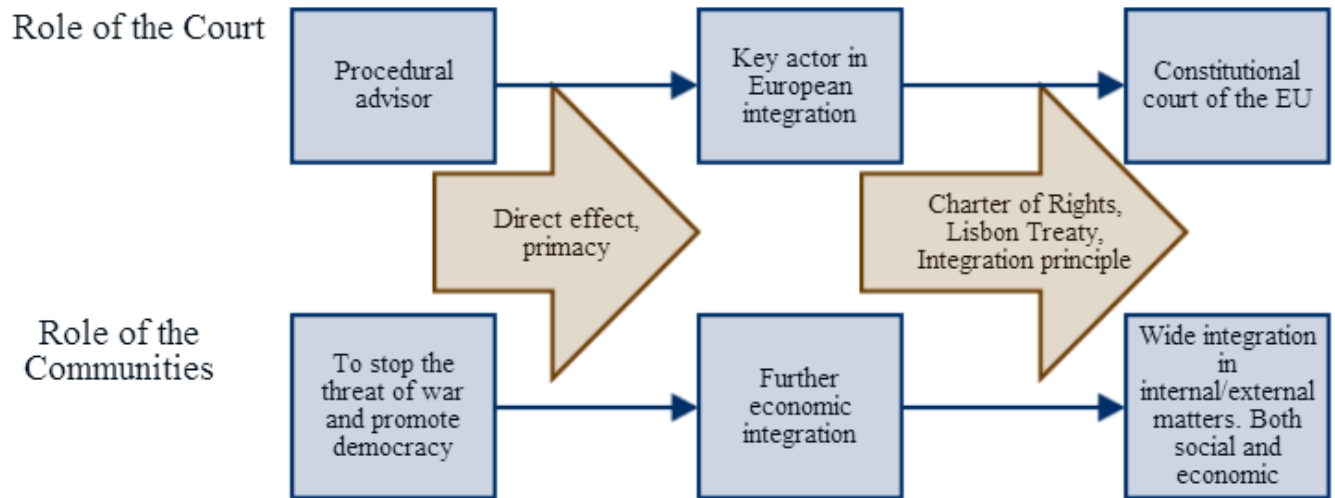


Figure 4

II. THE CJEU AS AN EFFECTIVE CONSTITUTIONAL COURT OF THE EUROPE?

As the title of the second chapter implies, here we will question the proposition of the CJEU as an effective constitutional court of Europe. After all, in national legal setting, the Constitutional court serves as a court of the highest power and influence. If the proposition proves to be correct, it would display the highest point of the CJEU's development. Having chosen this line of thought, couple of questions can be established:

- 1) What is the CJEU's doctrine about its own role and the nature of European law?
- 2) What are the required conditions for the court to work *effectively*?
- 3) Can we call the CJEU a constitutional court? What is take on that from perspective of constitutional law? International law?

2.1 Constitutional role from the Court's own point of view

This part will be closely linked to cases we analysed in previous chapter. In fact, the cases were handpicked for this very reason. To demonstrate how the Court changed the legal environment to allow itself to change both its own role and legal and political circumstances it works in.

While the Court does not directly approach the topic of its own constitutional status and does not try to take the name *constitutional*, some argue that the CJEU is already constitutional court in all but the name¹¹¹. As seen in part 1.2 of chapter one of this thesis, in early years the Court served only as an institution which explains delicate technicalities of working of the Communities. However, not without the help of the movement of pro-European jurists¹¹², the Court was given the cases in which it could gradually change the workings of Communities legal system and *ipso facto* change its own role. The Court gradually moved from definitions of public international law to constitutional law. The main idea of our research in chapter 2 of this thesis can be accurately summarized by the quote by Eric Stein:

Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe. From its inception a

¹¹¹ Bo Vesterdorf, *A Constitutional court for the EU?*, Int J Constitutional Law 2006 4: 607-617.

¹¹² Alter, *The European Court's political power: selected essays*, p. 65-91

*mere quarter of a century ago, the Court has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology*¹¹³.

Franz C Mayer distinguishes these key moments of the Court's practice which help to illustrate Stein's words¹¹⁴:

- 1) In *Van Gend en Loos* (1963) the Court first used the definition of *legal order of international law* to differentiate the EEC from 'other' international organisations;
- 2) In *Costa v ENEL* (1964) the doctrine was supplemented by idea of *own legal system*;
- 3) In *Les Verts v Parliament*¹¹⁵ (1986), the Court introduced the concept of the Treaty as *the basic constitutional charter*;
- 4) And lastly, in its Opinion 1/91 EEA¹¹⁶ (1991) the concept was additionally augmented into *the constitutional charter of a Community based on the rule of law*.

All these gradual changes were reiterated in Treaty establishing a *Constitution* for Europe¹¹⁷ which later on, in almost all but the name, became the Treaty of Lisbon. Interim conclusion can be that while the Court does not seek to attain the formal status of a Constitutional court, its agenda through number of cases changed the whole system it works in. From system where the Court is a legal advisor that explains formal procedural rules into the system of constitutional European law where the Court serves as a court of the highest instance.

On the international legal scene, the importance of *Van Gend en Loos* decision in differentiating the EEC from other international organisations can be reflected by a "counter" decision WTO panel made, stating:

*Neither the GAT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.*¹¹⁸

This shows that the international community understood the importance of the change in the Court's wording in *Van Gend en Loos* and possible outcomes it could lead to and separated

¹¹³ Excerpt from E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1

¹¹⁴ The past and future of EU law, p 20

¹¹⁵ Case 294/83 *Les Verts v Parliament* [1986] ECR 1339

¹¹⁶ Opinion 1/91 EEA [1991] ECR I-6079

¹¹⁷ Treaty establishing a Constitution for Europe. Official Journal of the European Union C 310/12, 16. December 2004.

¹¹⁸ United States, Sections 301-310 of the Trade Act of 1974, Report of the Panel 22.12.1999, WT/DS152/R

GATT/WTO framework itself from it so no one could claim that this organisation tries to establish supranational legal order.

2.2 Different approaches of scholars about the power of the CJEU

When analysing the status of the Court it is wise to base our arguments not only on our own findings but on scholarship of established authors as well. In this part, we will analyze the different approaches that various authors had when researching the Court. We will seek to understand how the legal thought developed through the years and how the research about the CJEU started including not only “formal” legal arguments but also complex analysis of “triggers” and power-relations that impact the CJEU to take particular decisions and the ultimate effectiveness of the decisions. The logic behind choosing models which focus on *influence* of the Court in broader, not only judicial systems, is that in order to develop towards the eventual status of the Constitutional court, the Court itself has to have potential to influence the system it works in. This is because due to short term political instabilities, the unanimity of the Member States is hard to attain and the “spirit of the Treaty” is hard to be implemented in practice.

There are few theories on how the scholarship on the CJEU changed with the times but we will follow the position of American author Karen J. Alter. As a main contesting opinion about the development of legal thought about the CJEU the approach of Alec Stone Sweet, that criticizes Alter’s model can be mentioned¹¹⁹. However, after analysis of both authors research it becomes clear that one does not critically negate the other. Moreover, Altec Stone Sweet points can be integrated in Alter’s scholarship¹²⁰.

Alter distinguishes three waves of scholars who research the topic of power of the European Court¹²¹. Her work, as she herself says, is a direct continuation of Eric Stein¹²² and Joseph Weiler¹²³ scholarship.

First wave Alter distinguishes is of *legalist* scholarship which mostly uses positivist logic. The Court here is seen only as an actor embodied by the Treaties. The CJEU itself does not have a

¹¹⁹ The Evolution of EU Law, 2nd ED, p. 140

¹²⁰ Part 2.3 of this thesis

¹²¹ Alter, The European Court's political power: selected essays, p 35

¹²² E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75 *American Journal of International Law* 1

¹²³ J. H. H. Weiler, *The Transformation of Europe*, The Yale Law Journal, Vol. 100, No. 8, Symposium: International Law Jun., 1991), pp. 2403-2483

preference or political will. The Treaty is seen as a constitutional and sacred text which embodies all the principles that the Court deduces. The Court's cases serve only as 'the inevitable working out of the correct implications of the constitutional text; and the constitutional court (the ECJ) as the disembodied voice of right reason and constitutional teleology'¹²⁴. This school of thought dominated European law in 1960-1970s. Nowadays, however, it can be considered outdated and the 'legal debate has mostly moved beyond these accounts'¹²⁵. Modern branch of legalists¹²⁶ focus their studies on examining 'how the ECJ uses its office as part of a political and legal strategy to build the foundations of its own political authority'¹²⁷. It is arguable that most Lithuanian legal studies are also highly influenced by this *legalist* doctrine and reluctantly expand to using more complex, and possibly more objective, logical systems of thinking which would include not only arguments of law but those of other social sciences as well.

Second wave comes from *international relations* political scholarship which was created to oppose *legalist* point of view. It shares the main negative point with *legalist* wave, that is, international relations scholarship is focused on one idea which is considered core and is not allowed to change. This idea in international relations scholarship is of *principal-agent*: 'the ECJ, like all courts, is an "agent" of the actors that delegated authority to it'¹²⁸. The theory of international relations scholars focuses on decisionmaking of the Court and what factors force the Court to make particular decisions. The limit of this theory is that in its core is the truism that any court is naturally "weaker" than the institution which founded it and a court always follows the wishes of that institution¹²⁹. The founding institution is called *principal*, hence the naming, *principal-agent* theory. Scientists who used this theory first reached the conclusion that the CJEU always follows the interests of the most powerful Member States¹³⁰. Later on the scholarship progressed and other theories of incentives for court to chose its course of action were tested, namely response to threats¹³¹ and concerns of non-compliance¹³². In early

¹²⁴ Shapiro, M. 'Comparative Law and Comparative Politics' (1980) 53 *Southern California Law Review* 537-542

¹²⁵ Alter, The European Court's political power: selected essays, p. 36

¹²⁶ Burley, A.-M. and W. Mattli. ,The Europe Before the Court' (1993) 47(1) *International Organization* 41-76; Helfer, L. R. and A.-M. Slaughter. 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) *Yale Law Journal* 273-291

¹²⁷ Alter, The European Court's political power: selected essays, p. 37

¹²⁸ *Ibid.*

¹²⁹ Garrett, G. and B. Weingast. 'Ideas, Interests and Institutions: Constructing the EC's internal Market'. In *Ideas and Foreign Policy*, ed. J. Goldstein and R. Keohane (Ithaca: Cornell University Press, 1993)

¹³⁰ Garrett, G. 'The Politics of Legal Integration in the European Union' (1998) 49(1) *International Organization* 171-181

¹³¹ Kilroy, B. 'Member State Control or Judicial Independence: The Integrative Role of the Court of Justice', 1995, Chicago; Kilroy, B. 'Integration through Law: ECJ and Governments in the EU'. Dissertation in Political Science, Department of Political Science, UCLA, Los Angeles, 1999

¹³² Pollack, M. *The Engines of Integration: Delegation, Agency, and Agency Setting in the European Union* (Oxford: Oxford University Press, 2003)

2000s the theory of *principal-agent* started losing its importance as there was still lack of any empirical data to confirm that any of the previous hypothesis were correct in explaining the pattern of the Court's decisions¹³³. Working in the interests of the most powerful Member States was questioned by major CJEU decisions in economically delicate cases, i.e. *Cassis de Dijon*¹³⁴ where the Court ruled against the interests of most influential countries, Germany in this case. Theory that the Court decides using primarily intent of highest possible compliance was partly negated by very low non-compliance rates against the CJEU's decisions in practice¹³⁵.

The third wave has started where the first two failed. It looks at the CJEU and its power as complex system with many actors and many different needs. It is not attached to one core idea which is presumed correct and is tested exceedingly. Both legal and political sciences are applied when explaining the process from the start of the claim to the process of thought the Court takes when justifying the arguments in judgement to the successful or unsuccessful implication of the decision. The research of this thesis can, hopefully, be included in this third category. It combines research about facts from the process of taking decision by the Court (the position of the MS governments, national courts, international organisations), the practical implications of the decision and last but not least, the legal principles the Court uses.

From the third wave of theories about the power of the Court we will give more regard to the position of Alec Stone Sweet who uses modified *principal-agent* theory and chooses model of a *trustee* instead of an *agent*¹³⁶. It can be seen as having reversed roles when compared to classical *principal-agent* theory where the Court is always an *agent* and always has less power than the *principal*, i.e. the powerful MS. When applying this *trusteeship* theory to the European legal system, three criteria have to be met:

- a) *The Court possesses the authority to review the legality of, and to annul, acts taken by the EU's organs of governance and by the Member States in domains governed by EU law;*

¹³³ Tallberg, J. *European Governance and Supranational Institutions: Making States Comply* (London: Routledge, 2003), Borzel, T. 'Non-compliance in the European Union: pathology or statistical artifact' (2001) 8(5) *Journal of European Public Policy* 803-853. ; Alter, K. J. 'Delegation to International Courts and the Limits of Recontracting Power'. In *Delegation and Agency in International Organizations*, ed. D. Hawkins, D.A. Lake, D. Nielson and M. J. Tierney (Cambridge: Cambridge University Press, 2006)

¹³⁴ Case 120/78, Judgment of the Court of 20 February 1979. *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. Reference for a preliminary ruling: Hessisches Finanzgericht - Germany. Measures heaving an effect equivalent to quantitative restrictions. Wider analysis of the case in Végèlė I. *Europos Sąjungos teisė. Vidaus rinkos laisvė, konkurencija ir teisės derinimas*. Vilnius, 2011.

¹³⁵ Alter, *The European Court's political power: selected essays*, p. 37

¹³⁶ The theory of *trusteeship* was originally introduced in G Majone, 'Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance' (2001) 2 *European Union Politics* 103;

- b) *The Court's jurisdiction, with regard to the Member States, is compulsory;*
- c) *It is difficult, or impossible as a practical matter, for the Member states, as principals, to 'punish' the Court, by restricting its jurisdiction, or reversing its rulings.*¹³⁷

This way the *principal*, or shared will of all of the Member States is delegating its power to the Court through act of constitutional importance, or the Treaty, with very limited ways to ever restrict it. The power is flowing not from the *principal* itself but from the constitutional values enshrined in the act. Alec Stone Sweet uses a metaphor for this kind of relation of powers, 'when the Court exercises review authority, it discharges a 'fiduciary' responsibility in the name of a fictitious entity designated by Article 1 TEU: 'the Peoples of Europe'.

Figure 5 will render the idea of *principal-trustee* we will follow in this thesis in more fluid way.

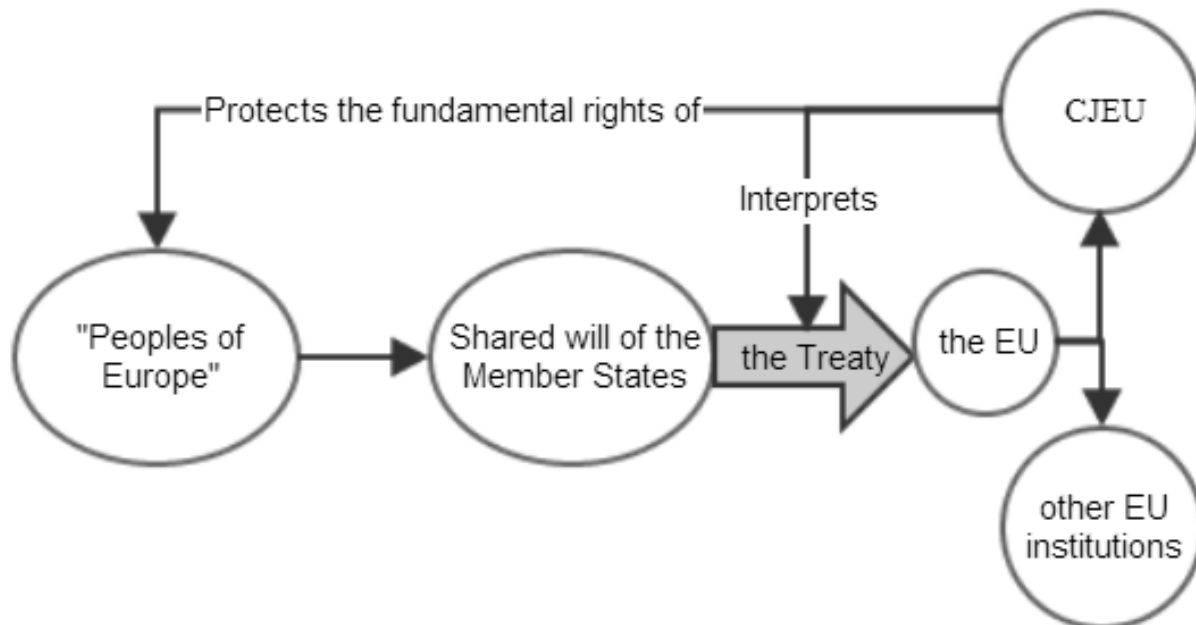


Figure 5

2.3 Effectiveness of the court and judicialisation of the system

We will use modified *principal-trustee* model to define the relation of the Member States and the CJEU. Using this theory combined with further arguments we will now try to establish how the process of empowering the Court works and what practical circumstances have significance in the Courts ability to undertake the system-changing decisions.

¹³⁷ The Evolution of EU Law, 2nd ED, p. 128

Alec Stone Sweet maintains that effectiveness of the Court can be described by how much its decisions provoke a ‘judicialisation’ of the regime and modes of governance. For a court to be truly effective, he distinguishes these three conditions:

- 1) *A judge must have case load;*
- 2) *Once activated, the judge must resolve these disputes and give defensible reasons for their decisions;*
- 3) *A minimally robust conception of precedent must develop within the system.*¹³⁸

Only when these three conditions are satisfied, the Court court has potential to work effectively and provoke ‘judicialisation’. However, the conditions set here do not provide full explanation of the Court’s activities as a complex system as it excludes or does not further analyse the importance of other external actors and risk of non-compliance when implementing the decision.

Karen Alter proposes more complex approach which can say to include Alec Stone Sweet’s conditions as well¹³⁹. In her research the Court is seen as an method for increasing compliance with international rules, the Communities’ law in our case. If we turn the theory around we can see the conditions for the Court to successfully increase the compliance with the Communities’ rules or in other words, preconditions for the Court to work effectively. The conditions Karen Alter proposes are presented by four thresholds:

*Threshold 1: Enforceable law (a.k.a. preliminary and permissive conditions for the ECJ or any other international court (IC) to influence national policies or politics)*¹⁴⁰

Two conditions are included in this first threshold to concretize it. The *compulsory jurisdiction and access for injured parties* is the first one. In the Communities’ system the Commission has access for non-compliance suits. Ability for private parties to access the court is also relevant where the case does not directly concern non-compliance. However, ability for private litigants to access is limited by national courts. According to Alter, the *Banana dispute* revealed that ‘national judges tend not to want to create legal barriers that governments in other countries do not face’¹⁴¹. Second condition in the first threshold is *substantive law on the books*. It means that legal base for making the claim must exist in

¹³⁸ The Evolution of EU Law, 2nd ED, p 131

¹³⁹ Alter, The European Court’s political power: selected essays, p. 21-23

¹⁴⁰ Ibid., p. 22

¹⁴¹ Ibid.

the Communities legal system and direct effect has to exist if the claimant is a private person. Also there must be conflict between national and European law for the case to go to the European Court.

Threshold 2: Interested litigants

The title implies the interest of litigants. However, Alter claims that narrow self-interest is not enough reason to provoke the gathering of powerful enough litigants that the Court would take policy-changing decision and there has to be ‘political commitments to the larger objectives the rules represent’. I.e. the claim has to be supported by much wider political and social force. ‘Litigants are more likely to mobilize around a litigation strategy where there is deep social commitment to objectives the rules promote, because judges are more likely to reward litigant efforts in such cases and because legal ruling will be more embarrassing for the government’.¹⁴² Also, the case is more likely to cause effective change in policy if the litigants are part of a larger group. Then it is easier to “create” cases with specific factual patterns which will provide basis for broad legal interpretation. The intent to change the large policy through litigation is not always the first choice for actors who have influence in political sector. Hence, the litigants who chose the Court as a method are usually either ‘narrowly focused groups or politically marginalized actors’¹⁴³. For example, as our research has showed¹⁴⁴, the pro-European legal community is a very effective actor for creating very effective litigation with long-term impact.

Threshold 3: Judicial Support (national and/or international)

Threshold 3 is further concretized by 3 occasions that might influence the willingness of the Court to seek policy-changing decisions:

- 1) *Judicial intervention in polycentric contexts (i.e. where there are many centers of authority and control)*, meaning that the Court is *less* willing to issue broad and influential interpretation in the case if there is a complex system of hierarchy and authority in institutions that will be affected by the decision and *more* willing if the system concerned is clear and there are not too many actors.
- 2) *Judicial intervention in contexts of sub-state preference divergence*, meaning that the Court will be willing to declare more impactful decisions in cases where there is no unanimous

¹⁴² Alter, K. J. The European Court's political power: selected essays, p. 23

¹⁴³ Ibid.

¹⁴⁴ Part 1.2 of Chapter 1

stance by the Member States and general public is more likely to prefer the new path the Court suggested.

- 3) *Issues involving the independence of courts and the rule of law*, meaning that the Court will more likely apply bold and ‘politically controversial’ interpretation if the case concerns independence and authority of national judges.

Threshold 4: Political follow-through

The last threshold analyzes what are main prerequisites for an already produced decision to have wide reaching importance. When the governments want to comply with the ruling, it is quite simple and the decision is followed without much resistance. However, broad policy change is more often related to opposing points of governments. The main condition that helps when there is opposition from an implementing actors is *group mobilization*. For such decision to be impactful, the group concerned with the decision has to be able to show the governments that further noncompliance with the Court’s decision is not cost-efficient. This requires strong power-actor to support the decision, i.e. an institution, powerful state or an NGO¹⁴⁵.

What can we conclude from these four thresholds? Karen J. Alter, the author of the threshold-based model states that ‘courts are tipping point political actors’¹⁴⁶. This means that there has to be strong forces on both side of an issue, ‘but governments have for whatever reason privileged an arguably less law-compliant outcome’¹⁴⁷. Hence, the Court can outweigh the scales to one side.

Using this theory of effectiveness we can realize what specific circumstances are needed for the Court to convey its influence on the system. It does not show, however, which side the CJEU is more willing to support and what general doctrine the Court has. This will be our main research object in the next part of the thesis, focusing on the Court as the leading force of the European integration and legal logic behind such position.

The *figure 6* below will summarise our previous analysis we have done on Karen Alter’s and Alec Stone Sweet’s theories and combine them. This will produce visual representation of the system

¹⁴⁵ Alter, *The European Court’s political power: selected essays*, p. 24

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, p. 25

of dependencies for the Court’s case to produce a *spillover* effect¹⁴⁸. This effect means that the Court’s position in cases spreads to further political and social areas, i.e. legislation.

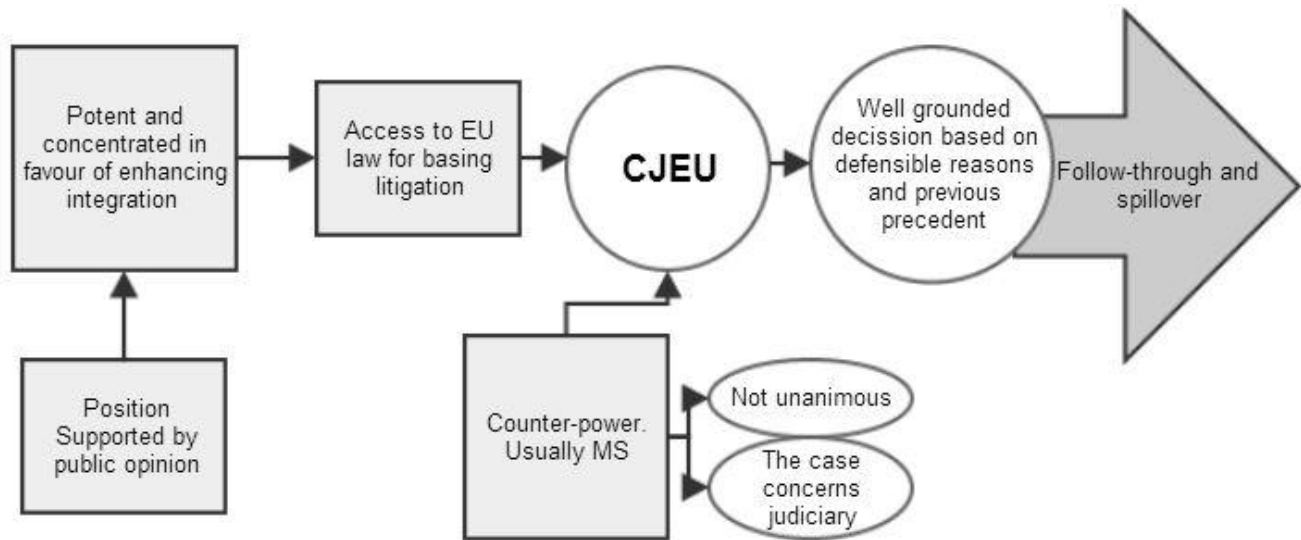


Figure 6

2.4 Examples of effectiveness – the CJEU as the main force in promoting integration

Having analysed the position of a court as an independent *trustee* and the necessary conditions for the court to work effectively in the constitutional European system we will now put this theory into the real world and explain how exactly the court promoted European integration since its early days.

Having attained a *trustee* status, the Court was stuck with a *principal* who was incapable to make substantial decisions. This was because the Member States were often unable to react with unanimity towards further European integration¹⁴⁹. This system forced the court to become stimulating factor of the whole system. It was done through number of bold decisions¹⁵⁰. Situation was suitable as there was another substantial “hidden” actor in the integration project, the European legal society¹⁵¹. Because of this, the Court had access to relevant cases which could always form a basis for a decision which could then stimulate integration further. While the support of the decisions was not absolute from the side of the Member States, support of the powerful private actors and the Commission, which backed further integration, was enough to keep the progress going. At first, the Court was clever to avoid issues of huge economical importance to the Member States and keep itself to “unimportant”

¹⁴⁸ More on *spillover* in Alec Stone Sweet, ‘The European Court of Justice and the judicialization of EU governance’, *Living Reviews in European Governance*, Vol. 5, (2010), No. 2, p. 13-14

¹⁴⁹ Craig, P. and de Burca, G. (eds), *The Evolution of EU Law* (Oxford University Press, 1999), p. 329-331

¹⁵⁰ Decisions we analysed in part 1 of this thesis were the first ones.

¹⁵¹ Alter, *The European Court’s political power: selected essays*, p. 63-92

matters of creating European constitutional system¹⁵². The logic that the Court used in its decisions was not particularly clear, however the system of thought in case-by-case basis was consistent so it did not attract much resistance from legal scholars opposing the European project¹⁵³.

The court used these circumstances to enhance its own role. This, as we will see, in turn lead to creation of constitutional-like legal system of the ECC. At first, there were limitations to the methods the Court could use to influence the system. The first project of the Court was to provide other actors as much possibilities to address the Court as possible. Treaty of Rome did not include the doctrine of supremacy at all and direct effect, while existing from international law viewpoint, was too limited to allow private actors sufficient access to the Court. After *Van Gend en Loos* and *Costa v ENEL* both “problems” were solved. Article 267 TFEU effectively became ‘decentralized mechanism for enforcing EU law’¹⁵⁴. This lead to two profitable changes for the Court and whole integration effort:

- 1) Using this newly found way of connecting to pro-European private actors the Court could more easily form comprehensive doctrine, based on which more integration could follow;
- 2) The national courts became a very useful instrument in the European integration effort.

Alec Stone Sweet notes that ‘these developments comprise one of the most remarkable cases of systematic judicialization-through doctrinal innovation-on record, in that it steadily enhanced judicial authority vis-à-vis all other law-making organs’¹⁵⁵. The theory of the ‘Legal Integration’ by Burney and Mattli¹⁵⁶ further demonstrated how the Court supported private actors in favour of further integration and opposed Member States which were unwilling to go for more European integration.

Second change, concerning national courts, was possible because national courts, with accepting the *supremacy* doctrine of the CJEU, at the same time gained more powers themselves¹⁵⁷. Such as judicial review of national acts implementing communities primary and secondary law. Considering ever-broadening scope of the Communities, the newly found powers of national courts are increasing as well. This was made possible by extensive litigation based on preliminary ruling procedure. Burney and Mattli maintain that ‘more litigation meant more preliminary references which,

¹⁵² Alter, *Establishing the Supremacy of European Law*, p. 229-232

¹⁵³ *Ibid.*

¹⁵⁴ *The Evolution of EU Law*, 2nd ED, p 132

¹⁵⁵ *Ibid.*, p. 132

¹⁵⁶ A-M Burley and W Mattli, ‘Europe Before the Court: A Political Theory of Legal Integration’ (1993) 47 *International Organizations* 41.

¹⁵⁷ *The Evolution of EU Law*, 2nd ED, p 133

in turn, generated the context for a nuanced, intra-judicial dialogue between the ECJ and national judges on how best to accommodate, and empower, one another¹⁵⁸.

Using all these newly gained powers, the Court started to intensively push the European integration project by both positive and negative integration measures. Positive integration was putting pressure on governments to enact EU Market Regulations, negative integration was removing national barriers to exchange within the EU¹⁵⁹.

Shapiro stresses that the Court's center place in European integration was only possible because of the constitutionalisation of the Communities law¹⁶⁰. Further empiric research of the Courts' rulings¹⁶¹ showed that the Court is more likely to support positions of pro-European actors such as the European Commission. The likelihood that the Commission's position would coincide with the one CJEU had was near 85 per cent in cases based on Article 267 TFEU¹⁶². Also, the Court was more willing to support private litigants coming from bigger and more significant markets to the integration project, i.e. France, Germany or Italy.

This steady flow of cases with decisions supporting European integration managed to influence further iterations of the Treaties. This is called the *spillover* of judicial decisions into political sphere¹⁶³. The research on origins of the Single European Act¹⁶⁴ has 'demonstrated the extent to which the Court, the Commission, and transnational business elites were ahead of governments in the process of "relaunching" Europe'¹⁶⁵.

The theories concerning relation of the CJEU and other power actors and principles of effectiveness showed us that the Court, while being central in European integration through the process of judicialisation, can not act alone. Even further, if the constitutional status of the Court is not sufficiently grounded, its powers are limited as it can not be said to work in the name of 'the Peoples of Europe'¹⁶⁶. In next part of the thesis we will analyse how the CJEU seeks to maintain dialogue with

¹⁵⁸ The Evolution of EU Law, 2nd ED, p 135

¹⁵⁹ Ibid., p. 136

¹⁶⁰ M Shapiro, 'The European Court of Justice' in P Craig and G de Burca (eds), *The Evolution of EU Law* (Oxford University Press, 1999), p. 338

¹⁶¹ A Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004) ch 3.

¹⁶² The Evolution of EU Law, 2nd ED, p 137

¹⁶³ Alter, *The European Court's political power: selected essays*, p. 156-158

¹⁶⁴ R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (St Martin's, 1998); J Weiler, 'The Transformation of Europe' (1991) 100 Yale LJ 2403, W Sandholtz and J Zysman, '1992: Recasting the European Bargain' (1989) 42 World Politics 95

¹⁶⁵ The Evolution of EU Law, 2nd ED, p 139

¹⁶⁶ Article 1 of TEU

national constitutional and international courts and fortify EU as a constitutional legal system even further.

2.5 How the court controlled its constitutional evolution in later cases

Having analyzed the theory of the Court serving as a *trustee* instead of an *agent*, we can see that while the initial basis for the functioning of the Court was formed by the *principals*, i.e. the Member States, this institutional, and later on constitutional, system was developed by the Court in conjuncture with other pro-European power actors. First part of turning of the European law system into system based on constitutional principles was done through cases we analyzed in chapter one of this thesis. However, the constitutional evolution of EU law did not stop there. *International Handelsgesellschaft* case introduced the opposition between the CJEU and national constitutional courts. Opposition began because the principle of *supremacy*, that openly included primacy of EU law over national Constitutions, threatened the sovereignty of the states and powers of national constitutional courts themselves¹⁶⁷. Another opposition emerged when protection of fundamental rights was declared as one of the core functions of the European law in the same case. This opposition was observed in both national and international space¹⁶⁸. Hence, the conflict between the CJEU and the European Court of Human Rights began¹⁶⁹. These contested points lead to litigation we will shortly analyze in next sections. However, due to limited size of master thesis we will be unable to go over *all* the key points in relevant national constitutional and international disputes. Therefore, we will focus on a few chosen cases that demonstrate how the constitutional European law developed and matured in more recent years.

In first series of cases we will distinguish principle of *primacy* and its relation to one of not founding Member States, the United Kingdom. The unique position of UK's constitutional system and its clash against the *supremacy* of the EU will serve as crucial pattern in distinguishing the link between national and European constitutional law. In analysis of later cases concerning *supremacy* of EU law we will touch Germany. The legal dispute between German courts and the CJEU started on the points of *supremacy* but later on was augmented by the notions of *fundamental rights*. This dispute will demonstrate close link between *supremacy* and protection of fundamental rights in constitutional systems. Later on the example of Lithuania will show ways of possible cooperation and not opposition between the EU and MS legal systems. And lastly, we will shortly analyze complex relation between

¹⁶⁷ Alter, Establishing the Supremacy of European Law, p. 71-118

¹⁶⁸ R A Wessel, 'The International Legal Status of the EU' (1997) 2 Eur Foreign Affairs Rev 109

¹⁶⁹ Craig, P. and de Burca, G. EU law: Texts, cases and materials, 5th ED, p. 399-405

the CJEU and the European Court of Human Rights. This will allow us to see how the ECoHR treats the CJEU like any equivalent constitutional court and what requirements are given for the European legal system

All these cases will answer the question of how the CJEU wants to be seen in maturing system of constitutional European law and what is the answer of the other courts about this position.

2.5.1 Constitutional order of the EU vs. Parliamentary sovereignty of the UK

The idea of supremacy of the Communities' law was established by the CJEU in the cases we analysed. While some countries did convey their discontent, the new Member States, that joined after *International Handelsgesellschaft* decision was already in place, had to accept it. Primacy doctrine was already part of the Treaty as new *acquis communautaire*. This was the case of the United Kingdom. Problem here was the unique concept of the Parliamentary sovereignty in the UK. Due to not having a traditional written constitution, the sovereignty is said to derive directly from the Parliament which consists of 'the King, the House of Lords, and the House of Commons'¹⁷⁰. In orthodox understanding of doctrine of Parliamentary sovereignty, a valid Act of Parliament cannot be questioned by the court¹⁷¹. This is directly against the obligations that flow from the Treaty and jurisprudence of the CJEU. Hence, the classic doctrine had to be adopted to modern times or the UK was in risk of being forced out of the Communities.

When the UK joined the Communities in 1972, due to dualist law system, a national act giving powers to the Treaty had to be adopted. This was done with the European Communities Act 1972. Key provisions that are most relevant to our research were in paragraphs s. 2(1), establishing *supremacy* of Community law and para s. 2(4), establishing interpretative duty of the courts. These provisions were cause for number of cases in the UK courts where the traditions of constitutional law of the UK and obligations to Communities clashed. Some key points from these cases where national courts repeatedly confirmed the primacy of EU law:

Shields v Coomes [1979]: ... *if such a tribunal should find any ambiguity in the statutes or any inconsistency with Community law, then it should resolve it by giving primacy to Community law*¹⁷².

¹⁷⁰ A.V. Dicey Introduction to the Study of the Law of the Constitution (1885)

¹⁷¹ W. Ivor Jennings The Law and the Constitution (London: University of London Press, 1st ed., 1933)

¹⁷² *Shields v Coomes* [1979] 1 All ER 456, 461: Lord Denning points.

Duke v GEC Reliance [1988]: *Section 2(4) of the European Communities Act 1972 does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals*¹⁷³.

However, because of the concept of the parliamentary sovereignty, the national court was not allowed to claim interim relief against an act released by the Crown¹⁷⁴. In *Factortame* litigation the European Court forced the Communities law and ignored the core principle on which the sovereignty of the UK is based. There were no reservations allowed by the CJEU, even against the acts of the Crown:

*It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule*¹⁷⁵.

The decision was later followed by a national court in the United Kingdom. Lord Bridge agreed to the CJEU's decision and stated:

*If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary*¹⁷⁶.

What is most relevant to us in this case is not the theoretical problems on how this decision influenced the constitutional law of the UK¹⁷⁷. Instead we should seek to observe the position of the CJEU in this conflict of legal systems. The CJEU did not consider the law of the communities as a system that is necessarily based on the roots of Member States constitutional traditions. Instead, the

¹⁷³ *Duke v GEC Reliance* [1988] AC 618, 638: Lord Templeman points.

¹⁷⁴ More on the facts of the *Factortame* case in P. Craig and G de Burca, *EU law: Texts, cases and materials*, 5th ED, p. 287-288

¹⁷⁵ Case C-213/89 *R v Secretary of State or Transport, ex p Factortame Ltd and others* [1990] ECR I-2433

¹⁷⁶ *Factortame v Secretary of State for Transport (No. 2)* [1991] 1 AC 603, 658: Lord Bridge points.

¹⁷⁷ There are various notions about how *Factortame* influenced the doctrine of Parliamentary sovereignty, for further research please consult P Craig, 'United Kingdom Sovereignty after *Factortame*' (1991) 11 *Yearbook of European Law* 221 and P. Craig and G de Burca, *EU law: Texts, cases and materials*, 5th ED, p. 289-292

Communities law was put above national constitutional law with its own unique basis. The legal system of the UK had two choices, to change its own doctrine or face penalties. The position of the CJEU was taken much more harshly in our next country of analysis, Germany.

2.5.2 Germany and EU law

Second country we will shortly cover in the genesis of EU constitutional law is Germany. Unlike the UK, Germany was one of the founding countries of the Communities. Legal conflict on the question of *supremacy* of EU law was made much more difficult because at the time of joining there was no principle of *primacy* in the Treaty and the CJEU was not *yet* protecting fundamental rights. After foundation in 1952, it took the CJEU couple of decades to reach the cases with potential of implementing these elements. Then the European Court swiftly used broad interpretation of the Treaty and deduced the principles of *primacy* and *protection of fundamental rights*.

International Handelsgesellschaft decision by the European Court¹⁷⁸ projected a response from German Administrative court. In it, the German court expressed fear that EU law was to be considered supreme over national constitutional law without any restrictions. If that was accepted, any limits deriving from basic German constitutional rights would be inoperative to the Communities' legislation. The case was further forwarded to the Federal Constitutional Court (*Bundesverfassungsgericht*).

The Federal Constitutional Court ruled that indeed, unlimited supremacy of EU law runs contrary to the Constitution of Germany and gave further reasoning:

*The Community still lacks a democratically legitimated Parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level. It still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution.*¹⁷⁹

What did the German Federal Constitutional Court effectively do? It told the CJEU that while the intention to include protection of fundamental rights is suitable, there is not yet enough legal basis for it. One mention in the European Courts case is not enough. It offered a way for the European legal system to develop and eventually reach the status equal to that of constitutional legal order. Two requirements are deduced:

¹⁷⁸ See part 1.2.3 of this thesis

¹⁷⁹ *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540

- 1) Catalogue of fundamental rights;
- 2) Directly elected legislator.

Knowledgeable reader will notice that these are two parameters which are fully implemented in the European legal and political system in 2013. However, we must not forget that the discourse between the CJEU and the BVerfG happened in early 70s. It becomes clear how these two courts offered an idea for further integration of European legal system which was later fully implemented into the Treaties. In fact, it took the European Community only 13 years to reach the status where German ultimatum could be lessened for the first time¹⁸⁰. It was done in 1987 in case called *Solange II*. In it the same BVerfG decided that:

In view of these developments, it must be held that, so long as the European Communities, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of the fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Constitution¹⁸¹.

Thus, the German court suggested intercourse of mutual-trust between national court and the CJEU. This was later called the *Doctrine of Equivalent Protection*¹⁸². This tendency will be noticed in our further analysis as well. While at the time the communities' protection of human rights was not at today's level, it was already considered sufficient for base German constitutional standard. This judgement, however, was only partial limit to the previous doctrine. The German Constitutional Court still kept the jurisdiction to decide about violations of fundamental rights¹⁸³.

¹⁸⁰ First direct elections to the European Parliament were organized in 1979, 5 years after the judgement of the Federal Constitutional Court

¹⁸¹ Re Wuensche Handelsgesellschaft, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225.

¹⁸² Paul De Hert and Fisnik Korenica, *The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights*, German Law Journal [Vol.13 No.07, 2012]

¹⁸³ Craig, P. and de Burca, G. EU law: Texts, cases and materials, 5th ED, p. 275

As time passed, while not without some conflicting situations¹⁸⁴, the German Constitutional Court cases further qualified conditions when the Constitutional court can decide on the actions of the EU's institutions¹⁸⁵. In *Lisbon Case*¹⁸⁶, the Court defines five areas in which the state must take a role:

- 1) Criminal law (substantial and procedural);
- 2) War and peace;
- 3) Public expenditures and taxation;
- 4) Welfare;
- 5) Culture and religion.

And lastly, in *Honeywell* case the court again reminded the need of intercourse based on mutual-trust. While it proposed yet another qualifying condition for itself when reviewing EU law, *ultra vires* (acting beyond one's competence), the CJEU is given ability to decide on the matter first:

*60 This means for the ultra vires review at hand that the Federal Constitutional Court must comply with the rulings of the Court of Justice in principle as a binding interpretation of Union law. Prior to the acceptance of an ultra vires act on the part of the European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU. As long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany.*¹⁸⁷

Hence, the Constitutional Court will never have a first word in the matters in case of *ultra vires* situation. This decision led to such position when there will be extremely difficult in practice to be allowed into the German Constitutional Court on the grounds of EU law breaching national constitutional law because most of the reasonings will be refused *ab initio* because they do not fall into one of many narrow qualifying criteria the Federal Constitutional Court set during many years¹⁸⁸. Some authors also argue that by taking this course of argumentation the Federal Constitutional Court used largely policy-based logic¹⁸⁹.

¹⁸⁴ i.e. the "Banana dispute", Case C-280/93 *Germany v Commission* [1994] ECR I-4873;

¹⁸⁵ *Brunner v The European Union Treaty* [1994] 1 CMLR 57

¹⁸⁶ 2 BvE, 2/08, 30 June 2009

¹⁸⁷ 2 BvR 2661/06, 6 July 2010

¹⁸⁸ Craig, P. and de Burca, G. *EU law: Texts, cases and materials*, 5th ED, p. 279

¹⁸⁹ Craig, P. 'The ECJ and *Ultra Vires* Action: A Conceptual Analysis' (2011) 48 CMLRev 395.

The Federal Constitutional Court still considers itself as an ultimate decider on its relation to the CJEU and owner of ultimate *Kompetenz-Kompetenz*. This is a protection in case the actions of the CJEU begin to go contrary to interests of Germany. But since that is not happening, the decisions of the German Constitutional Court so far have led to only weakening force of the Federal Constitutional Court over the CJEU. With most of the other courts having fully accepted supremacy of the EU, the Federal Constitutional Court is a risk if the Europe seeks to follow further path of integration. The threat of such system, if it starts resembling federal order, to be considered as breaching the German Constitution is large if the German Constitutional Court does not change its orthodox constitutional logic which prevents the CJEU from getting full *Kompetenz-Kompetenz*.

What can we deduce from the stream of cases we have shortly analysed? First thing is that long relationship of two courts, the CJEU and the Federal Constitutional Court of Germany managed to shape and advance the European project hugely. The German court defined principal requirements for any constitutional system, including the one of EU. The CJEU led using this logic and the Member States later followed. The German court pioneered the idea of mutual trust which was later borrowed by constitutional courts of other countries, i.e. the Lithuanian Constitutional Court and even the European Court of Human Rights as the *Doctrine of Equivalent Protection*. The relation of *democracy* and *protection of fundamental rights* became inherently linked in the *constitutional* legal order of EU law.

2.5.3 Lithuanian Constitutional court and EU law

Lithuanian legal theory, which is largely influenced by the German legal doctrine¹⁹⁰, has made its contribution to solving the conflict between national constitutional and European law. What is most relevant to our analysis, of how the CJEU is slowly gaining new powers and becoming the Constitutional court of Europe, is the position of the national constitutional courts. These courts are the guardians of national sovereignty and pose high risk for expanding of the CJEU's powers. As our analysis has shown, the German Constitutional Court is not afraid to make the CJEU follow its propositions about core constitutional requirements. Now we have to see how the position of German courts is taken by the constitutional courts of other Member States. Lithuania will be our example.

¹⁹⁰ Ravluševičius, P. *The Enforcement of the Primacy of the European Union Law: Legal Doctrine and Practice. Jurisprudence*. 2011, 18(4), p. 1384

The relation of Lithuanian legal system and European principle of *primacy*¹⁹¹ is well covered in scholarship of Pavelas Ravluševičius¹⁹² and Egidijus Kūris¹⁹³. We will use these accounts to represent the relation of Lithuanian and European judiciaries.

*Lithuanian Constitutional Court has recognized the primacy of EU law in the domestic legal order, however, it did not recognize the hierarchical supremacy of EU law against the Constitution*¹⁹⁴.

*The Lithuanian point of view was also underlined in the German legal doctrine. Mr. Hilf has clearly notified that the Lithuanian constitutional provisions expressly stated the primacy of the EU law, and it was applicable to the non-constitutional law*¹⁹⁵.

Position of Kūris, a former judge of the Lithuanian Constitutional Court, who is also considered one of the leading constitutionalists in Lithuania, has to be accentuated. According to him “the relationship between the Lithuanian constitutional law and the EU law shifts the solution from the field of ‘competing supremacies’ to the field of application of the law. In that way, it is irrelevant which law could have supremacy because the only relevant issue is which law has to be applied”¹⁹⁶. In the opinion of current delegate to the CJEU from Lithuania and a former judge of the Lithuanian Constitutional Court Jarašiūnas, ‘it should be developed between the constitutional courts and the European Court of Justice as a friendly dialogue, taking into account the respect for both legal systems (mutual amicability)’¹⁹⁷.

Aforesaid position of Kūris, once presented in the lecture of French professor Mr. Platon in the Mykolas Romeris University, generated considerable applause. The attempt to solve the *primacy* conflict in reinterpreting the concept itself into a problem of procedural norms seems like a very “legal”

¹⁹¹ Supra note 67

¹⁹² Ravluševičius, P. *The Enforcement of the Primacy of the European Union Law: Legal Doctrine and Practice. Jurisprudence*. 2011, 18(4)

¹⁹³ Kūris, E. Europos Sąjungos teisė Lietuvos Respublikos konstitucinio teismo jurisprudencijoje: sambūvio algoritmo paieškos [The EU Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania: Search for the algorithm of Coexistence]. In: Teisė besikeičiančioje Europoje. Mykolo Romerio universiteto Leidybos centras, 2008.

¹⁹⁴ Ravluševičius, 2011, p. 1381

¹⁹⁵ Hilf, M. *Costa v. ENEL Case* [interactive]. *Max Planck Encyclopedia of Public International Law* [accessed 21-06-2011]. <www.mpepil.com> (as cited in Ravluševičius, 2011)

¹⁹⁶ Kūris, E. Europos Sąjungos teisė Lietuvos Respublikos konstitucinio teismo jurisprudencijoje: sambūvio algoritmo paieškos [The EU Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania: Search for the Algorithm of Coexistence]. In: Teisė besikeičiančioje Europoje. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2008, p. 673, 707. (as cited in Ravluševičius, 2011)

¹⁹⁷ Jarašiūnas, E. Kelios mintys apie Lietuvos dalyvavimo tarptautiniuose santykiuose konstitucinius pagrindus [Some remarks about the constitutional basics of participation of the Republic of Lithuania in international relations]. In: Teisė besikeičiančioje Europoje. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2008 (as cited in Ravluševičius, 2011)

way to do it without creating additional political side-effects. The approach of Jarašiūnas is similar to the new wave of thinking, introduced in the CJEU-German Court dialogue we previously covered.

What do these propositions of the Lithuanian Constitutional Court judges and the scholars tell us? The situation is nearly complete repeat of our analysis of Germany. The conflict is not over, and neither side wants to give up on deciding on the highest *Kompetenz-Kompetenz*. However, in reality the conflict is peaceful and the courts are not taking any drastic measures or trying to prove their higher status.

Ravluševičius accurately concludes that ‘in its latest judgments the European Court of Justice refused to deal with the particularly sensitive questions of limitation of sovereignty and transfer of these powers to the EU’¹⁹⁸. This, however leaves the future of the CJEU in suspense. If the circumstances change radically, i.e. huge economic crisis, public opinion shifting to anti-integration, national Constitutional Courts can always use their ‘last card’, with ultimate *Kompetenz-Kompetenz* they can start to actively decide that European legislation runs contrary to the national Constitutions. Still, in order not to drift too much into political arguments and uncertainties we will turn to our last analysis of Chapter 2.

2.5.4 Dialogue between the CJEU and the ECtHR

We have covered how the CJEU introduced the *protection of fundamental* rights as one of the core legal principles of the Communities’ legal system. Also, how the German Federal Constitutional Court implied that the protection of such rights is only possible if catalogue of the rights is created. However, we must not forget that all the EU Member States are also members of the Council of Europe which has created the European Convention on Human Rights¹⁹⁹ (the ECHR) and all the members must follow it²⁰⁰. To this day the ECHR is still the only international human rights agreement providing such a high degree of individual protection. The keeper of this Convention is the European Court of Human Rights, situated in Strasbourg (the ECtHR from now on).

The problem is that while the ECtHR has rights to consider national acts, including national acts implementing the EU acts, it can not examine an EU act itself. Conflict of the courts started

¹⁹⁸ Ravluševičius, 2011, p. 1384

¹⁹⁹ The European Convention on Human Rights, Council of Europe, Rome, 4 November 1950.

²⁰⁰ We will not cover the specialities of the process of the EU’s accession to the ECHR due to the size such analysis would take in this thesis. Only some relevant arguments for the development of the EU’s constitutional order if the EU joins the ECHR will be given.

because of this imperfection of international-supranational law. The last relevant change was the position of the ECtHR expressed in *Bosphorus* case.

In the Court's view, State action taken in compliance with such legal obligations of retaining Convention liability in respect of [international] treaty commitments, is justified as long as the relevant organization is considered to protect fundamental rights as regards both the substantive guarantees offered and the mechanisms controlling their observance in a manner which could be considered at least equivalent to that for which the Convention provides.

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient²⁰¹.

Hence, the ECtHR followed in the footsteps of German courts. The *Doctrine of Equivalent Protection*²⁰², as scholars have named it, was born. It allows both courts to operate within agreed set of rules. Decision was not unquestioned. After *Bosphorus* there were some opinions that this protection is not sufficient, due to limited *locus standi* for private parties before the ECJ²⁰³. To our research the key moments are the requirements for this doctrine to work. I.e. *substantive guarantees offered and the mechanisms controlling their observance*.

How can this be translated into logical chain of our research? *Substantial guarantees* are a legal base for protection of human rights. The Charter of Fundamental Rights serves this purpose in the EU. Mechanisms controlling their observance can be considered institutions intended to protect human rights, the ombudsman of the EU, the Committee on Petitions of the European Parliament, agencies of the EU etc. However for this system to be equal to those of other ECHR member states, the system has to have an independent observer of the mechanisms and the legal base, similar to a national constitutional court.

This position the ECtHR has formed supplements the one the CJEU has kept since the 70s, that EU law has to efficiently protect fundamental rights of the peoples. It is wise to again remember our

²⁰¹ Application No 45036/98 *Bosphorus v Ireland* Judgement of 30 June 2005

²⁰² Paul De Hert and Fisnik Korenica, *The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights*, German Law Journal [Vol.13 No.07, 2012]

²⁰³ Craig, P. and de Burca, G. EU law: Texts, cases and materials, 5th ED, p. 403

assumption that the CJEU is moving towards the status of a constitutional court. In order for the European Union to avoid *manifestly deficient* status of the protection of human rights, the power of the CJEU has to evolve. The Court has to have enough powers to withstand political pressure in order to provide ultimate protection of fundamental rights. That is even further reinforced by forthcoming accession to the ECHR by the EU.

2.6 Conclusions of the second chapter

To understand the choices of presenting the Court's advancement in such a seemingly irregular way in second chapter it is wise to look again at *figure 4*. The forces that affected the Court's change were enormous. It is impossible or naïve to expect to suitably explain such a change using purely arguments of constitutional law or international law, or international relations point of view. So we were stuck in a situation when following just one line of argumentation would put us in risk of one-sided findings, yet it was impossible to deliver an extensive research using all disciplines because of the limitations of a master thesis platform. The choice was to use various systems analysing the evolution of the Court and to find common points in them. These points, if they coincide, lead to confirmation that our chosen line of thought about the evolution of the Court is correct.

In second chapter we have covered the Court as a developing constitutional actor which had an ability to impact the whole European order through its cases that produced a *spillover* effect. First we shortly reiterated the importance of cases from chapter one together with some new ones to show how the constitutional evolution developed in the CJEU's own language. Then we covered development of the legal scholarship in the area of our thesis. We have used Alec Sweet Stone's idea of *trusteeship*²⁰⁴, combined with *threshold model* by Karen Alter and formed comprehensive requirements for a *spillover* of Court's decision to happen in practice (see *figure 6*). Constitutional foundation for such actions of the Court was proposed, that is working in the name of the "peoples of the Europe" (see *figure 5*). We then went through couple of practical examples of how the Court applied the *spillover* effect in practice.

Lastly we used the CJEU's interaction with national and international courts to show how they affected the development of constitutional legal system in the EU. The UK's example showed how the CJEU sees itself in the system of judiciaries in Europe, as a supreme constitutional power. The cases from Germany displayed how such position can be limited by a strong national constitutional doctrine

²⁰⁴ For more in depth analysis of *trusteeship* and answer to critique please see Alec Stone Sweet, 'The European Court of Justice and the judicialization of EU governance', *Living Reviews in European Governance*, Vol. 5, (2010), No. 2, p. 13-14

and what are the necessary preconditions for true constitutionalism to develop in European order, at least in *Bundesverfassungsgericht*'s opinion. The Lithuania's example showed a way how national constitutional court doctrine can allow cooperation and contention with the CJEU. And lastly, the ECtHR's decision in *Bosphoros* case again affirmed the tendency of the courts to cooperate with the CJEU. However, again critical points were given for the cooperation to happen.

The research of second chapter gave us answer to our main question. Using the BVerfG's argumentation, we can determine that the CJEU is not yet in a position equal to that of an European constitutional court. We will continue into the third and the last part of our thesis with the following questions. What could help to establish the CJEU as a court that would be able to protect human rights against *manifestly deficient* violations? A court that would be able to work in the name of the "peoples of the Europe". And which *case law* could *generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities* (the European Union)? What could be the main *principle* to explain the actions of such court in the European legal system. How the events, opinions, cases we have already analyzed lead to the derivation of this principle?

III. LAST STEP TOWARDS THE CONSTITUTIONAL COURT OF EUROPE AND PRINCIPLE OF ‘AN EVER CLOSER UNION’

3.1 The principle of ‘an ever closer union’

The principle we will mention here is the last part in our analysis. It cannot be stressed enough that it is very important to see this thesis as an analysis of continual growth²⁰⁵, the process of coming into being of European constitutional law and how the Court played key role in it. First two chapters have lead us through couple of most important periods of this evolution. First, the period of early days of the Communities where the Court *interpreted* the Treaties and from that interpretation created the fundamentals of European constitutional law. In second chapter we analyzed more recent CJEU interactions with other national and international courts. Most notably, we deduced modern requirements to create sophisticated constitutional legal system for the Europe in these legal dialogues. In second chapter we also resumed the Court’s examination as a creative actor in the European integration project showing its relation to other power-actors and produced a scheme that shows when its decisions have a *spillover* effect. This shows how the Court can convey the “spirit of the Treaty” into further legislation and public medium.

Conclusions of the second chapter imply that European integration is at a critical point. Both legal, economical and political. Alec Stone Sweet argues that ‘as the authoritative interpreter of Charter rights, the CJEU’s *bona fides* as a Constitutional Court have been secured’²⁰⁶. What is lacking in European legal system is a strong *constitutional basis* that would explain the direction the Union is taking. It would increase both the potency of growth of the EU itself and the legitimacy of the CJEU as the Constitutional Court for Europe. Then the Court would avoid much critique for acting in *activist* ways and deciding using biased and unclear arguments. Legal authors argue that the CJEU has been performing the role of a constitutional court already²⁰⁷. Yet without this *constitutional base* its actions are hard to equate to those of full-fledged constitutional court, hence the conflict with the German law. This *constitutional basis* would be similar to the *grundnorm*²⁰⁸ in Kelzen’s work or a “spirit of the Constitution”²⁰⁹ in Lithuanian constitutional jurisprudence. Logical connection can also be derived

²⁰⁵ We advise the reader to glance over *figure 4* yet again to see where in the „chain of events“ we are

²⁰⁶ The Evolution of EU Law, 2nd ED, p. 153

²⁰⁷ Tamm, D 2013, ‘ The History of the Court of Justice of the European Union Since its Origin ’. in A Rosas, E Levits & Y Bot (eds), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law. Springer, p. 14

²⁰⁸ Kelsen, H. *Pure Theory of Law* (University of California Press 1978)

²⁰⁹ Kūris, E. Konstitucijos dvasia [The spirit of the Constitution]. *Jurisprudencija*, 2002, t. 30(22); p. 16–31

from *trusteeship* status as used by Alec Stone Sweet²¹⁰. Further foundation can also be found in *effet utile* doctrine:

*A concept also frequently used ... is that of effet utile, whereby the [European] Court [of Justice] has held that the efficacy of Community law would be weakened if it did not interpret EC law in such a way as to fulfill the treaty's objectives.*²¹¹

In comments on the early CJEU decisions we covered in chapter one, there were arguments that the Communities law could now work without the principles of *direct effect* and *primacy*. However, at the time of the first Treaty, there was not enough political will to introduce these principles in the text of the Treaty. It is said that the extreme scope and reach of the Communities law was left blank as a compromise between prime signatories²¹². Yet the Court argued that the Treaty did have these principles, they were coded between the lines²¹³. That position of the Court was never negated by the Member States and later even stressed in the Treaty revisions²¹⁴.

We argue that further progress of EU law is impossible without yet another *new principle* of EU law. Failure of the Constitution for Europe showed that with unstable political dynamics between the Member States, it is very hard, if not impossible, to implement such a significant constitutional change in the Treaty²¹⁵. At the same time, there is a strong political movement for further integration of the Union, that would provide grounds for a strong *spillover* to happen²¹⁶. We argue that the Court itself could introduce a *new principle* through its case law. Without it the effective working of the Court is restricted. This would not only increase the effectiveness of the EU legal system but as well:

- 1) Express a strong position of the CJEU to national constitutional courts in their long term dialogue on *primacy* and protection of *fundamental rights* - the conflict of 'competing

²¹⁰ See figure 5 in 2.2 of this thesis

²¹¹ Scott, D. Constitutional Law of the European Union (2002)

²¹² Tamm, D 2013, 'The History of the Court of Justice of the European Union Since its Origin'. in A Rosas, E Levits & Y Bot (eds), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law. Springer, p. 14-17

²¹³ See chapter 1.2

²¹⁴ Declaration No. 17 concerning primacy; Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260). *Official Journal of the European Union* C 83/344, 30. March 2010.

²¹⁵ Patrick Wintour, "EU scraps timetable for ratifying constitution", *The Guardian* (17 June 2005, London)

²¹⁶ I.e. see Guy Verhofstadt speech on 'The future of the European Union' in plenary session of the European Parliament (2013): https://www.youtube.com/watch?v=LlXbz_s2W90

supremacies²¹⁷ between the CJEU and national constitutional courts could be ended on the grounds of this *new principle*;

- 2) Give the Court a strong *constitutional base* to generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities²¹⁸;
- 3) Would send the ECtHR a strong message that the EU has a safeguard of human rights that will have the powers to maintain *equivalent protection* of human rights;
- 4) Explain the logical chain of the CJEU's actions in previous cases, defend the Court from accusations to have decided with needless *activism*²¹⁹;
- 5) Show “the peoples of Europe” that there is a concrete security mechanism of their rights in the EU, thus decrease the democratic deficit of the EU²²⁰;
- 6) In case of a *spillover*, give the Member States foundation for adopting further legislation based on this *new principle*, and lead towards the more integrated EU.

Since the main portion of this research was used for the analysis of the evolution of constitutional EU law, that is, finding preconditions for the birth of this principle, we feel like there is not enough space left to give the contents of the *new principle* enough respect. Hence, we will not try to provide full and sophisticated analysis of the contents of the *new principle*. We will go over some of the more concrete observations, relating to the preconditions, foundation and the possible content of the principle. Further analysis of the principle is foreseen in future scholarship by the author.

3.2 Genesis of the principle of ‘an ever closer union’

What our analysis of the cases showed was the Court's ability to introduce new important elements of European law using its interpretation and the *spillover* effect. This slowly formed the foundations of European constitutional system. Authors argue that it was done purposefully by the Court to enhance its own authority²²¹. Examples of steady CJEU practice leading towards

²¹⁷ Kūris, E. Europos Sąjungos teisė Lietuvos Respublikos konstitucinio teismo jurisprudencijoje: sambūvio algoritmo paieškos [The EU Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania: Search for the Algorithm of Coexistence]. In: Teisė besikeičiančioje Europoje. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2008

²¹⁸ Re Wuensche Handelsgesellschaft, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225.

²¹⁹ Tamm, D 2013, ' The History of the Court of Justice of the European Union Since its Origin '. in A Rosas, E Levits & Y Bot (eds), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law. Springer, p. 29

²²⁰ Majone, G. Europe's 'democratic deficit': The question of standards, European law journal, 1998

²²¹ Stefan Mayr, *Putting a Leash on the Court of Justice?*, European Journal of Legal Studies, Volume 5, Issue 2 (Autumn/Winter 2012/13)

differentiating of EU law as an ‘unique system of law’ were given²²². We argue that this was done because there was, from the very beginning, *the principle* encoded into the Treaties. The principle which binds the Court to promote the workings of the Treaties in a very concrete, integralist, way.

The principle stayed unmentioned as there was no need for the Court to seek to validate it fully. Instead the CJEU relied on lesser derivatives of *the principle* that helped to reach the required results at the time, i.e. constructing the principle of *direct effect*. Because of recent developments in judicial dialogue we covered in chapter 2 and the state EU’s progression has reached in general, *the principle* has to be elevated from unwritten law into jurisprudence of the Court to help the legal system break current stalemate of ‘competing supremacies’.

The basis of the principle lies in the preamble and the first article of Treaty on European Union and the Treaty on the Functioning of the European Union:

*(the Member States)[...] RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity*²²³.

*This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen*²²⁴.

The principle hence might be called *the principle of ever closer union* or, if simplification is required, *the principle of integration*. Embodied in this principle is the meta-objective of European integration. Every action of actors who are bound by it should have a long term goal of advancing and protecting the European project. We argue that *the principle* can possibly be tailored to the other EU institutions, the Court is a perfect executor of it as it is least politically biased on this matter. This is based on the way the judges of the CJEU are assigned where the judges themselves have an ability to decide if the new delegate is fitting.

The principle can continue the development of European law as a constitutional order. It can be seen as a *grundnorm* of the Treaties²²⁵. Flowing from it are all other principles of the Treaty, *primacy*,

²²² See 2.1 of this thesis

²²³ Preamble of the TEU

²²⁴ Art 1. TEU

²²⁵ More extensive comparison of the *principle of an ever closer union* with the *grundnorm* will be planned in following publications by the author

direct effect etc. If interpreted this way, the conflict with German courts could be ended as there would be a core principle that would possibly allow, if implemented strongly, to *generally ensure an effective protection of fundamental rights as against the sovereign powers of the Communities*. The logic of distinguishing this principle is in fact partly inspired by the decisions of the Federal Constitutional Court we analysed in previous chapter, i.e. the requirements for the EU law to advance towards the level of constitutional law²²⁶. National constitutional courts see themselves as sufficient protectors of the fundamental rights and democratic values in national systems. The conflict itself is there because the EU law does not satisfy the criteria of constitutional law. And the CJEU does not satisfy the criteria to become the Constitutional Court of the Europe. The principle, again, would fortify European law as true system of constitutional law. And provide the grounds for the CJEU to be considered as equal by other national constitutional courts.

We argue that *the principle of integration* in itself holds *the purpose and the aim of the Treaties*. These words were mentioned broadly in the CJEU's reasonings²²⁷. The reach of *the purpose and the aim* of the Communities was shown to be constantly changing²²⁸. However, the meta-objective stays the same:

To attain the best effectively achievable quality of integration in Europe at the time.

Just after the World War 2 that might have been simple alliance of coal and steel industries. In 2013 the level of integration is much, much higher. The Europe has reached such level of integration that any impact on the EU can have enormous, if not destroying, shocks on single Member States²²⁹. This requires the Court as prime actor in integration to take the liberty of explaining the core of the Treaties once again. A decision similar to the ones we have covered in chapter one.

Possible criticisms would be that the principle of such scope could violate the sovereignty of the Member States. An answer to such critique would be that the principles of *subsidiarity* and *proportionality* will not disappear, the competences of European Union in relation vs. those of MS will also not change just from the coming of this principle. The principles of *subsidiarity* and *proportionality* form the limits of the best effectively achievable quality of integration in Europe at this

²²⁶ For more in depth analysis see Cannizzaro, E. EU Law and National Constitution A Pluralist Constitution for a Pluralist Legal Order?; available online at: [accessed 19-21-2013] <http://www.astrid-online.it/Riforma-de/Studi-e-ri/Archivio-2/CANNIZZARO.PDF>

²²⁷ Find cases

²²⁸ See 1.2 of this thesis

²²⁹ I.e. see Guy Verhofstadt speech on 'The future of the European Union' in plenary session of the European Parliament. [accessed 19-21-2013] https://www.youtube.com/watch?v=LIXbz_s2W90

time. And if it is against the wills of the Member States to further invoke the *principle of integration* to promote integration, they will simply not do so. Hence, further *spillover* will never happen. *The principle of integration* at its core is intended for the Court to explain its own actions and relations with other constitutional and supranational courts and *not* for pushing political decisions. It is a principle that protects and explains the system of European law and establishes the Court as the protector of fundamental rights of the peoples of Europe.

3.3 Conclusions of the chapter three

In last chapter we proposed an idea to establish *the principle of ever closer union* which flows from the meta-objective of the Treaty, to attain the best effectively achievable quality of integration in Europe at the time. Innovations of such principle would be:

- 1) It would explain the Court's course of action since its early years;
- 2) Serve as a next point in the genesis of EU constitutional law, bring the status of the CJEU closer to that of a national constitutional court;;
- 3) Such principle would provide a strong basis to solve a conflict between CJEU and national constitutional and international courts, especially, the ECtHR and the *Bundesverfassungsgericht*.

The birth of such principle flows from our research in previous chapters where we analysed historical cases where the Court *interpreted* the Treaty in teleological manner to establish the principles of *direct effect* and *primacy*. The means for a coming of such principle were covered in chapter two where we focused on the effectiveness of the Court and the necessary conditions for a *spillover* effect. These conditions would allow the CJEU to use the same method to establish the proposed *principle of integration*.

Generic idea of the contents of *the principle* was given due to quantitative limitations of master thesis format. Further research on this topic is anticipated in the future. In *figure 7* we will give a visual representation of our groundwork on *the principle of integration* so far. We have divided the arguments for the coming of such principle in two areas, ones from jurisprudence of various courts, and ones from the legal theory and procedural norms. In red are the planned future directions if the research on this topic is continued.

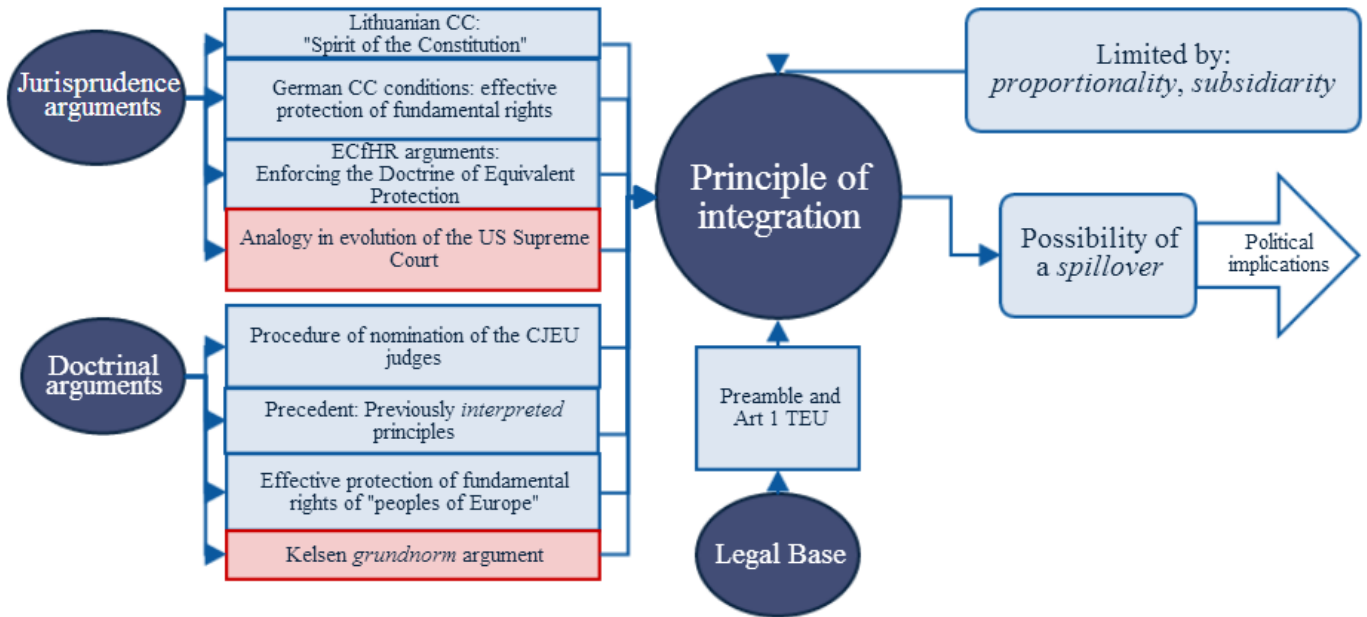


Figure 7

CONCLUSIONS

1. The change in the CJEU's role was influenced by an evolution of the European Union and deepening of European integration. Original role of the Court was to explain procedural rules of the Communities'. After key decisions in 1960s and early 1970s the Court started to move away from definitions of traditional international law and created unique supra-national legal system. This was started by establishing principles of *direct effect* and *primacy* in the CJEU case law. Using teleological interpretation of the Treaties the Court enforced increasing powers of EU law. The reactions of Member States and national judiciaries were not always benevolent, however the Court managed to avoid direct confrontation. In a long term, the aforementioned principles became an important part of the EU law and were further entrenched in the Treaties.
2. The role of the Court in the European integration was stimulated by the Euro-Law Advocacy Movements. This allowed the Court to gain access to cases with favourable circumstances and later fortify these judgements to cause a *spillover* effect. Thus the Court steadily introduced the idea of an European constitutional legal system in its legal reasonings. Because of this initiative of the Court, EU law is evolving into constitutional-like system and the Court itself becomes similar to a constitutional court.
3. From an analysis of different research on the CJEU it can be concluded that legal scholarship is slowly invoking methods from other disciplines when explaining complex systems of Court's relations with other power-actors. First such approach was *principle-agent* model but it has been proven ineffective when explaining the decisions of the European Court of Justice. Instead, a modern derivative of that model, a *trusteeship* theory can be chosen as best depicting the Court's relation to other power-actors. Using the *trusteeship* theory it can be shown how the Court is a direct representative of "peoples of the Europe".
4. Effectiveness of the Court actions are dependent not only on the Court but on outside factors and the political environment. For a *spillover* effect to happen the situation has to satisfy a complex list of criteria as can be seen in *figure. 6*.
5. Judicial dialogue between the CJEU and national constitutional and international courts direct the stance the CJEU takes in its cases. Tendency to move towards constitutional-like system is observed from the CJEU's dialogue with the BVerfG and the ECtHR. Core points of concern are of *supremacy* over national constitutions and sufficient protection of human rights.
6. New *principle of integration* is proposed as a next step in the genesis of European Union law. The *principle of 'an ever closer union'* focuses on the meta-objective of the Treaty, to attain the

best effectively achievable quality of integration in Europe at the time. Its legal base can be found in the preamble and Article 1 of the TEU. Using this principle in the judicial setting we can explain the *activist* actions of the Court. It can be established by the Court using a *spillover* effect. Existence of such principle can solve the conflict of ‘competing supremacies’ between the EU and Member States legal systems. It would also establish the CJEU as a powerful guardian of human rights that can offer *equivalent protection* to the ECHR standard, hence the accession of the EU to the ECHR would be made easier.

7. Hypothesis that the CJEU is the main driving force of the European integration project and the Court slowly but steadily promotes increasing powers of the European Union, at times even against the wishes of the Member States - and that all this can be explained by the *core principle* enshrined in the Treaties was proven correct. The actions of the Court can be explained by the *principle of ‘an ever closer union’*.

LIST OF REFERENCES

Legislation

1. Charter of Fundamental Rights of the European Union (Official Journal of the European Union, 30.3.2010, C 83-389).
2. Declaration No. 17 concerning primacy; Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260). *Official Journal of the European Union* C 83/344, 30. March 2010.
3. Official English translation of the Constitution of Kingdom of the Netherlands; Published by the Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division in collaboration with the Translation Department of the Ministry of Foreign Affairs. Boekje Grondwet 2008
4. The European Convention on Human Rights, Council of Europe, Rome, 4 November 1950.
5. Treaty establishing a Constitution for Europe. Official Journal of the European Union C 310/12, 16. December 2004.
6. Treaty of the European Union. Official Journal of the European Union C 83/13, 30. March 2010.
7. Treaty on Functioning of the European Union. Official Journal of the European Union C 83/47, 30. March 2010.
8. United States, Sections 301-310 of the Trade Act of 1974, Report of the Panel 22.12.1999, WT/DS152/R

Case-law of the Court of Justice of the European Union

9. Case 1/58, Stork v High Authority [1959] ECR 17;
10. Case 11/70, International Handelsgesellschaft mbH v Einfuhr – und Vorratsstelle fur Getreide und Futtermittel [1970] ECR 1125
11. Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein. Reference for a preliminary ruling: Hessisches Finanzgericht - Germany. [1979] ECR 649
12. Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen [1963], ECR 1;
13. Case 29/69, Stauder v City of Ulm [1969] ECR 419.
14. Case 294/83, Les Verts v Parliament [1986] ECR 1339
15. Case 40/64, Sgarlata and others v Commission [1965] ECR 419.
16. Case 44/79, Hauer v Land Rheinland-Pfalz, [1979] ECR 3727
17. Case 6/64, Flaminio Costa v. E.N.E.L. - Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy [1964], ECR 585
18. Case C-213/89, R v Secretary of State or Transport, ex p Factortame Ltd and others [1990] ECR I-2433
19. Case C-280/93, Germany v Commission [1994] ECR I-4873;
20. Opinion 1/91 EEA [1991] ECR I-6079

Case law of national courts and the European Court of Human Rights

21. 2 BvE, 2/08, 30 June 2009
22. 2 BvR 2661/06, 6 July 2010
23. Application No 45036/98 *Bosphorus v Ireland* Judgement of 30 June 2005
24. *Brunner v The European Union Treaty* [1994] 1 CMLR 57
25. BVerfG decision of 22 October 1986, *Re Wuensche Handelsgesellschaft*, [1987] 3 CMLR 225,265
26. C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*. Reference for a preliminary ruling: Supreme Court of the United Kingdom - United Kingdom.
27. *Conseil d'État, Nicolo*, 20 October 1989 (with conclusions Frydman), (1989) *Revue trimestrielle de droit europeen* 771, note by G Isaac.
28. *Cour de Cassation (Belgium)*, 27 May 1971, *S.A. Fromagerie franco-suisse "Le ski"* (1971) *RTD eur* 495.
29. *Cour de Cassation (France)*, Jacques Vabre, 23 May 1975 (with conclusions Touffait), (1975) *Revue trimestrielle de droit europeen* 336
30. *Duke v GEC Reliance* [1988] AC 618, 638:
31. *Factortame v Secretary of State for Transport (No. 2)* [1991] 1 AC 603, 658
32. *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540
33. *Shield v Coomes* [1979] 1 All ER 456, 461:

Articles

34. Alter, K. J. 'Delegation to International Courts and the Limits of Recontracting Power'. In *Delegation and Agency in International Organizations*, ed. D. Hawkins, D.A. Lake, D. Nielson and M. J. Tierney (Cambridge: Cambridge University Press, 2006)
35. Annual Report, 1997, The Court of Justice of the European Communities
36. Annual Report, 2012, The Court of Justice of the European Communities
37. Avbelj, M. 'Supremacy or Primacy of EU Law - (Why) Does it Matter?', *European Law Journal*, Vol. 17, Issue 6, pp. 744-763, 2011
38. Baquero Cruz, Julio (2006) "The Changing Constitutional Role of the European Court of Justice," *International Journal of Legal Information*: Vol. 34: Iss. 2, Article 7.
39. Beck, G. *The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor*, 30 *EUR. L. REV.* 42 (2005).
40. Being in charge is hard work, but it has its perks. (2013, November 23). *The Economist*.
41. Borzel, T. 'Non-compliance in the European Union: pathology or statistical artifact' (2001) 8(5) *Journal of European Public Policy* 803-853. ;
42. Burley A-M and Mattli W. 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organizations* 41.
43. Cannizzaro, E. *EU Law and National Constitution A Pluralist Constitution for a Pluralist Legal Order?*; available online at: <http://www.astrid-online.it/Riforma-de/Studi-e-ri/Archivio-2/CANNIZZARO.PDF>
44. Capotorti F. *Supranational Organizations*, *EPIL* 5 (1983), p. 262-269.
45. Coppel J. and O'Neill A. 'The European Court of Justice: taking rights seriously?' (1992) 29 *CML Rev* 669.
46. Craig, P. 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 *CMLRev* 395.
47. Craig, P. 'United Kingdom Sovereignty after Factortame' (1991) 11 *Yearbook of European Law* 221

48. Craig, P. Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law“ (1992) OJLS
49. De Hert, P. and Korenica, F. The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union’s Accession to the European Convention on Human Rights, *German Law Journal* [Vol.13 No.07, 2012]
50. Dehousse, F. Report on the Supremacy of EC Law over National Law of the Member States, *Eur Parl Doc* 43 (1965-66), [1965] JO (2923) 14.
51. Dicey, A.V. *Introduction to the Study of the Law of the Constitution* (1885)
52. European Court of Justice Eventually supreme? (2000, Mar 23). *The Economist*.
53. European Court of Justice, Biased referee? (2007, May 15). *The Economist*.
54. Garrett, G. ‘The Politics of Legal Integration in the European Union’ (1998) 49(1) *International Organization* 171-181
55. Garrett, G. and B. Weingast. ‘Ideas, Interests and Institutions: Constructing the EC’s internal Market’. In *Ideas and Foreign Policy*, ed. J. Goldstein and R. Keohane (Ithaca: Cornell University Press, 1993)
56. Ivor Jennings, W. *The Law and the Constitution* (London: University of London Press, 1st ed., 1933)
57. Jarašiūnas, E. Kelios mintys apie Lietuvos dalyvavimo tarptautiniuose santykiuose konstitucinius pagrindus [Some remarks about the constitutional basics of participation of the Republic of Lithuania in international relations]. In: *Teisė besikeičiančioje Europoje*. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2008
58. Keeling, D. T. ‘In Praise of Judicial Activism. But what does it mean? And has the European Court of Justice ever practiced it?’ *Scritti in Onore di Giuseppe Federico Mancini*, vol II (Milano, Dott. A. Giuffrè Editore, 1998.)
59. Kūris, E. Europos Sąjungos teisė Lietuvos Respublikos konstitucinio teismo jurisprudencijoje: sambūvio algoritmo paieškos [The EU Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania: Search for the algorithm of Coexistence]. In: *Teisė besikeičiančioje Europoje*. Mykolo Romerio universiteto Leidybos centras, 2008.
60. Kūris, E. Konstitucijos dvasia [The spirit of the Constitution]. *Jurisprudencija*, 2002, t. 30(22); p. 16–31
61. Kwiecien R., ‘The Primacy of European Union Law Over National Law Under the Constitutional Treaty’, in *German Law Journal*, 2005, 1479-1496;
62. Lenaerts, K. Exploring the Limits of the EU Charter of Fundamental Rights. *European Constitutional Law Review*, 8, (2012), pp 375-403.
63. Majone, G. ‘Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance’ (2001) 2 *European Union Politics* 103;
64. Majone, G. Europe's 'democratic deficit': The question of standards, *European law journal*, 1998
65. Mayr, S. Putting a Leash on the Court of Justice?, *European Journal of Legal Studies*, Volume 5, Issue 2 (Autumn/Winter 2012/13)
66. Pescatore, P. The Doctrine of ‘Direct effect’: An infant Disease of Community Law (1983) 8 *ELREV*
67. Ravluševičius, P. The Enforcement of the Primacy of the European Union Law: Legal Doctrine and Practice. *Jurisprudence*. 2011, 18(4)
68. Sandholtz, W. and Zysman, J. ‘1992: Recasting the European Bargain’ (1989) 42 *World Politics* 95
69. Shapiro, M. ‘Comparative Law and Comparative Politics’ (1980) 53 *Southern California Law Review* 537-542

70. Slaughter, A.-M. 'Towards a Theory of Effective Supranational Adjudication' (1997) 107(2) Yale Law Journal 273-291
71. Stein, E. 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1
72. Stone Sweet, A. 'The European Court of Justice and the judicialization of EU governance', Living Reviews in European Governance, Vol. 5, (2010), No. 2, p. 13-14
73. Vesterdorf, B. A Constitutional court for the EU?, Int J Constitutional Law 2006 4: 607-617.
74. Weiler J. H. H. The Transformation of Europe, The Yale Law Journal , Vol. 100, No. 8, Symposium: International Law Jun., 1991), pp. 2403-2483
75. Wessel, R. A. 'The International Legal Status of the EU' (1997) 2 Eur Foreign Affairs Rev 109

Books

76. Alter, K. J. Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe. Oxford: University Press, 2001
77. Alter, K. J. The European Court's political power: selected essays, Oxford: University Press, 2010
78. Cleas, M. and De Witte, B. 'Report on the Netherlands'. In The European Courts and National Courts, ed. A. –M. Slaughter, A. Stone Sweet and J. Weiler (Cambridge: Hart Publishing, 1998)
79. Craig, P. "Report on the United Kingdom", in: A.-M. Slaughter/A. Stone Sweet/J.H.H. Weiler (eds.): The European Court and National Courts - Doctrine and Jurisprudence Oxford: Hart Publishing, 1998
80. Craig, P. and de Burca, G. (eds), The Evolution of EU Law (Oxford University Press, 1999)
81. Craig, P. and de Burca, G. (eds), The Evolution of EU Law (Oxford University Press, 2011);
82. Craig, P. and de Burca, G. EU law: Texts, cases and materials, 5th ED (Oxford University Press 2011).
83. Cygan, A., (with Erika Szyszczak) Understanding EU law (London: Sweet and Maxwell, 2008, (2nd edition))
84. De Burca, G. and Weiler JHHH (eds), The European Court of Justice (OUP, 2001)
85. Dehouse, R. The European Court of Justice: The Politics of Judicial Integration (St Martin's, 1998);
86. Douglas-Scott, S. *Constitutional Law of the European Union* (Longman's 2002)
87. Hans Kelsen, Pure Theory of Law (University of California Press 1978)
88. Jacobs, F. G. Is the Court of Justice of the European Communities a Constitutional Court?, in Constitutional adjudication in European Community and national law: essays for the Hon. Mr. Justice T. F. O'Higgins (Butterworths 1992);
89. Kelsen, H. Pure Theory of Law (University of California Press 1978)
90. Kilroy, B. 'Member State Control or Judicial Independence: The Integrative Role of the Court of Justice', 1995,
91. Kilroy, B. 'Integration through Law: ECJ and Governments in the EU'. Dissertation in Political Science, Department of Political Science, UCLA, Los Angeles, 1999
92. McCown, M. Judicial Law-Making and European integration: The European Court of Justice. In European Union: Power and Policy Making, edited by Jeremy John Richardson. London: Routledge. 2005.
93. Poiras Maduro, M. and Azoulai, L. (eds.), The past and future of EU law : the classics of EU law revisited on the 50th anniversary of the Rome Treaty. Oxford ; Portland (Or.) : Hart Publishing, 2010

94. Pollack, M. *The Engines of Integration: Delegation, Agency, and Agency Setting in the European Union* (Oxford: Oxford University Press, 2003)
95. Robin C A White, 'The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?' in A Arnall, P Eeckhout and T Tridimas, *Continuity and Change in EU Law. Essays in honour of Sir Francis Jacobs*, (Oxford: Oxford University Press. 2008.)
96. Rosas, A. Levits, E. & Bot, Y. (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*. Springer, 2013
97. Shaw M. N. *International Law*. Cambridge University Press, 2008
98. Stone Sweet, A. *The Judicial Construction of Europe* (Oxford University Press, 2004)
99. Tallberg, J. *European Governance and Supranational Institutions: Making States Comply* (London: Routledge, 2003),
100. Vauchez, A. 'Integration through law: Socio-History of EU Political Common Sense'. In *European University Institute (EUI), Robert Schuman Centre of Advanced Studies Working Paper*. Fiesole 2008.
101. Vėgėlė I. *Europos Sąjungos teisė. Vidaus rinkos laisvės, konkurencija ir teisės derinimas*. Vilnius, 2011.

Internet sources:

102. Official Site of Lithuanian Radio and Television [accessed 19-21-2013].
<http://www.lrt.lt/naujienos/ekonomika/4/29475/seime_sklando_ideja_apriboti_konstitucinio_t_eismo_galias>.
103. Official Site of Human Rights Watch [accessed 19-21-2013].<<http://www.hrw.org/news/2013/09/18/hungary-constitutional-change-falls-short>>
104. Official Site of CVCE, an interdisciplinary research and documentation centre [accessed 19-21-2013].<<http://www.cvce.eu/viewer/-/content/3940ef1d-7c10-4d0f-97fc-0cf1e86a32d4/en>>.
105. Official Site of the European Union [accessed 19-21-2013].<http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm>.
106. Hilf, M. *Costa v. ENEL Case* [interactive]. Max Planck Encyclopedia of Public International Law [accessed 18-12-2013]. <www.mpepil.com>.
107. Guy Verhofstadt speech on 'The future of the European Union' in the plenary session of the European Parliament (2013) [accessed 19-21-2013].
<https://www.youtube.com/watch?v=LIXbz_s2W90>.

Sidasas. I. Powers of the Court of Justice of the European Union: the rise of influence / Master thesis in European Union Governance. Supervisor: Prof. dr. I. Vėgėlė. – Vilnius: Faculty of Law, Mykolas Romeris University, 2013. – 67 p.

SUMMARY

Master thesis focuses on the genesis of the European Union Court of Justice (CJEU) and its influence on the evolution of European Union (EU) law. Much attention is given to relation of the CJEU and other outside actors which influence the effective implementation of the CJEU's decisions. Two main **problem questions** are distinguished. What is the relation between the CJEU, the EU institutions, the EU Member States, and outside actors, is it properly expressed in the Treaties and the CJEU doctrine? And, what aims does the CJEU seek to achieve in its decisions, is there a dominant meta-objective that the Court follows? **Hypothesis** – the CJEU is the main driving force of the European integration project and the Court slowly but steadily promotes increasing powers of the European Union, at times even against the wishes of the Member States - and that all this can be explained by the *core principle* enshrined in the Treaties which determines such actions of the Court. First chapter of the master thesis shows how the role of the Court is affected by the evolution of EU itself. Then the Court's actions in its first key cases that established principles of *direct effect* and *primacy* are analysed. Significance of the Euro-Law Advocacy Movements that allowed the Court to both gain access to relevant cases and later enforcing the decisions is observed. Research shows how the CJEU gradually changed the concept of EU law progressively bringing it closer to system of constitutional-like law. Second chapter focuses on legal scholarship on the CJEU's relation with other actors. Theory of *trusteeship* is used to show how the CJEU's powers derive from 'the Peoples of Europe'. List of conditions on when the Court has power to influence the genesis of the EU legal system using a *spillover* effect is given. The CJEU's dialogue with national courts of the Member States and the European Court of Human Rights (ECtHR) is analysed. Bilateral influence is noted from this case law examination. Key requirements of the German Constitutional Court and the ECtHR for the CJEU are derived. Third chapter concludes the research by proposing the *principle of 'an ever closer union'* as a next step in evolution of EU law. Such principle would help explaining the CJEU actions to this date, thus proving the hypothesis. It would as well be a strong argument for the dialogue of CJEU with national and international courts and help to offer more effective protection of fundamental rights of 'the Peoples of Europe'. This principle would incorporate the meta-objective of the CJEU's actions, *to attain the best effectively achievable quality of integration in Europe at the time.*

Sidas I. Europos Sąjungos Teisingumo Teismas: įtakos didėjimas / Europos Sąjungos teisės ir valdymo magistro baigiamasis darbas. Vadovas Prof. dr. I. Vėgėlė. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2013. – 67 p.

SANTRAUKA

Magistro baigiamajame darbe analizuojama Europos Sąjungos Teisingumo Teismo (ESTT) raida ir ESTT įtaka Europos Sąjungos (ES) teisės vystymuisi. Daug dėmesio skiriama ESTT ir išorės veiksnių santykiui efektyviai įgyvendinant Teismo sprendimus. Išskiriami du pagrindiniai **probleminiai klausimai**: 1) Ar esamas santykis tarp ESTT, ES valstybių narių, ES institucijų ir kitų išorės veiksnių yra tinkamai išreikštas ES teisės aktuose ir ESTT doktrinoje?; 2) Kokio visaapimančio tikslo siekia ESTT? Darbo **hipotezė**: ESTT yra viena iš pagrindinių ES integraciją skatinačių jėgų; ESTT savo sprendimuose remiasi ES Steigimo Sutartyse užkoduotu *pamatiniu principu*. Darbą sudaro trys skyriai. Pirmajame skyriuje parodoma kaip kito ESTT vaidmuo didėjant ES kompetencijoms ir keičiantis Sąjungos tikslams. Analizuojamos istorinės ESTT bylos, kuriose pirmą kartą įtvirtinti tiesioginio veikimo ir ES teisės viršenybės principai. Pabrėžiamas Europinių-teisinių judėjimų indėlis padėjęs šioms byloms patekti į ESTT ir po to plačiai įtvirtinti šiuos precedentus. Tyrime parodoma kaip ESTT palaipsniui keitė ES teisės sampratą nuo tradicinės tarptautinių organizacijų teisės link konstitucinės teisės. Antrajame skyriuje aptariame įvairių teisės mokslo srovių darbus, kuriuose nagrinėjamas ESTT ir išorės veiksnių santykis. Naudojantis „globos“ teorija atskleidžiamas santykis tarp ES valstybių narių ir ESTT bei išvedamas pamatinis ESTT galių šaltinis iš siekio ginti „Europos piliečius“. Pateikiama analizė situacijų, kuriose ESTT veiksmai sukelia „šalutinį rezultatą“, t.y. iš esmės keičia egzistuojančią ES teisę. Analizuojamas ESTT ir ES valstybių narių teismų, bei EŽTT dialogas. Išanalizavus šį santykį nustatytas abipusės įtakos tarp šių teismų egzistavimas. Išskirti pagrindiniai Vokietijos Federalinio Konstitucinio Teismo ir EŽTT reikalavimai ES teisei. Trečiajame skyriuje apibendrinama ES teisės genezės analizė, pasiūlomas pagrindas naujam *ES integracijos principui*. Tokio principo egzistavimas patvirtina baigiamojo darbo hipotezę, kad ESTT veiksmai remiasi sutartyse užkoduotu integraciją skatinančiu pamatiniu principu. Šis principas kildinamas iš visaapimančio Sutarčių tikslo – pasiekti didžiausią tuo metu įmanomą integracijos kokybę Europoje. Tokio principo iškėlimas ESTT praktikoje padėtų pasistūmėti ESTT ir nacionalinių teismų bei EŽTT dialogui, sustiprinti „Europos piliečių“ pagrindinių teisių teisminę apsaugą. Šio principo atsiradimas įmanomas taikant darbe aptartą „šalutinio efekto“ schemą.