

Chapter 9 Fundamental rights in the EU

Context for this chapter

'Under the Lisbon Treaty, the court has taken on the ability to vindicate people's rights under the 55-clause "Charter of Fundamental Human Rights", including such peculiar entitlements as the right to found a school, or the right to "pursue a freely chosen occupation" anywhere in the EU, or the right to start a business.

These are not fundamental rights as we normally understand them, and the mind boggles as to how they will be enforced. Tony Blair told us he had an opt-out from this charter. Alas, that opt-out has not proved legally durable, and there are real fears among British jurists about the activism of the court.'

Boris Johnson, 'There is only one way to get the change we want: Vote to leave the EU'
(*Telegraph*, 21 February 2016)

<http://web.archive.org/web/20160222022356/http://www.telegraph.co.uk/news/newsttopics/eureferendum/12167643/Boris-Johnson-there-is-only-one-way-to-get-the-change-we-want-vote-to-leave-the-EU.html>

Discussing the quote

Discuss the CJEU's approach to EU fundamental rights in light of the quote.

Approaching the question: taking a position

The Boris Johnson quote, when read in light of the instructions given, argues that the CJEU's approach to fundamental rights is an 'activist' one. He worries about this activism in light of the adoption of the Charter, so it is important you address what (if anything) changed when the Charter was adopted. The instructions ask you to comment on the CJEU's approach more generally. In other words, do you think that the CJEU has been activist in how it has developed fundamental rights in the EU (both before the Charter was adopted, and since), and has this resulted in the EU having 'peculiar' human rights?

Once you have taken a clear **position** on that question, you can (as you did in Chapters 1, 2, 4, and 6) use Chapter 9 to compile **evidence** to build the **arguments** that support your **position**. It is not a question to which there is a clear 'correct' answer; rather, the question can be answered in any number of ways, disagreeing or agreeing with the quote either *in full* or *in part*. As such, you may think the CJEU *has* been activist, but that this has not resulted in the EU having a set of 'peculiar' fundamental rights. Or you may think that the CJEU *used* to be activist but is not anymore, and the 'peculiar' fundamental rights have not come from its case law. Or you may think it has never been particularly activist, but the EU nonetheless has a few 'peculiar' human rights!

The one thing that we wish to avoid is that you engage in what we call **sitting on the fence**: rather than adopting a position, you try to write an answer that basically just

describes how some CJEU case law suggests activism on the part of the Court, and other aspects of its case law suggest restraint, so in conclusion, in some ways the CJEU has been activist on fundamental rights and in some other ways it has not. This kind of answer, which fails to develop a clear **argument**, usually will fall into the trap of being very descriptive. It is likely to result in just a list of CJEU case law (i.e. the evidence), without actually using those qualities to tackle the question and to present a clear **position**.

Examples of possible positions you could take include, but are not limited to:

Agreeing with the statement: *‘The CJEU continues to significantly develop the EU’s fundamental rights. Attempts to stop it, by codifying the existing rights in the Charter of Fundamental Rights, have proven ineffective: the CJEU remains worryingly activist on the EU’s human rights dimension.’*

Disagreeing with the statement: *‘While the CJEU initially demonstrated activism in ‘finding’ fundamental rights, it has respected their codification in the Charter and is no longer trying to enhance EU competences in human rights law—it merely wishes to ensure that EU law complies with human rights law.’*

Mostly agreeing with the statement: *‘While there have been differing levels of CJEU ‘activism’ in developing EU fundamental rights, the CJEU has demonstrated that it will not hesitate to expand their reach if it feels that this is necessary. That said, it hasn’t done this as often as the Boris Johnson quote implies, and so concerns may be overstated.’*

Mostly disagreeing with the statement: *‘Inventing’ EU fundamental rights was obviously a form of activism, but this CJEU activism has by and large been conservative in nature: it has not plucked new EU rights from thin air, but rather has wrapped the Member States’ human rights regime around the EU institutions. This is a welcome development, which the CJEU has only rarely gone beyond.’*

Building your argument: evidence

In an exam question, or even in a piece of coursework, you cannot cover *every aspect* of how the CJEU has developed fundamental rights. Part of writing university-level essays is making smart decisions on what to include and what not to include in your response.

A first step is determining what, specifically, the question *needs* you to discuss. What are the **key issues** that arise in the quote that you must engage with to actually answer the question?

In this specific quote, there are several **key issues** that must be addressed to answer the question:

- 1) Has the EU’s development of fundamental rights produced ‘normal’ fundamental rights or ‘peculiar ones’, as the quote implies? (*Consider here how EU fundamental rights relate to the ECHR!*)
- 2) Has the CJEU always been the *same level* of activist in developing fundamental rights? (*Consider here the pre-Charter era, as well as the post-Charter era.*)

The quote contains a lot of further information that does not need to be addressed in order to tackle Boris Johnson's overall argument that worrying about the CJEU's activism on fundamental rights is appropriate. The mention of the 'opt-out' from the Social Chapter is a red herring of sorts, as it does not relate to the CJEU's enforcement of fundamental rights. The broader question of how fundamental rights are to be *enforced* is also not something that you need to tackle to respond to the set question. Careful reading of both the quote *and* the instructions is important—we will always set questions that *can* be answered in the set number of words/pages or in the number of minutes you have for an exam!

Now that you know what key issues you need to discuss, you can start thinking about what the best **evidence** is for your position. This will depend on your position. If you agree with the quote, you will need to demonstrate that the CJEU has been both activist in developing fundamental rights—and that the rights it has produced are 'peculiar', rather than mere reflections of existing human rights norms. The Chapter discusses the CJEU's case law in pre- and post-Charter stages—so you may find it helpful to consider its activism in 'stages'. And do any rights stand out as being particularly strange, or as rights that are applied by the CJEU in particularly 'activist' or 'peculiar' ways?

This will feel frustrating, but there is no *right or wrong* answer to what works as the 'best evidence'. It is a matter of you thinking about which material covered in Chapter 9 stood out to you the most..

For those of you who instinctively disagree with the quote, you will largely be looking at the same issues. You might look for *different* cases, though, and perhaps involve the connection between the EU's fundamental rights regime and the ECHR in more detail, so as to demonstrate that the majority of the CJEU's case law merely echoes existing rights.

Following the '**Discussing the quote**' boxes throughout the chapter will mean you have already reflected on the following potential issues to raise as evidence:

- The content of the Charter of Fundamental Rights, and how 'vague' some of the rights are—and whether their potential reach is appropriately restricted by Chapter 7's limitations of where its fundamental rights will apply.
- *Viking*, *Laval*, and *NS*, and what they suggest about the CJEU's activism on fundamental rights.
- Whether the Charter *specifically* enables the CJEU to expand the reach of fundamental rights, or whether this is a consequence of the general principles and how they function.

For the purposes of making your approach workable, the emphasis here is on selecting your **best** evidence. As mentioned, you cannot possibly discuss everything! So perhaps pick around 3 pieces of evidence that best support your position, and get ready to discuss them in detail before concluding that *you* are correct.

Dealing with counterarguments

In building an **argument**, it is important that you are consistent in arguing for the **position** you start your essay with. If you are not, you risk falling into the '**fence-sitting**' trap, whereby you describe a number of different views but do not clearly argue in favour of one.

That said, you cannot ignore the arguments that you disagree with! Doing so would make you far less persuasive to anyone that you are arguing with (including your future markers). For example, ignoring that the Treaties did not contain anything on human rights when originally drafted is *not* the way to argue that the CJEU is not particularly activist on fundamental rights. Anyone reading your argument would be thinking, ‘But what about...?’. And at that point, you are failing to convince the reader that your **position** is the correct one.

In other words, you must address counterarguments and explain *why* you think they are less persuasive. So, once again, considering the CJEU’s ‘discovery’ of fundamental rights—in the absence of the Treaty mentioning them—you might think this a necessary development and one whose effects (in light of the German *Solange* conflict discussed in Chapter 6) have been overstated. The CJEU filled a gap in the Treaties, but is not significantly activist in *how* it filled that gap.

This is far more difficult for any reader to disagree with: you have not ignored evidence that is inconvenient for your **position**; instead you have made it clear why that evidence does not *change* your **position**. This is the most effective way to tackle arguments that you disagree with, and you should find some room to do this in your response.

Again, in terms of identifying possible counterarguments to your position, having another look at the material you prepared for the ‘**Discussing the quote**’ boxes should help you identify some of the key developments in the EU’s fundamental rights development, and how the CJEU approached these developments.

Answer the question!

As a final and general note on essay-writing at university, it is imperative that you *conclude* your argumentation by ending on your **position** again. Be sure to explain how what you are discussing *proves* your **position**, and conclude with a firm statement of the position that you have by now proven to be correct. You can follow this up with a short summary of the **evidence** you have discussed, but in general, you need to ensure that the reader comes away from your essay with a clear understanding of your position on the quote.