

Weekly overview

Courts, power and politics: Europe in context

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Class structure

We will divide our time between lectures, student activities and group discussions. Student presentations will revolve around two topics: courts in the news and their own exam portfolio. With the exception of the first and last week, we will stay on a single topic for two weeks. The first week, we explore the readings through a more lecture-based session. The second week, we rely on student input.

Lecture weeks: the lectures will offer a run-through of the readings and the main questions that they reveal. We will run lectures at a bi-weekly rate, with student presentation of courts in the news with a personal analysis as a teaser.

Seminar weeks will primarily revolve around student's portfolio. Each student has the opportunity to present their draft portfolio

Time and place

Time: Thursdays, 15h-17h

Place: CSS 2-0-18 (except on the 27/11, CSS 1.1.18)

Overview

week	date	topic
1 (36)	04/09; CSS 2-0-18	Are courts political?

Individual behavior:

week	date	topic
2 (37)	11/09; CSS 2-0-18	Attitudinal framework: preferences and outcomes
3 (38)	18/09; CSS 2-0-18	
4 (39)	25/09; CSS 2-0-18	Judicial selection and career incentives
5 (40)	02/10; CSS 2-0-18	
6 (41)	09/10; CSS 2-0-18	Internal checks and balances: judicial bargaining
		<i>Fall break</i>
7 (43)	23/10; CSS 2-0-18	
		Court behavior and external actors:
8 (44)	30/10; CSS 2-0-18	External checks and balances 1: Legislative - judicial relationship
9 (45)	06/11; CSS 2-0-18	
10 (46)	13/11; CSS 2-0-18	External checks and balances 2: Executive - judicial relationship and public opinion
11 (47)	20/11; CSS 2-0-18	
12 (48)	27/11; CSS 1.1.18	<i>Practitioner's visit:</i> Henrik Saugmangaard Øe - former Advocate General (CJEU)
13 (49)	04/12; CSS 2-0-18	Legitimacy and authority - public opinion
14 (50)	11/12; CSS 2-0-18	

Weekly reading lists

Week 1 : Are Courts political?

To what extent can we think of courts as political actors? A court can be political in many ways: High courts – constitutional courts, supreme courts and international courts – not only adjudicate on issues relating to a polity's political life (i), their rulings also have political

consequences (ii). They grapple with the demands and resistance from political actors (iii), and we should also recognize that the judges may themselves hold an ideology or follow a specific agenda (iv).

This semester, we will be looking at elements ii-iv drawing on examples from different courts. That is, if rulings have political consequences, then we should care about how judges' political preferences are shaped, how they are expressed and what checks and balances we have on them.

Readings

- National Public Radio (2016) *More Perfect* podcast episode [“The Political Thicket”](#) provides a lively presentation of the political role of judges. The episode illustrates the most obvious scenario when supreme courts end up in a political role: When they adjudicate on elections and the distribution of powers in a polity (i).
- Voeten (2024) provides an example of when court rulings have political consequences (ii). In fact, they are siezed by political activists for precisely that reason; to provoke political change.
- Ferejohn, Rosenbluth, and Shipan (2009) provide an overview over judicial politics: the definition of judicial review, the difference between judicial power and independence, the value of independent courts and the place of courts in the separation of powers.
- Hirschl (2011) presents the idea of a global trend towards the “judicialization of politics”. The “judicialization of politics” refers to the increasing role of courts and judges in resolving issues that were traditionally handled by elected political bodies, such as policymaking, rights disputes, or governance questions. It reflects a shift in authority where policies are often framed as obligations, rights and protections that courts are tasked to enforce. However, it goes further than that, legal reasoning and judicial institutions end up shaping political outcomes, often by filling gaps left by political gridlock or strategic delegation.

Week 2-3: Judicial behavior: preferences and outcomes

Judges are human too. They bring with them experiences, competences and attitudes that influence how they decide cases. This is true for all courts, regardless of the direction of their bias and whether they operate in a democracy or an autocracy.

It is hard to know what the true merits of a case is (who should win), so when quantitative researchers study the effect of judges' characteristics on court outcomes, they work with the assumption that cases are randomly assigned with respect to their merits. I.e. the distribution of merits is the same for all cases studied. If outcomes vary systematically according to the judges on the case, they conclude that this bias is due to the judges and not to the fit between case facts and the law.

This session also introduces three of the core positive theoretical approaches to judicial behavior: the legal, attitudinal and strategic approaches.

Theoretical framework: the attitudinal approach; legal realism.

Readings

- Posner (2010) : presents a set of theories of judicial behavior. Pay particular attention to the “legal”, “attitudinal” and “strategic” approaches to judicial behavior (theory).
- Geerling et al. (2018) : effect of Nazi ideology on capital punishments in the Third Reich (Germany)
- Kern and Vanberg (2024) : effect of judges’ own NS ties on conviction rates in potential Nazi crimes (Germany)
- Garoupa, Gómez-Pomar, and Segura (2022) : effect of Supreme Court judges’ party affiliation on outcomes in labor law cases (Spain)
- Brace and Boyea (2008) : public opinion has direct and indirect effects on state supreme court judges’ vote to uphold a death penalty. This reading mixes strategic and attitudinal explanations for judicial behavior (US).

Seminar week

Student presentations:

- topic presentation and discussion
- long-format essay

Week 4-5: Judicial selection and career incentives

If the identity of judges matters for case outcomes, we should ask how we select them. Now, we need to balance several concerns.

On the one hand, we may be concerned with representation. Should we simply admit that judges are political actors and therefore go for a method of political selection in order to at least ensure representation? Or should we delegate their selection to an independent, non-political body. If so, to what extent do we have any guarantees that the group of judges will not have a bias?

On the other hand, we also want judges to be independent. How can we keep the prerogative of replacing judges (for representative purposes, for example), while still making sure they are not motivated by career incentives?

Theoretical framework: the strategic approach; theories of political agency.

Readings

- Ashworth (2012) : Provides an overview of theories of democratic accountability. He uses the same framework for predicting the political behavior of elected politicians and judges, but the normative implications differ (theory).
- Stiansen (2022) : effect of political accountability on judicial outcomes. Judges at the European Court of Human Rights (ECtHR) are politically appointed. When the ECtHR moved from transparent voting in combination with renewable terms to a single non-renewable term, judges' voting decisions changed (ECtHR, Europe).
- Hermansen and Naurin (2025) : Judges at the Court of Justice of the European Union are also politically appointed. They also sit on renewable terms, but voting is secret to protect their independence. The authors argue that while selection based on preferences is important, governments may accept a policy drift in order to retain influence (CJEU, Europe).
- Cheruvu (2024) : provides evidence of ideological congruence between the judges appointing governments, the lead judges on a case and case outcomes. However, he does not find evidence of pandering to new governmental majorities (CJEU, Europe).
- Podcast (n.d.) *Not another politics podcast* episode on “[Should judges be elected or appointed](#)”? provides an example of academics discussing the pros and cons of electing judges. (US)
- Podcast (n.d.) *Not another politics podcast* episode on “[Should the US Supreme Court have term limits](#)”? provides an example of academics discussing the need for representation as well as our preception of courts as apolitical. (US)

Seminar week

Student presentations:

- topic presentation and discussion
- long-format essay

Week 6-7: Internal checks and balances

How do judges bargain between each other when confronted with a case? Because each judge has their own individual biases, they rarely make decisions on their own. Most higher courts are “collegial”; with checks and balances built into the decision making. There is also a formal and informal internal hierarchy that judges belong to. Some judges wield more influence than others, and some systems implies a transfer of authority in the monitoring of judges from external political actors to internal judicial actors. This becomes part of an intricate power-balance between different judges.

Older theories have relied on the voting rule on collegial courts – simple majority – to infer that decisions reflect the median justice’s preferences (“median theories”). However, courts

often delegate the task of preparing and/or writing the final judgment to a single judge. Other scholars have therefore argued that the agenda setter has a disproportional influence on case outcomes (“author theories”). Finally, the “case-space model” assumes that judges care both about the quality for the legal argument and the outcome of the case and bargain over both at the same time. This implies that the case outcome – as well as delegation decisions – reflect the relative power of a host of different court members. Lastly, the degree of disagreement does not only hinge on the ideological differences between the judges, but also the agenda of the court: disagreement naturally increases if the courts case load consists in divisive cases.

This session considers the internal bargaining dynamics between judges on the court. Underlying several of these debates is the question: Does disagreement increase or decrease the quality of the court’s output?

Theoretical framework: the internal strategic approach, and more specifically the case-space model.

Readings

- Epstein and Knight (1997) chapter 3 provides an account of justices’ bargaining on the USSC. It illustrates the different types of exchanges that judges have and how they relate to each other (USSC, US)
- Lax (2011) presents the case-space model assuming that judges care about the law, the quality of the ruling as well as the case outcome. It provides a theory of how delegation decisions and bargaining happens on the bench (theory).
- Hermansen and Voeten (2024) adapt and apply the case-space model to decisions of the CJEU. They find an effect of ideology, but use it to distinguish the effect of simple majority voting, agendasetting and other judges’ workload (CJEU, EU).
- Frankenreiter (2018) introduces the concept of informal judicial hierarchies (CJEU, EU).
- Bentsen (2018) illustrates the importance of judicial agenda setting through docket control for how courts allocate their time. Courts will often prioritize what they consider important cases – and thus potentially divisive cases – which would increase the rate of dissent. He discusses different explanations for why rates of dissent may differ, then test in on the Norwegian Supreme Court (Norway).
- Borderlines (2024) : *Borderlines* podcast episode with [Koen Lenaerts](#), the President of the CJEU. Illustrates several of the thematics in this and the previous topic: judges’ appointments, judicial independence, case management and dissents (CJEU, EU).
- Saurugger and Terpan (2017a) (chapter 3). Overview of how the CJEU makes its decisions. Support reading if you feel you need more information on how the CJEU is organized. (CJEU, EU)

Seminar week

Student presentations:

- topic presentation and discussion
- long-format essay

Week 8-9: External checks and balances 1: Legislative - judicial relationship

A first set of checks we have on judges' decision making is the separation of powers framework (SOP theories). The court is held in check by the political branch and vice versa. We begin by considering the relationship between higher courts and the legislator.

"In politics none has the last word" (Ferejohn and Weingast, 1992). Courts are part of a policy-making cycle, where judges interpret the law and sometimes strike down policies, but where the legislator may also rewrite it if they dislike the court's case law. Each of them anticipates and adjust the other's actions in interesting ways.

Theoretical framework: the external strategic approach/separation-of-powers theories, and more specifically the behavioral effects of threats of legislative or judicial override.

Readings

- Vanberg (2015) presents an overview of why politicians would want constitutional review and the different approaches to how other branches of government relate to the court, and vice-versa (theory).
- Ferejohn, Rosenbluth, and Shipan (2009) repetition reading with focus on sections 3.2 and 5, courts' independence from the legislative branch.
- Carrubba, Gabel, and Hankla (2008) show how the CJEU alters its decisions as a function of the political signals sent from EU member states (national executive/EU legislator in the Council) (CJEU, EU)
- Martinsen (2015) illustrates how the legislators learn from the Court of Justice's case law to later codify it in EU law (CJEU, EU).
- Podcast (n.d.) *Not another politics podcast* episode "[Reigning in the Supreme Court](#)" provides a discussion of Tom Clark's (2009) paper on how the US Supreme Court uses the legislators as weather balloons for public opinion support. It also reviews different court-curbing techniques. (US)
- Saurugger and Terpan (2017b) (chapter 4). Overview of the CJEU's different procedures and role in the EU political system. Support reading if you need more information. (CJEU, EU)

Seminar week

Student presentations:

- topic presentation and discussion
- long-format essay

10-11: External checks and balances 2: Executive - judicial relationship

A second check on courts' power comes from government. Governments are in charge of implementing the courts' decision, but the judiciary has no formal means to enforce its rulings. This can lead to rather timid court outcomes. However, courts are not without alliance partners. In democracies, judges may sometimes count on public opinion to threaten politicians with an electoral backlash unless they comply. This week, we consider the “menage à trois” between courts, governments and public opinion.

Theoretical framework: external strategic approach/separation-of-powers approach, and more specifically the behavioral effects of threats of non-compliance.

Readings

- Glick (2009) provides a qualitative study of the USSC's conditional strategic retreat in face of executive threats of non-compliance. He theorizes that such retreats are likely when 3 conditions are satisfied (US)
- Vanberg (2005) (ch 2, 4 and 5) provides a theory where public opinion sometimes acts as a partner for courts in challenging the political branch. The chapters present the theory (ch 2), a quantitative test (ch 4) and a qualitative test (ch 5) of the argument (Germany)
- Krehbiel and Cheruvu (2021) domestic courts refer to the ECJ when public opinion is favorable to the ECJ and the risk of non-compliance is high (CJEU, EU)
- Pavone and Stiansen (2022) argue that sometimes the mere prospect of judicial review prompts governments to make preemptive reforms to avoid litigation (EFTA Court, Norway)
- Stiansen (2021) argues that precise remedial indications (concrete prescriptions of government action) increases compliance with ECtHR rulings because it allows pro-compliance domestic actors to monitor implementation. This reading bridges with our last topic on the relationship between courts and the public. (ECtHR, Europe)

Seminar week

Student presentations:

- topic presentation and discussion
- long-format essay

Week 12: Practitioner's visit – Henrik Saugmansgaard Øe, former AG at the CJEU

Joint lecture with the EU specialization (separate room, CSS 1.1.18)

Reading

- Saurugger and Terpan (2017a) (chapter 3). Overview of how the CJEU makes its decisions. Repetition (CJEU, EU)
- Saurugger and Terpan (2017b) (chapter 4). Overview of the CJEU's different procedures and role in the EU political system. (CJEU, EU)

Week 13-14: Legitimacy and authority - public opinion

If courts can team up with public opinion to compel governments to comply, a relevant question is *how does the public opinion assess court decisions? And what can courts do to appeal to the public?* This topic surveys different types of sociological legitimacy – diffuse and concrete public support – that courts may enjoy, and how this support is built.

Public support for rulings has two sources: Citizens may support the outcome of a case (concrete support/ideological congruence) or the authority of the court to rule on an issue (diffuse support). How is diffuse support built? And which one prevails when the two are in conflict?

International courts are particularly interesting in this respect, because they are usually less known by the public and therefore need to cultivate support.

Theoretical framework origins and effects of sociological legitimacy, and the tension between diffuse and concrete support for court rulings.

Readings

- Bartels and Johnston (2013) argue that ideological disagreement reduces the public's support for the USSC. (USSC, US)
- Gibson and Nelson (2015) rebuts this statement by arguing that ideological disagreement is a minor element in the legitimacy capital (diffuse support) that courts draw from. (US)

- Christenson and Glick (2015) balance the two views by arguing that citizens update their belief about the USSC incrementally by factoring in their ideological support for specific Court rulings. (USSC, US)
- Madsen et al. (2021) study support for potential ECtHR and CJEU rulings and find that the public is more concerned with the content of the ruling (ideological congruence) than the level of government (national or international court) at which a decision is made (ECtHR and CJEU, Europe)
- Helfer and Alter (2013) argue that the fate of international courts largely depends on their ability to tap into a compliance constituency/public support for their existence (Europe, Africa, Americas)
- Hermansen, Pavone, Boulaziz study the CJEU's use of individual rights protections to build legitimacy (CJEU, EU)

Seminar week and recap

First hour: Seminar week with presentations

Last hour: Group recap and student evaluations

Bibliography

You can access all readings through the links provided in the following reading list as long as you are logged onto the KU network. Alternatively, you can access through the Royal Library/Black Diamond: <https://www.kb.dk/en/visit-us/black-diamond-copenhagen>.

Readings that are not accessible online are on Absalon.

Podcast episodes are available in your browser on the respective podcast websites, as well as on Spotify/Apple podcast.

- Ashworth, Scott. 2012. "Electoral Accountability: Recent Theoretical and Empirical Work." *Annual Review of Political Science* 15 (1): 183–201. <https://doi.org/10.1146/annurev-polisci-031710-103823>.
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