

Important challenges in European governance: Judicialization of Europe

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Abstract

This course will engage with challenges arising from the judicialization of politics in Europe. Charges of a “democratic deficit” are frequently raised, both regarding decision-making at the European Union level, but also regarding national political processes. In the intersection between these tensions sits the Court of Justice of the European Union, playing an increasingly politicized role as the Union’s central arbitrator as well as the peak court of the evolving European judicial system.

Contact

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Time and place

Lectures take place **15:00–17:00** in room **CSS 2-0-30**.

Class activities

Classes will be structured around student presentations, lectures and discussions. On each topic, the readings present a theoretical overview and/or a classical study in the field before they exemplify with empirical applications on the EU. Students are expected to familiarize with the assigned literature before each class and be able to ask questions and meaningfully engage with their peers in class discussions.

Each class starts with a 10 minute student presentation that recapitulates the main takeaways from the previous week. Presentations are done in groups, and therefore allow students to prepare a topic in a similar format as the synopsis for the exam in collaboration with peers. We then move on to the week's lecture and class discussion.

Course description

This course will engage with challenges arising from the judicialization of politics in Europe. Charges of a “democratic deficit” are frequently raised, both regarding decision-making at the European Union level, but also regarding national political processes. In the intersection between these tensions sits the Court of Justice of the European Union, playing an increasingly politicized role as the Union's central arbitrator as well as the peak court of the evolving European judicial system.

The Court of Justice of the European Union, established already with the foundation of the European Coal and Steel Community, has been an increasingly central arbitrator in the decades that have followed. Playing this role the Court has not only shaped the European Union as we know it, through the formulation of defining doctrines of European Union law; it has also fundamentally changed the legal system of European member states, both challenging the national constitutional order and working alongside national judges in a shift towards a European one. In this course, we examine how

the judicialization of politics has redefined Europe, and the central challenges that arises from this transformation.

Examination: Oral/synopsis exam

Students will be asked to make an individual oral presentation based on a written paper (synopsis) of *max 7200 characters*. Although the presentation will be individual, you may write the synopsis alone or in groups of up to three people.

The presentation of the synopsis will be followed by a broader discussion of the entire syllabus of the course, as you are to be graded on the contents of the entire course as such. You will not be graded on the basis of the written synopsis: Grading is made *solely based on the oral performance*.

Students may bring an outline consisting of maximum 100 keywords to the oral exam. You *may not* add further comments to the synopsis or to your keyword sheet.

Exams are to be held individually, and no other students are to be present during your presentations.

Learning outcome

Knowledge

- Knowledge of the aspects that make the Court of Justice of the European Union into a political actor and how to situate it in a comparative context.
- Understanding of the role of the Court of Justice of the European Union in the process of European integration.
- Overview over the theoretical approaches that are commonly used to analyze judicial behavior – the legal, attitudinal and strategic approaches – and how they may apply to the CJEU.

- Theoretical and empirical knowledge of how actors may shape the Court's policies: the political branch, lower courts, the public and litigants.
- Overview of the challenges facing the Court of Justice of the European Union.

Skills

- Ability to identify and discuss elements that constrain or enable judicial policy making in the EU.
- Apply different theories of judicial behavior in a critical discussion of the relationships between actors within the Court and between the Court and its external interlocutors.
- Give an account of the main academic debates pertaining to different aspects of judicial policy making in the EU.

Competences

- Independent reflection on judicialization of European politics based on the academic literature
- Critical analysis of the scope, nature and/or effect of the role of the Court of Justice in European integration.

Seminars

Judicialization of European politics

1: What is judicialization? – Brekke

September 5, 2024

- Hirschl (2008) “The Judicialization of Politics”
- Ferejohn (2002) “Judicializing Politics, Politicizing Law”
- Krenn (2022) *The Procedural and Organisational Law of the European Court of Justice*, chapter 2: “What Courts Do”

Politics within the Court

2: The CJEU as a political actor and approaches to judicial behavior – Hermansen

September 12, 2024

- Hix and Høyland (2022) *The Political System of the European Union* chapter 4
- Posner (2010) “Nine Theories of Judicial Behavior”
- Segal (2008) “Judicial Behavior”

3: Trapped in ideology? Judicial attitudes and decisions – Hermansen

September 19, 2024

- Caporaso and Tarrow (2009) “Polanyi in Brussels”
- Höpner and Schäfer (2012) “Embeddedness and Regional Integration”
- Zhang, Liu, and Garoupa (2018) “Judging in Europe”

4: Checks and balances on the Court: Inter-judge relationships – Hermansen

September 26, 2024

- Lax (2011) “The New Judicial Politics of Legal Doctrine”
- Hermansen and Voeten (2024) “The Effect of Ideology on Court Rulings: The Role of Judges in State Aid Litigation before the Court of Justice of the EU”
- Fjølseth, M. J. Gabel, and Clifford James Carrubba (2023) “The Timely Administration of Justice”
- Krenn (2020) *A Sense of Common Purpose. On the Role of Case Assignment and the Judge-Rapporteur at the European Court of Justice*

5: Independence or accountability? How judges are recruited – Hermansen

October 3, 2024

- Dunoff and Pollack (2017) “The Judicial Trilemma”
- Cheruvu (2024) “Are Judges on Per Curiam Courts Ideological?”
- Hermansen and Naurin (2019) “Shaping the Bench: The Effect of Ideology, Impact, and Information Relevance on Judicial Reappointments”
- Pérez (2015) “Selecting Europe’s Judges”

6: Recap: Institutional design and its consequences – Hermansen

October 10, 2024

- Brekke et al. (2023) “That’s an Order!”
- Hermansen (2020) “Building Legitimacy”

No teaching. Potato holiday!

The Court’s interlocutors

7: Legislative–judicial relationship – Hermansen

October 24, 2024

- Ferejohn and Weingast (1992) “A Positive Theory of Statutory Interpretation”
- Kelemen (2012) “The Political Foundations of Judicial Independence in the European Union”
- Clifford J. Carrubba, M. Gabel, and Hankla (2008) “Judicial Behavior under Political Constraints”
- Martinsen (2015) “Judicial Influence on Policy Outputs?”

8: Executive–judicial relationship – Brekke

October 31, 2024

- König and Mäder (2014) “The Strategic Nature of Compliance”
- Fjølstul and Clifford J. Carrubba (2018) “The Politics of International Oversight”
- Kelemen and Pavone (2022) *Where Have the Guardians Gone?*

National, supra-national

9: Inter-court dynamics – Brekke

November 7, 2024

- Alter (1998) “Who Are the “Masters of the Treaty”?”
- Mayoral and Pérez (2018) “On Judicial Mobilization”
- Pavone (2019) “The Ghostwriters” chapter 1: “The politics of ghostwriting lawyers”.
- López Zurita and Brekke (2023) “A Spoonful of Sugar”

10: Over-constitutionalisation and judicial resistance – Brekke

November 14, 2024

- Grimm (2015) “The Democratic Costs of Constitutionalisation”
- Blauberger and Schmidt (2017) “The European Court of Justice and Its Political Impact”
- Pavone (2018) “Revisiting Judicial Empowerment in the European Union”

11: Legal mobilization – Hermansen

November 21, 2024

- Epp (2008) “Law as an Instrument of Social Reform”
- Conant et al. (2018) “Mobilizing European Law”
- Alter and Vargas (2000) “Explaining Variation in the Use of European Litigation Strategies”
- Vanhala (2009) “Anti-Discrimination Policy Actors and Their Use of Litigation Strategies”
- Passalacqua (2021) “Legal Mobilization via Preliminary Reference”

Politicization of the judiciary

12: The Court of public opinion – Brekke

November 28, 2024

- Blauburger, Heindlmaier, et al. (2018) “ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence”
- Dederke (2022) “CJEU Judgments in the News – Capturing the Public Salience of Decisions of the EU’s Highest Court”
- Krehbiel and Cheruvu (2022) “Can International Courts Enhance Domestic Judicial Review?”

13: Legitimacy and backlash – Brekke

December 5, 2024

- Caldeira and Gibson (1995) “The Legitimacy of the Court of Justice in the European Union”
- Lupu (2013) “International Judicial Legitimacy”
- Voeten (2020) “Populism and Backlashes against International Courts”

14: Concluding session – Brekke & Hermansen

December 12, 2024

Re-visit literature from the second week of Core course 1:

- Burley and Mattli (1993) “Europe before the Court”
- Weiler (1994) “A Quiet Revolution”
- Wind (2010) “The Nordics, the EU and the Reluctance Towards Supra-national Judicial Review”
- Kelemen (2020) “The European Union’s Authoritarian Equilibrium”
- Atik and Groussot (2021) “Constitutional Attack or Political Feint?”

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- Alter, Karen J. and Jeanette Vargas (2000). “Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy”. In: *Comparative Political Studies* 33.4, pp. 452–482.
- Atik, Jeffery and Xavier Groussot (2021). “Constitutional Attack or Political Feint? -Poland’s Resort to Lawfare in Case K 3/21”. In.
- Blauberger, Michael, Anita Heindlmaier, Dion Kramer, Dorte Sindbjerg Martinsen, Jessica Sampson Thierry, Angelika Schenk, and Benjamin Werner (2018). “ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence”. In: *Journal of European Public Policy* 25.10, pp. 1422–1441.
- Blauberger, Michael and Susanne K. Schmidt (2017). “The European Court of Justice and Its Political Impact”. In: *West European Politics* 40.4, pp. 907–918.
- Brekke, Stein Arne, Daniel Naurin, Urška Šadl, and Lucía López Zurita (2023). “That’s an Order! How the Quest for Efficiency Is Transforming Judicial Cooperation in Europe”. In: *JCMS: Journal of Common Market Studies* 61.1, pp. 58–75.
- Burley, Anne-Marie and Walter Mattli (1993). “Europe before the Court: A Political Theory of Legal Integration”. In: *International organization* 47.1, pp. 41–76.
- Caldeira, Gregory A. and James L. Gibson (1995). “The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support”. In: *American Political Science Review* 89.2, pp. 356–376.

- Caporaso, James A. and Sidney Tarrow (2009). “Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets”. In: *International Organization* 63.4, pp. 593–620.
- Carrubba, Clifford J., Matthew Gabel, and Charles Hankla (2008). “Judicial Behavior under Political Constraints: Evidence from the European Court of Justice”. In: *American Political Science Review*, pp. 435–452.
- Cheruvu, Sivaram (2024). “Are Judges on Per Curiam Courts Ideological? Evidence from the European Court of Justice”. In: *Journal of Law and Courts* 12.1, pp. 185–197.
- Conant, Lisa, Andreas Hofmann, Dagmar Soennecken, and Lisa Vanhala (2018). “Mobilizing European Law”. In: *Journal of European Public Policy* 25.9, pp. 1376–1389.
- Dederke, Julian (2022). “CJEU Judgments in the News – Capturing the Public Salience of Decisions of the EU’s Highest Court”. In: *Journal of European Public Policy* 29.4, pp. 609–628.
- Dunoff, Jeffrey L. and Mark A. Pollack (2017). “The Judicial Trilemma”. In: *American Journal of International Law* 111.2, pp. 225–276.
- Epp, Charles R. (2008). “Law as an Instrument of Social Reform”. In: *The Oxford Handbook of Law and Politics*. Ed. by Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington. Oxford University Press.
- Ferejohn, John (2002). “Judicializing Politics, Politicizing Law”. In: *Law and contemporary problems* 65.3, pp. 41–68.
- Ferejohn, John and Barry R. Weingast (1992). “A Positive Theory of Statutory Interpretation”. In: *International Review of Law and Economics* 12.2, pp. 263–279.
- Fjelstul, Joshua C. and Clifford J. Carrubba (2018). “The Politics of International Oversight: Strategic Monitoring and Legal Compliance in the European Union”. In: *American Political Science Review* 112.3, pp. 429–445.

- Fjelstul, Joshua C., Matthew J. Gabel, and Clifford James Carrubba (2023). “The Timely Administration of Justice: Using Computational Simulations to Evaluate Institutional Reforms at the CJEU”. In: *Journal of European Public Policy* 30.12, pp. 2643–2664.
- Grimm, Dieter (2015). “The Democratic Costs of Constitutionalisation: The European Case”. In: *European Law Journal* 21.4, pp. 460–473.
- Hermansen, Silje Synnøve Lyder (2020). “Building Legitimacy: Strategic Case Allocations in the Court of Justice of the European Union”. In: *Journal of European Public Policy* 27.8, pp. 1215–1235.
- Hermansen, Silje Synnøve Lyder and Daniel Naurin (2019). “Shaping the Bench: The Effect of Ideology, Impact, and Information Relevance on Judicial Reappointments”. In: *Conference Paper*. Mons.
- Hermansen, Silje Synnøve Lyder and Erik Voeten (2024). “The Effect of Ideology on Court Rulings: The Role of Judges in State Aid Litigation before the Court of Justice of the EU”. In: *Presented at European Political Science Association’s Annual Meeting*. Cologne.
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- Krehbiel, Jay N. and Sivaram Cheruvu (2022). “Can International Courts Enhance Domestic Judicial Review? Separation of Powers and the European Court of Justice”. In: *The Journal of Politics* 84.1, pp. 258–275.
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- (2022). *The Procedural and Organisational Law of the European Court of Justice: An Incomplete Transformation*. Cambridge Core. URL: <https://www.cambridge.org/core/books/procedural-and-organisational-law-of-the-european-court-of-justice/BE92A48792D3083C8A3BB701629E4752> (visited on 03/24/2023).
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