

# ECJ as a political actor

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# Introduction

## Some questions for you

Go to [www.menti.com](https://www.menti.com) and use the code 8159 7684 to answer.

## Purpose for today

- ▶ ECJ is a political actor
- ▶ theories of judicial behavior
- ▶ overview of the topics covered the next weeks

# Argument

# Argument

*To what extent can we think of the Court of Justice of the European Union (CJEU) as a political actor?*

- ▶ adjudicates on issues relating to the EU's political life
- ▶ its rulings also have political consequences
- ▶ is subject to the demands and resistance of political actors
- ▶ judges may themselves hold an ideology or follow a specific agenda

⇒ *what are the Court's incentives and constraints?*

# Overview: A political take

## A twin phenomenon

### Judicialization of politics leads to a politicization of courts

- ▶ **Judicialization of politics:** courts increasingly distribute political and societal values
  - ▶ a global phenomenon (Hirschl 2011)
- ▶ **Politicization of courts** (Ferejohn 2002)
  - ▶ courts are perceived as political
  - ▶ we seek to influence them

⇒ *a question of legitimacy, but also independence*



## Judicialization of politics

**Judicialization of politics means that courts challenge parliament in three ways**

- ▶ **regulate political activity**
- ▶ **distribution of competences**
- ▶ **make policies**
  - ▶ inadvertently: political consequences
  - ▶ positively: courts fill in “gaps”

⇒ *the ECJ is doing all of this*

# Politicization of courts

**politicization of courts:** increasing influence of political factors on judges'

- ▶ **behavior** (output)
  - ▶ judicial decisions appear political
- ▶ **appointment** (input)
  - ▶ judicial appointments replace elections (preferences)
  - ▶ case-to-case political pressures (strategic)

⇒ *what are the checks and balances?*

## Topic of this semester

⇒ *what moves the Court is a democratic challenge in the EU*

# The Court's political role

## Regulate political activity

# Regulate political activity

- ▶ **judicialization of politics:** courts replace parliament
  - ▶ **regulate political activity**
  - ▶ limit the legislator
  - ▶ make policies

## ECJ regulates political activity

**Les Verts v. European Parliament (C-294/83)** establishes that the EU is based on the rule of law

- ▶ EP parliamentary groups financed elections (from EU budget)
- ▶ ... but you need to be elected to receive that money

⇒ *ECJ rules on the fairness of campaign subsidies*

## ECJ regulates political activity

⇒ ... *but also the first reference to EU treaties as “constitution”*



## distribution of competences

# distribution of competences

- ▶ **judicialization of politics:** courts replace parliament
  - ▶ regulate political activity
  - ▶ **distribution of competences**
    - ▶ EU level
    - ▶ EU/national level

⇒ *role of federal constitutional courts*

## EU level: ECJ limits (or empower) the legislator

### **The Isoglucose/Roquette frères case (1980, C-138/80) changed the distribution of power between the Council and the EP**

- ▶ a year after the first direct EU elections (1979)
- ▶ court ruled that the Council has to wait for Parliament's opinion in the consultation procedure
- ▶ EP changed its rules of procedure (1981) to automatically “refer proposal back to committee” if Commission does not incorporate changes to legislation → overruling EP would require a unanimous vote in Council

⇒ *a delaying veto to the European Parliament*

# EU/National level: constitutionalization

# Hierarchies

## Courts dabble with two hierarchies

- ▶ hierarchies of laws: in case of a conflict between laws
  - ▶ most recent prevail
  - ▶ highest ranked prevail: constitution > legislation > executive decisions
- ▶ hierarchies of courts:
  - ▶ higher courts ensure uniform application in the polity

## Constitutionalization of the EU

### ECJ case law has been a driver of the constitutionalization of EU

- ▶ **direct effect** (van Gend en Loos)
  - ▶ regulations: horizontal and vertical
  - ▶ directives: vertical + “state liability” → *EU law is more similar to domestic than international law*
- ▶ **supremacy** (Costa v/ENEL)
  - ▶ EU law takes precedence even when national law is more recent
  - ▶ any EU law takes precedence over any national law

→ *will domestic higher courts accept this?*

## Political consequences

# Political consequences

- ▶ **judicialization of politics**: courts replace parliament
  - ▶ regulate political activity
  - ▶ distribution of competences
  - ▶ **political consequences** (make policies)
    - ▶ inadvertently
    - ▶ positive: filling in “gaps”



## Inadvertantly: political objectives are constitutionalized

### EU reflects the general move to constitutionalizing rights after WWII

- ▶ political rights: who can vote, free speech, but also human rights
- ▶ policy objectives: social and economic rights
  - ▶ free trade: (Dassonville, 1974)
  - ▶ mutual recognition (Cassis de Dijon, 1979)

⇒ *is the EU trapped in a neoliberal ideology?*

# Policy making: the law is an incomplete contract

## Court's apply rules to facts

- ▶ laws are abstract
- ▶ litigation is concrete

⇒ *they enforce and "fill in" where there are lacunas*

# Why are laws incomplete?

- ▶ express an intention: e.g. European integration
- ▶ legislators
  - ▶ cannot predict all consequences of a law (e.g. incomplete information)
  - ▶ cannot agree (e.g. gridlock)
  - ▶ don't want to face the consequences (e.g. politicization)
  - ▶ cannot monitor application of laws (e.g. fire alarm)

## ECJ makes policies: gay marriage

### An example of the ECJ recognizing a right that wasn't intended



- ▶ Citizens' Rights Directive or Free Movement Directive (2004) grants rights of residence to "spouses"
  - ▶ governments agree to disagree; gender neutral term
  - ▶ Mr Coman, a Romanian man married in Brussels and moves to Romania with his (male) spouse, Mr Hamilton (2010)
  - ▶ Romania does not grant residence because the country doesn't recognize gay marriage
- ▶ yet ECJ rules that a derived right of residence (from marriage) cannot be removed (2018)

⇒ Court **grants** rights that are inherently political/social

## Class discussion

Consider the cases related to Van der Leyen and her acquisition of Covid vaccines :

- ▶ what are the facts of the case?
- ▶ who brought the cases?
- ▶ what was the *legal* problem that the Court had to resolve?
- ▶ to what extent is this a *political* problem?

⇒ *how does this case relate to the Court as a political actor?*

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# Political influences on the Court

# Political influences on the Court

**politicization of courts:** increasing influence of political factors on judges' decisions

- ▶ **behavior** (output)
  - ▶ judicial decisions appear political
- ▶ **appointments and pressures** (input)
  - ▶ judicial appointments replace elections (attitudes)
  - ▶ incentives and pressures: (strategies)
    - ▶ on individual judges
    - ▶ on the court

⇒ *If Court decisions are political, what determines the Court's decisions?*

## Theories



## Is the ECJ an international or federal supreme court?

- ▶ **international court:** its design inspired many regional courts
  - ▶ institutional choice theories (Hix and Høyland 2022)
    - ▶ EU specific: grand theories of European integration
    - ▶ general theories: an agent of member states
- ▶ **federal court:** comparative judicial politics
  - ▶ theories of judicial behavior (Posner 2010)
    - ▶ legal
    - ▶ attitudinal
    - ▶ strategic

## International courts

**Why do we delegate authority to courts? Why do governments accept their decisions?**

- ▶ **principal-agent theories**
  - ▶ governments delegate to courts
  - ▶ courts resolve problems
- ▶ **questions**
  - ▶ what problems?
  - ▶ do governments comply?

## EU specific theories: the great integrator

**A long-standing story about the ECJ as a motor of integration, but different rationales**

- ▶ **behind member states' back**: a neo-functionalist approach (Burley and Mattli 1993)
  - ▶ expansion in number and scope of EU laws
  - ▶ a change in expectations → law as mask and shield
- ▶ **by outsmarting governments** (Alter 1998)
  - ▶ governments are short-cut: reliance on domestic courts
  - ▶ time as a bargaining asset:
    - ▶ governments think short-term (outcome)
    - ▶ ECJ thinks long-term (legal innovation)
- ▶ **joint decision-making trap** intergovernmental approach (Scharpf 1988)
  - ▶ strict voting rules and diverging preferences paralyze governments
  - ▶ ECJ steps in to replace the legislator

⇒ *Grand theories of EU integration*

## Approaches to judicial politics

**There are different ideal-type approaches to the role of courts among political scientists (Posner2011a?)**

- ▶ **legalism:** emphasizes the importance of legal principles and precedents in shaping judicial decision-making
- ▶ **attitudinal model:** judges follow their *preferences* regardless of laws
  - ▶ judges are politicians in robes
  - ▶ ... but constrained by the judicial agenda
- ▶ **strategic model:**
  - ▶ rules guide behavior and distribute power
  - ▶ judges have preferences → an institutional approach; they pursue their preferences following rules

⇒ *All effective judges are strategic* (Ferejohn and Weingast 1992)

## Judicial attitudes

# Judicial attitudes

## What is the role of ideology?

- ▶ ideological content of judgments
  - ▶ a legal-functionalist explanation (week 3)
  - ▶ judges' personal ideology (week 4)
- ▶ governments are at the origin of these preferences
  - ▶ legislation (week 3)
  - ▶ judicial appointments (week 4-5)

## Strategic approaches

# Strategic approaches

**We often divide strategic approaches in two** (Spiller and Gely 2008)

▶ **external strategic approach:**

- ▶ court is a unitary actor
- ▶ contends with external actors: executive, legislative, public. . .

▶ **internal strategic approach**

- ▶ focus on judges' interactions
- ▶ decision making prior to the ruling

⇒ *structures much of the class*

# Internal strategic approach

## What are the checks and balances on individual judges?

- ▶ **peer-monitoring: bargaining at the court**
  - ▶ internal checks and balances (week 4)
- ▶ **external pressures targeted at individual judges:** curtail their future (week 5)
  - ▶ threats of physical retaliation
  - ▶ non-(re)nomination
  - ▶ retirement



## External strategies: court as unitary actors

## The separation of powers approach

**Courts can be seen as a unitary actor interacting with other (institutional) actors**

- ▶ **executive** proposes legislation
- ▶ **legislative** adopts legislation
- ▶ **courts** interpret legislation
- ▶ **executive** (and legislator) implement

⇒ *strategic action means that each actor looks ahead*

## Sources of constraints

**ECJ displays a consistent sensitivity to government preferences, but why?**

- ▶ **institutional-level constraints** (week 7-8)
  - ▶ legislative override
  - ▶ non-compliance
  - ▶ court “stripping” (removal of competences), boycott (no cases)
  - ▶ court packing
- ▶ **alliance partners and agenda setting**
  - ▶ lower courts (week 9-10)
  - ▶ litigants (week 11)
  - ▶ public opinion (week 12)

# Connecting the dots

## Your takeaways

Go to [www.menti.com](https://www.menti.com) and use the code 8159 7684 to answer.

- ▶ what is the “legal approach” to judicial behavior? Who espouses it and why? Can you find examples in your ECJ readings (e.g. Hix and Høyland)?
- ▶ what is the “attitudinal approach” to judicial behavior? What is according to Posner its main limitation? Can you find examples in your ECJ readings (e.g. Hix and Høyland)
- ▶ what is the “strategic approach” to judicial behavior? In your opinion, is it an independent theory? Can you find examples in your ECJ readings (e.g. Hix and Høyland)

**Thank you!**

# Literature

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