Judicial politics in Europe
Constitutional courts in comparative perspective
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Introduction
In the United States, there is a widely shared perception of courts as political actors, and the fields of sociology and political science have explored this phenomenon for decades (Maveety 2003). By contrast, in Europe ‘judicial politics’ as a research topic is relatively new and is still in the process of being established. Since the 1990s, the linkage between courts and politics has been sporadically explored. This process began with special issues published by certain major journals that included the European perspective (Schmidhauser 1992; Volcansek 1992; Shapiro and Stone 1994b; Vallinder 1994b). In addition, a small number of comparative edited volumes have increased the international visibility of several scholars who have been researching courts in their home countries for quite some time (Holland 1991; Jackson and Tate 1992; Tate and Vallinder 1995; Jacob et al. 1996).

Even today, the extent of research on judicial politics in Europe is very limited. Christoph Hoennige has determined that between 1995 and 2008 more articles were published on the US Supreme Court in the American Journal of Political Science alone than were published on other courts in six (more European-centric) journals put together (Hoennige 2011: 349–50). The (very slowly) growing volume of literature notwithstanding, research on judicial politics in Europe remains narrow in scope in some respects. First, it is limited to the subject of judicial review by constitutional courts – the most obvious and spectacular type of judicial politics, as it often involves repealing a law passed by the legislative branch.1 Ordinary or lower courts have scarcely appeared on the agenda, with the exception of labour courts (Rogowski and Blankenburg 1986; Rogowski and Wiltangen 1994; Rehder 2009; Rogowski and Deakin 2011; Schneider and Bodah 2011; Stone Sweet and Stranz 2012). Studies on labour courts generally fall under the category of industrial relations research, which is connected to sociology rather than to political science. Second, while there are a considerable number of case studies on judicial review in various European countries (to be discussed on pp. 390–394), little comparative research has been conducted (e.g. Alivizatos 1995; Andrews and Montinola 2004; Hoennige 2011). Third, the European scholarly endeavours that have been published in international books and journals show a strong bias towards rational-choice perspectives and veto-player theories (Alivizatos 1995;
Volcansek 2001; Andrews and Montinola 2004; Brouard 2009; Hoennige 2009, 2011; Dalla Pellegrina and Garoupa 2013). This does not mean that other (e.g. institutionalist) approaches do not exist or are unimportant, but they are relatively invisible to the international community (for Germany, e.g. Lhotta 2003; Lembcke 2008; Kneip 2009). And, fourth, research on European courts has confined itself thus far to analysing the effects of judicial action on politics and the political system, leaving the topic of judicial decision-making largely neglected.

The chapter is organized as follows: the next section addresses why so little research was done on courts in European countries for decades, and why this has changed over the past 15–20 years. In addition, scholarly attempts to explain the transfer of judicial review from the US to Europe in the context of various ‘waves of democratization’ are discussed. After that, the main characteristics of constitutional courts in Europe (e.g. methods of judge selection and competences) are introduced, focusing on national commonalities and differences. Judicial independence is the topic of the following section. And, finally, challenges and topics for future research are discussed.

Courts and the social sciences in Europe

In contrast to the situation in the US, the role of courts in politics and society in Europe is a relatively young research field. How can we explain this striking research gap? The literature offers several arguments, all of which are linked to the traditional distinction between common law and code law systems. Very often, judicial policy-making in countries other than the US is considered to be a relatively new phenomenon of the post-war era; after World War II, many countries in Europe and elsewhere established constitutional courts with the power to declare legislation unconstitutional (e.g. Stone Sweet 1992; Shapiro and Stone 1994a; Vallinder 1994a). Many authors argue that, historically speaking, European countries with a code law tradition had a strong commitment to the ‘separation of law and politics and to a vision of judges as independent, neutral law appliers rather than policymakers’ (Shapiro and Stone 1994a). The experience of totalitarianism and its outrages against citizens’ rights changed this attitude, in Germany more than in any other European country (Vallinder 1994a). Courts thus came to be seen as a means of monitoring and reviewing legislative activity and therefore protecting individual rights. Through this shift, the courts became more engaged in politics than ever before. However, the European countries chose a path different from that of the United States, where each court has the capacity to declare a law unconstitutional. In several European countries, separate constitutional courts were established to perform this monitoring function (a system known as the ‘European model’ of judicial review). Confining the task of judicial review to special constitutional courts enabled states to preserve the main principle of the European separation of powers doctrine (Stone Sweet 1992: 225–6). Because judicial review is a post-World War II phenomenon, so the argument goes, Europe-centric research in this area is relatively new (in comparison to the US-based literature) and has concentrated on constitutional courts.

A second common explanation for the lack of European research is also linked to the alleged separation of law and politics in code law systems. Alec Stone argues that due to the distinctiveness of the legal system, academic discourse on this topic has largely remained the privileged domain of law professors (Stone Sweet 1992: 6). Moreover, the specialized technical-legal discourse requires fluency in a ‘second language’ (Shapiro and Stone 1994a: 398), which may discourage many social scientists. It is difficult to refute these points.

However, at least with regard to Germany, these reasons cannot fully explain why hardly any systematic research on courts and politics has emerged thus far. In this country, the modern
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field of Political Science grew out of the discipline of Law. Some of the most prominent early political scientists had been trained as jurists. Their work often included the analysis of courts and their effects on the functioning of the political system. For example, Ernst Fraenkel analysed the impact of *Klassenjustiz* (class-based justice) on democracy and the labour movement from the Weimar era onward (Fraenkel 1999 [1958]). Franz Neumann viewed judicial policy-making as a driving force of ‘the Behemoth’, the National Socialist state (Neumann 1963 [1944]), and Otto Kirchheimer investigated ‘political justice’ in Germany, France and East European countries (Kirchheimer 1961). Although these scholars had a major impact on the development of political and constitutional theory in German political science, inspiring a young generation of ‘critical jurists’ in the 1960s (Iser and Strecker 2002), they did not motivate further research on courts and politics in Germany. Interestingly, Kirchheimer’s research became well known in the United States and was acknowledged as ‘a leading work’ in the ‘political jurisprudence’ research tradition (Shapiro 1964: 294).

The lack of interest in law-related issues and the courts is even more astonishing given the long German tradition of sociology of law (e.g. Max Weber, Niklas Luhmann, Jürgen Habermas). In the 1950s and 1960s, the field of sociology of law rekindled the discussion of class-based justice once more (Dahrendorf 1961, 1965). In other words, Alec Stone’s argument that the law has been the privileged domain of law professors tells only part of the story. It seems that the legal perspective was somehow lost over the years. Most likely, this development was due in part to the fact that political science was a latecomer in Germany: it was only established as an independent discipline after 1945. Scholars have therefore sought to emphasize the differences between this relatively new field and competing disciplines such as sociology and law. It is thus perhaps not *in spite of* but *because of* its legal roots that political science in Germany largely abandoned the analysis of legal issues.

**Explaining the transfer of judicial review**

According to Ginsburg, the spread of judicial review is closely linked to the secular trend of democratization, which occurred in three waves (Ginsburg 2008: 82–8). The general idea of courts monitoring legislative activity was developed in the context of common law federal polities. In the United States, which can be more or less regarded as the founding case, judicial review has been practised even without an explicit textual mandate since the landmark decision of *Marbury v. Madison* in 1803. The second wave started in the 1920s in Austria, when Hans Kelsen developed the ‘European’ centralized model of judicial review, in which a designated constitutional court is tasked with protecting the constitutional order and the human rights of individual citizens, thereby working independently from the other parts of the judiciary.2 After 1945, five post-fascist European countries followed this path: Austria (1945), Germany (1949), Italy (1948), Spain (1979) and Portugal (1982). The third wave took place after the fall of the Berlin Wall in the 1990s, when a significant number of new constitutional courts were established in Eastern Europe (with the exception of Estonia, which followed the US model of judicial review).3

Several arguments have been offered to explain the diffusion of constitutional review from the United States to Europe and elsewhere. Most of these refer to the ideational and/or institutional aspects of a broader democratization process. Shapiro sees a close link between the liberal idea of the ‘rule of law’ and a strong emphasis on limited government (Shapiro 1999). This argument helps to explain the emergence of judicial review in the US system, in which a high level of distrust towards state actors and the government has prevailed for centuries. In Western Europe, this idea took root in a significantly different manner. Following the continent’s
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experiences with fascism, the concept of human rights and natural law-based limitations on the power of the state gained ground. Constitutional courts were seen as a means of establishing and monitoring these limitations (Cappelletti 1970: 1018–19). The legitimacy of constitutional courts could be increased by providing them with a relatively high degree of independence from the rest of the judiciary, which – at least in Germany – had been heavily involved in the Nazi regime.4

Another set of accounts emphasizes the role of institutions. Here, the emergence and diffusion of constitutional review are explained by a functional need for conflict resolution in highly fragmented political systems (Ferejohn 2002). Institutional arrangements with a high degree of fragmentation in the vertical dimension (e.g. federalism) or in the horizontal dimension (e.g. divided governments) require third-party institutions for dispute resolution among the different branches or levels of government. A similar argument is proposed by the literature on ‘adversarial legalism’: party and interest-group pluralism and the absence of corporatist networks foster the necessity of (constitutional) courts in the processes of political decision-making and interest intermediation (Kagan 2001). In short, political systems with a high number of veto players require a constitutional court as another veto player to mediate between the different political actors.

In this context, Ginsburg introduces the role of power relations between political parties (Ginsburg 2003: 21–5). He considers constitutional courts to be a response to political uncertainty in the formative years of a political entity. In the process of constitutional design, political parties, fearing a potential loss of power in the future, have an interest in establishing a strong constitutional court capable of constraining the government. Other authors stress the dominant political party’s interest in introducing constitutional courts as a means of preserving their power, a mechanism Hirschl refers to as ‘hegemonic preservation’ (Hirschl 2004). Trochev and Thorson find this dynamic to be applicable in the case of Russia as well: Russian political decision-makers seek to enhance their own credibility by supporting judicial review (Thorson 2004; Trochev 2005). A third group of scholars evaluates the overall strategic aspects of party decisions, arguing that all political parties have an interest in strong courts precisely because there is no way of knowing who will be the winner or loser in future elections (please note this very interesting application of the various theories on Italy by Volcansek 2010). Clearly, not only ideas and institutions play an important role, but also strategic calculations under the conditions of uncertain power relations in the future.

Although all of these accounts provide some amount of empirical evidence, comparative or in-depth case studies that reconstruct the historical process of the design and establishment of constitutional courts have been rare, at least in the internationally visible debate (one very interesting collection of articles on different countries edited by Pasquino and Billi [2009] should be highlighted as an exception). Such studies could help to clarify the particular interplay between ideational, institutional and actor-centred explanations with regard to concrete political and historical contexts.

In the German case, for example, the functional role of being a third party to resolve conflicts was a very important part of the ‘job description’ for the court anticipated by the political actors who designed the constitution (Niclauß 2006). The predicted lines of conflict referred to the dimension of federalism, due to the relatively strong political position of the state governments after 1945. However, this does not mean that the power inherent in this role of the court was widely accepted or approved by the political parties in concrete political conflicts. The fact that the modern German Bundesverfassungsgericht is regarded as one of the most influential constitutional courts expresses a functional need to some extent, but this influence is also the result of several conflicts between the court and various levels of government over power (Lembcke
2006: 155–8). Today, constitutional disputes between government institutions represent only a minor part of the court’s agenda; hence, its functional role seems to have changed.

Recently, a debate has evolved over the question of why judicial review has spread everywhere in Europe except to the Nordic countries. In Denmark and Sweden, substantial judicial review has rarely been practised; in Finland, it was explicitly prohibited until the year 2000 (Føllesdal and Wind 2009: 132; Hirschl 2011: 450). The unique Nordic development can be explained by a special legal culture that is neither purely common law nor entirely a code law tradition, but rather a hybrid version of the two legal families. Moreover, many of the Scandinavian countries largely avoided the fascist terror and destruction of World War II. Other potential explanatory factors include the supremacy of the parliament in the Nordic political systems, the traditional predominance of social democratic parties and a procedure referred to as ‘administrative review’, which incorporates policy networks and the most important interest groups, such as the trade unions. Consequently, the same arguments that help to explain the spread of judicial review elsewhere can be applied to explain the absence of strong constitutional courts in Scandinavia. In recent years, some scholars have argued that the Nordic countries have begun to consider a more prominent role for judicial review for several reasons. First, the institutional structure has become somewhat more fragmented: the social democrats have lost their hegemonic position in the party systems, and corporatist networks of interest groups have become weaker. This newly emerging pluralism seems to have fostered the process of judicialization in Scandinavia (Holmstroem 1994: 157–8; Ojanen 2009). More significantly, there has been pressure towards judicial review stemming from the process of European integration, the European Court of Justice and the European Court of Human Rights (Føllesdal and Wind 2009: 131). As a result, Scandinavia also seems to be a good example of the influence of transnational legal developments on the domestic practice of judicial review.

Features of constitutional courts in Europe

Although there is a European model of judicial review, there is no definitive European model of constitutional courts, and a wide variety of rules can be found. This heterogeneity of institutional arrangements and procedures applies to the process of judge selection, the rules of court access, the competences of the courts and the issue of judicial independence (to be discussed on pp. 392–394). Table 22.1 summarizes some main characteristics with regard to the process of judge selection, thereby illustrating remarkable variation across countries (Hoennige 2008). In all cases, the national parliament (in the case of a two-chamber system, both chambers) is involved in the selection process, but the roles of the government, the head of state and the judiciary vary. Moreover, the selection procedures of sequential and proportional systems differ, as do the majority rules.

This institutional diversity suggests that all of the approaches discussed above that seek to explain the spread of judicial review are missing some historical micro-level basis. Evidently, the overall trend of human rights discourse and a functional need for conflict resolution between political parties can result in highly divergent institutional solutions. Almost no clear patterns can be identified, with a few exceptions. In the West European countries, judges tend to be elected in a more consensual manner (super-majority), whereas in Eastern Europe they are more often elected by simple majorities (Hoennige 2011). This finding corresponds to the fact that consensus democracies are found more often in Western than in Eastern Europe. In addition, Hoennige argues that East European courts tend to enjoy more competences than West European courts, although his finding seems to apply only to individual constitutional complaints (which are more often allowed in Eastern Europe). Moreover, his results must be
qualified to some extent due to the recent political attacks against the constitutional courts in Romania and Hungary. In Hungary, the parliament very recently (in 2013) passed a reform restricting the competences of the constitutional court, although legal scholars are still debating the scope and the implications of the bill (for a more comprehensive discussion of the Hungarian case, see Bond 2006; Lembcke and Boulanger 2012; Mazza 2013). Moreover, judges in Hungary are now forced to base their decisions only on the new constitution approved in 2012.

A summary of court competences is shown in Table 22.2. In general, three types of competences or court access routes can be identified. Abstract judicial review is usually initiated by (opposition) political parties or institutions, whereas concrete review takes place wholly within the judicial system. The third type of competence represents the largest part of the courts’ caseload, namely constitutional complaints by individual citizens.

Due to the institutional variation in court arrangements, no theoretical or empirical classification exists. This explains in part why so little comparative research has been conducted thus far. If there is nothing but most-different cases, what can be compared? Moreover, no consensus exists in the literature regarding the likely effects of a particular institutional design. For example, it is unclear whether the size of the bench has any effect on the power of the court. A large number of judges can complicate the decision-making process; on the other hand, a large bench allows a functional division of labour among the judges, which might contribute to higher-quality verdicts (Ginsburg 2003: 47). In addition, Ginsburg claims that a sequential procedure of judge selection (whereby one institution nominates a candidate who is confirmed or rejected by another institution) leads to the appointment of politically moderate judges, whereas a proportional procedure (whereby certain institutions elect ‘their own’ candidates) might contribute to the politicization and the polarization of the court. However, Hoennige argues very convincingly that this depends on the distribution of power among the chambers that are involved in the judge selection process. While Ginsburg’s theory may be correct under the condition of divided government, this is not necessarily the case in the constellation of concurring majorities (Hoennige 2008).

Finally, it is unclear how the different institutional and procedural features of the courts interact with each other. If constitutional courts in East European countries have slightly more competences than those in Western Europe, but are more vulnerable to political pressures exerted by institutions via the mechanism of judge selection, what does this combination of factors mean with respect to the political power of the courts? Everything depends on the concrete historical situation.
Judicial independence in question?

Judicial independence can be defined as the ‘aspiration that judicial decisions should not be influenced in an inappropriate manner by considerations judged to be normatively irrelevant’ (Vanberg 2008: 100). Most significantly, this implies independence of the courts from the preferences of the government or other political office-holders. Various institutional safeguards are known to isolate judges from political pressure. A summary of institutional mechanisms used to ensure judicial independence in Europe is shown in Table 22.3.

Long-term (or even lifetime) positions and non-renewable appointments can protect judges against incentives to accept political deals that might help them to be re-elected. Similarly, judicial independence might be threatened by the possibility of expulsion from office by external political actors (e.g. the president or the parliament). In addition, the right of legislative bodies to overrule a court’s verdicts could pose a serious danger for the independence of the court as an institution. As mentioned above, constitutional courts in Western Europe tend to be more protected against political attacks than those in Eastern Europe. In the Czech Republic, Estonia and Hungary, the re-election of judges is possible; in four East European countries, expulsion from office by external political institutions is permitted.

In recent years, the issue of judicial independence has been prominent on the European research agenda. By means of quantitative large-N designs, several scholars have tested the independence of constitutional courts vis-à-vis legislative bodies, governments and political parties, drawing on arguments from the US literature (Santoni and Zucchini 2004; Fiorino et al. 2007;
Franck 2009). The findings of these studies are similar. With respect to France, Franck finds that judicial independence increases under the condition of cohabitation, when the political chambers are divided between left-wing and right-wing parties (Franck 2009). Santoni and Zucchini argue that the number of effective parties has an impact on judicial independence, at least in Italy (Santoni and Zucchini 2004: 447–54). Fiorino et al. assert that the selection procedure plays a role: when the judiciary is involved in the selection process, independence from political actors is bolstered (Fiorino et al. 2007: 690–700).

More qualitatively oriented case studies have analysed the informal and subtle mechanisms undermining the formal safeguards of judicial independence, especially in Central and Eastern Europe. Bobek asserts that the Czech court was undermined by old Communist elites through the mechanism of state court administration (Bobek 2010: 268). Schoenfelder examines the role of corruption and the communist legacy in Bulgaria (Schoenfelder 2005: 77–81). Amaral-Garcia et al. explore the pressure legal peer groups can exert on the court (Amaral-Garcia et al. 2009), while Herron and Randazzo find that in most East European countries judicial review correlates negatively with economic conditions (Herron and Randazzo 2003: 432–3).

The role of exogenous forces has also been discussed with regard to European integration. One branch of the literature has focused on the interplay between judicial review, economic conditions and the EU. The reluctance of the German constitutional court to accept the supremacy of the European Union and the European Court of Justice is very well known, and this has become an issue for East European courts as well (Sadurski 2008). This debate can easily be linked to the issue of judicial independence, because it raises the question of whether the constitutional courts truly have the power to adjudicate against further steps of integration and harmonization in Europe, especially under conditions of severe economic and monetary crisis.
In a recent study, Carlos Closa finds that the national courts sometime bark but never bite, meaning that there has been no case in which an EU Treaty ever was rejected by a court (Closa 2013). Closa argues that the judges take into account the costs of (non-)implementation. If this explanation is correct, this would signify that judicial independence can be threatened by contextual variables, such as market forces or societal expectations. Over the last few months and years, the German constitutional court has had to rule on various aspects of the political process establishing the European Stability Mechanism. The court’s deliberations were continuously monitored by a variety of political actors, the media and stock exchanges around the world. Although public support is considered to be the most important exogenous source of judicial independence, the intensity of this public attention casts doubt over whether the judges truly have the power to decide independently of political and market pressures.

### Conclusion: future research agendas

‘Judicial politics’ as a social science research area in Europe is still very much a work in progress. The notion of a ‘European model of judicial review’ suggests that there might be a uniquely European type of constitutional court, especially from a US perspective. However, this is not the case. The fragmentation of the European court system(s) is to some extent reflected in the landscape of research. A growing number of single-case studies and large-N designs are being conducted on various aspects of judicial politics, but most of these are isolated and refer back to the US literature rather than one another. The state of the art is unclear. Hoennige claims that we need more comparative research ‘beyond the judicialization thesis’ (Hoennige 2011). There is no doubt that this is true; however, it raises the question of which path of comparative research should be chosen.

At the micro-level, comparative case studies could help to explain why judicial review has been institutionally organized in so many different ways in Europe. In this research perspective, the roles of national institutions and actor constellations, legal traditions and scholarships, historical heritage and contextual factors should be taken into account. This type of study could also attempt to reveal the mechanisms of judicial decision-making – a topic that has been largely neglected by the European literature. However, the international debate seems to be moving in a different direction. At the moment, scholars who are well versed in the comparative analysis of political institutions at the macro-level are attempting to integrate the courts into their veto-player research framework (see the literature cited on pp. 386–387). These researchers generally assume a rational-choice model of decision-making, thereby marginalizing other types of theoretical micro-foundations.

Another problem with this kind of macro-level comparative research is that it treats courts just like any other political institutions, such as parliaments. But do legal institutions and legal decision-makers actually follow the same logics and dynamics as political decision-makers and their legislative bodies? It might therefore be helpful to increase the visibility of other approaches, especially institutionalist perspectives, at the international level of the debate.

Regardless of the usual cleavage lines between qualitative and quantitative research, rational-choice accounts and institutionalist perspectives, all researchers face similar methodological and data-related problems. In comparison to the US legal system, little data on European courts, their procedures, their files and their decisions are provided by the courts themselves or by other institutions. In many cases, the votes of the judges are not registered and/or not made public; at times, the panel of judges decides as a collective, not as a collection of individual judges. This lack of or limited access to data stems from the traditional (European) assumption that courts are not political institutions and are therefore not required to fulfil modern...
expectations of transparency and accountability. Research on judicial politics in Europe will continue to be restricted to some extent as long as this misconception persists.

Notes

1 In addition, the European Court of Justice and the European Court of Human Rights have attracted scholarly attention, but this literature is discussed in Chapter 15 of this Handbook.

2 By contrast, as noted, the common-law countries developed a decentralized path, implying that every court can declare a law to be unconstitutional.

3 In addition, in Portugal a combination decentralized/centralized system was established in 1982. Alaez Corral and Arias Castano argue that this hybrid version of judicial review also applies to the Spanish system (Alaez Corral and Arias Castano 2009). France has its own interpretation of judicial review: the Conseil constitutionnel is not truly a court but rather a political chamber in which politicians (e.g. former state presidents) as well as judges take part (Stone 1992a).

4 In the German case, this ‘anti-fascist’ heritage of the constitutional court is reflected in the biographies of the first generation of judges, many of whom had themselves been prosecuted by the Nazis.

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