

# Judges and Politics: Constitutional Courts and Policy Change in Europe

MixCache.com

---

## Table of Contents

- **Introduction**
  - **Chapter 1** The Judicialization of Politics in Europe
  - **Chapter 2** Constitutional Courts: Designs, Jurisdictions, and Powers
  - **Chapter 3** Appointment Politics: Selection, Tenure, and Safeguards
  - **Chapter 4** Standards of Review: Proportionality, Balancing, and Deference
  - **Chapter 5** Agenda-Setting and Docket Control: How Cases Reach the Bench
  - **Chapter 6** Models of Decision-Making: Legal, Strategic, and Institutional
  - **Chapter 7** Compliance and Implementation: Remedies, Follow-Up, and Impact
  - **Chapter 8** Courts and Political Branches: Parties, Coalitions, and Parliaments
  - **Chapter 9** Interest Groups and Strategic Litigation
  - **Chapter 10** Media, Public Opinion, and Judicial Legitimacy
  - **Chapter 11** Social Rights I: Health, Housing, and Minimum Income
  - **Chapter 12** Social Rights II: Education, Equality, and Family Policy
  - **Chapter 13** Market Regulation I: Competition, State Aid, and Privatization
  - **Chapter 14** Market Regulation II: Labor Law, Collective Bargaining, and the Platform Economy
  - **Chapter 15** The European Union Dimension: ECJ, Supremacy, and Judicial Dialogue
  - **Chapter 16** The ECHR Dimension: Subsidiarity, Margin of Appreciation, and Rights Protection
  - **Chapter 17** Constitutional Pluralism and Inter-Court Cooperation
  - **Chapter 18** Germany's Federal Constitutional Court: Identity Review and Beyond
  - **Chapter 19** France's Constitutional Council: From Political Arbiter to Rights Protector
  - **Chapter 20** Italy's Constitutional Court: Incrementalism and Balancing
  - **Chapter 21** Spain's Constitutional Court: Territorial Conflict and Civil Liberties
  - **Chapter 22** Central Europe: Poland, Hungary, and the Politics of Backsliding
  - **Chapter 23** The United Kingdom: Human Rights Act, Brexit, and the Supreme Court
  - **Chapter 24** Crisis Governance: Terrorism, Migration, and Pandemic Responses
  - **Chapter 25** Reforming Judicial Governance: Independence, Accountability, and Future Pathways
-

# Introduction

Constitutional courts have become central arenas in Europe where fundamental political conflicts are argued, reframed, and ultimately decided. From disputes over the scope of social rights to battles about market regulation, judicial review now shapes the terms of public debate and the feasible space for policy. Yet courts do not operate in a vacuum: they are embedded in institutional designs, appointment rules, and political environments that both empower and constrain them. This book offers a scholarly yet accessible analysis of how high courts influence policy change and political contests, showing when judges lead, when they follow, and how they interact with elected officials and civil society.

Our point of departure is comparative. Europe brings together a rich variety of constitutional arrangements—from Kelsenian constitutional courts to supreme courts with constitutional jurisdiction—and a multi-level legal order that includes the European Court of Justice and the European Court of Human Rights. These layered institutions generate dialogue and sometimes friction, but, more importantly, they create channels through which legal claims can be translated into policy shifts. By examining this diversity, we can isolate the mechanisms by which judicial decisions travel from the courtroom into ministries, parliaments, and agencies, ultimately affecting the lives of citizens.

The analysis proceeds through case studies that trace how courts intervene in two broad policy domains: social rights and market regulation. In the social sphere, rulings on health care entitlements, housing protections, education, and equality have prompted governments to redesign programs, recalibrate budgets, or rewrite statutes. In the market arena, decisions on competition, state aid, privatization, labor rights, and the platform economy have reconfigured regulatory frameworks and the balance of power among firms, workers, and consumers. Across both domains, we pay special attention to the legal standards—such as proportionality and balancing—that structure judicial reasoning and condition the depth of policy change.

Because courts are also political institutions, we probe the dynamics of appointment and tenure that shape judicial behavior and legitimacy. Politicization of appointments can threaten independence, but it can also shine light on the democratic stakes of constitutional adjudication. We examine safeguards that buffer courts from partisan capture—transparent selection procedures, supermajority voting rules, incompatibility provisions, and ethical frameworks—alongside the tools of accountability that sustain public trust. The goal is neither to romanticize nor to vilify courts, but to understand the conditions under which they can adjudicate fairly while engaging as responsible policy actors.

Methodologically, the book integrates doctrinal analysis with process tracing and carefully chosen quantitative indicators of legal and policy change. We follow the life

cycle of litigation—from agenda-setting and case selection through remedies and implementation—to identify the leverage points where judicial choices matter most. Implementation is treated not as an afterthought but as a central puzzle: compliance varies across governments and issues, and remedies—from annulment to proportional, temporally modulated orders—shape whether rulings produce swift transformation, gradual adjustment, or symbolic signaling.

The European multi-level context receives sustained attention. Constitutional courts converse with Luxembourg and Strasbourg through citation, preliminary references, and principled contestation; they also sometimes push back, asserting constitutional identity or proposing limits to supranational authority. These interactions are not merely jurisdictional squabbles—they set parameters for national policymaking, recalibrate rights protection, and influence how executives and legislatures plan and defend reforms. Understanding this dialogue is essential to grasping contemporary European governance.

Finally, the book is written for multiple audiences: legal scholars seeking conceptual clarity, judges reflecting on institutional role and craft, and policymakers designing reforms that both protect judicial independence and enable effective governance. By clarifying when judicial review advances democratic values and social welfare—and when it risks overreach—we aim to equip readers with practical criteria for institutional design and policy strategy. The chapters that follow move from foundational concepts to concrete country studies and thematic applications, culminating in a reform agenda that balances independence, accountability, and the legitimate expectations of democratic politics.

---

## **CHAPTER ONE: The Judicialization of Politics in Europe**

Europe has witnessed a profound transformation in its political landscape over the past decades: the increasing prominence of courts and legal processes in addressing matters once considered solely within the purview of elected officials. This phenomenon, often termed the "judicialization of politics," signifies a notable shift in how public policy is made, challenged, and implemented across the continent. It reflects an evolving relationship between the judiciary and other branches of government, where legal discourse, procedures, and, crucially, judicial decisions, exert a growing influence on core moral predicaments, public policy questions, and political controversies.

At its heart, judicialization implies that courts have expanded their reach, either by

actively inserting themselves into the political sphere or through a process of delegation, where other political actors increasingly rely on judicial mechanisms to resolve disputes. This expansion is not merely theoretical; it manifests in judges making significant policy decisions that, not so long ago, would have been considered the exclusive domain of bureaucrats and politicians. This intricate dance between law and politics means that the boundaries between these traditionally distinct realms are becoming increasingly blurred.

The roots of this judicialization in Europe can be traced back to several key historical and political developments. While the concept of judicial review first gained significant traction in the United States, Europe developed its own distinct model, often referred to as the Kelsenian or Austrian model, which established specialized constitutional courts. Austria and Czechoslovakia were among the first to adopt this centralized model of constitutional review in 1920. However, the widespread adoption of constitutional courts across Europe truly took off after World War II.

The post-war era saw a concerted effort to rebuild democracies and enshrine constitutionalism, largely as a reaction against the authoritarian regimes that had previously gripped the continent. Countries like Germany and Italy, emerging from the shadows of dictatorship, established constitutional courts to protect the constitution, defend fundamental rights, and arbitrate disputes between governmental branches. This wave of constitutional court creation continued with countries like Spain and Portugal, and later, the transitioning democracies of Central and Eastern Europe after the fall of communism. These new institutions were seen as vital components of a system of checks and balances, ensuring that even parliaments respected the supremacy of the constitution.

The expansion of judicial power, however, is not a monolithic phenomenon, and its manifestations vary. One key aspect is the explicit empowerment of judges through constitutional review, allowing courts to critically assess legislative and administrative acts for their consistency with constitutional norms and declare them invalid if necessary. This has introduced substantive constraints on lawmakers, as certain policies can be ruled unconstitutional. Beyond direct judicial pronouncements, judicialization also involves the spread of legal discourse, jargon, rules, and procedures into the broader political sphere and policymaking processes. This means that political decision-making itself often anticipates how a court might rule on legislation, creating a regenerative feedback loop.

Another significant driver of judicialization is the increasing importance of fundamental rights and freedoms in modern constitutional democracies. As societies have become more rights-conscious, there's been a growing reliance on courts to address core moral predicaments and public policy questions through the lens of constitutional rights. This "rights revolution" has led to a situation where issues of rights are increasingly identified and understood as legal rather than purely political in nature.

Civil society actors, particularly in newer democracies, have also actively utilized courts and legal processes to advance their agendas, further propelling the process of judicialization.

The European Union itself has been a powerful engine for judicialization. The "constitutionalization of the EU" and the extraordinary impact of the European Court of Justice (ECJ) have created one of the most complex and dramatic examples of judicialization globally. The ECJ, in collaboration with national judges, established doctrines like direct effect and supremacy, effectively rewriting the Treaty and creating a decentralized mechanism for enforcing EU law. This has led to a steady stream of cases and a sophisticated jurisprudence that influences decision-making not only at the EU level but also within national legal orders, leading to a "Europeanisation" of national law and policymaking.

However, the rise of judicial power has not been without its critics and challenges. Concerns about democratic accountability arise when unelected judges substitute their decisions for those of elected officials. This "government by judges" narrative, though often debated, highlights the tension between judicial independence and democratic legitimacy. The appointment of judges, for instance, can be highly politicized, opening courts to criticisms of partisan influence. Indeed, in recent years, a "backlash" against courts has been observed in some European countries, often fueled by populist movements that resent what they perceive as technocratic constraints on the popular will.

This backlash sometimes involves direct attacks on judicial independence, with governments attempting to exert greater control over the judicial system through reforms or by questioning the authority of national and even supranational courts. Poland and Hungary, for example, have seen significant efforts to curb judicial power and influence the appointment of judges. This dynamic underscores that the judicialization of politics is not a linear, unstoppable trend but rather a complex and often contested process, subject to political pressures and counter-movements.

Despite these challenges, the general trend toward judicialization across Europe remains undeniable. Courts are increasingly involved in scrutinizing executive branch prerogatives, electoral processes, and even matters of national security. This expanding involvement means that political decision-making is now routinely shaped and constrained by higher-order principles articulated by judges. The phenomenon also extends beyond the direct application of rules by judges, encompassing the growing use of trial-like procedures for governmental decisions and the extension of law-like processes into new social spheres.

The growing caseloads in courts and the dramatic increase in legislative acts that judges must apply further contribute to their evolving role. The judiciary, therefore, operates at both the micro-level of day-to-day dispute resolution and the macro-level

of fundamental decisions that impact government responsibilities and boundaries. This intricate involvement transforms how disputes are resolved, often shifting from traditional political bargaining to reliance on third-party judicial means.

The judicialization of politics, therefore, is not merely an academic concept; it has tangible consequences for the daily lives of citizens. Court rulings on issues ranging from fundamental rights to market regulation have the power to reshape public services, economic frameworks, and individual freedoms. This ongoing evolution of the judiciary's role demands a careful and nuanced understanding of its causes, mechanisms, and implications, forming the very foundation for the subsequent chapters of this book. We embark on this journey to unpack how these powerful, yet often constrained, institutions navigate the complex currents of European politics and policy.

---

---

*This is a sample preview. Purchase the book to read the full content.*

Visit [MixCache.com](https://MixCache.com) to purchase the complete book.