

POLI 330: Law and Courts in Europe

POLI 330
Winter 2021

Prof. Maria Popova

Fixed Sessions (Lectures): Wed/Fri, 4pm-4:50pm on Zoom
Office Hrs: Tue 11am-1pm, or by appointment, on Zoom

This course is an introduction to judicial politics in Europe. We will examine the conceptual, theoretical, and empirical foundations of the study of the rule of law and the role of courts in European politics. The conceptual discussion will focus on the elements of the rule of law doctrine, the multiple definitions of judicial independence, and the judicialization of politics. We will also cover the dominant theories of the emergence and sustainability of independent courts and the trend towards judicial empowerment. The empirical examples provided will be very diverse: contemporary and historical European experiences, Western and Eastern European states, democratic, authoritarian, and post-authoritarian regime settings, and constitutional and ordinary judiciaries. The aim of the course is for students to come away with both a strong theoretical understanding of how civil law systems function, as well as some concrete factual knowledge of institutional configurations and salient issues in a broad range of European countries.

Required Readings

This course requires a moderate amount of reading, but many of the articles are challenging either conceptually or methodologically. Plan accordingly. Do NOT fall behind, because you will not be able to skim the readings to catch up. Readings include:

John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford University Press, 1985)

Available for purchase online or at Paragraphe Bookstore: <https://paragraphbooks.com/>

Articles are available online through McGill library resources.

A few readings will be posted on MyCourses.

Remote Delivery

The course has been redesigned for remote delivery.

Lectures will take place on Zoom during the fixed session slots on Wednesday and Friday. The Zoom sessions will be recorded and posted on MyCourses. I strongly encourage you to attend the lectures, but if you cannot attend, you can watch the recording on MyCourses. I will set aside 10-15 minutes during each fixed session for Q&A. The Q&A will not be recorded.

Conferences will start in Week 3. They will be led by the TA and will also take place on Zoom in a fixed session format. You need to sign up for a conference and “attend” that conference slot.

All content of this course, including slides, video recordings, lecture notes, etc. remain the instructor's intellectual property. As such, you may use these only for your own learning (and research, with proper referencing/citation) ends. You are not permitted to disseminate or share these materials; doing so may violate the instructor's intellectual property rights and could be cause for disciplinary action.

Course work

Conference Participation: 10%

You should register for a conference time on Minerva. Conferences will be led by the TA and will begin during the third week of classes. Half of your conference grade will be based on attendance. You are expected to attend all conferences. The other half of your conference grade will be based on the quality of your participation in group discussions and activities. If you cannot attend a given conference, you can submit a 250-word response to the week's readings to get attendance/participation credit. Submit your response to the TA no later than a week after the missed conference.

Film Response Assignment: 35%

To better understand how a typical civil law country organizes and implements criminal justice, you will watch two documentaries: *Who Killed Little Gregory* (2020) and *10th District Court: Moments of Trial* (2006) and write a response assignment on one of them. The first documentary is available on Netflix. Unfortunately, there is no way for me to make it available through McGill. If you do not have a Netflix account, you should write your assignment on *10th District Court*. I will show *10th District Court* on Zoom, on date/time TBA. The film response assignment will be due a week from the documentary screening. The response should focus on outlining 3-5 typical elements of the civil law criminal justice process, which appear in the movie. You should also include an analytical section, which discusses the main drawbacks or strengths of the civil law criminal justice process in terms of efficiency or justice. The response should be 750-1000 words long.

Final Essay: 55%

Each student will write a 2500-3000 word essay on a European example of the intersection of law and politics that we have not covered at length in class. If you're particularly interested in Poland and Hungary's rule of law backsliding, in the Russian regime's use of the courts to persecute political opponents, or in Italy's 1990s anti-corruption campaign, you'd have to come up with an angle on these topics that is distinct from the approach in the assigned readings. Some interesting topics that we won't have time to cover in class are the criminal prosecutions of Catalonia's sovereigntist leaders and the role of the Spanish Constitutional Court in adjudicating the conflict between Catalonia and Madrid; Nicolas Sarkozy's political corruption prosecutions; Russia's tense relationship with the ECHR; Austria's Constitutional Court decision to cancel the results of the 2016 presidential election, etc.

The essay should accomplish two goals: 1) it should clearly lay out the main facts of the incident/process that you are focusing on—What happened? Who were the main actors? What was at stake? What was the outcome? 2) it should engage with a theory or concept covered in lecture or the readings. For example: is judicial independence compromised, illustrated or enhanced? Is judicial power at stake? Has the judiciary acted as an activist or a deferential institution? Is the rule of law under threat or has a rule of law breakthrough been achieved?

It is a good idea to discuss the specific theoretical/conceptual approach/question that you want to address in your essay with the TA or with me in office hours. I will NOT be able to offer detailed guidelines on your topic over email.

On Academic Integrity and Submitting Written Work in French

McGill University values academic integrity. Therefore, all students must understand the meaning and consequences of cheating, plagiarism and other academic offences under the Code of Student Conduct and Disciplinary Procedures (see www.mcgill.ca/integrity for more information).

L'université McGill attache une haute importance à l'honnêteté académique. Il incombe par conséquent à tous les étudiants de comprendre ce que l'on entend par tricherie, plagiat et autres infractions académiques, ainsi que les conséquences que peuvent avoir de telles actions, selon le Code de conduite de l'étudiant et des procédures disciplinaires (pour de plus amples renseignements, veuillez consulter le site www.mcgill.ca/integrity).

In accordance with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded.

Other issues

If you have a disability and you would like to discuss the issue with me, please contact me to arrange a time to meet. It would be helpful if you contact the Office for Students with Disabilities at 514-398-6009 before you do this.

End-of-term course evaluations are one of the ways that McGill works towards maintaining and improving the quality of courses and the students' learning experience. You will be notified by e-mail when the evaluations are available on Mercury, the online course evaluation system. Please note that a minimum number of responses must be received for results to be available to students.

Additional policies governing academic issues which affect students can be found in the McGill Charter of Students' Rights (The Handbook on Students' Rights and Responsibilities is available at : www.mcgill.ca/files/secretariat/Handbook-on-Student-Rights-and-Responsibilities-2010.pdf).

Lecture and Reading Schedule

PART I: THE STRUCTURE OF EUROPEAN JUDICIARIES

Introduction: why do we study courts in a political science course? (Jan 8)

The civil law legal tradition (Jan 13, Jan 15)

- John Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (Stanford University Press, 1985), pp. 1-33.

Ordinary Judiciary (Jan 20, Jan 22)

- John Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America (Stanford University Press, 1985), pp. 34-161.

Criminal prosecution in civil law countries (Jan 27, Jan 29)

- Bron McKillop, "Anatomy of a French Murder Case," *American Journal of Comparative Law*, 45:3 (Summer 1997), pp. 527-583, available online [here](#)
- Independent Commission Against Corruption, Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison, November 1994, pp. 4-31 (article will be posted on the course website)
- William Pizzi, *Trials Without Truth* (New York University Press, 1999), pp. 5-25; 117-140 (article will be posted on the course website)
- Einbinder, Fred. "Corruption Abroad: From Conflict to Co-Operation: A Comparison of French and American Law and Practice." *Int'l Comp., Policy & Ethics L. Rev.* 3 (2019): 667.

Constitutional Courts (Feb 3, Feb 5)

- Louis Favoreu, "American and European Models of Constitutional Justice," in David S. Clark (ed.), Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday (Berlin: Duncker & Humblot, 1990), pp. 105-120.
- Donald Kommers, "The Federal Constitutional Court in the German Political System," *Comparative Political Studies*, Vol. 26, No. 4 (1994), pp. 470-491, available online [here](#)
- Alec Stone Sweet. "Why Europe rejected American judicial review: and why it may not matter." *Michigan Law Review* 101.8 (2003): 2744-2780, available online [here](#)

Transnational Judiciaries: ECHR and ECJ (Feb 10, Feb 12)

- Helen Keller and Alec Stone Sweet, eds. *A Europe of rights: the impact of the ECHR on national legal systems*. Oxford University Press, USA, 2008, Chapter 1 and Chapter 11, available online [here](#)
- Karen Alter, "Who are the "masters of the treaty"?: European governments and the European Court of Justice." *International organization* 52, no. 1 (1998): 121-147, available online [here](#)
- Stone Sweet, Alec. "The European Court of Justice and the judicialization of EU governance." (2010), available online [here](#)

PART II: Main concepts

Rule of law (Feb 17)

- Carothers, Thomas. "The rule of law revival." *Foreign Aff.* 77 (1998): 95.
- Skaaning, Svend-Erik. "Measuring the rule of law." *Political Research Quarterly* 63, no. 2 (2010): 449-460.

Power and activism (Feb 19)

- Hirschl, Ran. "The judicialization of politics." In *The Oxford handbook of political science*. 2008.

- Ferejohn, J. (2002). Judicializing politics, politicizing law. *Law and contemporary problems*, 65(3), 41-68.
- Staton, Jeffrey K. and William Moore. 2011. "Judicial Power in Domestic and International Politics" *International Organization* 65(3): 553-587, available online [here](#)

Activism and accountability (Feb 24)

- Waldron, Jeremy. 2006. The Core of the Case against Judicial Review. *The Yale Law Journal*. 115:1346, available online [here](#)
- Scheppele, Kim Lane. "Democracy by judiciary. Or, why courts can be more democratic than parliaments." *Rethinking the rule of law after communism* (2005): 53-54, available online [here](#)

(In)dependence (Feb 26)

- Maria Popova, *Politicized Justice in Emerging Democracies* (Cambridge University Press, 2012), pp. 14-26. available online [here](#)
- Helmke, Gretchen, and Frances Rosenbluth. "Regimes and the rule of law: Judicial independence in comparative perspective." *Annual Review of Political Science* 12 (2009): 345-366, available online [here](#)

Theories of power and independence of the ordinary judiciary (March 10, March 12)

- Lisa Hilbink, "The origins of positive judicial independence." *World Politics* 64, no. 4 (2012): 587-621, available online [here](#)
- Jose Toharia, "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain," *Law and Society Review*, 9:3 (Spring 1975), pp. 475-496, available online [here](#)
- Hendley, Kathryn. "Rewriting the rules of the game in Russia: the neglected issue of the demand for law." *E. Eur. Const. Rev.* 8 (1999): 89.
- Maria Popova, *Politicized Justice in Emerging Democracies*, pp. 26-44, available online [here](#).
- Kosař, David. "Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe." *German Law Journal* 19, no. 7 (2018): 1567-1612.

Theories of power and independence of constitutional courts (March 17, March 19)

- Lee Epstein, Olga Shvetsova and Jack Knight, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *Law & Society Review*, Vol. 35, No. 1 (2001), pp. 117-163, available online [here](#)
- Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, 2004), pp. 31-100
- Vanberg, Georg. "Constitutional courts in comparative perspective: a theoretical assessment." *Annual Review of Political Science* 18 (2015): 167-185; available online [here](#)

PART III: COURTS AND POLITICS IN EUROPE

Anti-corruption campaigns: Italy, Romania and Bulgaria (March 24, March 26)

- Donatella Della Porta and Alberto Vannucci, "Corruption and Anti-Corruption: The Political Defeat of 'Clean Hands' in Italy," *West European Politics*, Vol. 30, Iss. 4 (September 2007), pp. 830-853, available online [here](#)
- Ceron, Andrea, and Marco Mainenti. "Toga Party: The political basis of judicial investigations against MPs in Italy (1983–2013)." *South European Society and Politics* 20, no. 2 (2015): 223-242, available online [here](#).
- Popova, Maria. "Why doesn't the Bulgarian judiciary prosecute corruption?." *Problems of Post-Communism* 59, no. 5 (2012): 35-49., available online [here](#).
- Mendelski, Martin. "15 years of anti-corruption in Romania: augmentation, aberration and acceleration." *European Politics and Society* (2020): 1-22, available online [here](#).

Rule of law backsliding (March 31, April 2)

- Bánkuti, Miklós, Gábor Halmai, and Kim Lane Scheppele. "Disabling the constitution." *Journal of Democracy* 23.3 (2012): 138-146, available online [here](#)
- Kovács, Kriszta, and Kim Lane Scheppele. "The fragility of an independent judiciary: Lessons from Hungary and Poland—and the European Union." *Communist and Post-Communist Studies* 51, no. 3 (2018): 189-200. Available online [here](#)
- Kosař, David, and Katarína Šipulová. "The Strasbourg court meets abusive constitutionalism: Baka v. Hungary and the rule of law." *Hague Journal on the Rule of Law* 10, no. 1 (2018): 83-110.
- Sadurski, Wojciech. "Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler." *Hague Journal on the Rule of Law* (2018): 1-22.

European integration and the courts (April 7, April 9)

- Daniel Kelemen. "Suing for Europe: adversarial legalism and European governance." *Comparative Political Studies* 39.1 (2006): 101-127, available online [here](#)
- Ackerman, Bruce. "Three Paths to Constitutionalism—and the Crisis of the European Union." *British Journal of Political Science* 45, no. 4 (2015): 705-714, available online [here](#)
- Halmai, Gábor. "The Possibility and Desirability of Rule of Law Conditionality." *Hague Journal on the Rule of Law* (2018): 1-18.
- Kelemen, R. Daniel. "The European Union's authoritarian equilibrium." *Journal of European Public Policy* 27, no. 3 (2020): 481-499.

Courts in authoritarian regimes (April 14, April 16)

- Kathryn Hendley "'Telephone law' and the 'rule of law': The Russian Case." *Hague Journal on the Rule of Law* 1, no. 2 (2009): 241-262, available online [here](#)
- Maria Popova "Putin-Style 'Rule of Law' & the Prospects for Change." *Daedalus* 146, no. 2 (2017): 64-75, available online [here](#)
- Scheppele, K. L. (2018). Autocratic legalism. *The University of Chicago Law Review*, 85(2), 545-584.