The Procedural and Organisational Law of the European Court of Justice

How should judges of the European Court of Justice be selected, who should participate in the Court’s proceedings and how should judgments be drafted? These questions have remained blind spots in the normative literature on the Court. This book aims to address them. It describes a vast, yet incomplete transformation. Originally, the Court was based on a classic international law model of court organisation and decision-making. Gradually, the concern for the effectiveness of EU law led to the reinvention of its procedural and organisational design. The role of the judge was reconceived as that of a neutral expert, an inner circle of participants emerged and the Court became more hierarchical. While these developments have enabled the Court to make EU law very effective, they have also created problems from a democratic perspective. The book argues that it is time to democratise the Court and shows ways to do this.

Christoph Krenn studied in Graz and Paris and received his PhD in law from Goethe University Frankfurt. He is a research affiliate at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, where he was also a research and senior research fellow from 2011 to 2019. In 2019 he was awarded an APART-GSK-Fellowship by the Austrian Academy of Sciences to pursue a four-year research project on the rise of constitutional adjudication in Austria and Switzerland. He has been a visiting scholar at the University Paris 1 Panthéon-Sorbonne, at the iCourts Centre in Copenhagen and at the University of Zurich.
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Anneli Albi
The Procedural and Organisational Law of the European Court of Justice
An Incomplete Transformation

Christoph Krenn
Max Planck Institute for Comparative Public Law and International Law, Heidelberg
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Preface

What are courts for? Specifically, what role has the European Court of Justice (ECJ) intended to fulfil within the legal order of the EU? These are the questions that animate Christoph Krenn’s new book, which we are delighted as Series Editors to welcome to the Cambridge Studies in European Law and Policy.

In very many respects, the role of courts should be obvious. It is to ensure justice and the rule of law, both at a systemic and an individual level. In that respect, the ECJ is no different to other courts, despite its being a relatively unusual type of court with a treaty-based jurisdiction. A large part of the scholarship that addresses the functions of courts does so via a focus on what they do and what they say, especially via various techniques of interpretation. Krenn’s focus is different, although it retains the normative approach of seeking the ‘best’ version of the Court which is common in much writing about what the ECJ actually does. He focuses on the procedural and organisational law of the ECJ, and examines it against a backdrop of three core theories of political and social organisation, which he can also match to the phases of the ECJ’s development. The liberal theory, which focuses primarily on the capacity of courts to deliver individual justice and freedom, can be matched to the early phases of the evolution of the Court, from the time of the Coal and Steel Community onwards. A long middle phase of the Court’s development can be understood best by reference to systems theories which focus on the rule of law tasks that a court such as the ECJ undertakes. Finally, Krenn observes that in some respects the Court’s role, within its wider political and institutional setting, has changed in recent years, and this requires a theory with a focus on how judges deliberate within a wider public discourse which is connected to the will of the democratic legislator. This final turn in the
book allows Krenn then to offer suggestions about how to improve the ECJ’s embeddedness in its social and political environment, for example through reforms to the appointment of judges or to the admission of NGOs and other organisations as participants in court processes.

Krenn offers a deft handling of the theories which help to understand better how courts operate in modern liberal democracies or in post-liberal legal environments such as that of the European Union. He underpins his work by extensive documentary analysis and some quantitative analysis based on datasets of ECJ processes such as the allocation of cases to particular judges as reporting judge. In the end, he offers some shrewd and thought-provoking arguments for reform, which – if adopted – could help to reinforce the legitimacy of this unique supranational court.

Jo Shaw
Mark Dawson
Laurence Gormley
Acknowledgements

This book is the result of a long journey. I developed the main ideas in a doctoral thesis, which I wrote at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and defended at Goethe University Frankfurt in June 2017. It took some time to turn them into this book.

I am grateful to a great number of people who have helped me along this journey. I would like to thank Armin von Bogdandy, who has taught me what it means to be a legal scholar. He not only supervised my doctoral thesis but also let me be part of an exceptional academic community, his Dienstagsrunde. The group’s weekly meetings at the Max Planck Institute have provided the soil from which this book grew. I owe a great debt to all its members – past and present. I would also like to thank Rainer Hofmann, professor at Goethe University, who drafted a swift second opinion and participated in my thesis defence.

This book benefited enormously from two research stays. At the University of Paris 1 Panthéon-Sorbonne, Antoine Vauchez patiently nudged a lawyer into asking empirical questions. His work and his intellectual generosity remain uniquely inspiring to me. At the iCourts Centre in Copenhagen, Mikael Madsen and Jan Komárek have been tremendously helpful in sharpening my conceptual framework. I would also like to thank colleagues and friends associated with the Court of Justice who generously gave their time, at conferences or elsewhere, to discuss my ideas and correct some misunderstandings. All remaining mistakes are entirely my own.

Writing this book would have been a less pleasant experience without the company of many friends. Among them Franz Ebert, Anuscheh Farahat, Markus Fynmys and Stephan Schill stand out. They are not only exceptional discussion partners and true academic role models,
but have also been there for me all along the way. My sisters, no matter how far away, are a source of constant support. Finally, I would like to thank my parents without whose trust and backing I could not have come close to writing this book. This book is dedicated to them.
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ, the Court</td>
<td>European Court of Justice</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>EU</td>
<td>European Union</td>
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<td>GC</td>
<td>General Court of the European Union</td>
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<td>HUDOC</td>
<td>Human Rights Documentation</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>MEP</td>
<td>Member of the European Parliament</td>
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<td>NGO</td>
<td>non-governmental organisation</td>
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<td>O.J.</td>
<td>Official Journal of the European Union</td>
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<td>RoP</td>
<td>Rules of Procedure</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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