13

Judicial Behaviour in the CJEU

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13.1 INTRODUCTION

Comparative judicial behaviour 'seeks to illuminate the choices judges make and the consequences of their choices for society' (Epstein et al. 2024). Indeed, the field of judicial behaviour has expanded beyond analyses of the American judiciary to attempt to characterise judges' decision-making in many contexts around the globe. These accounts of judicial behaviour cross disciplinary boundaries and adopt a variety of theoretical and empirical approaches (see Epstein, Chapter 5 in this volume). This interdisciplinary field attempts to eschew the characterisation of judges as legal robots applying the law in a vacuum, and treats them as individuals that have preferences and are subject to the institutional constraints in which they operate. In other words, contrary to previous eras of academic belief, judges are humans too (e.g., Rachlinski and Wistrich 2017).

In this chapter, I apply this broad interdisciplinary range of research to the Court of Justice of European Union (CJEU) to assess the state-of-the-art in the scholarship. Importantly, I argue that empirical research is necessary to answer questions of judicial behaviour in EU law. I start first from a typology of this research adapted from Epstein and Weinshall (2021) and Epstein et al. (2024) (see Table 13.1). Second, I assess the degree to which scholars of the CJEU have engaged with these approaches and provide suggestions for areas in which the CJEU scholarship can remedy its shortcomings and avenues for future research. Third, I ask whether research on the CJEU can simply follow these paths or if there are features unique to the CJEU's international character that may generate innovative research that does not exist in other areas.

13.2 THE TYPOLOGY OF JUDICIAL BEHAVIOUR AND THE CJEU

Adapting the typology of Epstein and Weinshall (2021) and Epstein et al. (2024), the study of judicial behaviour can be broadly separated into five approaches: (1)

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TABLE 13.1 *Approaches to analyse judicial behaviour*

Approach	Description
Legalism	Judges 'find' the meaning of legal rules through (politically) neutral methods.
Attitudinal Model	Judges' votes reflect their policy preferences towards case facts.
Rational Choice Accounts	**Labour Market Model:** Judges are motivated and constrained by (mostly) non-pecuniary costs (e.g., effort, criticism) and benefits (e.g., esteem, influence, self-expression). **Strategic Analysis:** Judges are strategic actors who realise that their ability to achieve their goals depends on the preferences of other actors, the choices they expect others to make, and the institutional context in which they interact.
Identity Accounts	Judges' biographies, professional backgrounds, personal characteristics, and identities affect their choices.
'Thinking Fast' Judging	Judges rely on heuristics, intuitions, and the like (e.g., 'hunches') to make fast and effortless decisions.

Source: Adapted from Epstein and Weinshall (2021) and Epstein et al. (2024).

Legalism, (2) the Attitudinal Model, (3) Rational Choice Accounts, (4) Identity Accounts, and (5) 'Thinking Fast' Judging (see Table 13.1). Legalism broadly eschews political considerations and argues that judges primarily use neutral methods to determine the meaning of the law. In the civil law tradition, for example, the prevailing account is that only the legislature makes law with the judge applying the law as an 'expert clerk. Presented with fact situations to which a ready legislative response will be readily found … the judge's function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union' (Merryman and Pérez-Perdomo 2019: 36). Such approaches mainly discuss the principles and rules that guide the application of the law as opposed to considerations unique to judges or external to the judiciary (e.g., Conway 2008).

Alternatively, the remaining accounts depart from simply contextualising judges' decision-making as a function of legal constraints, and provide frameworks that emphasise individual, institutional, and external factors that influence the outcomes of cases. The Attitudinal Model, for example, argues that judges' votes or opinion-writing on cases is a function of their policy preferences regarding case facts, with the underlying political preferences reflective of ideological or partisan concerns. Rational Choice accounts take the form of the Labour Market Model – in which judges are often trying to find the most efficient means to accomplish their goals on the bench (e.g., Epstein et al. 2013) – and more strategic analyses – in which they are weighing the preferences of institutional and external actors when charting the best course to achieve their goals (e.g., Lax and Cameron 2007). Identity Accounts emphasise judges' personal and professional characteristics in influencing their choices (e.g., Boyd et al. 2010; Glynn and Sen 2015). Lastly, 'Thinking Fast'

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Judging approaches emphasise judges' use of heuristic and cognitive shortcuts to quickly solve cases (e.g., Posner and De Figueiredo 2005).

Important to note is that the vast majority of this scholarship primarily concerns the United States and, even when outside of the United States (e.g., Helmke 2005; Ramseyer and Rasmusen 2001), is focused primarily on domestic judiciaries (for notable exceptions, see Posner and De Figueiredo (2005); Stiansen (2022); Voeten (2008)). In what follows, I divide the CJEU judicial behaviour scholarship into three categories: judge-level factors, internal institutional factors, and external factors that encompass various facets of the aforementioned typology. I survey and critique this scholarship, while providing areas for improvement. In sum, the CJEU scholarship has engaged well with rational choice accounts of judicial behaviour, but a considerable opportunity exists to apply attitudinal, identity, and 'Thinking Fast' approaches.

13.3 JUDGE-LEVEL FACTORS

Judges have preferences over case outcomes (e.g., Segal and Spaeth 2002), must often resolve a case in a collegial setting, (e.g., Edwards 1998), and have limited time to allocate to a large caseload (e.g., Epstein et al. 2013). While the vast majority of scholarship uses individual judges' votes or written dissents (e.g., Garoupa et al. 2021; Voeten 2007), examining how these factors impact decision-making at the CJEU is an empirical challenge, as the CJEU is a per curiam court that does not publish individual judges' votes on cases. Indeed, as former CJEU judge Josef Azizi (2011: 55–56) explains, revealing judges' positions on cases could put a judge

> under pressure to change his or her attitude in order to be in line with his or her member state … and, consequently, bias his or her vote in an anticipative manner … Every time a judge in office knows he or she will have to find himself or herself a future professional career … the perception of his or her judicial behaviour by a potential employer might have an influence on that behaviour.

Despite the Court's deliberate obfuscation of the decision-making process, scholars utilise available information to make inferences about how individual judges may affect case outcomes.

As Member States employ a variety of procedures to appoint their judges to the CJEU without requiring the consent of the other Member States (Dumbrovsky et al. 2014), resulting in a wide range of heterogeneity in judge background (Brekke et al. 2023), it is likely that judges at the CJEU also have differences in preferences. To assess these differences, Malecki (2012) leveraged rotation among chambers to demonstrate that the judges' preferences across are not uniform. Frankenreiter (2017, 2018), additionally, provides evidence that the preferences of Advocates-General also vary across the European integration spectrum. Furthermore, Cheruvu (2024) demonstrates empirically that when the judge-rapporteur (JR, opinion-writer) receives an observation (amici curiae brief) from their appointing

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Member State, the JR's panel is likely to rule in favour of the appointing Member State.

The Court's judges, nonetheless, make decisions collectively. CJEU President Koen Lenaerts (2013: 1351) observes, 'As consensus-building requires to bring on board as many opinions as possible, the argumentative discourse of the [CJEU] is limited to the very essential. In order to preserve consensus, the [CJEU] does not take "long jumps" when expounding the rationale underpinning the solution given to novel questions of constitutional importance.' This consensus-building, however, may at times favour some judges over others.

For example, Cheruvu and Zeigler (n.d.) use the texts of judgments and convolutional neural networks to demonstrate how the content of judgments may systematically differ based on which judge is serving as the JR. Similarly, Ovádek et al. (n.d.) distinguish the contribution of non-rapporteur judges to the final text of a judgment. Wijtvliet and Dyevre (2021), furthermore, use expert interviews to place judges on the General Court on a pro-business latent scale and provide evidence that decisions on state aid and competition are correlated with the ideology of the median. Given the non-random assignment of cases to judges (e.g., Cheruvu and Krehbiel 2022; Hermansen 2020), however, a substantial inferential problem exists. That is, it is difficult to distinguish whether or not these differences among judges are a result of the cases the Court's president assigns to them. Future scholarship can endeavour to formulate creative research designs that can promote causal identification (see Dyevre (2023) for a thorough discussion on this point).

Additionally, judges at the CJEU, in a similar vein to other courts around the world (e.g., Epstein et al. 2013; Roussey and Soubeyran 2018), face strong workload pressures and have incentives to efficiently dispose of cases. The Court's use of French as its working language also exacerbates this constraint, as Cheruvu (2019) provides evidence that cases with a non-native French-speaking JR take more time to complete on average. To increase efficiency, the Court has increasingly relied on small chambers to decide cases (e.g., Kelemen 2012). Running a series of computational simulations, Fjelstul et al. (2023) suggest that increasing the number of judges at the court as well as the use of the chamber system may lead to substantial efficiency gains for the court. The CJEU also now has new procedural tools to reduce the likelihood of hearing cases that deal with substantively similar issues, which Brekke et al. (2023) argue increased efficiency at the CJEU. Future research can explore how workload pressures on judges may systematically affect the quality of decisions or affect the likelihood of certain judges having more influence over case outcomes relative to others.

Much of the aforementioned scholarship of the individual-level factors that affect the CJEU's decision-making, however, has primarily leveraged ideological distinctions among judges on the pro-anti EU dimension (with the notable exception of Wijtvliet and Dyevre (2021)), or Member States' overt signals to their judges through observations. Importantly, other salient cleavages, such as the left/right ideological

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divide (e.g., Cheruvu 2022; Larsson and Naurin 2019) and social class, along with other identity-based factors, such as gender (e.g., Gill and Jensen 2020) and religion, are largely understudied (e.g., Shahshahani and Liu 2017). As such, the CJEU literature largely lacks a stream of research in the vein of the attitudinal model. Arguably, this dearth of research may largely be due to the lack of identifying votes, which functionally reduces the number of data points to analyse judges' behaviour. Furthermore, given the variation in judges' Member States and political parties that appointed them, placing the judges on a single ideological dimension without expert knowledge of them (e.g., Wijtvliet and Dyevre 2021) is challenging.

To make headway in this regard, the scholarship requires models of CJEU decision-making. In other words, when a panel of judges hears a case and the members of the panel have different preferences on a given dimension, in expectation, what should be the outcome of the case? While models suggesting the median judge or the median of the majority is decisive may be applicable (e.g., Carrubba et al. 2012; Wijtvliet and Dyevre 2021), the JR's ability to draft the initial judgment may impact whether other judges are willing to expend costly effort to make a counteroffer (more details on this point in the following section). For example, judges with higher workloads, as the labour market model predicts, may find it more costly to exert effort to alter the JR's judgment (Hermansen and Voeten 2024). Upon generating such predictions from a theoretical model of CJEU decision-making, scholars can then leverage various proxies of judicial ideology (e.g., Sen 2015) to then examine the impact of ideology on outcomes. As such, while an individual judge's behaviour in the form of a vote is not public information, scholars can generate and test predictions when they specify a model of decision-making.

13.4 INTERNAL INSTITUTIONAL FACTORS

The internal organisation and rules of courts can substantially affect outcomes, as they fundamentally affect the bargaining process (e.g., Carrubba et al. 2012; Lax and Cameron 2007). At the United States Supreme Court in which the Chief Justice assigns opinion authorship when they are in the majority, for example, Lax and Rader (2015) provide evidence that opinion-authorship assignment affects the probability of a justice's defection from the initial majority-coalition. At the CJEU and many other European courts, the Court's president assigns a case to a JR when it arrives to the court. This allows the JR to have 'a greater weight in the eyes of the other judges ... [T]he rapporteur holds a near monopoly over knowledge of facts and other materials concerning the case, including the competing arguments, so the other judges may be left at an informational disadvantage' (Kelemen 2017: 43). After authoring a preliminary report, the JR presents it to the plenary session of all the judges, at which point a determination is made as to the size and composition of the panel that will hear the case. The First AG assigns

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the case's AG when it arrives at the Court, with the plenary also determining whether the AG will issue an opinion.

The various steps of this process of case assignment to JRs and the composition of panels is consequential to outcomes at the CJEU. First, Hermansen (2020) provides evidence that the Court's president (1) systematically assigns cases on similar topics to the same JRs and (2) assigns cases in which substantial disagreement exists among governments to judges whose governments are closer to the median ideologically among EU members (see Kelemen (2012) for a thorough theoretical justification of this point). While, on the one hand, the president encouraging judges' specialisation in specific policy areas may increase consistency in the law, on the other hand, coupling this finding with research demonstrating JR's ideological alignment with their appointing governments (e.g., Cheruvu 2024), may lead to systematic biases in case law favouring the positions of specific Member States. Future research can explore the potential counterfactual development of CJEU case law if the president were to assign cases quasi-randomly, as is the practice at US Circuit Courts (e.g., Hall 2010).

Second, Cheruvu and Krehbiel (2022) provide evidence that when the CJEU faces a credible threat of legislative override, it is more likely to assign a case to a larger panel of judges. These larger panels, thus, are more likely to vote in favour of the position favoured by the Member States, complementing Hermansen's (2020) finding regarding the president's strategic JR-assignment. This discrepancy in decision-making between smaller chambers and larger formations, while strategic to accommodate Member State preferences, may also have other consequences. Although the Court's delegation of cases to chambers provides efficiency gains (Fjelstul et al. 2023), it leads to inconsistencies in the application and development of EU law (Fjelstul 2023), with these effects particularly pernicious as judges' preferences become more heterogeneous. Research can further examine the discrepancies in case outcomes when different groupings of judges hear cases and connect such findings to the more general scholarship about institutional procedures and outcomes at courts.

In this area of research, substantial opportunity exists for synergies with the legal scholarship. For example, volume 19 issue 7 of the *German Law Journal* (2018) was entirely dedicated to the topic of judicial self-governance. Many of these articles, in particular, highlight the role of the president's case assignment as potentially affecting the day-to-day operations of the court. These presidents 'can either assign cases on a discretionary basis, or they determine (or at least heavily influence) the rules … of case assignment' (Blisa and Kosař 2018: 2045–46) in Ireland (O'Brien 2018), Italy (Benvenuti and Paris 2018), France (Vauchez 2018), the Netherlands (Mak 2018), and the Czech Republic (Blisa and Kosař 2018). Legal scholars and social scientists alike are aware of the potential implications of these institutional mechanisms on the development of law. Scholars of the CJEU, which as I previously mentioned also are increasingly interrogating the role of the president

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(Cheruvu n.d.a), can profit from engaging in this scholarship and can add another layer to theories of judicial behaviour in the form of institutional governance.

13.5 EXTERNAL FACTORS

Gibson et al. (1998: 343) contest that 'with limited institutional resources, courts are therefore uncommonly dependent upon the goodwill of their constituents for both support and compliance. Indeed, since judges often make decisions contrary to the preferences of political majorities, courts, more than other political institutions, require a deep reservoir of goodwill.' Simply put, courts cannot always rely on other institutions to comply with or enforce their decisions. As such, a large comparative judicial politics scholarship explores the different external constraints courts face and the actions of courts to mitigate such constraints (e.g., Ferejohn and Weingast 1992; Helmke 2005; Staton 2010; Vanberg 2015). Heeding the call of Staton and Moore (2011), scholars have increasingly analysed the CJEU similarly to its domestic counterparts as a court whose decisions take into account the potential enforcement problem, the possibility of legislative override, and the potential for retribution against individual judges through appointments.

First, scholars argue that courts can compel policy-makers to comply with their decisions if they have sufficient public support for their decision-making. As a member of the German Bundestag explained, 'There is not a single deputy here who thinks it would be advisable to move against the court. A serious confrontation would just create a public discussion in which one could easily get a bloody nose' (Vanberg 2005: 121). As such, Gibson and Caldeira (1995, 1998) and Caldeira and Gibson (1995) examined public support for CJEU decision-making three decades ago and generally conclude that the CJEU does not have a large store of public support and that EU citizens would not accept a CJEU decision that they find objectionable. While Kelemen (2012) pushes back against these claims, the scholarship regarding the public's general willingness to accept CJEU decisions requires updating.[1] Krehbiel (2021) provides evidence that the CJEU is less likely to issue a pro-integration ruling as public awareness of its decisions increases – suggesting that, unlike in other courts (e.g., Staton 2010; Vanberg 2005) – the CJEU believes that public awareness may be detrimental to its ability to obtain compliance and conditions its decisions on such awareness. Other scholars argue that politicisation of issues in the general public has systematically altered CJEU jurisprudence in citizenship rights (e.g., Blauberger et al. 2018; Blauberger and Martinsen 2020).

[1] See Cheruvu et al. (2024) for the role of partisanship and democratic values in determining Hungarians' acceptance of the CJEU's rule of law mechanism decision, Cheruvu and Krehbiel (n.d.) for Hungarians' support of the CJEU's judicial power over questions of democracy, and Cheruvu and Krehbiel (2024) for how the preliminary reference procedure can increase public support for EU law).

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Second, scholars argue that legislative and executive institutions may affect judicial decision-making. Broadly speaking, if courts care about their influence over policy and constraining governments, they may anticipate legislative reactions to their behaviour because they believe that doing so allows them to secure better long-term outcomes (e.g., Ferejohn and Weingast 1992; Rogers 2001) or – returning to the first point – that open defiance may erode their public support and systematically undermine its ability to affect policy in the future (e.g., Carrubba 2009; Gibson et al. 1998). Although substantial debate existed as to whether the CJEU was responsive to the preferences of Member States (e.g., Garrett 1995) or largely insulated from them (e.g., Burley and Mattli 1993; Stone Sweet and Brunell 1998) (see Naurin, Lindholm, and Schroeder, Chapter 2 in this volume, and Dyevre (2023) for a summary of this debate), recent scholarship provides systematic empirical evidence that CJEU is responsive to Member State preferences (see Krehbiel et al. 2017) for a comprehensive review). Carrubba et al. (2008), Carrubba and Gabel (2015), and Larsson and Naurin (2016) provide evidence that the CJEU is responsive to threats of legislative override as Member States express through their observations to the court. Larsson (2021) further specifies this claim by distinguishing between political and constitutional overrides, suggesting that political overrides are the prevalent form of legislative action. Building on this scholarship, Cheruvu (n.d.b) demonstrates that when the Council President submits an observation in a case, the CJEU will wait until after the presidency is over to issue its decision in a case to reduce the probability of the President initiating override legislation. Larsson et al. (2017) argue that as an additional tool to combat override, the CJEU will more likely embed its decisions in existing case law to increase the persuasiveness of its arguments to reluctant Member States. Schroeder (2023) demonstrates empirically that the CJEU is less likely to show deference to national courts as it receives more observations from Member States. In addition to these direct overtures through briefs, the CJEU may also face explicit domestic modification and non-adoption in Member States as a form of resistance to its decisions (e.g., Martinsen 2015a, 2015b). Castro-Montero et al. (2018) also provide evidence that the CJEU is less likely to rule against Member States when infringement cases coincide with treaty negotiations. Although the CJEU has had a systemic preference towards supranationalism in its jurisprudence (e.g., Ovádek 2021; Pollack 1997), its judges are responsive to these constraints when making decisions.

Third, scholars provide evidence that the process by which governments appoint, promote, and discipline judges affects judicial decision-making (e.g., Canes-Wrone et al. 2014; Dunoff and Pollack 2017; Helmke 2005; Ramseyer and Rasmusen 2003). Indeed, governments that want favourable decisions from courts will be prudent to appoint judges that are sympathetic to their policy proposals (e.g., Bonica and Sen 2017). Substantial variation exists across the EU for how judges are appointed (Dumbrovsky et al. 2014), with some processes more insulated from politics relative to others. The fact the CJEU does not publish judges' votes may affect judges'

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responsiveness to political pressure. For example, Cheruvu (2024) finds that CJEU judges are responsive when their appointing government sends observations, but are not as responsive to observations when the government of their appointing Member State turns over. This finding suggests that judges have some ideological affinity with their appointing government, but feel protected from retaliation by the per curiam nature of CJEU rulings. Nonetheless, despite per curiam decisions, Hermansen and Naurin (n.d.) provide evidence that appointing governments decide (not) to (re)appoint judges based on ideology. The CJEU in 2010 introduced the Article 255 panel as a merit commission to evaluate judges on the court. Cheruvu et al. (n.d.) demonstrate that the presence of the panel systematically influences judges' effort investments into their opinion-writing and affects their efficiency. Moving forward, scholars can further examine how these appointment pressures affect judicial decision-making and how Member States can influence the CJEU's judgments on cases through appointments.

13.6 WHAT CAN EMPIRICAL LEGAL STUDIES OF THE CJEU ADD TO JUDICIAL BEHAVIOUR?

The international character of the CJEU may raise a number of unique considerations that may affect judicial decision-making in ways that are largely unaddressed by previous scholarship. First, the CJEU brings together judges from a variety of legal cultures and traditions. Scholars provide substantial evidence across contexts regarding the relationship between legal traditions and judicial decision-making (e.g., Garoupa 2024). At the CJEU, and other international courts, judges across legal traditions are making decisions together. Such differences among legal traditions may require judges to compromise in ways that are uncommon in their domestic legal systems. Furthermore, judges at the CJEU come from a variety of linguistic backgrounds that may lead to different understandings of EU law and create frictions among judges who must use French in writing their judgments, even if it is not their native language (e.g., Cheruvu 2019). Judges, for example, have to wait until all of the documents in a case are translated into French before they are able to proceed in their adjudication process. As McAuliffe (2011: 98) states, 'Together with the difficulties of manipulating a language that is not one's own, the result is often a stilted and awkward text.'

Yet, despite these potential obstacles to effective judging, scholars also provide evidence of substantial socialisation among judges (e.g., Vauchez 2012) resulting in a broadly pro-integrationist jurisprudence over time (e.g., Ovádek 2021), and a '"CourtFrench" which necessarily shapes the case law produced and has implications for its development, particularly insofar as it inevitably leads to a type of precedent in that case law' (McAuliffe 2011: 99). This insight about the diversity of judges' backgrounds, but supposed coherence of the decision-making of the institution, may play an important role in theory development that may go beyond the

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existing reach of the judicial behaviour typology. Although extensive scholarship discusses the development of collegiality among judges (Edwards 2003; Nelson et al. 2022) and its effects on judicial decision-making, scholars can spend more time theorising about how judges adapting to an unfamiliar multilingual environment may potentially dampen the correlation between ideology and judicial decision-making. Alternatively, scholars may posit that as judges learn and are socialised into a new institution (Vauchez 2012), they are able to leverage this capital over time to achieve their goals (Hermansen and Naurin, n.d.). Put differently, multilingual and diverse environments such as the CJEU may increase a judge's costs to develop new doctrine or advance their new agenda, thus creating a unique obstacle relative to domestic courts in achieving one's preferred outcome in a case.

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