

**GRAD-C2-2004: Law and Governance: the rule of law crisis in the European Union**

Ana Bobić

**1. General information**

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| Class time                | Fridays, 12-14h   |
| Course Format             | <b>Online Only:</b><br>This course is taught online only via the platform Teams. Teams allows for interactive, participatory, seminar style teaching. |
| Instructor                | Ana Bobić   |
| Instructor's office       | F194, Office 3.13   |
| Instructor's e-mail       | <a href="mailto:bobic@hertie-school.org">bobic@hertie-school.org</a>  |
| Instructor's phone number | +49 30 259 219 354  |
| Assistant                 | Email: <a href="mailto:adjunctsupport@hertie-school.org">adjunctsupport@hertie-school.org</a>   |
| Instructor's Office Hours | By appointment.   |

Link to Module Handbook [MIA](#) and [MPP](#)Link to [Study, Examination and Admission Rules](#)Instructor Information:

Ana Bobić is a Postdoctoral Researcher at the LEVIATHAN Project at the Hertie School of Governance. As part of the LEVIATHAN team, she is working on questions of accountability in EU economic governance, with a specific focus on the role of judicial and constitutional review conducted by the Court of Justice and national constitutional courts. Her research interests also include EU constitutional law and theory, as well as judicial interactions in the EU more generally. She completed the DPhil at the Faculty of Law, University of Oxford as a Law Faculty Graduate Assistance Fund scholar. Previously, Ana studied B.A. LL.M. at the Faculty of Law, University of Zagreb, Croatia, and graduated summa cum laude in 2011; and the MJur at Oxford as the OSI/University of Oxford scholar in 2012. Ana was a lecturer in Constitutional and Administrative Law at Keble College, University of Oxford, and the Graduate Mooting Assistant at the Oxford Law Faculty. She is currently the coach of the Hertie School's team at the Philip C. Jessup International Law Moot Court Competition.

**2. Course Contents and Learning Objectives**Course contents:

Supreme and constitutional courts across the world have played an important role in holding the legislative and executive power to account, by reviewing and annulling legislation and other binding regulation for their compliance with national constitutions. Constitutional review, as this judicial

activity is called, has been at the root of a number of theoretical as well as practical debates concerning the appropriate role of courts in democratic systems.

More specifically in the European Union, the Court of Justice has played a central role in shaping the relationship between the Union and national law. Crucially, however, this has been done by way of cooperation with national judges, who have been obliged to hear cases involving EU law brought before them. On the national level, highest national courts have traditionally contested expansions of EU law imposed by the Court of Justice, relying on the obligation of the EU in the Treaties to ensure diversity and protect national 'fundamental structures, political and constitutional'. Traditionally, conflicts between the EU and national highest courts of its Member States have helped the development of EU constitutional law in a number of ways that will be explored in this course.

Most recently, we are witnessing a different type of conflict between the EU and a number of EU Member States, where governments' attacks on the independent judiciary can be seen as the preferred method of diminishing the rule of law. Through the course of the semester, the students will therefore be introduced to the theory and practice of constitutional review, and constitutional conflicts in the European Union.

#### Main learning objectives:

The aim of this course is to, first, provide a theoretical background on constitutional review as a concept, and provide theoretical debate surrounding this concept in comparative constitutional settings such as the US and a number of European countries. The overall aim of the course is to provide participants with an introduction into legal decision-making and the role of law and courts.

Second, the course will look at the development and role of constitutional review in the European Union, and the resulting judicial interactions between the European Court of Justice and national constitutional courts. This will be aided by a look at the theoretical debates on constitutional conflict in theories of federalism and constitutional pluralism.

Finally, from an empirical perspective, the course will go through five different stories of constitutional conflict that took place throughout the process of European integration, beginning in the 1970s up to present. Finally, the course will address the most recent rule of law backsliding the EU is currently facing.

#### By the end of this course, students will be able to:

1. Apply academic debates and literature to contemporary issues concerning the powers and role of highest courts in different political systems;
2. Reflect on current contested issues – i.e. surrounding the role of courts in democratic systems and the relationship between authoritarianism and judicial independence;
3. Develop practical research, advocacy, and legal argumentation skills.

#### Target group/Prerequisites:

This course is a variation of the Law and Governance core course. The target group for this course is 1<sup>st</sup> year public policy students with limited knowledge and experience of law and legal systems. There are therefore no prior prerequisites for enrolment in the course. However, this course may include some advanced-level content.

#### Teaching style:

The course combines the discussion of theoretical concepts that have emerged through practice of institutions legal and political institutions in different constitutional systems. The different sections of the course integrate academic readings and the application of these concepts to examples throughout the spectrum of polities, national and supranational. Reflecting on merits of the theoretical contributions discussed in the first part of the course will be the aim of the first assignment (essay). Furthermore, combining theory and practice will specifically be the focus of the second assignment (research paper). Finally, the application of these theoretical and research skills in group work and through written and oral legal argumentation will be at the centre of the third assignment (moot court).

### **3. Grading and Assignments**

#### Composition of Final Grade:

|  |                               |                   |     |
|--|-------------------------------|-------------------|-----|
| <b>Assignment 1: Essay.</b>                | Deadline: 5 March 2021, 5PM.  | Submit via email. | 25% |
| <b>Assignment 2: Research paper.</b>       | Deadline: 9 April 2021, 5PM.  | Submit via email. | 25% |
| <b>Assignment 3: Moot court.</b>           | Deadline: 23 April 2021, 5PM. | Submit via email. | 40% |
| <b>Participation grade (if applicable)</b> |                               |                   | 10% |

#### Assignment Details

##### **Assignment 1 - Essay (25%)**

A 1500-word essay (excluding references) will be submitted on **5 March 2021**. The lecturer will distribute the essay topic, and these will be given to students one week in advance of the deadline. It is expected that the essay will critically reflect upon the theoretical debates discussed in classes. The readings covered in classes will be used as the basic literature, and the students will be expected to offer more nuanced theoretical discussions and conclusions.

##### **Assignment 2 - Research paper (25%)**

A 1500-word research paper (excluding references) will be submitted on **9 April 2021**. The lecturer will distribute the research question, which the students will explore in a particular system of constitutional review of their choice, in agreement with the lecturer. The readings covered in classes will be used as the basic literature, however, students will be expected to conduct independent research of the specific national system, to provide a more detailed overview of the research question.

##### **Assignment 3 - Moot court (40%)**

Week 11 of the course will consist of a simulated legal pleading called a 'Moot Court'. Course participants will be split into groups of 5-6 students (depending on class size) and will be given a hypothetical legal case on 9 April 2021. Working as a team, you will have to prepare arguments for one of the parties to the case, to be submitted as written legal memorials. Written pleadings should be 2.500 words maximum and should be submitted by email (deadline **23 April 2021**). You will also have to plead orally, i.e. defend your client by presenting legal arguments from the written submission

in simulated court proceedings, responding to the arguments of the other side, and to the questions of the judges. The judges of the oral pleading will be the instructor and previous moot court competitors of the Hertie School. More detailed instructions will be given with the hypothetical legal case.

#### **Participation grade (10%)**

The participation grade is based on the assumption that students take part, not as passive consumers of knowledge, but as active participants in the exchange, production, and critique of ideas—their own ideas and the ideas of others. Therefore, students should come to class not only having read and viewed the materials assigned for that day but also prepared to discuss the readings of the day and to contribute thoughtfully to the conversation. Participation is marked by its active nature, its consistency, and its quality.

**Late submission of assignments:** For each day the assignment is turned in late, the grade will be reduced by 10% (e.g. submission two days after the deadline would result in 20% grade deduction).

**Attendance:** Students are expected to be present and prepared for every class session. Active participation during lectures and seminar discussions is essential. If unavoidable circumstances arise which prevent attendance or preparation, the instructor should be advised by email with as much advance notice as possible. Please note that students cannot miss more than two out of 12 course sessions. For further information please consult the [Examination Rules](#) §10.

**Academic Integrity:** The Hertie School is committed to the standards of good academic and ethical conduct. Any violation of these standards shall be subject to disciplinary action. Plagiarism, deceitful actions as well as free-riding in group work are not tolerated. See [Examination Rules](#) §16.

**Compensation for Disadvantages:** If a student furnishes evidence that he or she is not able to take an examination as required in whole or in part due to disability or permanent illness, the Examination Committee may upon written request approve learning accommodation(s). In this respect, the submission of adequate certificates may be required. See [Examination Rules](#) §14.

**Extenuating circumstances:** An extension can be granted due to extenuating circumstances (i.e., for reasons like illness, personal loss or hardship, or caring duties). In such cases, please contact the course instructors and the Examination Office *in advance* of the deadline.

## **4. General Readings**

The course does not have general textbooks that will be used throughout the course. You will be working with a wide range of legal sources e.g. judgments from the European Court of Justice and a number of national constitutional and supreme courts, policy documents, and academic book chapters and articles.

## **5. Session Overview**

| Session | Session Date | Session Title  |
|---------|--------------|--|
| 1       | 12.02.2021   | Constitutional review                                      |
| 2       | 19.02.2021   | The counter-majoritarian difficulty                        |
| 3       | 26.02.2021   | Systems of constitutional review                           |
| 4       | 05.03.2021   | The Simmenthal mandate and judicial interactions in the EU |

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| 5  | 12.03.2021 | Theorising judicial interactions and constitutional conflict in the EU |
| 6  | 19.03.2021 | The fundamental rights protection story                                |
| Mid-term Exam Week: 22 – 26.03.2021 – no class |            |  |
| 7  | 09.04.2021 | The internal market story  |
| 8  | 16.04.2021 | The judicial remedies story  |
| 9  | 23.04.2021 | The judicial independence story  |
| 10   | 30.04.2021 | Rule of law backsliding  |
| 11   | 07.05.2021 | Moot court session   |
| 12   | 14.05.2021 | The future of judicial interactions and constitutional conflict        |
| Final Exam Week: 17 – 21.05.2021 – no class    |            |  |

## 6. Course Sessions and Readings

All readings will be accessible on the Moodle course site before semester start. In the case that there is a change in readings, students will be notified by email.

Required readings are to be read and analysed thoroughly. Optional readings are intended to broaden your knowledge in the respective area and it is highly recommended to at least skim them.

| Session 1: Constitutional review |  |
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| <b>Learning Objective</b>        | <p>In this session, the aim is to introduce the students to the concept of constitutional review and its role in contemporary democracies. The readings include an introduction to judicial interpretation and the development of constitutional review across different constitutional systems. In addition, the session will cover several seminal judicial decisions establishing or expanding constitutional review.</p> <p>The overall aim of this session is to introduce main concepts and issues surrounding constitutional review, to be complemented by the following two sessions. This will create the basis to be able to delve further into the details of constitutional review and its issues in the European Union and its Member States in the sessions to follow.</p> |
| <b>Required Readings</b>         | <ol style="list-style-type: none"> <li>1. P Schlag, No Vehicles in the Park, (1999) 23 Seattle U. L. Rev. 381.</li> <li>2. M Fichera - Constitutional courts as positive legislators</li> <li>2. Marbury v Madison (US Supreme Court 1803).</li> <li>4. Court of Justice Case 6/64 <i>Costa v ENEL</i> [1964] EU:C:1964</li> <li>5. Court of Justice Case 26/62 <i>van Gend en Loos</i> [1963] EU:C:1963:1</li> </ol>  |
| <b>Optional Readings</b>         |  |

## Session 2: The counter-majoritarian difficulty

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| <b>Learning Objective</b> | This session will aim to introduce the students to the debates surrounding the legitimacy of constitutional review. In particular, we will be discussing the concept of the counter-majoritarian difficulty, as the central critique directed to the courts' ability to review and annul legislation. The aim is to enable a discussion on the merits and drawbacks of constitutional review, in order to provide a sound basis for further discussions concerning the reach and legitimacy of the role of courts in the EU and its Member States, and their position in the rule of law crisis. |
| <b>Required Readings</b>  | <ol style="list-style-type: none"><li>1. O Bassok and Y Dotan, 'Solving the countermajoritarian difficulty?' (2013) 11(1) <i>ICON</i> 13.</li><li>2. Supreme Court of the US, <i>Obergefell v Hodges</i>, Judgment of 26 June 2014. (Opinions of Judge Kennedy (p. 2-28) and the Dissenting Opinion of Justice Scalia)</li></ol>   |
| <b>Optional Readings</b>  | <ol style="list-style-type: none"><li>1. J Waldron, 'The core case against judicial review' (2006) 115 <i>Yale Law Journal</i> 1346.</li><li>2. M Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94(2) <i>Michigan Law Review</i> 245.</li></ol>  |

## Session 3: Systems of constitutional review

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| <b>Learning Objective</b> | The aim of this session is to look into different systems of organising constitutional review. We will look into three systems of constitutional review that have historically developed in Europe and the US, and are representative of the majority of European countries. This will enable the students to better understand the different power dynamics between the legislature, the executive, and the judicial branch on the national level, and in relation to the European Court of Justice.   |
| <b>Required Readings</b>  | <ol style="list-style-type: none"><li>1. M de Visser, <i>Constitutional Review in Europe</i> (Hart Publishing 2014), Chapter 2: "The Rise of Constitutional Adjudication" (except section III.C.).</li><li>2. P H Lindblom, 'The role of supreme courts in Scandinavia' (2000) 39 <i>Scandinavian Studies in Law</i> 325, pages 330-337.</li><li>3. L Garlicki, 'Constitutional court and politics. The Polish Crisis' in Landfried, C. (Ed.) <i>Judicial Power: How Constitutional Courts Affect Political Transformations</i>. (Cambridge University Press 2019).</li></ol> |
| <b>Optional Readings</b>  |   |

## Session 4: The Simmenthal mandate and judicial interactions in the EU

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| <b>Learning Objective</b> | This session aims to introduce the European Court of Justice and its jurisprudence that is relevant for the transformation of the European judicial landscape. The students will learn of the seminal decisions of the Court of Justice, the preliminary reference procedure, and how this has influenced different national systems of constitutional review (as discussed in Session 3). |
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| <b>Required Readings</b> | <ol style="list-style-type: none"> <li>1. M Claes, <i>The National Courts' Mandate in the European Constitution</i>. (Hart Publishing, 2006). Chapter 4 "The Duty to Review National Law: the 'Simmenthal Mandate'", pages: 69-77, 89-91, 97-103, 108-112, 115-118.</li> <li>2. Court of Justice Case 106/77 <i>Simmenthal</i> [1978] EU:C:1978:49, [18]-[22].</li> <li>3. Court of Justice Case 166/73 <i>Rheinmühlen</i> [1974] EU:C:1974:3.</li> <li>4. Court of Justice Case 11/70 <i>Internationale Handelsgesellschaft</i> [1970] EU:C:1970:4, [1]-[3].</li> <li>5. Court of Justice Case 294/83 <i>Les Verts</i> [1986] ECLI:EU:C:1986:166, [20]-[23].</li> </ol> |
| <b>Optional Readings</b> | <ol style="list-style-type: none"> <li>1. T Tridimas, 'Constitutional review of member state action: the virtues and vices of an incomplete jurisdiction', (2011) 9(3-4) <i>ICON</i> 737.</li> <li>2. J H H Weiler, 'A Quiet Revolution: The European Court of Justice and its interlocutors' (1994) 26(4) <i>Comparative Political Studies</i> 510.</li> </ol>  |

### Session 5: Theorising judicial interactions and constitutional conflict in the EU

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| <b>Learning Objective</b> | The aim of this session is to introduce the students to the theoretical debates that have developed following the introduction of the Simmenthal mandate as discussed in Session 4, and connect it to broader issues of constitutional review as discussed in Sessions 1 to 3. These theoretical debates will aim to provide groundwork for discussing the role of judicial constitutional conflict in the EU in the coming sessions, as well as the current rule of law backsliding in several EU Member States. |
| <b>Required Readings</b>  | <ol style="list-style-type: none"> <li>1. D Kelemen, 'The Structure and Dynamics of EU Federalism' (2003) 36(1-2) <i>Comparative Political Studies</i> 184.</li> <li>2. A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice' (2017) 18(6) <i>German Law Journal</i>, 1395-1428.</li> </ol>   |
| <b>Optional Readings</b>  | 1. D Grimm, 'Does Europe need a constitution?' (1995) 1 <i>European Law Journal</i> 282.  |

### Session 6: The fundamental rights protection story

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| <b>Learning Objective</b> | This session covers the first constitutional conflict to take place between the European Court of Justice and national constitutional courts. It concerns the protection of fundamental rights, and the appropriate level of protection as found in national constitutions. The students will learn of methods of contestation of EU law by national courts, and how the Court of Justice chronologically engaged in a dialogue with national courts. |
| <b>Required Readings</b>  | <ol style="list-style-type: none"> <li>1. Court of Justice Case 29/69 <i>Stauder</i> [1969] EU:C:1969:57.</li> <li>2. German Federal Constitutional Court Case 37 BVerfGE 271 <i>Internationale Handelsgesellschaft (Solange I)</i> Judgment of 29 May 1974.</li> <li>3. Court of Justice Case 4/73 <i>Nold</i> [1974] EU:C:1974:51.</li> </ol>   |

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|                   | <p>4. German Federal Constitutional Court Case 2 BvR 197/83 <i>Re the Application of Wünsche Handelsgesellschaft (Solange II)</i> Decision of 22 October 1986.</p> <p>5. Court of Justice Case C-617/10 <i>Fransson</i> [2013] ECLI:EU:C:2013:105</p> |
| Optional Readings |   |

### Mid-term Exam Week: 22 – 26.03.2021 – no class

#### Session 7: The internal market story

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| Learning Objective | <p>This session looks at the judicial dialogue between the Court of Justice and national courts in developing the rules of the internal market. It also covers responses from the national level that put forward demands to deviate from these rules by claiming the protection of important national constitutional values. Importantly for the current rule of law crisis, this case law was the beginning of a trend whereby national courts raise objections of national and constitutional identity to evade their EU law obligations, which has been exacerbated in the current rule of law backsliding, relevant for Session 10.</p> |
| Required Readings  | <ol style="list-style-type: none"> <li>1. M Maduro, <i>We the Court</i> (Hart Publishing 1998), Chapter 5.</li> <li>2. Court of Justice Case 8/74 <i>Dassonville</i> [1974] ECLI:EU:C:1974:82.</li> <li>3. Court of Justice Case C-208/09 <i>Sayn-Wittgenstein</i> [2010] ECLI:EU:C:2010:806.</li> <li>4. Court of Justice Case C-391/09 <i>Runevič-Vardyn</i> [2011] ECLI:EU:C:2011:291.</li> </ol>   |
| Optional Readings  | <ol style="list-style-type: none"> <li>1. Court of Justice Case C-36/02 <i>Omega</i> [2004] ECLI:EU:C:2004:614.</li> </ol>   |

#### Session 8: The judicial remedies story

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| Learning Objective | <p>In this session, we will look at the ways in which the Court of Justice has influenced national judicial autonomy - the organisation of procedures and remedies that national courts can and must provide in order to ensure the application of EU law to their citizens. We will also learn about the ways in which the Court of Justice expanded legal remedies for EU citizens to be able to demand damages from their Member State, when it fails to properly apply EU law. This area of judicial interactions is of central relevance to the rule of law crisis, as the governments where rule of law is under attack have directed their efforts at constraining the judicial autonomy of national courts, in order to disable their application of EU law and the protection it affords to individuals.</p> |
| Required Readings  | <ol style="list-style-type: none"> <li>1. A Arnall, Article 47 CFR and national procedural autonomy (2020) 45(5) <i>European Law Review</i> 681.</li> <li>2. Court of Justice Joined cases C-6/90 and C-9/90 <i>Francovich and Bonifaci</i> [1991] EU:C:1991:428.</li> <li>3. Court of Justice Case C-224/01 <i>Köbler</i> [2003] EU:C:2003:513.</li> </ol>   |



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| Optional Readings |  |
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### Session 9: The judicial independence story

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| <b>Learning Objective</b> | This session covers the final instance of judicial conflict in the European Union, that relates directly to the core principle of the rule of law - judicial independence. Students will learn of the ways in which the Court of Justice has and is currently dealing with the attacks on national judiciaries by governments in Poland and Hungary, and the methods of addressing those concerns. In particular, the students will learn about further expansions of judicial review by the Court of Justice, and the way in which the Court interpreted and justified them. These methods will be of particular use in preparing legal arguments for the moot court assignment. |
| <b>Required Readings</b>  | <ol style="list-style-type: none"> <li>1. M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juizes Portugueses' (2018) 14 <i>European Constitutional Law Review</i> 622.</li> <li>2. Case C-64/16 Associação Sindical dos Juizes Portugueses [2018] EU:C:2018:117.</li> <li>3. Court of Justice Joined Cases C-585/18 i C-624/18 A.K. [2019] EU:C:2019:982.</li> <li>4. Court of Justice Joined Cases C-404/05 PPU and C-659/15 PPU <i>Aranyosi and Căldăraru</i> [2016] ECLI:EU:C:2016:198.</li> </ol>  |
| <b>Optional Readings</b>  | 1. G Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European Arrest Warrant: <i>Aranyosi and Caldaru</i> ' (2016) 53(6) <i>Common Market Law Review</i> 1675   |

### Session 10: Rule of law backsliding

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| <b>Learning Objective</b> | The aim of this session is to take a look at the most recent attacks of the Polish government on the independence of the judiciary, and the ways in which the European Union's judicial and political institutions have attempted to respond to it.   |
| <b>Required Readings</b>  | <ol style="list-style-type: none"> <li>1. Commission 2020 Rule of Law Report - Poland.</li> <li>2. Decision of the Disciplinary Chamber of the Polish Supreme Court, 23 September 2020, File no. II DO 52/20.</li> <li>3. Multiannual Financial Framework (MFF) and the Rule of Law Proposal, European Parliament document July 2020.</li> <li>3. Joint Statement of Governments of Poland and Hungary on the Rule of Law conditionality in the MFF.</li> </ol> |
| <b>Optional Readings</b>  | <ol style="list-style-type: none"> <li>1. M. Dawson, "How Can EU Law Respond to Populism?" (2020) 40 <i>Oxford Journal of Legal Studies</i> 183.</li> <li>2. L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (Jean Monnet Working Papers, 2009), Working Paper No 04/09.</li> <li>3. K Lenaerts, Upholding the Rule of Law within the EU (Speech).</li> </ol>   |

### Session 11: Moot court session

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| <b>Learning Objective</b> | In this session, students will learn how lawyers reason and argue, and how does this differ from other forms of argumentation (such as scientific deduction or political rhetoric). Students will prepare a written submission for the parties, and present them in oral pleadings, learning how to construct and present a 'valid' argument in legal terms. The class will therefore take the form of a moot court, with the case and instructions provided to you on 9 April 2021 as explained in the assignments section. |
| <b>Required Readings</b>  | A short introduction about the moot court: <a href="#">About moot courts</a>   |
| <b>Optional Readings</b>  |  |

### Session 12: The future of judicial interactions and constitutional conflict

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|---------------------------|---|
| <b>Learning Objective</b> | The aim of this session is to take stock of the different types of constitutional conflicts that took place in the course of European integration, and look at the ways in which courts and other political institutions can respond to the increasing challenges to the rule of law in the future. We will look at the connection between the challenges to the Court of Justice from Germany and Poland, and how they relate to each other.   |
| <b>Required Readings</b>  | <ol style="list-style-type: none"><li>1. National Courts Cannot Override CJEU Judgments. A Joint Statement in Defense of the EU Legal Order. <a href="#">Verfassungsblog</a>.</li><li>2. A Bobić and M Dawson. Op-Ed: "What did the German Constitutional Court get right in Weiss II?"</li><li>3. "Judges should be fully insulated from any sort of pressure" Interview with K Lenaerts. <a href="#">Verfassungsblog</a>.</li><li>4. M Steinbeis, From Warsaw with Love. <a href="#">Verfassungsblog</a>.</li></ol> |
| <b>Optional Readings</b>  |   |

**Final Exam Week: 17 – 21.05.2021 – no class**