Legislative - judicial relationship

Reading questions: week 7

Silje Synnøve Lyder Hermansen

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> To prepare for class, please familiarize with the assigned readings. The reading questions are intended to help you in your preparations. If you want to prepare in groups, you may reach out to the students you do your presentation with. The supplementary readings are useful to situate the readings in the broader debate and/or provide alternative texts that cover the same ideas.

Do political actors outside of the Court influence its decisions? And to what extent does the Court influence them? The legislator is an important interlocutor for the Court. Judges interpret – give meaning and effect – to laws after the law is enacted. This is not the end, however. The legislator has multiple ways to react to judicial decisions. It can react with hostile "court-curbing" measures: legislative override (new legislation), non-implementation (ignore the ruling), competence-stripping, court packing/appointments. However, it can also take inspiration and build on the

Court's ruling. In any case, the two institutions will adapt their behavior in view of how they expect the other to react. These adaptations are central to the "external strategic approach" to judicial behavior; also often termed the separation-of-powers literature (SOP).

Readings

- Ferejohn and Weingast (1992) (esp. 163-170; 176-179) introduce the strategic approach to their contemporaries. They show how even a non-activist court – which only wants to protect the intention of the law – will have to act strategically to be effective.
- Kelemen (2012) gives an overview of judicial politics in the EU.
- Carrubba, Gabel, and Hankla (2008) forcefully demonstrate how the CJEU adapts its rulings to member states' preferences.
- Martinsen (2015) presents several ways in which the legislator may react to CJEU rulings.

Reading questions:

- What is the theoretical ambition that Ferejohn and Weingast (1992) announce in this paper? How do htey relate to the legal and attitudinal approaches to judicial behavior (e.g. Posner 2010)?
- What is the uncertainty that legislators face and why is it a problem for them, according to Ferejohn and Weingast (1992)?

- How do Ferejohn and Weingast (1992) define judges' preferences? How does this serve their argument (i.e. the point they want to make)? Do you find their assumption convincing?

- To enact a policy in the US Congress, both the House and the Senate have to agree. Why would a strategic court place its' ruling between the two of them? How is status quo defined in Ferejohn and Weingast (1992)?

- Consider choice of the naive textualist to defend status quo. Why would a strategic textualist propose a different solution? Which option would yield the best outcome, given their preferences? How is this a response to the legal approach?

- The "unconstrained policy advocate" can have preferences anywhere on the policy dimension. Does this mean that the court is "unconstrained"? How is this a response to the judicial attitudinalists?

- What is the main empirical take-away from Carrubba, Gabel, and Hankla (2008)?

- How do Carrubba, Gabel, and Hankla (2008) define the ECJ's preferences relative to the member states? What is status quo? Can you map their preferences (schematically) on a pro- /anti- European integration axis?

- Drawing on Ferejohn and Weingast (1992) and Carrubba, Gabel, and Hankla (2008) – and looking at your policy scale – how can the ECJ

drive EU integration? How far can it move policies under unanimity voting in the Council? And what about qualified majority voting?

- EU functionalists – in particular – have labeled the ECJ as a "run-away agent" driving EU integration without heed payed to member state preferences (e.g. Burley and Mattli 1993). Old-school IR realists/ EU intergovernmentalists, on the other hand, would argue that international courts (as any international orgainzation) are pawns to the (powerful) member states (e.g. Garrett 1992). Given your readings, how would you qualify the ECJ?

- Where does Martinsen (2015) place her study in terms of the policy-making process sketched out by Ferejohn and Weingast (1992)?

- How does she define the legislator (i.e. how many ideal points does the legislator have) compared to Ferejohn and Weingast (1992) and Carrubba, Gabel, and Hankla (2008)?

- What policy dimension does she assume to be relevant? How does thi compare to Carrubba, Gabel, and Hankla (2008)'s assumption about the Court's and the EU legislators' preferences? How does this map onto Ferejohn and Weingast (1992)'s categorization of courts' preferences (textualist, strategic textualist, unconstrained policy advocate)?

- Martinsen (2015) distinguishes between four different legislative responses to court rulings: codification, modification, override and non-adoption. Can you define them?

- How does her explanation of the legislators' "non-adoption" in case of "legislative gridlock" relate to Ferejohn and Weingast (1992)'s model?

- A pro-active legislative response (codification, modification, override) to the ECJ's ruling starts with a proposal from the Commission (Martinsen 2015). How does the Commission's role relate to the role of committees in the US Congress (Ferejohn and Weingast 1992)? Drawing on their theorization, under what conditions would the Commission propose legislation?

- If you apply Ferejohn and Weingast (1992)'s logic on Martinsen's data, what can we infer? Of 125 policy proposals, Martinsen (2015) finds that 40 relate to ECJ case law ("jurisprudence"). What is the Commission's expectation about the EU legislator's (Parliament and Council) preferences? Can we infer from her data whether the Commission "often, but not always" sides with the Court (Martinsen 2015, 1635)? What would the Commission do if it prefers the Court's solution to what the legislative majority would want?

- In her case studies, Martinsen (2015) points out there were a few failed proposals from the Commission. Can Ferejohn and Weingast (1992) and Carrubba, Gabel, and Hankla (2008) account for that? ... and what about the category of "codification"?

Supplementary readings:

- There is a string of papers that debate the "override" argument (but also non-implementation). It pitches the "dynamic view" of the ECJ (Martinsen's vocabulary) Stone Sweet and Brunell (2013) against the "constrained" view of the court Carrubba, Gabel, and Hankla (2012)
- Larsson and Naurin (2016) probe the over-ride argument forwarded by Carrubba, Gabel, and Hankla (2008) empirically, and find the the ECJ is less responsive to the member states' submissions when override would imply qualified majority in the Council.
- Castro-Montero et al. (2018) argue that the ECJ is also sensitive to threats of competence-stripping.

Bibliography

Burley, Anne-Marie, and Walter Mattli. 1993. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47 (1): 41–76. https://doi.org/10.1017/S0020818300004707.

Carrubba, Clifford James, Matthew J. Gabel, and Charles Hankla. 2008. "Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice." *American Political Science Review* 102 (4): 435–52. https://doi.org/10.1017/S0003055408080350.

———. 2012. "Understanding the Role of the European Court of Justice in European Integration." *American Political Science Review* 106 (1): 214–23. https://doi.org/10.1017/S0003055412000020.

Castro-Montero, José Luis, Edwin Alblas, Arthur Dyevre, and Nicolas Lampach. 2018. "The Court of Justice and Treaty Revision: A Case of Strategic Leniency?" *European Union Politics* 19 (4): 570–96. https://doi.org/10.1177/1465116518793707.

Ferejohn, John A., and Barry R. Weingast. 1992. "A Positive Theory of Statutory Interpretation." *International Review of Law and Economics* 12 (2): 263–79. https://doi.org/10.1016/0144-8188(92)90046-T.

Garrett, Geoffrey. 1992. "International Cooperation and Institutional Choice: The European Community's Internal Market." *International Organization* 46 (2): 533–60. https://doi.org/10.1017/S0020818300027806.

Kelemen, R. Daniel. 2012. "The Political Foundations of Judicial Independence in the European Union." *Journal of European Public Policy* 19 (1): 43–58. https://doi.org/10.1080/13501763.2012.632127.

Larsson, Olof, and Daniel Naurin. 2016. "Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU." *International Organization* 70 (2): 377–408. https://doi.org/10.1017/S0020818316000047.

Martinsen, Dorte Sindbjerg. 2015. "Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union." *Comparative Political Studies* 48 (12): 1622–60. https://doi.org/10.1177/0010414015592591.

Posner, Richard A. 2010. *How Judges Think*. Harvard University Press. https://doi.org/10.4159/9780674033832.

Stone Sweet, Alec, and Thomas L. Brunell. 1998. "Constructing a Supranational Constitution: Dispute Resolution and Governance in the Eu-

ropean Community." *American Political Science Review* 92 (1): 63–81. https://doi.org/10.2307/2585929.

———. 2013. "Trustee Courts and the Judicialization of International RegimesThe Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization." *Journal of Law and Courts* 1 (1): 61–88. https://doi.org/10.1086/668499.