

Legislative-judicial relationships

How judges are appointed

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Introduction

Where are we?

- ▶ internal relations: individual judges and preferences (week 2-6)
- ▶ external relations: the Court and its interlocutors (week 7-13)

⇒ *how does the Court react to political pressure?*

On Monday

Former Advocate General Saugmandsgaard Øe claimed:

- ▶ Danish Supreme Court judges face the same legal gaps as the ECJ
- ▶ ... but Danish politicians are less reverential as to the Court's case law

⇒ *to what extent does the legislator constrain the court?*

Forward-looking, informed and strategic

If a policy maker knows that they will not obtain a policy if they propose it...

- ▶ they might:
 - ▶ not propose anything (they prefer if status quo to what we can get)
 - ▶ modify their proposal to satisfy the final decision maker (if they prefer their (modified) policy to status quo)
- ▶ this holds for:
 - ▶ courts: a well-informed and strategic court will not experience court curbing
 - ▶ legislators:
 - ▶ gatekeeper (Commission; committees)
 - ▶ final decision maker/plenary (two houses; 27 member states)

⇒ *courts and legislators hold each other in check (SOP)*

Legislative transit

- ▶ gatekeeper/agenda setter proposes policy
- ▶ plenary/legislator decides on a policy
- ▶ courts review policy

⇒ *then, rinse and repeat*

Court-curbing techniques

The political branch can threaten the court:

- ▶ budgetary cuts
- ▶ appointments
 - ▶ non-appointments (career incentives)
 - ▶ court-packing (change preferences)
 - ▶ renewal (change preferences)
- ▶ non-implementation (ignore the ruling)
- ▶ competence stripping (remove cases/authority)
- ▶ legislative override (new legislation)

⇒ *do we have to see them used for them to have an effect?*

Theoretical perspective (Ferejohn and Weingast 1992)

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Two motivations:

- ▶ a commitment problem
- ▶ why courts would be strategic

A commitment problem

- ▶ the biggest threat to a legislative majority today
- ▶ ... is the legislative majority tomorrow

⇒ *so why not create a system with gate-keepers?*
(committees/Commission)

Why courts would be strategic

Courts are strategic because:

- ▶ they have preferences
- ▶ but there are constraints
 - ▶ rules
 - ▶ other political actors

A policy space with preferences

Why would a Court adapt to the legislator's preferences?

- ▶ court is a status quo defender (naive and strategic textualist)
- ▶ court is an unconstrained policy advocate

⇒ *central role of the gridlock interval*

Strategic adaptations from the Court (Carrubba, Gabel, and Hankla 2008)

Empirical study

- ▶ ECJ adapts the outcome to the majority of MS submissions
- ▶ first large-N study that showed that
- ▶ controversial

⇒ *does this mean the Court is just a puppet to governments?*

Strategic adaptations from the legislator (Martinsen 2015)

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What happens after the Court has rendered a judgment?

- ▶ Commission proposes (or not) a policy
- ▶ EU legislator (Parliament and Council) adopts it (or not)

⇒ *what does this tell us about the Court's influence? And the Commission's role?*

Literature

- 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>.
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- 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>.