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## Fighting for Authority: Strategic Actions of National High Courts in the European Union

### Abstract

National high courts in the European Union (EU) are constantly challenged: the European Court of Justice (ECJ) claims the authority to declare national standing interpretations invalid should it find them incompatible with its views on EU law. This principle noticeably impairs the formerly undisputed sovereignty of national high courts. In addition, preliminary references empower lower courts to question interpretations established by their national 'superiors'. Assuming that courts want to protect their own interests, the article presumes that national high courts develop strategies to elude the breach of their standing interpretations. Building on principal-agent theory, the article proposes that national high courts can use the level of (im-) precision in the wording of the ECJ's judgements to continue applying their own interpretations. The article develops theoretical strategies for national high courts in their struggle for authority.

*Key Words:* European Court of Justice, High National Courts, Judicial Actors, Principal-Agent Theory, Strategic Action

### Zusammenfassung

*Ein Kampf um Autorität: Strategisches Handeln oberster nationaler Gerichte in der Europäischen Union*

Im europäischen Mehrebenensystem werden oberste nationale Gerichte ständig herausgefordert: Der Europäische Gerichtshof beansprucht die Autorität, die Rechtsauslegungen der obersten Gerichte für unanwendbar zu erklären, sollte er sie für nicht vereinbar mit europäischem Recht halten. Dieser Grundsatz beschneidet die zuvor unbestrittene Auslegungshoheit der nationalen obersten Gerichte deutlich. Darüber hinaus gibt das Vorabentscheidungsverfahren nachgeordneten Gerichten die Möglichkeit, die Interpretationen ihrer „Vorgesetzten“ infrage zu stellen. Unter der Voraussetzung, dass Gerichte ihre eigenen Interessen verteidigen wollen, wird erwartet, dass oberste Gerichte Strategien entwickeln, um ihre Auslegungshoheit zu bewahren. Auf der Grundlage einer Prinzipal-Agenten-Beziehung wird angenommen, dass oberste Gerichte ungenaue Formulierungen in den Urteilen des Europäischen Gerichtshofes nutzen, um ihre eigene Auslegungspraxis weiterführen zu können. Der Artikel stellt Strategien vor, die oberste Gerichte in ihrem Kampf um Autorität nutzen können.

*Schlagwörter:* Europäischer Gerichtshof, judikative Akteure, oberste nationale Gerichte, Prinzipal-Agenten-Theorie, strategisches Handeln

## 1 National High Courts in the European Multi-Level System

Courts – especially high and constitutional courts – undisputedly play a central part in policy development and execution: be it through their interpretation of single regulations, vetoing a standing interpretation, by even practically creating a new norm, or by drawing

parliament's attention to a necessary re-evaluation (Gibson, Lodge & Woodson, 2014, p. 839; for a collection of case studies see Volcansek, 2014). Taking into account the strict hierarchy of national judicial systems, high courts also impose their interpretation of the law on lower, meaning 'subordinate', courts. Therefore, high courts can arguably be the most influential actors in the interpretation and even the development of national law.

However, when adding the judicial system of the European Union (EU) to the picture, this assessment must be called into question. During the process of European integration, the European Court of Justice (ECJ) was able to shape EU law and its own role in the continuously developing Union (see e.g. Burley & Mattli, 1993; Alter, 2001; Conway, 2012; Kelemen & Schmidt, 2012). The most important steps in this process were the establishment of EU law as a 'new legal order', which produces 'direct effect' without having to be transferred into national law, and the declaration of EU law's supremacy of application, which can effectively supersede the member states' national legislation (see e.g. Mayoral, 2017, p. 552). The ECJ's interpretation of EU law is therefore in most parts binding for the member states and significantly influences the development and interpretation of national law.

The consequences of direct effect and EU law supremacy are especially far-reaching for national high courts (Alter, 2001): the virtually binding effect of the ECJ's judgments contests their formerly mostly unchallenged authority and can cause them to deviate from their established practices should their standing interpretations contradict the ECJ's views on EU law. Thereby, national high courts have to accept that they lose their spot at the 'top of the food chain' in all matters concerning EU law should they acknowledge the ECJ's general role in the EU's legal system (Höreth, 2008; Ketelhut, 2010). In addition, Art. 267 of the Treaty on the Functioning of the European Union (TFEU) allows lower courts to request a preliminary ruling by the ECJ if they are uncertain how to interpret EU law in a pending case. Thus, lower courts may cast into question a high court's standing interpretation, expressing their doubts on the compatibility of their 'superior's' principles with higher ranking law (see *Figure 1*). Should the ECJ find a national norm or at least its present application to be inconsistent with EU law, the said national application will have to be adjusted. This way, high courts will have to change their established practices following an initiative of a lower court, which is supposedly bound completely to the interpretations of its federal 'superior' (Thüsing, 2009).

It becomes evident that high courts are continuously losing authority when interpreting the law: they have to acknowledge a higher level of jurisdiction as well as come to terms with the possibility of lower courts not following their lines of interpretation and even indirectly compelling them to change their practices. On the whole, a shift of power in the European judicial system in favour of the supra- and subnational level and with the high courts as 'losers' in the process is apparent (Alter, 1996; Mattli & Slaughter, 1998; Stone Sweet & Brunell, 1998; Hix & Høyland, 2011; Hornuf & Voigt, 2012). It seems far-fetched to assume that high courts will gladly embrace this development. In fact, it is rather to be expected that they will try to find ways to preserve their authority as best they can (Alter, 1996; Ketelhut, 2010). Following Alter, 'authority' here means, "that judges protect their legal turf" (Alter, 2001, p. 46). Using a principle-agent approach, this article sets out to infer strategies for high courts to defy assaults on their standing interpretations and jurisdiction. It thereby widens the theoretical view on judicial actions which has for a long time been mostly restricted to analysing courts' strategies to develop and assert policy preferences (Epstein & Knight,