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Introduction

More than sixty years ago, Poland agreed to compensate Polish citizens who had lost their property when the Soviet Union annexed parts of Poland. Yet Poland did not keep this promise and failed to pay. The citizens sued to obtain compensation and won their suits in Polish courts. Yet, even after its national courts ruled that it was obligated to do so, Poland refused to pay. Nonetheless, fifty years after the promise was made, an individual filed a suit at the European Court of Human Rights (ECHR), and the court ruled that Poland had violated its citizens' right to property. Poland responded by enacting legislation to ensure these individuals received proper compensation.¹

¹ Details from *Broniowski v. Poland*, judgment of June 22, 2004, 2004-V EUR. Ct. H.R. 1, discussed at length in Chapter 6.

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978-1-107-03113-5 - Reputation and Judicial Tactics: A Theory of National and International Courts

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Excerpt

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Reputation and Judicial Tactics

Why would a country be more willing to comply with the judgments of an international court than with its own domestic courts? After all, when international courts render judgments against states, they have no means of enforcing their judgments. The answer, which this book explores in some detail, lies in the idea that courts, particularly those without enforcement power, actively seek to build reputational capital and to use it in ways that increase the costs to states of failing to comply with their judgments. Reputation helps to explain why some international courts – like the European Court of Human Rights (ECHR) – manage to secure compliance with over 80 percent of their judgments, even in contexts where the states strongly object to their decisions.

The theory developed in this book can also be extended to explain a variety of other features of courts' behavior that have long puzzled students of judicial behavior. For example, what explains the decisions of some international courts to issue increasingly demanding judgments against particular states? What (apart from bias) might explain why some states are subject to harsher remedial measures than others? Why do national courts encourage dissenting opinions in some cases and in some contexts while discouraging them in others? What determines the type of reasoning used by courts and the types of authority they rely on in particular cases?

Introduction

A. Courts as long-term strategic actors that seek to maximize their reputations

This book, like most of the literature on courts and judicial behavior, starts from the assumption that courts seek to implement their policy preferences. It proposes a theory of the accumulation and spending of reputational capital to explain how courts that lack the power to directly enforce their judgments are nonetheless able to induce states to comply with their decisions and thereby effectuate their policy preferences.

The core of the theory is simple: Courts build reputational capital by carefully calibrating their judgments to manipulate the probability that a state will choose to comply. Each time a state complies with a judgment, it strengthens the norm of compliance. Other states, viewing the act of voluntary compliance, reason that they will look worse if they fail to comply with future judgments rendered against them, thus making them more likely to comply with future judgments. As the court secures compliance in additional cases, the perceived reputational penalty for failing to comply with its judgments also grows, making it possible for the court to issue judgments that are gradually more demanding and costly for states to implement. As the book explains, the process by which this is done and the ways that courts calibrate their judgments differ from case to case, and the tactics used by courts to build their reputational capital

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are quite ingenious and complex. The bulk of the analysis is devoted to identifying these tactics, presenting case studies that demonstrate their power and identifying their limitations – limitations rooted in culture, politics, and the constraints of legal rules and court processes.

The book is organized as follows. After this Introduction, Chapter 2 presents the basic theory of judicial reputation, while situating it in the literature on judicial behavior more generally and exploring carefully the conditions and context in which it most powerfully applies. Reputation is attractive to courts, but states also have reputations. It is the interaction of states and courts that produces their respective reputations. For analytic reasons, the book distinguishes between high-reputation and low-reputation courts, although of course reputation is in fact a continuous variable. Similarly, states can be high-reputation or low-reputation states.

Building on the basic theory, Chapter 3 presents the constraints that courts face as they shape their strategy within the limits of doctrine and the rules of the legal system that circumscribe their discretion. It goes on to describe the possible counter measures that the executive can use against a national court and that states can use against international courts. Parties can use the threat of noncompliance, criticism, or exit of the court's jurisdiction, as well as other harmful responses, to exert their influence on courts and to constrain them to behave according to the parties' interests.

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Chapter 4 carefully explores the wide variety of tactics national and international courts can use in order to improve their reputation. Such tactics include the practice of issuing increasingly demanding judgments when the court's reputation is improving and shifting to less demanding judgments when the court's reputation is declining, the shift toward methods of reasoning that expose judicial discretion when the court's reputation is high and hiding judicial discretion when the court's reputation is low, the attempt to support especially demanding judgments with reasoning that hides the judges' discretion, the practice of issuing more demanding judgments against states that are known not to comply with many judgments compared to states whose compliance practices are better, and several other more nuanced judicial practices.

Chapter 5 presents a case study of a national court, the Israeli Supreme Court, that demonstrates the use of judicial tactics by the court. The chapter also presents the responses of the executive against the court's strategy and the ways the court adapts to those responses by changing its behavior.

Chapter 6 presents a case study of an international court, the European Court of Human Rights, that also uses the tactics described in the book. The strategic analysis of the court's behavior explains two patterns in its judgments: a trend toward constantly increasing its demands from states and issuing more demanding judgments against states that often fail to comply with its judgments, compared to states that usually comply.

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Chapter 7 investigates the behavior of courts and the different tactics they use in situations where they are not interested in increasing their reputation. Considering these situations helps identify and clarify more precisely the way that the desire to build reputation affects courts' actions. It also helps identify the conditions and contexts in which the theory outlined here will and will not be a powerful predictor of courts' actions.

Chapter 8 concludes and suggests preliminary normative implications of the book.

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A theory of the reputation of courts

This chapter presents the basic concept of courts' reputation and the reason courts try to improve their reputations. It studies the reputation of parties facing the court, a concept that is necessary to study the court's behavior, and then presents the basic theory of how courts can increase their reputations by taking calculated risks. The chapter explains the concept of public support and the connection between public support and reputation and presents different methods for measuring courts' reputations. Finally, the chapter situates the theory in the literature on judicial behavior and explains when the theory is and is not applicable.

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A. What is courts' reputation?

Before explaining the type of court reputation discussed in this book, it is useful to begin with a short explanation about the concept of reputation. When two actors interact in a repeated game, they observe each other's behavior and try to predict the future behavior of the actor faced. The belief each actor forms about the future behavior of the other actor can be referred to as that actor's reputation.¹ When more than two actors are interacting, information about their beliefs passes from one actor to another. A community of actors can form a prevailing belief about the future behavior of a single actor – this belief is that actor's reputation. Reputation can describe not only the predicted behavior of a specific actor, but also the predictions of the relevant community about the behavior of certain actors toward that actor.

The reputation of courts described in this book refers to the belief of the relevant community about the prospects of compliance with future judgments of the court. Therefore, the reputation of the court is determined by predictions about the behavior of parties that are subject to the court's judgments and not the predicted behavior of the court itself.

¹ Miller defines reputation as: "... a judgment about an actor's past behavior that is used to predict future behavior." See Gregory D. Miller, *Hypotheses on Reputation: Alliance Choices and the Shadow of the Past*, 12 *Security Studies* 40, 42 (2003).

A theory of the reputation of courts

A court with a high reputation is expected by the relevant community to be complied with more often than a court with a low reputation. As the next section shows, this expectation of the relevant community can be self-fulfilling by creating a greater reputational incentive to comply with high-reputation courts.

B. Why courts want to increase their reputation

Why would a court want to be viewed as having a high reputation? A court's reputation is only a means to an end, and courts may pursue many different kinds of goals. The theory developed here is not concerned with the purpose courts should serve, only with the description of how courts act. Nevertheless, the theory has important normative implications, because the power courts possess as a result of their reputations can be used to achieve certain policy goals, whether good or bad.

Let us start with the idea that parties to judicial proceedings have their own reputations for compliance with courts and that these can be affected by court decisions. Party reputations are affected differently depending on the reputation of the court. When a party fails to comply with a judgment by a high-reputation court, it suffers a greater reputational sanction than it would if it failed to comply with a judgment by a low-reputation court, because noncompliance with a high-reputation court is more unexpected than noncompliance with a low-reputation court. When a

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party complies with a high-reputation court, it gains less reputation than it would gain for compliance with a low-reputation court because compliance with a high-reputation court is more expected than compliance with a low-reputation court. Because, for the courts examined in this book, compliance is usually much more expected than noncompliance, the reputational sanction from noncompliance is substantially larger than the reputational benefit from compliance. A high-reputation court therefore generates a larger reputational payoff – the sum of the reputational sanction for noncompliance and the reputational benefit for compliance – than a low-reputation court. The reputational payoff describes the incentive of parties to comply: If they comply, they will both avoid the reputational sanction for noncompliance and gain the reputational benefit associated with compliance.

A party facing a court will comply with it only if the material cost of compliance is lower than the reputational payoff. Therefore, the higher the reputational payoff, the more likely the party is to comply. Because high-reputation courts generate a higher reputational payoff than low-reputation courts, they are more likely to be complied with than low-reputation courts when they issue similar judgments. Costs of compliance can include not only monetary payments but also the costs of taking actions that lead to internal political resistance or that jeopardize long-term interests such as security or maneuverability. Although the court cannot observe the exact cost of compliance with its