Working papers series

WP ECON 11. 05

Choosing High-Court Judges by Political Parties

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JEL Classification numbers: D72.
Keywords: Negotiation, Political Competition, random protocols, legislative bargaining.

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Abstract

This paper proposes a mechanism to overcome the possibility that political parties may block the nomination of High-Court judges when the Parliament is involved in their nomination and their mandate expires on a fixed date. This possibility arises when the default option is that the judge whose mandate expires holds office until an agreement is reached. Our proposal consists of changing the default option by a weighted lottery. We show that this mechanism is capable of solving the problem and implementing the socially optimal solution.

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Acknowledgments: Financial support from the Spanish Ministry of Science and Innovation, under projects (ECO2008-04321 and ECO2010-21706), and the Junta de Andalucía, under projects (SEJ-6882/ECON, SEJ-02936 and SEJ-04992), are gratefully acknowledged.

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1. Introduction

This paper refers to a problem that appears when different parties have to agree on the choice of a candidate for a fixed time period. The conflict arises when the period expires and there is no agreement on a new appointee. This is a typical case of conflicting norms that can be found in very different environments. A case in point is that in which political parties have to agree on the nomination of High-Court judges, as it happens with the Constitutional Court in Spain, that is our key reference. On the one hand, we find that each judge is designated for a fixed term. On the other hand, the rule establishes that substituting a judge whose mandate expires requires a qualified majority in Parliament (e.g. the candidate needs the support of 2/3 of the members). Both principles are sensible: a fixed time period prevents a disproportionate influence of specific individuals, and a wide agreement in Parliament diminishes the effects of the political cycle on the interpretation of the fundamental norms.

Needless to say, there are cases in which the term of a judge expires and the Parliament does not reach the required majority to approve a substitute. What happens then? The default is, in many cases, that the status quo prevails. That is, the judge whose mandate has expired can stay in office for some extra period (sometimes for years!). We have seen that in the Spanish Constitutional Court, that has made very important decisions with half of its members who should have been replaced well in advance. This is always a source of concern about the nature of the resolutions adopted in that interim period (some lawyers and politicians have actually questioned the legitimacy of those resolutions).

The ultimate source of the conflict is the design of the mechanism used to appoint those judges. More specifically, the effect of the default option on the incentives to reach an agreement among the political parties. The reason is clear: if the ideology of the judge to be substituted is close to a given party, then this party has no incentive to agree on a different candidate, unless it belongs to the same ideological group. When this party is needed for the nomination, it will block the process.

Note that the problem cannot be solved by either imposing an external agreement to the Parliament (the ultimate depositary of people's authority) or disregarding the necessary substitution of High Court Judges. So what?

We propose here a simple mechanism that is respectful with the Parliament and nevertheless ensures the substitution of the judge in due time, by changing the default option.

It can be described as follows. Once the judge's appointment expires, the Parliament is required to make a proposal that satisfies the established quota. If there is an agreement, then the candidate is chosen and substitutes the exiting judge. This part coincides with the standard procedure. If there is no agreement, though, then a weighted lottery applies. Each party presents a candidate and such a candidate enters into a random choice mechanism with a probability weight equal to the share in the Parliament of the proposing party. The weighted lottery is played and the chosen candidate will correspond to that determined by the lottery. This is the new default option that would substitute that of keeping the status quo and ensuring that no undue extension of mandates happens, because a party can block the required agreement.

This new mechanism is fair because it is respectful with the distribution of power among the parties. First, because it coincides with the existing one as long as parties are able to reach an agreement. Second, because, on average, each party will get her preferred candidate a fraction of time equal to the fraction of seats in the Parliament.

Solving the problem of those conflicting principles raises some interesting questions. First, how often will parties agree on substituting a judge whose mandate has expired when the status quo is the default option? Or, put differently, the problem described above is just a rarity or we should expect to find it frequently? Second, will the introduction of the weighted lottery mechanism, as the new default option, induce the agreement in the first round? And third, will the outcome of this process be socially optimal?

We show in this paper that, under rather general conditions (single peaked preferences on the ideological traits of the candidates) and a rich variety of candidates over the ideological spectrum, the following holds:

(i) When status quo is the default option, disagreement is the natural outcome;

(ii) The weighted lottery mechanism induces the agreement between parties before actually recurring to the lottery;

(iii) This new mechanism implements the social optimum as a Nash equilibrium; and

(iv) Those results are robust to the case of bi-dimensional preferences (i.e. when parties care both about the ideology and the ability of the candidates).

This note builds on the non-cooperative theory of bargaining (following the seminal work by Rubinstein, (1982)). More precisely, it is related to models of legislative bargaining where legislators non-cooperatively bargain over alternative policy decisions (see Baron and Ferejohn (1989) for a classic reference). Despite being very simple, the model has clear connections with two strands of the literature. First, in this paper the status-quo plays a key role. In this sense, there are papers that have studied legislative bargaining where, contrary to what happens in Rubinsteininan models, the status-quo need not be a bad outcome for all participants. Banks and Duggan (2006) provide a general multidimensional model of legislative bargaining where the status-quo can be any arbitrary point in the policy space and show that this can lead to equilibrium delays in the agreement (contrary to what happens in Rubinstein-type models). Secondly, there is another strand of the literature that studies the implications of imposing super-majority agreement requirements in negotiations (see the recent work by Cardona and Ponsatí (2011) for a general characterization of equilibria in one-dimensional bargaining models with super-majority rules).

The remainder of the paper is as follows. The next section sets up the model and predicts the outcome of the negotiations in the absence of any mechanism. Section 3 presents the weighted lottery mechanism and characterizes its implications. Section 4 briefly elaborates on the consequences of taking into account not only the judges' ideology, but also their competence. Finally, Section 5 concludes.

2. The Model

Let us consider, for the sake of simplicity in exposition, the case in which the Parliament consists of just two parties, L and R. The Parliament has to design a new High-Court judge, to substitute one whose term is over, by a qualified majority p (two thirds of its members, say). Assume that none of the parties has enough seats in Parliament so as to reach the qualified majority required. Therefore both parties have to agree on the nomination. We can attach a power index to each party, given by the share of deputies in the parliament, equal to $\alpha_L < p$ and $\alpha_R < p$, respectively, with $\alpha_L + \alpha_R = 1$, $p \in (0.5, \ \ 1]$.

The chosen candidate (c) has to be selected from a pool of candidates C in the ideological space $[0, 1]$. Assume, for the time being, that all candidates are equally capable of serving as judges (there is no quality dimension in the problem).

The current incumbent has ideology $c_0 \in C$ and this individual will retain his position until an agreement on his/her substitute has been reached.

Each party has an ideological position defined by a function $V_i(c)$ that represents the value it assigns to selecting a judge of ideology c. We assume that preferences are single-peaked so that $c_i = \arg\max_c V_i(c)$ is the preferred candidate of party $i = L, R$. Moreover, we assume that the preferences are smooth and, hence, that $V_i''(c) \leq 0$ for all c. Let $c_L < c_R$, without loss of generality (that is, the closer c is to zero, the more leftist is the chosen candidate).

The optimal choice, from a social perspective, corresponds to selecting the candidate who better reflects the ideological composition of the parliament. In other words, the optimal candidate would be:

$$c_\alpha \equiv \alpha_L c_L + \alpha_R c_R.$$

2.1. Bilateral Negotiation

Assume that parties enter into a non-cooperative bargaining process in order to select a candidate. The process can go on for infinite-many periods with the status quo c_0 prevailing as the default option until a choice is made.

In this setting it is easy to show that indefinite disagreement is the most likely outcome, no matter the negotiation protocol. Formally:

Proposition 1. *If $c_0 \in (c_L, c_R)$ no agreement is reached and the status-quo c_0 prevails.*

Proof. *To prove the result it suffices to consider that, independently from the details of the negotiation protocol, each party will always play the "safe" strategy of rejecting any offer they receive and making no offer. This strategy ensures that parties obtain $V_L(c_0)$, $V_R(c_0)$, respectively.*

Consider, without loss of generality, a proposal $\hat{c}$ made by party R. If party R found it optimal to make the offer it is because $V_R(c_0) < V_R(\hat{c})$. Moreover, since $c_0 < c_R$ then it necessarily follows that $\hat{c} > c_0$. Now, from the perspective of party L, if the rejection-strategy is not optimal for this offer it is because $V_L(c_0) < V_L(\hat{c})$ and this, together with $c_0 > c_L$, requires $\hat{c} < c_0$ what results in a contradiction.

The same argument applies if it is party L the one that makes a proposal. ∎

This simple result shows that, unless the status-quo is too extremist for both parties, negotiations will certainly fail. The reason is that, when the status-quo is moderate, any agreement different from c_0 will imply a loss for one of the parties, which will block any possibility of agreement. Only when the status-quo is too extremist for both parties there is room for mutual benefit. That is, a necessary (yet not sufficient) condition for agreement is that either $c_0 < c_L$ or $c_0 > c_R$. That situation can only occur if the party that is closest to c_0 has changed ideology moving towards a more central part of the political spectrum. Otherwise a candidate c_0 would never had been chosen.

Therefore, when parties ideologies are stable, non-cooperation is the sure outcome. Consequently, the time period for which the judge has been nominated can last forever as no solution to substitute the judge whose term has expired will be found.

3. Negotiations with Deadline and a Weighted Lottery

We have seen that, taking the status quo as the default option, negotiations are most likely to fail. There is good evidence about that. Let us define a different choice rule, by changing the default option, that ensures that a new appointment will be obtained in due course. We shall present first this rule and then analyze how this new default affects the possibility of reaching an agreement.

Consider the following two-stage rule:

1. Stage 1: Parties open a process of bilateral negotiation in order to reach an agreement within a given time span. If an agreement is obtained, then the chosen candidate is designated. If there is no agreement within the established period, we go to stage 2.

2. Stage 2: The two parties are asked to simultaneously name their final candidates c_i^f. The new judge c is appointed according to a weighted lottery, in such a way that:

$$c = \begin{cases} c_L^f & \text{with prob. } \alpha_L \\ c_R^f & \text{with prob. } \alpha_R \end{cases}.$$

Let us see how agents behave with this mechanism.

Consider the final round and calculate the right value of c_i^f. Each party will choose c_i^f in such a way that

$$c_i^f \in \arg\max_c \alpha_i V_i(c) + (1-\alpha_i) V_i\left(c_j^f\right) \qquad [1]$$

with $i = L,\ R,\ j = R,\ L$. It is immediate to check that equation [1] yields $c_i^f = c_i$. That is, each party will propose its preferred candidate as a dominant strategy and there is no scope for manipulating the selection of candidates.

Now the question is: is there room for an agreement?

Let EV_i^f be the expected benefit that each party obtains from the final round (the expected utility of the lottery). Formally

$$EV_i^f = \alpha_i V_i(c_i) + (1-\alpha_i) V_i(c_j).$$

Now let $\tilde{c}_i$ be the certainty equivalent to this expected benefit. In other words, $\tilde{c}_i$ is the point in the ideological spectrum at maximum distance of party i's ideal point, compatible with reaching an agreement in the first stage. Formally.

$$\tilde{c}_L = \max_c c$$
$$\text{s.t. } V_L(c) \geq EV_L^f$$

and

$$\tilde{c}_R = \min_c c$$
$$\text{s.t. } V_R(c) \geq EV_R^f$$

The following result is obtained:

Proposition 2. *Assume that preferences $V_i(.)$, for $i = L, R$, are single peaked and smooth, with $V''(.) \leq 0$. Then, the weighted-lottery mechanism ensures that there is scope for an agreement between the two parties in the first stage. Moreover, the socially optimal solution c_α is always in the set of mutually acceptable candidates.*

Proof. First, notice that a necessary condition for the weighted-lottery mechanism to induce an agreement in the first stage is that $\tilde{c}_L \geq \tilde{c}_R$. Otherwise, there is no agreement and the final round is reached.

Let us show now that $\tilde{c}_R \leq c_\alpha \leq \tilde{c}_L$, which trivially implies the condition above. Take first party L. From the definition of $\tilde{c}_L$ we have that $\tilde{c}_L \geq c_\alpha$ if and only if

$$\begin{aligned} V_L(c_\alpha) &\geq EV_L^f \iff \\ V_L(\alpha_L c_L + \alpha_R c_R) &\geq \alpha_L V_L(c_L) + \alpha_R V_L(c_R) \end{aligned}$$

and this inequality holds due to the fact that $V_L''(c) \leq 0$. The same logic applies for the case of party R. ■

Proposition 1 says that, independently on the negotiation protocol, the weighted lottery mechanism induces the parties to agree on an intermediate ideological level, $c' \in [\tilde{c}_R, \tilde{c}_L]$, without actually recurring to the lottery. The reason is that there is always scope for mutual benefit beyond the thresholds defined by the certainty equivalent values. Note that this result does not require any particular functional form and holds for any single peaked utility function.

The second part of Proposition 1 can be rephrased as follows:

Corollary 1. *The socially optimal solution can be implemented as a Nash equilibrium by the weighted-lottery mechanism.*

Remark 1. *The case of three parties, L, E, R, where E stands for "centrist", is rather immediate as well. When any two parties suffice to reach the established quota, the solution corresponds to the centrist candidate in the first round (which may be incompatible with the social optimum). In this context the third party is pivotal and gets all the surplus. Otherwise the third party is irrelevant, gets nothing, and we go back to the two party case.*

4. The choice problem when both ideology and ability matter

Consider now the more general case in which the parties' preferences are bi-dimensional: they care both about the ideology (c) and the ability (a) of the candidates. Utilities, therefore, take the form $V_i(c, a)$, for $i \in \{L, R\}$. We assume, as before, that utilities are single peaked and smooth with respect to the ideological component; that is, $\frac{\partial V_i(c,a)}{\partial c} > 0$ (resp. $\frac{\partial V_i(c,a)}{\partial c} < 0$) if and only if $c < c_i$ (resp. $c > c_i$), and $\frac{\partial^2 V_i(c,a)}{\partial c \partial c} < 0$. Concerning the ability dimension we assume that utilities are increasing, $\frac{\partial V_i(c,a)}{\partial a} > 0$, and that both parties agree on the measurement of ability, that varies in a compact interval $[\underline{a}, \overline{a}]$.

The following result is quite straightforward,

Proposition 3. *Assume that $V_i(c, a)$ is single-peaked and concave in c, and increasing in a, for $i = L, R$. Then, the weighted-lottery mechanism induces an agreement on some candidate c' such that, there is no other candidate with ideology c' and a higher ability.*

Proof. Let $\overline{a}(c)$ denote the highest ability attainable for a candidate with ideology c.As $\frac{\partial V_i(c,a)}{\partial a} > 0$ for both parties, then a change from any $a \neq \overline{a}(c)$ to $\overline{a}(c)$ would imply an increase in the value obtained by both parties. Therefore, $a \neq \overline{a}(c)$ can never be an equilibrium.

Define now $\tilde{V}_i(c) \equiv V_i(c, \overline{a}(c))$, for each $c \in [0,1]$. Then Proposition 1 brings the desired result. ■

An example of a situation where the weighted lottery mechanism works well is when there is always a high-competent candidate for every ideology level. Formally, this corresponds to a situation where, for every c it holds that $\overline{a}(c) = \overline{a}$.

Note that the social optimum, $[c_\alpha, \overline{a}(c_\alpha)]$ can also be implemented as a Nash equilibrium.

5. Final comments

We have presented a very simple model that suggests a way of solving a serious problem in the application of conflicting principles. We have shown that when political parties have to agree on the substitution of a High-Court judge, designated for a fixed term, the default option affects substantially the incentives to reach an agreement. When holding office until the agreement is reached is the default, then no agreement should be expected. When the default is a weighted lottery, then agreement will most likely occur, prior to the realization of the lottery.

One may argue that this is an artificial mechanism that goes against the culture of lawyers and politicians. This is not the case. A lottery mechanism, known as *insaculation*, was used for almost four centuries in Spain to appoint public officers at different levels. This choice procedure was introduced in the XIV Century in order to avoid the excessive influence of some families in the management of public affairs. A set of candidates was first selected and then pieces of paper with their names were introduced in a bag (*sacculum*, in Latin) from which one was chosen at random. Our proposal here may be regarding as following this tradition.

We have kept the model at the simplest level in order to illustrate the key message. There are two questions worth commenting that involve a more complex setting. The first one refers to the role of discounting. The second one to the existence of a finite number of candidates.

In our two-stage model no time discount has been contemplated. This is so because we implicitly assume that the period to reach an agreement is short. When the period enabled to reach an agreement is long enough and the status quo prevails meanwhile, the results may change. More specifically, impatience may affect the strategies of the parties and there will be a threshold beyond which it could be preferable waiting until the lottery applies.[1]

We have assumed that there are enough eligible judges to cover all the political spectrum. When this is not the case, the results may also change. Things would not change much provided there is enough variety that spreads more or less uniformly over the political spectrum. Otherwise results will depend on the richness and the specific distribution of the candidates. Be as it may, the case of discrete alternatives always makes more difficult the model and opens the problem of multiplicity of equilibria.[2]

[1] See Porteiro (2007) for an analysis of a negotiation protocol that explicitly accounts for discounting in the presence of a status-quo and where the level of patience has direct implications on the equilibrium negotiation strategies of players.

[2] From a technical perspective, moving from a bargaining problem over a perfectly divisible issue to one where there are indivisibilities, is far from straightforward. As the paper by Van Damme, Selten and Winter (1990) shows, introducing indivisibilities in the alternating-offer bargaining game of Rubinstein (1982) eliminates the uniqueness of equilibrium (there are infinite subgame perfect equilibria, including very inefficient ones).

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