Accountability and authority/ Responsabilité et autorité

The Court must be independent, yet accountable. How does the Court interact with domestic and European democratic bodies? How should the authority of its judgments best be maintained? Does it respect professional standards of legal reasoning? Should it be more responsive to public opinion? Is there room for principled non-compliance?

La Cour doit à la fois être indépendante et responsable. Comment interagit-elle avec les organes démocratiques nationaux et européens ? Comment l'autorité de ses arrêts peut-elle être assurée ? La Cour respecte-t-elle les normes professionnelles d'argumentation juridique ? Devrait-elle répondre davantage à l'opinion publique ? Le non-respect par principe est-il possible ou légitime ?

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Legitimacy Challenges – and what to do about them[46]

The Court is among the most powerful of international courts. No surprise, then, that critics accuse it of several severe legitimacy deficits. Such criticisms have been analysed in depth by scholars present today, including Professors Çalı, Christoffersen and Helfer. For this session on accountability, four concerns merit mention:

- the Court's backlog of well-founded cases;
- allegations of overly dynamic interpretation by power-hungry judges;

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- criticism that the Court abdicates by granting powerful states a margin of appreciation;
- criticism that the Court lacks due deference toward well-functioning democracies.

A quick glance shows that some of these concerns about the Court are misguided, and that they are not even mutually compatible.

Yet the criticisms challenge the *authority* of the Court. That is the weight other actors will give to the judgments of the Court when they consider how to act. These other actors include domestic parliaments, governments and courts; other Council of Europe bodies; not least: citizens and NGOs, other States – and soon, several bodies of the European Union. For instance: states may react by complying – but they may also cut funding, refuse to comply, and possibly exit from the Convention.

The protection of human rights in Europe is at risk. What is to be done?

Many proposals may be subsumed under a general call for more accountability of the Court. To help our assessment of these suggestions, I first discuss accountability and point to a paradox of the accountable Court: its authority in the eyes of other actors requires both less and more accountability toward the States Parties. To move forward, I then summarize some of the risks that accountability measures are often meant to resolve, before concluding with six – or really five – challenges for the Court.[47]

I. Accountability – by the Court and of the Court

Accountability mechanisms typically have four central features (Grant and Keohane 2005, Bovens 1998; Føllesdal 2004):

- some *actors* hold;
- a *subject* – a particular institution;
- to certain *standards*;
- and if the actor concludes that the subject has failed to live up to those standards, the actor may set in motion *reactions* – also by others – such as sanctions, exit, or denouncement.

The Court plays two different roles in two different discussions about accountability:

47 I leave aside important other responses, such as checks and balances that could involve the Committee of Ministers and other bodies.

- Accountability *by* the Court. As an *actor* it is an umpire which holds *states* accountable to the standards of the Convention. If the Court finds the State wanting, this may be a signal to the population, opposition parties, national institutions and NGOs to mobilise, and other States to be vigilant. Indeed, the most important impact of human rights courts is often precisely when mobilising such other audiences to hold their own domestic authorities accountable.
- Secondly, the Court is also a *subject:* it should *itself* be held accountable to a variety of actors, to prevent the Court from abusing its powers.How can the Court best be held accountable? We can see that it should not be the same States that should hold the Court accountable, that it itself should monitor. Without sufficient independence from them, other States and citizens cannot trust the Court's adjudication.

II. The Puzzle: Independent with discretion – yet accountable?

The judges must be independent, and they must enjoy wide *discretion* when interpreting the Convention, to help prevent violations of human rights in ever new circumstances. New threats to individuals' urgent interests were unimaginable in the 1950s – ranging from internet surveillance and defamation to the increased heterogeneity of expressions of religious or sexual lifestyles; in states with a remarkable diversity of experiences with democracy and the rule of law.

For the Court to maintain its authority in pursuit of its objectives, it must thus enjoy independence from particular states, and a broad scope of discretion.

The risk is that the States and citizens of Europe may thus create a cure worse than the disease: the rule in Europe not of human rights law but of unaccountable human rights lawyers at the Court.

This creates a dilemma: how can the Court provide trustworthy, independent oversight of the policies and legislation of its masters, without itself becoming a new source of unaccountable domination?

Too much accountability toward a few states – or the EU – may make the Court into their puppet; while too much accountability toward too many audiences may become a straightjacket. However, complete unaccountability is a recipe for new risks of abuse – from the Court itself.

In order to discuss these challenges it is helpful to remember some of the risks of international courts generally, real or imagined.

III. The risks of domination by the Court: corruption, puppets, institutional entrepreneurs

What are some *possible* risks that the Court can abuse its power (Føllesdal 2014)?

A first risk is that international judges may become *corrupt for their private gain*.

Secondly, judges may serve as *puppets* – as pawns or marionettes for the powerful States that nominate them (Shapiro 1981, ch 1; Voeten 2013).

Thirdly, there is an *"entrepreneurial"* risk. Judges, particularly at a *new* international court, must build its legitimacy "capital" and its authority. Problems arise if the international judges pursue the power of the institution, beyond what is required to secure the objectives of the treaty.

These observations concern international courts generally. The Council of Europe must ask whether the Court is likely to suffer from any of these risks, and only if so, then, ask what should be done – without preventing the Court's main function.

There may be three main strategies to fine-tune accountability mechanisms: firstly, by considering how the judges are *appointed*, and then ways to *guard* and *guide* the international court as a whole – without preventing the Court from holding States accountable to the Convention, but rather fostering professional legal norms of reasoning in the procedures and judgments to ensure that the decisions are sound and are regarded as authoritative.

IV. Some paths to improve the accountability of the Court

As we turn to suggestions for further improvements in light of these risks, I first submit a reminder that should temper eagerness to increase the accountability *of* the Court:

a) If it ain't broke, don't fix it

While the Court enjoys a high level of formal independence, there are at least three reasons to be cautious about further reform proposals to make the Court more accountable.

Firstly, the Court's room for discretion is already limited, since it can only address cases brought to it, and these must have exhausted local remedies. However, insofar as the Court must now select among the cases, this creates a certain risk of abuse of this power.

Secondly, compared to other international courts and tribunals, the Court already has a high degree of *transparency* of process and reasoning, even including public dissenting opinions.

Thirdly, while the current backlog and lack of *compliance* with the Court's rulings are problems *for* the Court and for the citizens of Europe, it is not primarily a problem *of* the Court – but a challenge *to* certain Member States. Director Christoffersen (Christoffersen 2011) and several other scholars present have highlighted this point. One important implication is that the solution should aim to maintain a high legal quality of the judgments, and to promote their impact on domestic actors by protecting democratic freedoms, and to bolster independent domestic courts, through judicial dialogue. It is not obvious that this requires further strengthening the sanctions that human rights courts may leverage.

b) The selection of judges

With regard to the selection of judges, states must have enough influence in the *selection* process to ensure indirect democratic accountability, whilst ensuring that the judges are highly skilled so that decisions are regarded as authoritative by other actors. At the Court, this is done by a procedure where each State nominates three candidates, which are then selected by the Parliamentary Assembly of the Council of Europe. Rules regarding the term of office are also crafted to secure independence from the appointing bodies: This would seem to be one reason for the changes wrought by Protocol 14, that judges serve one non-renewable nine year term rather than a six-year term once renewable.

One possible task for the longer term is to elaborate and revise the Committee of Ministers' helpful *Guidelines on the selection of candidates*, and the role of advisory panels of experts.

c) Better accountability through better legal reasoning

Both accountability *by* the Court and *of* the Court will be fostered by more systematic and principled legal analysis. As Professor Çalı and others have argued, the authority of the Court in the eyes of states and other actors increases when the legal reasoning is consistent and persuasive (Çalı, et al. 2011). At the same time, this strengthens what professor Helfer calls "discursive self constraint" of the Court when it seeks acceptance by surrounding judicial bodies at domestic, regional and international levels (Helfer 2006). This helps reduce the risk of too much activism.

Among sources of lessons we should welcome such initiatives as the European Research Council-funded project "Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning", chaired by professor Eva Brems.[48] Topics include dealing with cultural and other types of diversity, proportionality analysis and consistent approaches to conflicts in human rights.

48 www.ugent.be/nl/onderzoek/ugent/toponderzoek/eu-portfolio/enhr.htm.

d) The Margin of Appreciation Doctrine

The Margin of Appreciation doctrine is an interesting part of both forms of accountability, by the Court and of the Court, and even more so with Protocol 15.

The Margin of Appreciation reduces the risks of the Court's dynamic interpretation. Indeed, states now seem to use this doctrine to hold the Court to account: recall the Lautsi case concerning crucifixes on classroom walls. The Italian Government there criticised the Court for not granting it a margin of appreciation.[49]

The doctrine also helps accountability *by* the Court, because it helps citizens and other states hold the State accountable. Consider that the Court often denies such a margin if there is no evidence of a good faith *proportionality test* by the state prior to deciding on legislation or a policy. Over time this may induce state authorities to deliberate more carefully, in public, about the social objectives, alternative modes to promote them, and the likely effects of these alternatives for the human rights of affected individuals. Such deliberation is crucial if rulers are to be responsive to their citizens, and for domestic democratic accountability to be effective.

The margin of appreciation imposes two important tasks for reflection and reform. Several judges – and scholars present here today – criticise the practice as being *too vague*. The result is apparent inconsistencies of the Court, and suspicion that the Court favours some States. We need a more specified, predictable practice, guided by a clear understanding of why the Court should grant States a margin of appreciation in the first place.

A second issue concerns the Court's appeal to an *"emerging European Consensus*" or "common European values" (Letsas 2013). When the Court observes such emerging patterns, it restricts the margin of appreciation. The Court thereby becomes accountable *to majorities* among the States (Stone Sweet and Brunell 2013).

However, sightings of such a consensus are controversial, also among judges of the Court (Føllesdal 2014). And the policy is not obviously sound. Suppose there is partial convergence on *one* particular way to address tensions between human rights, or between such rights and social objectives – for instance to end the practice of established state churches. Why should this trend make the Court more suspicious toward *other* modes of handling these tensions by other Member States who will keep their established church?

49 "A study would have shown that there was no common approach in Europe in these fields, and would accordingly have led it to the finding that the Member States had a particularly wide margin of appreciation; consequently, the Chamber, in its judgment, had failed to take that margin of appreciation into consideration, thus ignoring one fundamental aspect of the problem." (summarised in *Lautsi v. Italy* Ii 2011, para 34).

e) Principled non-compliance – an ultimate accountability mechanism?

The current criticisms from some Member States *may* give rise to a new phenomenon: principled non-compliance by a State as an accountability mechanism and ultimate correction device.

We have witnessed other incidents of non-compliance with international law which raise similar concerns, thus professor Franck argued that the NATO forces in Kosovo, even though the intervention was illegal due to the lack of Security Council authorisation, still was morally necessary: it was a morally mandatory act of international civil disobedience.

One reason to expect such reactions is that international courts must resort to dynamic interpretation of treaties that are difficult to change. We must expect that even wise judges will sometimes make mistakes in their dynamic interpretations. One corrective device States may resort to as a last resort is non-compliance with a judgment, akin to "civil disobedience" known from domestic settings.

But how can we – and the Court – distinguish these acts of non-compliance aimed at changing treaty interpretation from "ordinary" law breaking? (Goodin 2005). It will be important to make such a distinction, both for the Court to understand that it should reconsider, and to avoid the spread of non-compliance.

To illustrate: one reason why the Hirst case should not count as such an incident is that we should require evidence that the State is actually engaged in a judicial dialogue of sorts, that it seeks to *voice loyalty* to the Convention – possibly to avoid *exit* as a last resort (Hirschman 1970): the State must state reasons for non-compliance, including a preferred alternative interpretation of the ECHR.

f) The accountability roles of the EU vis-à-vis the Court

A final topic for the long-term future of the Court concerns the roles that the EU and its court may play in the two forms of accountability – *by* the European Court of Human Rights, and *of* the Court. There are several new challenges, some because the EU does not merit the same sort of deference as a democratic state.

Not only is the EU not a state, but the EU itself is frequently charged with a democratic deficit (Føllesdal and Hix 2006). This is one reason why the EU should not enjoy a margin of appreciation, at least not for the same reasons as the democratic Member States of the Council of Europe enjoys.

Secondly, the debate of how the Court should reform or reject its Bosphorus doctrine has not reached its conclusion.

Thirdly, the Court of Justice of the European Union may challenge the independence of the European Court of Human Rights.

One consequence is that the accession of the EU should lead the Council of Europe to think even more carefully about the challenges outlined in this presentation.

Conclusion

To conclude: I have urged that a central task for the Council of Europe in the years to come is to ensure that the European Court of Human Rights can both on the one hand promote accountability and the legitimate authority of its Member States and the EU. At the same time: the Court itself should remain accountable and maintain its own authority, so that it continues to contribute to the protection of human rights in Europe.

I have suggested five areas where further deliberation may be necessary in the long-term for the Court:

- the selection of judges;
- maintaining the high legal quality of judgments;
- the margin of appreciation doctrine;
- possible instances of principled non-compliance;
- the accountability challenges wrought by the accession of the EU.

This is not an exhaustive list. To the contrary, I suspect we will have a much longer list by the end of our days here.