

Independent yet accountable: stress test lessons for the European Court of Human Rights

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Approximately as appears in

Maastricht Journal of European and Comparative Law 24 (4): 484-510
<https://doi.org/10.1177/1023263X17729945>

Abstract

An important 'stress test' for regional human rights courts would be to see how well such courts perform when faced with authoritarian, human rights-violating regimes that they are supposed to hinder or constrain. These states are not only subjects of the court, but also its masters insofar as they enjoy various forms of control and accountability mechanisms that may constrain the court's independence. The article argues that, at least in the case of the European Court of Human Rights (ECtHR), its precarious 'constrained independence' should be modified to enhance its impact even under such circumstances. Such changes could strengthen the ECtHR's impartial and independent role without running the risk of turning it into a so-called 'juristocracy' - subjecting European states to the arbitrary rule of international judges.

Keywords: Accountability, Independence, European Court of Human Rights, Selection of Judges, Selection of Cases, Gender Bias, Professional Background, Role of Registry

1. Introduction

The European Convention on Human Rights (ECHR) along with its European Court of Human Rights (ECtHR) were set up after the Second World War to check or constrain the authoritarian tendencies that had existed in European states.¹ Is the ECtHR well designed for this task?

An important 'stress test' for regional human rights courts, such as the ECtHR, would be to see how well such courts perform under the sort of unfavourable conditions they are supposed to hinder. Such a stress test might occur as a 'natural experiment' as the result of an increase in governments that are skeptical of delegating some of their authority to international bodies, and whom are particularly wary of human rights insofar as they threaten traditional community values. Some argue that this is an accurate description of parts of the present political climate in Europe, where attitudes toward perceived transnational threats have increased in salience. Political parties described as

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¹ Research for this article was partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 – PluriCourts: The Legitimacy of the International Judiciary. Previous versions were presented at Masaryk University, Brno, 30 May 2014 and in Prague on 16 October 2015. The author is grateful for the comments received from David Kosař and Aida Torres Pérez.

traditional/authoritarian/nationalist (TAN)² have become more influential in several countries. Some see a 'neo-Westphalian' movement of populations and their governments towards more traditional, nationalist strategies, including the re-nationalization of previously international/regionally pooled or delegated sovereignty. This tendency challenges universal and regional human rights authorities, especially those that protect critical media, or religious, ethnic, sexual and other minorities to the perceived detriment of the wider national society and its values.³

Such descriptions are contested,⁴ yet the question remains: how well can a regional human rights court, such as the ECtHR, protect and promote human rights even against the will of several states? These states are not only subjects of the ECtHR, but also its masters insofar as they enjoy various forms of control and accountability mechanisms that may constrain the ECtHR's independence. We should not expect the ECtHR to completely prevent authoritarian governments. Yet, I shall suggest that it may be possible to bolster the ECtHR's precarious 'constrained independence' and even enhance its impact under such circumstances. Such changes may strengthen the ECtHR's impartial and independent role without running the risk of turning it into a 'juristocracy' – that is, subjecting European states to the arbitrary rule of international judges.

One main function of domestic and international courts is to provide a sufficient and impartial means of settling disputes – including review – on the basis of legal norms established independently of the particular case, and then competently applied to the particular case with due consideration of local circumstances.⁵ Some disputes take the form of judicial review of legislation and policies: that is, whether there is a breach of the treaty. Other disputes mainly concern the application of undisputed legislation. In order to address and sometimes to resolve such disputes by a court applying pre-existing legal rules, the parties must accept and respect the judgments, even when some of their claims remain unsatisfied. To serve this role as an umpire, a court must be perceived by the losers, and by potential losers, to satisfy several desiderata.

The court must be designed, embedded, staffed and operate so as to secure and exhibit several partially conflicting normative standards or considerations, including independence, impartiality, competence and accountability.⁶ Independence also creates new risks. The international court may make wrong decisions, either by mistake or by downright abuse of its discretion. To reduce such risks, mechanisms must be put in place to constrain or place a check on judges. The ECtHR's independence must thus be combined with some measures of *accountability*.

² L. Hooghe et al., 'Does Left/Right Structure Party Positions on European Integration?', in G. Marks and M.R. Steenbergen (eds.), *European Integration and Political Conflict* (Cambridge University Press, 2004), p. 131.

³ S. Hopgood, *The Endtimes of Human Rights* (Cornell University Press, 2013).

⁴ T. Landman, 'Social Magic and the Temple of Human Rights: Critical Reflections on Stephen Hopgood's Endtimes of Human Rights', in D. Lettinga and L. van Troost (eds.), *Changing Perspectives on Human Rights: Debating the Endtimes of Human Rights - Activism and Institutions in a Neo-Westphalian World* (Amnesty International, 2014).

⁵ M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981).

⁶ Compare, e.g., B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

Of concern here are the design challenges of the ECtHR in particular. In order to provide assurance about states' human rights compliance, human rights courts (including the ECtHR) must be sufficiently *independent* from the states who are accused of violations so that it adjudicates *impartially* and objectively on the basis of law, and moreover is seen to do just that. The judges must be regarded as impartial and skilled at interpreting and applying the ECHR, not least when they 'balance' different human rights norms. The judges must also enjoy wide discretion in *interpreting* and *developing* the ECHR, to help prevent violations of human rights in novel or hitherto unseen circumstances. The many threats that now exist, and which may affect individuals' urgent interests, and which international review may alleviate, were simply inconceivable when the ECHR was drafted in the 1950s – ranging from internet surveillance and defamation to the increased heterogeneity of expressions of religious or sexual lifestyles. While it is imperative that the judges undertake such a 'dynamic interpretation' of the ECHR, there is a risk the ECtHR subjects the states and citizens of Europe to the arbitrary discretion of international judges. This consequently creates a dilemma: how can the ECtHR provide trustworthy, independent oversight of the policies and legislation of its masters, and interpret the Convention 'dynamically', without itself becoming a new source of unaccountable domination?

However, the ECtHR should not be controlled by the same states organs that the ECtHR should monitor. Without sufficient independence from the states, other states and citizens would not be able to trust the ECtHR's adjudication. Too much accountability toward a few states may make the ECtHR appear as their puppet; while too much accountability toward too many audiences may become a straightjacket. However, complete unaccountability is conducive to the risk of abuse – from the perspective of the ECtHR itself. The ECtHR must be held in check to prevent the rule of unaccountable judges of the ECtHR in Europe.

This institutional design challenge is difficult for any treaty architect: how to set up the institutional and professional structures to combine independence and accountability. There is now an extensive scholarship concerning the 'bounded discretion' of international judges.⁷ Details of institutional design help alleviate the particular tensions as they arise for human rights courts, in particular the ECtHR. Several formal and less formal legal, structural, political and discursive accountability mechanisms are available: appointment procedures, budget control and professional standards of interpretation.⁸

An extra challenge is that it is the state parties who create these structures, and who know that, in the future, they may find themselves party to the cases. An important 'stress test' for the ECtHR would be where several Member States are skeptical of such self-binding institutions. Such cases point to some weak aspects of the existing institutional design which may be better addressed.

Section 1 identifies several of the relevant features of the ECtHR. Sections 2, 3 and 4 explore the peculiar forms of independence, impartiality and accountability that an international

⁷ E.g., T. Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *Virginia Journal of International Law* (2005), p. 631-673; L. Helfer, 'Why States Create International Tribunals: A Theory of Constrained Independence', in S. Voigt et al. (eds.), *International Conflict Resolution* (Mohr Siebeck, 2006).

⁸ L. Helfer, in S. Voigt et al. (eds.), *International Conflict Resolution*.

human rights court such as the ECtHR must require in order to serve its objectives and to help states assure other stakeholders of their commitment to respecting human rights.

Section 5 then draws together suggestions for changes to several procedures and practices of the ECtHR, which will enable it to strengthen its ability to promote its objectives, even under 'stress test' conditions.

2. The European Court of Human Rights

The ECtHR was established by the member states of the Council of Europe under the auspices of the ECHR. The ECHR has been effective since 1953. Protocol No. 9 of 1994, obligatory for new state parties entering the Council of Europe, enables individuals to lodge complaints before the ECtHR. Protocol No. 11, agreed in the same year, established the ECtHR on a permanent footing from 1998.

This system was originally put in place as an early warning system to help prevent lapses into totalitarianism by means of a court that could hold states accountable for human rights violations.⁹ The role of the ECtHR is to 'ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto'.¹⁰ The ECtHR acts as an umpire that holds states accountable to the standards of the ECHR. The most important impacts of human rights courts, such as the ECtHR, are not so much the court-imposed sanctions, but to mobilize other audiences to hold their own domestic authorities accountable.¹¹ If the ECtHR finds the state wanting, this is a signal to the population, opposition parties, national institutions and NGOs to mobilize and for other states to become vigilant.

Several aspects of the ECtHR are particularly relevant. These features have important implications for the independence, impartiality and accountability that are required of ECtHR judges, compared to the judges of domestic judiciaries and of many other international courts. The challenge of the ECtHR is not primarily to be impartial *between* the two state parties to the dispute. It must instead be sufficiently independent *from* the accused state to protect certain human rights against violations by the authorities *of that state*, and at the same time to assist the domestic authorities in protecting those rights. The judges, and the ECtHR as a whole, must also be well-informed about the relevant local circumstances.

⁹ L. Woolf, 'Review of the Working Methods of the European Court of Human Rights', *European Court of Human Rights* (2005), [Http://Www.Echr.Coe.Int/Documents/2005_Lord_Woolf_Working_Methods_Eng.Pdf](http://www.echr.coe.int/Documents/2005_Lord_Woolf_Working_Methods_Eng.Pdf); E. Bates, *The Evolution of the European Convention on Human Rights. From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010).

¹⁰ Council of Europe, 'European Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocols Nos. 11 and 14. Entry into Force 3 September 1953', http://www.echr.coe.int/Documents/Convention_ENG.pdf, Article 19 (the ECHR).

¹¹ X. Dai, 'Why Comply? The Domestic Constituency Mechanism', 59 *International Organization* (2005), p. 363-398; B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009); J. Christoffersen and M.R. Madsen, *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2013); R. Harmsen, 'The Reform of the Convention System: Institutional Restructuring and the (Geo-) Politics of Human Rights', in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics*.

Furthermore, the ECtHR must not become so independent and unaccountable that it constitutes a possible site of the abuse of power.

A. A self-binding court

One of the central functions of the ECtHR is to allow legislative bodies and governments to bind themselves and to enhance their claim that they respect human rights. The ECtHR is thus, in a particular sense, a 'self-binding' court. One should, in this regard, consider why the European states in the 1950s agreed to limit their sovereignty by agreeing to be held accountable by an international body for their treatment of their own citizens.¹² All states, no doubt, wanted to prevent other states from committing further atrocities that were witnessed during the Second World War. A further prominent concern for several governments was to 'lock in' human rights constraints, on themselves and importantly on their successor governments in their own state.¹³ Such a delegation of aspects of their sovereignty to an international authority is a form of 'self-binding' behaviour.¹⁴ It allows a government to decrease uncertainty and provide assurance toward the citizenry and other states about *its own* human rights commitments – and constrain future governments.

Contrast this role to those international courts which states establish mainly to resolve collective action problems among themselves, for example, to ensure that no state free rides on other states' compliance with a free trade agreement. A state agrees to the jurisdiction of the latter kind of international court mainly to bind *other* states. An international court can help reduce free rider problems by monitoring and even permitting sanctions, and thereby reducing the risk that some states maintain illegal trade barriers. Human rights treaties and courts also help solve such coordination problems where there is a risk of defection, in particular since the ECtHR serves as a gate keeper to the EU – which ensures that all states who pool their sovereignty are only ruled by other states which have a similar commitment to the protection of human rights. A state thus provides assurances to various international constituencies that it will remain committed to its treaty obligations, and be a rule-of-law-respecting and human-rights-respecting political system. This is often important for its own citizens and for other member states of the Council of Europe - especially for states within the European Union.

This self-binding role will necessarily and sometimes constrain state sovereignty, and creates particular tensions between the ECtHR's required independence and state sovereignty, because a central task of the ECtHR is to undertake judicial review of national laws and policies in order to determine whether they are compliant with the ECHR.

B. Permanent tribunal

¹² From 1990 even accepting petitions from individuals (Protocol No. 9).

¹³ A. Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 *International Organization* (2000), p. 217-252.

¹⁴ K. Alter, 'Delegating to International Courts: Self-Binding Vs. Other-Binding Delegation', 71 *Law and Contemporary Problems* (2008), p. 37-76.

A second feature of the ECtHR is that it is a permanent tribunal. This gives it greater power than ad hoc arbitration panels. It establishes precedents and thereby shapes states' expectations to a greater extent. The judges are also somewhat more independent of the states that appoint them, than is the case with the members of such ad hoc panels. They are not selected for a particular decision, but will remain on the bench to decide several cases – and remain in office even when the home government changes. The importance of precedents also serves to constrain the judges in two ways: precedents restrict and guide their discretion, and the role of precedents may strengthen the role of the permanent administrative staff – the Registry.

C. The registry of the ECtHR

The Registry of the Court consists of 270 lawyers and 270 other staff whom provide legal and administrative support to the judges. The Registry thus provides judges with valuable information and an induction into the ECtHR's culture, procedures, case law and mindset. Indeed, the Registry is the de facto guardian of the 'institutional memory' of the ECtHR's case law.¹⁵ The broad impact of the Registry raises questions about its influence on the case selection and judgments.

D. Subsidiary role within the multi-level legal order

A fourth important feature is that the ECtHR operates within a multi-level system where states remain the primary protectors of human rights. The role of the ECtHR is carried out in accordance with the principle of subsidiarity, to *supplement* and *strengthen* the protection offered by domestic judiciaries for certain rights, rather than to replace that authority.¹⁶ One of several expressions of this subsidiary role is visible from the fact that the ECtHR does not nullify national laws or policies - in this sense it performs a rather 'weak' form of judicial review.¹⁷ Still, unfavorable judgments challenge state sovereignty in ways that are reminiscent of domestic constitutional review:

Constitutional-review authority entails the power to nullify laws and policies that contradict the constitution. Committing to constitutional review is both a self-binding precommitment on the part of the legislature, and an other-binding choice made to bind future legislative actors and units within the political system to the constitutional bargain.¹⁸

This conflict between sovereignty and weak judicial review is a central challenge for the ECtHR, especially if governments no longer want to subject themselves to such self-binding commitments.

¹⁵ P.H. Russell, 'Toward a General Theory of Judicial Independence', in P.H. Russell and D.M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University of Virginia Press, 2001); and D. Kosař, 'Selecting Strasbourg Judges: A Critique', in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Cambridge University Press, 2015), p. **Error! Bookmark not defined.**, 123-124 and 133 (especially note 88).

¹⁶ R. Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity', 14 *Human Rights Law Review* (2014).

¹⁷ J. Waldron, 'The Core of the Case against Judicial Review', 115 *The Yale Law Journal* (2006), p. 1346-1360, 1355

¹⁸ K. Alter, 71 *Law and Contemporary Problems* (2008), p. 49.

E. Broad discretion in interpretation and adjudication

A fifth important feature is that the human rights review carried out by the ECtHR often requires it to exercise extensive discretion. Two main elements are worth noting here. The ECtHR must determine, in particular cases, whether restrictions to certain ECHR rights are permissible. Thus, Articles 8 to 11 of the ECHR (concerning the right to privacy, freedom of thought, of and expression, and of assembly, respectively) permit derogations in light of various social objectives, 'in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. Such assessments leave much discretion to the ECtHR. The ECtHR has developed a 'proportionality test' to help guide its assessment. This requires the ECtHR to possess local and counterfactual knowledge about the likely impact of policies for vulnerable citizens, and which alternatives may be feasible for a government to adopt. This is one reason why the bench always includes a judge 'in respect of' the accused state. The ECtHR also limits its own discretion by its practice of granting the domestic judiciary a 'margin of appreciation' in determining whether there is a breach of the ECHR – arguably another expression of the subsidiarity principle:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.¹⁹

A second area where the ECtHR exercises extensive discretion arises in the context of interpreting the ECHR. The text of the ECHR is often vague – containing phrases such as the 'respect for private and family life'.²⁰ They must also be interpreted to protect individuals in new circumstances:

(...) the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards (...) of the member States of the Council of Europe in this field.²¹

Examples include whether human trafficking is prohibited as a form of slavery, servitude or forced labour in the sense of the ECHR,²² and how to apply norms concerning rights to family life to children born out of wedlock when societal norms surrounding marriage have changed.²³ The ECtHR thus interprets the ECHR 'dynamically', akin to taking on a legislative function.

F. Changes in the membership of the Council of Europe

A further important feature concerns the fairly recent changes in the composition of the Council of Europe's membership, and hence the role of the ECtHR. Over time, the main

¹⁹ ECtHR, *Handyside v. United Kingdom*, Judgment of 7 December 1976, Application No. 5493/72, para. 48.

²⁰ Article 8 of the ECHR.

²¹ ECtHR, *Tyrer v. United Kingdom*, Judgment of 25 April 1978, Application No. 5856/72, para. 31.

²² ECtHR, *Rantsev v. Cyprus and Russia*, Judgment of 10 January 2010, Application No. 25965/04.

²³ ECtHR, *Marckx v. Belgium*, Judgment of 13 June 1979, Application No. 6833/74.

objective of the ECHR and the ECtHR was to slowly change and fine-tune fairly well-functioning democracies. Several observers of the ECtHR reported, however, on how the new crop of state parties of the Council of Europe post-1989 required the ECtHR to revert back to its earlier focus on less stable democracies – whilst maintaining a consistent treatment of all state parties.²⁴ Many recent members have weaker traditions in respecting the rule of law and are less experienced in executing their human rights commitments than is the case in comparison to many of the older member states of the Council of Europe. To fulfill its objectives to protect and promote human rights and democracy, the ECtHR must therefore monitor and engage states more rigorously – thereby further challenging the sovereignty of the state parties. The changing composition of the Council of Europe has also led to more attention to the selection procedures and the weaknesses thereof.²⁵

G. Reducing the backlog of cases

The ECtHR may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation.²⁶ With more than 800 million people in the Council of Europe states, the ECtHR has suffered from a severe backlog of cases: from 8,400 applications in 1999, peaking at more than 160,000 in 2011, down to 67,000 applications pending before a judicial formation in March 2016.²⁷ Of these applications, only five to ten percent will eventually be declared admissible. Some have criticized the ECtHR for its dynamic interpretation of the ECHR, resulting in it being too invasive in state sovereignty, and that this has in turn caused the backlog.²⁸ However, the backlog is partly a consequence of the ECtHR's budget, which is decided by the states subject to its scrutiny – who may have an interest in the speedy dismissals of cases. The ECtHR also highlights what it sees as one cause of the backlog: very few of the states are giving rise to a large proportion of the cases.²⁹ Two thirds of these applications have been lodged against one of the following five states: Ukraine, Russia, Turkey, Italy and Hungary.

In order to reduce the backlog, the ECtHR has established procedures to allow a quicker sifting of clearly inadmissible cases by a single judge panel and a three-judge panel. The

²⁴ L. Woolf, 'Review of the Working Methods of the European Court of Human Rights', *European Court of Human Rights* (2005); P. Mahoney, 'New Challenges for the European Court of Human Rights Resulting from the Expanding Case Load and Membership', 21 *Penn State International Law Review* (2002), p. 101-114; M.R. Madsen, 'The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash', 79 *Law and Contemporary Problems* (2016), p. 140-178.

²⁵ Compare, J.F. Flauss, 'Les Élections De Juges À La Cour Européenne Des Droits De L'homme (2005–2008)', 19 *Revue trimestrielle des droits de l'homme* (2008); N.P. Engel, 'More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights', 32 *Human Rights Law Journal* (2012), p. 448-455, 448; D. Kosař, in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*.

²⁶ Article 34 of the ECHR.

²⁷ Council of Europe, 'European Court of Human Rights: Annual Report 2015', http://www.echr.coe.int/Documents/Annual_Report_2015_ENG.pdf, p. 187

²⁸ Raab, Dominic. 2011. *Strasbourg in the dock: Prisoner voting, human rights and the case for democracy*. London: Civitas: Institute for the study of civil society., p. 42. Available at <http://www.civitas.org.uk/pdf/StrasbourgInTheDock.pdf>

²⁹ ECtHR, European Court of Human Rights. 2017. "Annual report 2016." Available at http://www.echr.coe.int/Documents/Annual_Report_2016_ENG.pdf

Registry plays a valuable and important role in proposing lists of cases to be declared inadmissible to the single judge, often with only a very brief justification. Indeed, the Registry's role and de facto influence on decisions about the admissibility of cases and on particular judgments are sometimes questioned. For instance, Protocol No. 14, which entered into force in 2010, requires that the applicant has suffered a 'significant disadvantage'. 'Insofar as the Registry is concerned to reduce the backlog and also involved in applying that criterion, it may urge judges to increase the threshold of such disadvantage.

3. The independence of the ECtHR and its judges

In order to be credible in the eyes of both parties to a particular dispute, a court must appear to be sufficiently independent of both parties. The court must be seen to decide a case on the basis of legal principles rather than the relative power of the parties to the dispute. Some authors have argued that an international tribunal is more likely to secure compliance by the parties if the tribunal is dependent on the state parties, so that the judgments 'reflect the interests of the states at the time that they agree to submit the dispute to the tribunal'.³⁰ In response, other scholars point out that in several issue areas, states have an ex ante interest in delegating authority to bodies that are, by design, independent from the parties, inter alia to enhance their own credibility when making international commitments.³¹

There are three important issues where the ECtHR's independence arises. Insofar as the ECtHR can 'select' its cases, this must be done independent of the parties; the dynamic interpretation of the treaty must not be skewed due to dependence on one party and the judgments must not be unduly influenced by either party.

A. 'Selection' of cases

The ECtHR does not formally have the power to select among the cases brought before it. However, Protocol No. 14 requires that the applicant has suffered a 'significant disadvantage'.³² The ECtHR, deciding by means of a single judge arrangement, may find cases inadmissible on the basis of this ground. Obviously, the accused state must not influence the assessment of such disadvantage. Thus, the judge may not decide cases against the state in respect of which she or he has been elected.³³ Note that the Registry plays an important role in proposing lists of cases to be declared inadmissible to the single judge, often only with very brief justifications.

The ECtHR also addresses cases in a particular order, which in fact also amounts to a selection of cases due to the ECtHR's large backlog. The Rules of the Court state that it may

³⁰ E. Posner and J. Yoo, 'Judicial Independence in International Tribunals', 93 *California Law Review* (2005), p. 1-74, 6; Compare, L. Helfer, in S. Voigt et al. (eds.), *International Conflict Resolution*.

³¹ L. Helfer and A.-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 *California Law Review* (2005), p. 83, 33-35.

³² A. Torres Pérez, 'Can Judicial Selection Secure Judicial Independence? Constraining State Governments in Selecting International Judges', in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*; R.D. Keleman, 'Selection, Appointment, and Legitimacy: A Political Perspective', in M. Bobek (eds.) *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*.

³³ Council of Europe, 'European Court of Human Rights: Rules of Court 14 November 2016', http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf, Article 52A(2) (the Rules of the Court of the ECtHR).

address the cases in an order that reflects the 'importance and urgency of the issues raised on the basis of criteria fixed by it'.³⁴ These criteria are further spelled out in a special document,³⁵ which gives priority to urgent cases where there is a risk to the health or life of the applicant, and cases which may have an impact on the effectiveness of the ECHR system. The latter criterion clearly requires some discretion, and thus requires that the ECtHR's decision about how to classify each case appears independent of the accused state. The Registry may, again, have a significant de facto influence on these decisions.

B. Independent interpretation

When the ECtHR dynamically interprets the ECHR, this is always in the context of addressing a particular case. This poses a challenge to the ECtHR's dispute settlement role, since it should apply the legal norms that have been established independently from the particular case. Moreover, depending on the formulations of the judgment, the interpretation may apply to many more future cases, and thus be a form of law making. To provide an impartial judgment, this process must be sufficiently independent of the parties - even although the result will tend to favour one of them in the particular case, or more generally.

States may have good reasons for delegating such law making to independent courts. Exhaustive negotiations of how the norms should regulate all circumstances may be too costly for states compared to delegating to an independent court to 'fill in' the 'incomplete contract'.³⁶ The states may also prefer to leave such specification to a court which is independent of all the parties because it may be impossible for states to predict all possible situations that will arise, or the states may think that further specification of the law is better done by such a court in the particular context.³⁷ These arguments only hold if the court can be trusted to be sufficiently independent and to follow recognized legal methods of interpretation such as those established in the Vienna Convention on the Law of Treaties.³⁸

C. Independent judgments

Judicial independence from the parties is important to secure in cases where the state is one party to the dispute. Such judicial independence is necessary for the rule of law: the judges should not be 'subject to the influence of some other actor(s); they are the authors of their own decisions'.³⁹

³⁴ Article 41 of the Rules of the Court of the ECtHR.

³⁵ The European Court of Human Rights, 'The Court's priority policy', http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

³⁶ J. Pauwelyn and M. Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals', in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012); A. Stone Sweet and T.L. Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization', 1 *Journal of law and courts* (2013), p. 61-88.

³⁷ T. Ginsburg, 45 *Virginia Journal of International Law* (2005), p. 644.

³⁸ Article 31 of the United Nations Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol. 1155, p. 331.

³⁹ L. Kornhauser, 'Is Judicial Independence a Useful Concept?', in S.B. Burbank and B. Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage, 2002), p. 48.

There are at least three central types of cases where the state is party. The domestic judiciary must be independent from the executive and the legislative branch in order to secure domestic judicial review. An international court must be independent of states when adjudicating disputes among them; and it must be independent of a state which is faced with accusations by individuals, as is the case with the ECtHR. The ECtHR must be sufficiently independent of the parties: there must be a 'lack of concurrence of interests between the judge and one of the parties or their position'.⁴⁰ Such independence reduces the risk of being subject to the arbitrary will of the state - and suspicions thereof. Such subjection is discussed extensively as forms of 'domination' in the 'Republican' tradition of political philosophy.⁴¹ Of particular concern for the ECtHR is avoiding such domination by government bodies, so that the government cannot be suspected of being a judge in a case brought against it.

The ECtHR must be trusted to not be any state party's agent, for example, in pursuit of foreign policy interests.⁴² This begs the question: how independent of the nominating states are the judges of the ECtHR? Among the risks that many international courts face, is that the foreign judges on these courts may have extraneous motives for finding against the accused state.⁴³ The following subsections first lay out the procedure for the election of judges to the ECtHR and then summarizes findings pertaining to two central procedural aspects which serve to secure the requisite form of independence: whether states' role in electing judges influences their judgments and whether the rules pertaining to non-renewable terms help to enhance their independence.

D. The selection procedure and term of office of judges to the ECtHR

Much thought has been put into how to elect judges to the ECtHR in order to secure the necessary independence. The ECtHR includes one judge nominated by each state. The judges are elected by the Parliamentary Assembly of the Council of Europe; one judge from each list of three qualified candidates are proposed by each state. The Parliamentary Assembly requires that states describe the nomination process, according to the guidelines issued by the Committee of Ministers⁴⁴ which must include a 'fair transparent and consistent national selection procedure'. The competition for the post must be announced in specialized literature. A Committee of the Parliamentary Assembly can dismiss the slate for various listed reasons, such as lack of members of both genders on the list.⁴⁵ The Committee of

⁴⁰ J. Crawford and J. McIntyre, 'The Independence and Impartiality of the "International Judiciary"', in S. Shetreet and C. Forsyth (eds.), *The Culture of Judicial Independence* (Martinus Nijhoff, 2012).

⁴¹ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Clarendon Press, 1997).

⁴² Committee of Ministers, 'Recommendation on Judges, Independence, Efficiency and Responsibilities. Adopted November 17, 2010', [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true).

⁴³ A. T. Perez, 'Can judicial selection secure judicial independence? Constraining state governments in selecting international judges.' In M. Bobek (ed.), *Selecting Europe's judges: A critical review of the appointment procedures to the European Courts*, 181-201. Oxford: Oxford University Press. Compare also, B. Cali et al., 'The Legitimacy of the European Court of Human Rights: The View from the Ground', 35 *Human Rights Quarterly* (2013).

⁴⁴ Committee of Ministers, 'Guidelines on Selection of Candidates for the Post of Judge at the European Court of Human Rights', https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cb1ac.

⁴⁵ K. Lemmens, '(S)Electing Judges for Strasbourg: A (Dis)Appointing Process?', in M. Bobek (ed.),

Ministers has set up an Advisory Panel of Experts to examine and ensure that the candidates meet the requirements for office.⁴⁶

The term of office is crafted to promote independence from the appointing bodies – its effect is discussed below. Until Protocol No. 14 entered into force, the judges served a six-year term, renewable once. Protocol No. 14 changed this to one, non-renewable nine-year term, in order to reduce the risk that judges would vote in favour of their own state to secure reappointment, and was done ‘to reinforce [the judges’] independence and impartiality’.⁴⁷

Research finds that these procedures have proven to have some success in securing the sort of independence that is required. We now turn to consider some findings .

E. Judges appear to have little bias in favour of their home state

Authors seem to disagree about whether judges are loyal toward their own state. András Sajó, the Hungarian judge at the ECtHR, holds that ‘[t]here is no evidence in the scholarly literature of national bias in the Court’s judgments and, on the contrary, scholarly studies indicate the personal integrity of the judges’.⁴⁸ On the other hand, judge Tulkens, the Belgian judge at the ECtHR observed that ‘The raison d’état is more present here than I would have thought possible’.⁴⁹ Different and very able observers can thus notice different patterns. More comprehensive comparative research indicates that the answer lies somewhere in between these two opposing views. To be sure, there are reports of individual judges who are alleged to be insufficiently independent from the nominating state, or otherwise unsuitable.⁵⁰ Erik Voeten noticed some pattern of this voting bias when looking at the votes of the ECtHR judges, especially concerning Article 3 cases concerning the prohibition of torture:

When a ruling favored the respondent government, 100% of ad hoc judges and 95% of regular judges from the respondent's country voted with the majority. This compared to 81% of other judges. When the ruling went against the respondent state, 33% of ad hoc judges and 16% of regular national judges dissented, compared to only 8% of other judges.⁵¹

Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts.

⁴⁶ Committee of Ministers, ‘Recommendation on Judges, Independence, Efficiency and Responsiblities. Adopted November 17, 2010’.

⁴⁷ Council of Europe, ‘Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention: Explanatory Report’, <http://www.conventions.coe.int/Treaty/EN/Reports/html/194.htm>

⁴⁸ A. Sajo, ‘An All-European Conversation: Promoting a Common Understanding of European Human Rights’, in S. Flogaitis et al. (eds.), *The European Court of Human Rights and Its Discontents* (Elgar, 2013), cited in D. Kosař, in M. Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts.*

⁴⁹ F.J. Bruinsma, ‘Judicial Identities in the European Court of Human Rights’, in A. van Hoek, et al. (eds.), *Multilevel Governance in Enforcement and Adjudication* (Intersentia, 2006), p. 53; and compare, E. Voeten, ‘The Impartiality of International Judges: Evidence from the European Court of Human Rights’, 102 *American Political Science Review* (2008), p. 417-433.

⁵⁰ N.P. Engel, 32 *Human Rights Law Journal* (2012).

⁵¹ E. Voeten, 102 *American Political Science Review* (2008), p. 425; M. Kuijjer, ‘Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice’, 10 *Leiden*

Judges are less loyal to states' foreign policy objectives than might be feared. The ECtHR is not used as an arena for states to pursue their foreign policy objectives:

Judges were not more likely to vote for countries on which their national governments depend for trade or with which they frequently vote in the United Nations. (...) [T]he ECtHR is an unlikely context for geopolitics to matter in, in comparison to courts that directly settle interstate disputes, such as the ICJ [The International Court of Justice] and the WTO's Dispute Settlement Understanding. Nonetheless, the absence of systematic geopolitical bias is extremely good news for the impartiality of the ECtHR.⁵²

Thus, the real risk of extensive partiality toward the nominating state seems small. Yet rumors about just a few examples of such partiality illustrate how the perceived normative legitimacy of courts is very vulnerable: just a few cases of alleged deviation can destroy whatever perceived legitimacy the ECtHR may have had.

F. The independence of permanent judges with non-renewable terms

Many scholars hold that permanent judges are more independent than judges that have merely been appointed to settle a particular case, and that incentives to have the appointment renewed biases the judges' judgments. Comparative research on the voting patterns of ad hoc versus regular judges of the ECtHR supports the former view, 'ad hoc judges, who are appointed by their government to sit on the bench for a particular case, demonstrate a stronger national bias (...) than the regular judges as they do not feel much solidarity with them and are contrary to the regular judges not exposed to group pressure'.⁵³

Regarding the impact of renewable terms, there are some cases where judges were not renewed and the public reason offered was the judge's decision.⁵⁴ There is also some evidence that judges facing retirement would be more likely to vote against their government than judges who face the possibility of re-election, but the evidence in that regard is weak.⁵⁵ However, the career prospects of judges may still affect their judgments, especially for younger judges who must find other positions after their non-renewable term at the ECtHR has expired.⁵⁶ This is an unintended effect of the non-renewable term: a post-ECtHR career is a concern for more judges. They may think that their prospects may depend on the good will of the executive of their own state, be it an attractive post within the domestic judiciary or possible nominations to other international courts.

In general, then, it seems that the judges of the ECtHR enjoy extensive, but not full, independence of the relevant kind from the states that nominate them.

4. Impartiality

Journal of International Law (1997), p. 49-67; D. Kosař, in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, p. 123.

⁵² E. Voeten, 102 *American Political Science Review* (2008), p. 429-30.

⁵³ F.J. Bruinsma, in A. van Hoek et al. (eds.), *Multilevel Governance in Enforcement and Adjudication*; and the quotation (reprinted above) from E. Voeten, 102 *American Political Science Review* (2008), p. 429-30.

⁵⁴ E. Voeten, 102 *American Political Science Review* (2008), p. 421.

⁵⁵ *Ibid.*, p. 421.

⁵⁶ D. Kosař, in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, p. 140.

Judges in courts must be trusted to decide cases on the basis of prior legal norms and methods, instead of simply applying their own personal preferences or extraneous considerations. They must be impartial, not only by not being biased for or against any state, but they must also avoid the appearance of bias of other sorts of bias - such as the gender or the professional background of the judges. Consider several forms of bias that may hinder the appearance of impartial judgments on the basis of law, beyond the risk discussed above that judges may serve as mere agents of the states that nominate them.

One risk is that international judges may pursue their own personal preferences or prejudices. The judges must be experts of the relevant law, but may often be faced with decisions where there is a legal disagreement of interpretation. There is then a possibility that the judges bring their own idiosyncratic theoretical or ideological legal perspectives to bear - in violation of the standards of good judging.

A second risk is that judges become corrupt for their private gain – that they accept bribes in return for favourable judgments. This is often one reason given in support of remunerating judges sufficiently.⁵⁷

Thirdly, there is an ‘entrepreneurial’ risk. Particularly in a new international court, judges must build their legitimacy ‘capital’ and authority. Problems arise if the international judges, or the administration of the international court, pursue the power of the institution beyond or in other directions than what is required to do to secure the objectives of the treaty.

Some risks concerning impartiality are unique to self-binding courts such as international and regional human rights courts. A main task of the human rights courts is to allow individuals to bring cases against their own states, leading the court to impartially review domestic legislation and policies against the appropriate human rights standards. The members of the international court must, of course, be trusted to be competent judges. In addition, the judgments must not be seen to be biased in favour of or against certain groups or affected parties.

The requisite independence may be promoted by ensuring that each judge is independent, or by ‘balancing’ the competing interests within the court. Thus, international investment-state dispute settlement by a tribunal secures impartiality of the tribunal itself even though some members may not be independent. A typical tribunal is composed of one arbitrator, appointed by each of the parties, and a third chosen by the two parties or their appointed arbitrators. Such ‘internal’ recreation of a balance among interests can also be created among different branches of government, or political parties may select representatives to the court or tribunal in order to secure that the court as a whole enjoys the requisite independence. By way of example, half of the judges on the German Constitutional Court (*Bundesverfassungsgericht*) are elected by the German Federal Parliament (*Bundestag*) and the other half by the German Federal Assembly (*Bundesrat*).⁵⁸

⁵⁷ OHCHR, Office of the United Nations High Commissioner for Human Rights. 2011. "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers." At www.ohchr.org/Documents/Publications/training9chapter4en.pdf pp 116-117.

⁵⁸ Article 95.2 of the Basic Law of the Federal Republic of Germany (*Grundgesetz Für Die Bundesrepublik, Deutschland, Bundesgesetzblatt (BGBl) Teil III, Gliederungsnummer 100-1 (1949)*).

Two main forms of bias merit mention: arguably the ECtHR must secure various forms of representativity, including gender, to assure that all relevant information and arguments are duly heeded and 'weighted' by the court. And the ECtHR must avoid the appearance of bias either in favour of or against state parties in general.

A. Gender bias in the ECtHR

One possible bias within the ECtHR concerns gender. There are markedly more male than female judges in the ECtHR – currently there is almost a two-thirds majority of male judges.⁵⁹ One might fear that this has an unfortunate impact on the ECtHR's interpretations and judgments, and on the general reputation and perceived legitimacy of the ECtHR. For instance, the gender imbalance may lead some to question the representativity of the ECtHR,⁶⁰ and the impartiality and fairness of the process and of the ECtHR itself.

What are we to make of such concerns? There is, hitherto, very little research concerning whether female and male judges tend to vote differently in the ECtHR.⁶¹ And whether having both genders represented on the bench present affects the deliberations and the decisions – for instance toward making the ECtHR more sensitive toward reasoning and arguments invoked by women – or by historically underrepresented groups more generally.⁶² There are several disagreements worth noting, which are extensively discussed with regards to the issue of representativity in legislatures: how to understand and identify 'women friendly' judgments; whether these are judgments which correct existing gender discrimination, or favour the situation of groups which historically tend to consist of women. Further questions concern how 'representative' and sensitive to the group members' interests the elected members of the court actually are.⁶³

The actual gender imbalance notwithstanding, the ECtHR has proclaimed gender equality as a key underlying principle of the ECHR, for example, in the case of *Leyla Sahin v. Turkey*, upholding the state's ban on headscarves at universities and other public institutions.⁶⁴ With regard to some of the interests that are arguably of particular concern to women, the ECtHR has required states to protect women from domestic violence, required further state

⁵⁹ Calculated by the author (20 June 2016) with recourse to, European Court of Human Rights, 'Composition of the Court', <http://www.echr.coe.int/Pages/home.aspx?p=court/judges>.

⁶⁰ N. Grossman, 'Achieving Sex-Representative International Court Benches', 110 *American Journal of International Law* (2016), p. 82-95.

⁶¹ *Ibid.*, p. 89.

⁶² P. Wald, 'Six Not-So-Easy Pieces: One Woman's Journey to the Bench and Beyond', 36 *University of Toledo Law Review* (2005), p. 979-993, 989; D. Terris et al., *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis, 2007), p. 186-87; I owe these references to N. Grossman, 110 *American Journal of International Law* (2016), p. 89. And compare, N. Torbisco-Casals, 'Why Fighting Structural Inequalities Requires Institutionalizing Difference: A Response to Nienke Grossman', 110 *American Journal of International Law Unbound* (2016), p. 92-97.

⁶³ I.M. Young, 'Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought', in I.M. Young (ed.), *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton University Press, 1997), p. 44; A. Phillips, *The Politics of Presence* (Clarendon, 1995).

⁶⁴ ECtHR, *Leyla Sahin v. Turkey*, Judgment of 29 June 2004, Application No. 44774/98, para. 115. For a thorough overview of the relevant jurisprudence, compare I. Radacic, 'Gender Equality Jurisprudence of the European Court of Human Rights', 191 *The European Journal of International Law* (2008), p. 841-857.

investigations into alleged rape and prohibited discrimination against single mothers. The ECtHR has interpreted the ECHR to include the right to carry a maiden name, to prevent forced gynecological examinations and against trafficking in human beings.⁶⁵

It must be noted that whether a judgment *is* particularly 'women friendly' is often contested. Thus, in the *Sahin* case, concerning headscarves, Judge Françoise Tulkens noted that:

Wearing the headscarf is considered (...) to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women. However, what, in fact, is the connection between the ban and sexual equality? The judgment does not say. (...) What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to.⁶⁶

Leaving aside whether the gender imbalance affects the procedures and the outcomes, it is worth noting that what might be done to reduce the gender imbalance is a task for the particular member states and the Council of Europe, rather than the responsibility of the ECtHR itself. To reduce the gender disparity, the Council of Europe imposed new requirements on states concerning how to compose the slate of nominees. For the purposes of the 'stress test' of the ECtHR, it is of some interest to consider how domestic actors have responded to these new requirements.

In order to secure a better balance between the sexes on the bench, the Parliamentary Assembly of the Council of Europe has required that at least one of the three candidates for each post as judge must come from the under-represented sex.⁶⁷ The Assembly has often sent lists of candidates back to the state to urge compliance with this requirement. Nevertheless, one country – Malta – both in 2004 and 2006 maintained that they could not find any suitably qualified female nominee. Consequently, the Rapporteur of the Committee on Legal Affairs and Human Rights explored arguments that there may be exceptional circumstances where 'a state has done everything possible to include members of the under-represented sex in the list of candidates – but without success because of the requirement to satisfy the other criteria concerning the choice of the best qualified candidates'.⁶⁸

⁶⁵ ECtHR, *Opuz v. Turkey*, Judgment of 9 June 2009, Application No. 33401/02; ECtHR, *M.C. v. Bulgaria*, Judgment of 4 December 2003, Application No. 39272/98; ECtHR, *Ünal Tekeli v. Turkey*, Judgment of 16 November 2004, Application No. 29865/96; ECtHR, *Y.F. v. Turkey*, Judgment of 22 October 2003, Application No. 24209/94; ECtHR, *Rantsev v. Cyprus and Russia*, Judgment of 7 January 2010, Application No. 25965/04, respectively.

⁶⁶ ECtHR, *Leyla Sahin v. Turkey*, para. 11.

⁶⁷ Parliamentary Assembly of the Council of Europe, 'Resolution 1366 (2004) on Candidates for the European Court of Human Rights', <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17194&lang=en>.

⁶⁸ Report by the Rapporteur in European Court of Human Rights, 'Advisory Opinion on Certain Legal Questions Concerning the Lists of Candidates Submitted with a View to the Election of Judges to the European Court of Human Rights', <https://wcd.coe.int/com.instranet.InstraServlet?Comman=com.instranet.CmdBlobGet&DocId=1217788&SecMode=1&Admin=0&Usage=2&InstranetImage=2786059>, para. 14.

Critics have challenged the claims about the quality of legal professionals in Malta, and also noted that Malta could even have nominated a non-Maltese candidate. After this, the Assembly also granted Belgium permission to submit a list of three men – again, from a country which clearly has very many well qualified women, and which could also nominate non-Belgians if it desired to do so. The deference of the Council of Europe bodies toward states on this matter merits further scrutiny. The upshot on this gender bias on the bench is that it may affect the requisite impartiality of the procedures and the judgments of the ECtHR, as well as its perceived representativeness. But further research is needed to determine whether such risks are real.

The discussions surrounding the gender bias of the composition of the ECtHR gives rise to a more general concern: there would seem to be parallel arguments to ensure broad representativity of the population of Europe among the judges. In particular, the need for perceptive attitudes toward perspectives and arguments from historically and presently discriminated groups may lend support to the claim that the ECtHR should include judges that are very familiar with several religious traditions, in particular Islam; and judges with a range of ethnic backgrounds and a variety of sexual orientations – as well as representing other minorities at added risk due to the ‘stress test’ conditions.

B. Professional bias

A bias that provokes concern in connection with the ECtHR is due to professional background. The main objective of the ECtHR is not to adjudicate among states, but between the state and the individuals on its territory. This ‘self-binding’ aspect has important implications for the kind of impartiality which the court, as a whole, should ensure: it should not be biased in favour or against the state interests, when they conflict with human rights. Two relevant findings merit attention. Firstly, the judges of the ECtHR appear to maintain the professional norms of their previous places of employment.⁶⁹ The relevance is that some backgrounds tend to be more ‘state friendly’, and other professional backgrounds less so. There may be several causes for these biases: individuals with a prior preference for the interests of the state or of individuals may select to work in central administration or as human rights activists, respectively. Further socialization may occur within the workplace. Several authors have found such correlations between judges’ professional background and their voting patterns:

First, judges who were diplomats in their previous careers were about 20% more likely to favor their national governments than were judges who came from different career tracks. This implies that governments could potentially stack the deck by advancing diplomats as their candidates. However, only 24% of all ECtHR judges in the period under investigation were career diplomats. Second, judges with activist inclinations, when they evaluate other countries, are also less likely to favor their own governments. This effect is substantial: a one-standard-deviation shift in the level of judicial activism corresponds with an expected 8% increase in the probability of a vote against the national government, holding all other factors constant.⁷⁰

⁶⁹ F.J. Bruinsma, in A. van Hoek et al. (eds.), *Multilevel Governance in Enforcement and Adjudication*, p. 31.

⁷⁰ E. Voeten, 102 *American Political Science Review* (2008), p. 428.

As a result, some ECtHR judges are influenced by their past professions – at least to some extent. This should not come as any surprise. These findings are especially interesting in light of a second finding, namely that there seems to be a shift in the professional backgrounds of the judges of the ECtHR. The ECtHR itself claims that ‘The Court has traditionally been composed of roughly one third professional judges, one third practitioners and one third academics. This blend of experience has proved its worth over the years’.⁷¹

However, the claim that there has been a 33% division is not supported by the evidence.⁷² The bar is underrepresented, if the ideal is that a third of the judges are to be ‘practitioners’ in this sense. Furthermore, the administration – including former government agents – is not explicitly mentioned in the ECtHR’s opinion, but is surely present.⁷³ Mikael Madsen has also traced a shift in the composition of the ECtHR which is significant in this context.⁷⁴ The early ECtHR was populated by a legal-political elite of law professors. They were keenly aware of the structural challenges faced by key member states when deciding cases, and engaged in ‘legal diplomacy’ rather than a straightforward application of the law. Madsen notes a major shift in the composition of the ECtHR which began in the mid-1990s. Protocol No. 11, which entered into force in 1998, established the ECtHR as a permanent court, with the selection procedure laid out above. Since then the judges are generally younger and more specialized in human rights – and states tend not to select human rights activists. One important effect of this shift is to weaken the interface of the ECtHR toward political and societal actors. Madsen claims that this contributes to explaining the growing criticism that the ECtHR has received.

This shift challenges a relevant kind of impartiality of the ECtHR: it should maintain and exhibit impartiality with regards to the interests both of individuals that complain of human rights violations by the state, and of the state thus charged. Changes in the professional background may tip the ‘balance’ among the judges in ways which challenge the impartiality of the ECtHR.

One very important implication of this professional bias among the judges is that the states may strategically select more state-friendly judges, rather than human rights-activists. As Voeten notes, ‘the increased activism of international courts is not necessarily irreversible: governments could, and sometimes do, choose to stack international courts with diplomats predisposed to the *raison d’état*’.⁷⁵

If several states decide to influence the ECtHR in a more sovereignty-respecting manner, they would thus be advised to nominate candidate judges from the diplomatic service or from elsewhere in the government administration.

Such a scenario is precisely the kind of ‘stress test’ we may think that the ECtHR’s election process should be designed to handle. Yet there are no explicit requirements concerning the

⁷¹ Opinion of the Court in reply to Recommendation 1429 (1999) by the Parliamentary Assembly, cited in F.J. Bruinsma, in A. van Hoek et al. (eds.), *Multilevel Governance in Enforcement and Adjudication*.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ M.R. Madsen, ‘The Legitimization Strategies of International Courts: The Case of the European Court of Human Rights’, in M. Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts*, 259-278.

⁷⁵ E. Voeten, ‘The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights’, 61 *International Organization* (2007), p. 669-701, 672.

professional composition of the ECtHR. The Sub-Committee on the Election of Judge to the European Court of Human Rights, of the Committee on Legal Affairs and Human Rights, of the Parliamentary Assembly is instructed to consider the candidates 'not only as individuals but also with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance'.⁷⁶

This requirement could clearly be strengthened. Compare, for instance, the instructions concerning election of judges to the International Criminal Court which necessitates competence in both international law and in criminal law:⁷⁷

Article 36 Qualifications, nomination and election of judges

3 (b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court; ...

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

(...) At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.⁷⁸

C. The influence of the Registry

The Registry of the ECtHR provides crucial services to the judges of the ECtHR. The judge's dependence on a well-functioning Registry also merits further future attention. The loyalty of the Registry to the objectives of the ECtHR need not be questioned, but several recent developments of the ECtHR require the Registry to 'balance' several important objectives – a difficult task even in good times: with increased pressure to reduce the case load, the Registry's preparation for single judge decisions about inadmissible cases becomes important. With one-term judges, the Registry becomes a more important repository of institutional memory including precedents, since more of the judges are relatively new to the

⁷⁶ Parliamentary Assembly of the Council of Europe, 'Procedure for electing judges to the European Court of Human Rights', <http://website-pace.net/documents/1653355/1653736/ProcedureElectionJudges-EN.pdf/e4472144-64bc-4926-928c-47ae9c1ea45e>, Article 12.

⁷⁷ Noted in E. Voeten, 'International Judicial Behavior', in C.P.R. Romano, K.J. Alter and Y. Shany (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press, 2013), p. 566.

⁷⁸ Article 36 of the Rome Statute of the International Criminal Court, A/CONF.183/9 (the ICC Statute).

job. And with younger judges, they may be more malleable in light of the advice given by the Registry.

There will always be a need to 'balance' speedy dismissals of unfounded cases against a thorough assessment of the merits of a case, and the Registry's assessment of priorities among these important concerns may differ from that of the judges. Several reports indicate that the Registry works to fulfill a certain target number of cases, with the effect that more complex cases may be left aside.⁷⁹ Thus, the threshold of 'significant disadvantage' appears to be adjusted in order to dismiss many cases - perhaps too many cases - at early stages. The ordering of cases creates similar tensions: the ECtHR may be expected to take a longer time for dealing with applications that raise questions concerning structural or endemic situations, than applications dealt with in repetitive cases - while the former are to be dealt with first.⁸⁰ The Registry also provides much needed assistance to judges in drafting the judgments of a case, suggesting both reasoning and outcomes. This framing helps ensure consistency and high judicial quality, but may reduce the discretion left to the ECtHR judges. More studies may be needed to understand and assess patterns of recruitment to the Registry, and its choices that help frame the decisions of the judges of the ECtHR.

5. Accountability

A judiciary must be independent of the parties, impartial and competent to settle disputes and develop the law. At the same time, independent courts may fail to judge or make law competently, but instead abuse their discretion - in effect becoming a new source of domination. Generally, there are at least two main strategies to fine tune accountability mechanisms: ways to *guard* against these risks of abuse of power, and ways to *guide* the judges' discretion. Guards may come in the form of checks or controls, while guides may include recommendations, standards and norms of adjudication, etc.

A. International Court (IC) Judges: Trustees, not only agents

The design challenges of guarding and guiding the judges of international courts are different from those where governments delegate authority to an *agent* who is supposed to carry out the state's preferences as instructed in each particular case. The nature of constraints and control over international judges by states is not simply to ensure such convergence in each case. Instead, several authors note that a better description of the relationship between the state and the judge it elects is of the judge acting as a *trustee*.⁸¹ Alter describes the trustee-relationship thus:

the point of delegation is to harness the authority of the Trustee so as to enhance the legitimacy of political decision-making. Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions

⁷⁹ L. Woolf, 'Review of the Working Methods of the European Court of Human Rights', *European Court of Human Rights* (2005), p. 55.

⁸⁰ The European Court of Human Rights, 'The Court's priority policy', http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

⁸¹ K. Alter, 'Agents or Trustees? International Courts in Their Political Context', 14 *European Journal of International Relations* (2008), p. 33-63; A. Stone Sweet and T.L. Brunell, 1 *Journal of Law and Courts* (2013).

according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary.⁸²

In practice, the judges blend the role of agent and trustee in many complex ways. Still, the differences between an agent and a trustee warrant reflection concerning, not how international judges can be *controlled* as agents, but rather how they are and can be held *accountable* as trustees. The interests to be pursued by the judges of the ECtHR are not simply those of the state she is elected by. Instead, the beneficiaries are the individuals and states within the jurisdiction of the ECtHR. The norms and professional criteria that the judge is authorized to apply do not generally serve all interests of the state, but stem from the state's interest in being subject to an international court that can be trusted by others to provide independent and impartial judgments, and to develop the law based on a treaty and on legal methods. Judges cannot perform that role of making states' commitments credible if they are fully under the control of the states that appoint them, '[t]he fact that states have committed to subject such disputes to an independent international court shows a general service that international courts perform: they enhance the credibility of the commitments sovereign states make'.⁸³

The judges must still be held to account, but to the standards of impartial, legal interpretation and judgments, using other mechanisms than when states hold agents to account. To understand the peculiar accountability design challenges, it is of help to consider how accountability mechanisms are structured in general.

B. A sketch of accountability

Accountability mechanisms typically have four central features:⁸⁴

- (i) some *actors* hold
- (ii) a *subject* – such as a particular person or institution;
- (iii) to certain *standards*
- (iv) and can instigate *reactions* if the subject is found to fail to live up to those standards.

For the purposes of this article, accountability may occur either before the subject acts or afterwards: *ex ante* accountability includes selection – or non-selection – of a subject on the basis of the actor's assessment.

C. Accountability mechanisms of international courts

International courts create particular accountability challenges partly because the standards they should be held to are more complex than those of 'mere' agents. Moreover, international courts are at the same time actors and subjects of two different accountability systems. These courts are *actors* who hold *subjects* - namely states – accountable to various

⁸² K. Alter, 14 *European Journal of International Relations* (2008), p. 35.

⁸³ L. Helfer and A.-M. Slaughter, 3 *California Law Review* (2005), p. 33-35.

⁸⁴ R.W. Grant and R.O. Keohane, 'Accountability and Abuses of Power in World Politics', 99 *American Political Science Review* (2005), p. 29-43; M. Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press, 1998); D. Kosař, *Perils of Judicial Self-Government in Transitional Societies: Holding the Least Accountable Branch to Account* (Cambridge University Press, 2016), p. 30-36.

standards stated in the respective treaties; and they are at the same time *subjects* of the same states, whom as *actors* hold courts to certain standards – ideally standards of judicial reasoning etc. rather than a standard of maximizing the state’s own preferences. How to make an international court accountable yet sufficiently independent – and effective – is thus a difficult matter of institutional design.

Institutional comparisons suggest a broad portfolio of creative responses to the dilemmas of combining independence for international courts of the necessary sorts with accountability of the requisite kinds.⁸⁵

Helfer and Slaughter provide a helpful overview of mechanisms, not only of ex post accountability, but for the general regulation of international independent tribunals⁸⁶ Among the mechanisms are ‘a diverse array of structural, political, and discursive controls’⁸⁷ some of which states can apply, but are also exercised by ‘a global community of domestic courts and international tribunals, a community that helps to shield judges from overtly political influences’.⁸⁸

The formal, structural and political mechanisms may occur before a particular judgment, or after one has been issued, to which a state objects. Among the formal ex ante mechanisms are clearly defined substantive rules and methodologies; reservations, procedural rules and rules to select judges and compose the court. Ex ante political mechanisms include informal practices regarding the selection of judges, funding, and the court’s relation to other tribunals. Ex post formal mechanisms include the reinterpretation or renegotiation of substantive and procedural rules, mechanisms for the re-appointment of judges and withdrawal from the treaty. Political mechanisms include public challenges of the legitimacy of the international court, variable compliance with judgments and ‘forum hopping’ among international courts with competing jurisdiction.

Another important form of accountability that Helfer and Slaughter discuss is ‘discursive constraints’ by the global community of law, including procedural rules, interpretive methods and substantive norms. These preclude that judges enjoy ‘a blanket license to conform legal rules to their own moral or ideological values. To the contrary, a community of law imposes constraints on decision makers that are equally important and equally real’.⁸⁹ Such professional networks might hold the courts accountable to standards of legal interpretation and methods, as well as norms of judicial culture and professional behaviour.

D. Accountability mechanisms of the ECtHR

The design challenge for accountability mechanisms is especially complex for the judges of ‘self-binding’ tribunals. Recall that the ECtHR plays two different roles in two different discussions about accountability. Firstly, there is accountability provided *by* the ECtHR

⁸⁵ R. MacKenzie and P. Sands, ‘International Courts and Tribunals and the Independence of the International Judge’, 44 *Harvard International Law Journal* (2003), p. 271-285. For a thorough and comprehensive account, compare, D. Zimmerman, *The Independence of International Courts - the Adherence of the International Judiciary to a Fundamental Value of the Administration of Justice* (Nomos, 2014).

⁸⁶ L. Helfer, in S. Voigt et al. (eds.), *International Conflict Resolution*, p. 44-56.

⁸⁷ L. Helfer and A.-M. Slaughter, 3 *California Law Review* (2005), p. 44.

⁸⁸ *Ibid.*, p. 45.

⁸⁹ *Ibid.*, p. 55.

which holds *states* accountable to the ECHR. Findings of violations may mobilize reactions from the population, opposition parties, national institutions, NGOs and other states. At the same time, the ECtHR is and must also be an accountability *subject*: it must itself be held accountable to a variety of actors, to prevent the ECtHR from abusing its powers.

The states' *reactions* against the ECtHR and the actual and potential judges may include effects on the ECtHR's funding, (non)appointment of the judges, (partial) noncompliance with judgments and informal criticism. Consequently, Alter notes that

a Trustee can be influenced by appointment politics, and that because a Trustee needs to be perceived as acting appropriately, and in the interest of the beneficiary, it can be influenced by rhetorical and legitimacy politics. Should a Trustee stray beyond what the power elite or body politic can accept, the option of removing a Trustee or eliminating the office altogether remains.⁹⁰

Consider how the Council of Europe addresses and alleviates the risk of states constraining the independence of the ECtHR by including several accountability actors and reactions.

The judges of the ECtHR are firstly held to account by each state, but also by several other agents (thus arguably reducing the influence of individual states): the states jointly, the Council of Europe, professional networks and arguably the Registry.

The ECtHR is held to account by the Council of Europe – not least because the ECtHR's budget is controlled by the Council of Europe. Threats of budget cuts, or failure to increase budgets in response to the increased case load can have important effects on courts' procedures, case selection and the ordering of cases.⁹¹ This may, in part, be intentional by some states.

Each state's ability to control the ECtHR in the direction of their own preferences by the judges they elect is limited, because the Parliamentary Assembly checks the nominees' competence, and selects among them. The nomination and appointment process as a whole (...) cannot be controlled by any one state or organized group of states. While states did choose to keep the international judiciary beyond the control of the most powerful states, the probably unintended result is that international judges are institutionally less subject to appointment politics than their domestic counterparts.⁹²

Otherwise, the ECtHR is not checked by a regional or international executive or legislature. Thus, the ECtHR is not held accountable in other ways that are familiar to the domestic systems of checks and balances. It is instead constrained by a variety of 'diagonal' checks across different levels.

Another important way the ECtHR is held to account is by professional networks that promote acculturation to judicial culture and professional norms. Thus, the international judges may be sensitive to their reputation among other international and domestic judges

⁹⁰ K. Alter, 14 *European Journal of International Relations* (2008), p. 44.

⁹¹ T. Ingadottir, 'The Financing of International Adjudication', in C.P.R. Romano, K.J. Alter and Y. Shany (eds.) *Oxford Handbook of International Adjudication*, p. 610-612.

⁹² K. Alter, 14 *European Journal of International Relations* (2008), p. 46.

and legal scholars - be they human rights experts or scholars of general international law in various 'networks of judges',⁹³ or in the interaction between judges and the Registry.

In response to the growth of human rights – with regard to skeptical states, at least three tasks seem crucial: the states' ability to nominate judges whom are skeptical to human rights should be curtailed, including by way of requiring solid judicial competence of all nominees and a slate from each state which includes a broad range of candidates from different professional backgrounds. Secondly, it seems important to strengthen the other accountability mechanisms, so that the Parliamentary Assembly Committee does not allow states to flout the requirements. Finally, the professional community of lawyers and the Registry should supervise and guide the ECtHR's judgments, both to strengthen their legal quality and to provide counterpressure against states that might urge more state-friendly judgments.

6. Conclusions

The present contribution has sought to lay out aspects of the ECtHR to understand and assess tensions between the independence, impartiality and accountability of that court. It is a 'self-binding' court, whereby states seek to enhance their own credibility, which creates a particular challenge to maintain impartiality and independence and at the same time maintain workable mechanisms of accountability to secure constrained independence. There are several ways that individual states – and states jointly – may hold judges and the ECtHR accountable, at least to some extent.

The existing mechanisms of accountability are challenged by two developments among and within the states parties of the Council of Europe. Several recent state parties have a less entrenched political and legal culture of respect for constitutional democracy and the rule of law. A second apparent shift appears to occur in several states, where governments appear both to favour the renationalization of issue areas previously delegated or pooled to regional or global institutions, and at the same time are skeptical to minorities who appear to challenge the perceived and somewhat imagined national community. They may seek to reduce the role of the ECtHR's review of their respect for human rights. Media critical of the rulers, religious, sexual and ethnic minorities thus face new risks.

The valuable forms of independence of the ECtHR from the states are challenged under these conditions referred to above as a 'stress test'. The upside of this might seem to be that there is a measure of democratic control over the judges:

some accountability is operative in the sense that the ideological views of the winners of elections get greater representation on the courts than those of the losers. This can provide some counterweight to charges that international courts enhance the democratic deficit of international institutions by creating positions of authority for unaccountable judges.⁹⁴

It is true that with regard to selection of judges, democratic states must have enough influence in the selection process to ensure indirect democratic accountability. However, not all states parties to the Council of Europe score high on standards of democratic quality and

⁹³ A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004).

⁹⁴ E. Voeten, in C.P.R. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, p. 559.

respect for the rule of law.⁹⁵ And importantly, the rationales for states in establishing international courts are typically to allow them to bind themselves more credibly, and reduce the chances that they change their policies. This role requires that the international court maintains sufficient independence to make the court, and appear sufficiently, impartial, ensuring that the judges are highly skilled and informed so that decisions are regarded as authoritative by other actors. Democratic control is problematic insofar as it reduces the credibility of the ECtHR's independence.

If the ECtHR is to continue its role in supporting domestic authorities respect for human rights, the above arguments support several modifications of the existing rules and practices to weaken states' ability to unduly skew the ECtHR in a state-friendly direction, and to strengthen other bodies' accountability mechanisms toward the ECtHR. The changes should help ensure that each chamber of the ECtHR is composed in such a way that a wide range of relevant perspectives are included. The procedures should foster deliberation among them so that they do not regard themselves as representatives of their own state or profession, but rather as trustees of the ECtHR.

A. BALANCE AMONG PROFESSIONAL BACKGROUNDS SHOULD BE A REQUIREMENT

There is a clear risk that state authorities decide to reduce the risk of being found in violation of the ECHR by nominating central government lawyers and diplomats to the ECtHR. They may be more inclined to find no violation, by granting a wide margin of appreciation or by other means. If many states do this, the impartiality of the ECtHR as a whole may suffer. Human rights-skeptical governments may benefit from ensuring that the best of their three nominees have a background in diplomacy or central administration, rather than for example, being human rights activists:

The selection of judges may be a more important tool for government influence over courts than hitherto realized (...) governments could respond to activist international court decisions by appointing judges more inclined toward self-restraint. This may well be desirable from a perspective of accountability, as it may help counter often-heard criticisms that international courts remain unchecked and engage in wayward activism. Such responsiveness is limited, of course, by the reality that each government is at best responsible for the appointment of a single judge, so one would need the support of other governments to change the direction of a court.⁹⁶

Voeten's findings do not seem to support such a shift in nomination patterns; but Madsen's more updated research indicates otherwise. Indeed, one might wonder why it has taken states so long to shift their preferences toward nominees whom can be expected to be more state-friendly. Part of the answer is surely that many states have a genuine commitment to human rights and are held politically accountable by an electorate and civil society groups. This may however change in several states.

One change to the election practice is to require a certain representation of professional backgrounds on the ECtHR's bench. Recall that the current recommendation is that the Subcommittee on the Election of Judge to the European Court of Human Rights should *consider* the candidates 'not only as individuals but also with an eye to a harmonious composition of

⁹⁵ World Audit, 'Democracy Table June 2017', <http://www.worldaudit.org/democracy.htm>.

⁹⁶ E. Voeten, 102 *American Political Science Review* (2008), p. 431.

the Court, taking into account, for example, their professional backgrounds and a gender balance'.⁹⁷ This should be strengthened, perhaps in the direction of the ICC's requirement in Article 36 of the Rome statute which stipulates that there should be a percentage of backgrounds including experience from central state offices, and from human rights law.

B. Specify the margin of appreciation doctrine

One of the most obvious means by which more 'state-friendly' judges may render the ECtHR's review less intrusive is to grant states a broader 'margin of appreciation'. The ECtHR thereby defers to the state's judiciary to determine, within certain limits and on certain conditions, whether the rights of the ECHR are violated in a particular case. The doctrine will become part of the Preamble of the Convention, if and when Protocol No. 15 enters into force.⁹⁸ A key objection to the current doctrine is that it is too vague: it is hardly a 'doctrine' in the sense of a principle or clear procedure, and that it may lead to an ECtHR whose 'control mechanism may evaporate if there is in fact no effective check upon national power'.⁹⁹ To avoid this fate, it will be important for the ECtHR to develop a more precise and well-reasoned margin of appreciation doctrine.¹⁰⁰

C. Representativity: beyond profession and gender

In order to deserve its authority as a resolver of disputes on the basis of law, the court must understand both the relevant legal norms and the relevant facts of the case. All requisite perspectives and arguments must be presented and properly heeded by the judges. A trend among some states toward less respect for minorities' interests underscores the need to nominate and select members to the courts and tribunals from a broad range of backgrounds to ensure access to information and a well-reasoned 'balancing' of considerations. If this requires actual representation by a member of such minorities on the ECtHR, this may lead to further requirements on the nomination process. The ECtHR should then be even more carefully composed to ensure that several of the vulnerable minorities are represented. Thus, a focus on a gender balance may have to be supplemented in order to include judges who are members of various religions and sexual and ethnic minorities. Several premises of this argument merit closer scrutiny before policy proposals are developed.

D. Enhance the election procedures further

⁹⁷ Parliamentary Assembly of the Council of Europe, 'Procedure for electing judges to the European Court of Human Rights', Article 12.

⁹⁸ Council of Europe, 'Protocol No. 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms', http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf.

⁹⁹ H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Brill, 1996), p. 181.

¹⁰⁰ D. Spielman, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', *Max Planck Institute for Comparative Public Law and International Law* (2013), http://www.echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf; A. Follesdal, 'Squaring the Circle at the Battle at Brighton: Is the War between Protecting Human Rights or Respecting Sovereignty over, or Has It Just Begun?', in O.M. Arnardóttir and A. Buyse (eds.), *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations between the ECHR, EU, and National Legal Orders* (Routledge, 2016).

Complaints about the variable quality of judges can currently be met by claims that the alleged low quality is due to the state which nominates suboptimal candidates, or that the Committee of the Parliamentary Assembly is insufficiently competent. Of course, both of these accusations may be correct, and corrective measures may need to be taken. Further steps seem warranted. In particular, the ongoing work to improve the recommendations for nomination procedures and requirement on candidates should continue. The states' ability to nominate human rights skeptical judges should be curtailed, including by way of requiring solid judicial competence of all nominees and by requiring a slate of nominees from each state which includes a broad range of professional backgrounds. An important component may be to allow more actors to hold governments to account vis-à-vis their nomination processes, including more transparency.¹⁰¹ However, increased transparency may also have disadvantages, for example, by discouraging some able candidates from applying.¹⁰²

The deference of the Parliamentary Assembly Committee toward states who flaunt the requirements for the slate of nominees for being judges merits further scrutiny, and we might welcome ways to bolster the compliance with those requirements. There may be lessons from states' noncompliance with the gender requirement for how to respond better to states' claims that they are unable to satisfy such requirements.

E. More attention to the Registry

A final important issue concerns the accountability of the Registry of the Court. The non-renewable terms for judges, combined with a pattern of younger judges, entail that the Registry may grow to have a major influence over the decisions made by the ECtHR. This has several aspects that are worth considering. The Registry may serve an even more important role to imbue and maintain conditions of appropriate independence and professional legal culture among the judges, and to foster consistent and high quality judgments. The members of the Registry may also have a strong institutional interest in maintaining the social legitimacy of the ECtHR, at least as much as the judges of the ECtHR. However, there is also a risk that the Registry will develop institutional interests that, at times, may conflict with the objectives of the ECtHR, for example, taking inappropriate steps to reduce the backlog, or giving too much 'weight' to human rights considerations relative to states' concerns. The Registry may enjoy more independence vis-à-vis the ECtHR and the Council of Europe because they lack equivalent accountability mechanisms to those fine-tuned to ensure that the judges of the ECtHR are independent yet accountable. This may merit more attention due to the increasingly important role of the Registry.

The ECtHR was established to promote states' compliance with the ECHR. The guardian has grown in power to such an extent that it now faces many calls for it to be guarded. Such calls must be heeded, but not mainly because there is reason to suspect that the ECtHR abuses its authority. The ECtHR – and the states and citizens of Europe – face new human rights challenges, and the important supportive role of the ECtHR requires that it be above

¹⁰¹ A. T. Perez, "Can judicial selection secure judicial independence? Constraining state governments in selecting international judges." In M. Bobek (ed.), *Selecting Europe's judges: A critical review of the appointment procedures to the European Courts*.

¹⁰² A. Alemanno, 'How Transparent Is Transparent Enough? Balancing Access to Information against Privacy in European Judicial Selections', in M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*.

suspicion. Both these challenges require us to reconsider – once again – how to best ensure that the ECtHR remains independent in the right ways, so that it can continue to hold states to account – and be accountable itself.