The ECtHR's Coping Strategy

The pitfalls of subsidiarity and deference as strategies to avoid backlash

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The European Court of Human Rights (ECtHR) is operating in an increasingly challenging political and legal environment. Even if member states have stopped short of far-reaching reforms, they have signaled their collective desire for a more restrained Court, starting with the 2012 Brighton Declaration. Governments in established democracies, like the United Kingdom, have refused to implement or dragged-out implementation of ECtHR judgments. In some countries, government officials or major politicians have suggested exiting the Court's jurisdiction altogether. Finally, several member states have rolled back domestic rights protections for politically unpopular groups, such as criminal defendants, suspected terrorists, asylum seekers, and non-traditional families.

When courts face political attacks on their legitimacy, they typically resort to process-based coping strategies. This is understandable. Court legitimacy hinges not just on satisfying political actors but also on demonstrating adherence to general principles. Judges are much better equipped to apply procedural fixes than to pick case outcomes that will be politically popular.

However, process-based coping strategies are not always effective or normatively desirable. The practical effect of process-based coping strategies typically is more deference to political actors, which may not be what the Court's key support constituencies want. If courts become overly focused on deference, then they may forego opportunities to advance justice in areas where an interventionist approach may well be politically popular, such as climate litigation.

Subsidiarity as a coping strategy

The Court's primary coping strategy has been a renewed emphasis on subsidiarity. The subsidiarity principle has deep roots in the Convention system and European governance more generally. Yet, the principle gained prominence after the Brighton meetings and the adoption of Protocol 15, which added the principle to the Convention's preamble. The Court's President, judge Robert Spano, has argued that the court has entered an "age of subsidiarity," claiming that "in this process-based mechanism, the Court may grant deference if national decision-makers are structurally capable of fulfilling that task." Governments appear eager for the Court to follow through on this approach. The 2018 Copenhagen Declaration mentions subsidiarity six times, claiming that the Court should "[..]not substitute its own assessment for that of the domestic courts, unless there are strong reasons for doing so."

The practical effect has been increased deference to a select set of governments in established democracies. Başak Çali refers to this as a "variable geometry" in which governments in some parts of Europe that are seen as acting in good faith get more leeway than other governments. With Øyvind Stiansen, I have shown that the Court has indeed become more deferential to established democracies, especially those that have made themselves heard at multilateral conferences. Larry Helfer and I find evidence that the Court's judges themselves are increasingly expressing concerns over what they view as regressive directions in the case law.

Do people really want more deference?

But is more deference really what people want? In a recently published article in the *American Political Science Review*, Mikael Madsen, Juan Mayoral, Anton Strezhnev, and I test this using survey experiments in five countries: Denmark, France, Poland, Spain, and the United Kingdom. We present subjects with

vignettes in which an individual contests a government action: a foreign criminal who faces expulsion, a person fighting a fine for burning the Quran, and a home-owner contesting eviction. Each vignette had two treatment conditions: whether a European court rules differently from a national court (deference treatment) and whether an applicant wins or loses (outcome treatment). We evaluated whether the treatment affects agreement with the decision, support for compliance, and support for European Court authority. Moreover, we examined whether individuals who strongly identify as exclusive nationalists respond differently to disagreement between European and national courts.

We find very little evidence that individuals have an inherent preference for a more deferential European court. They care about outcomes (substance). Most people are just fine with a European court that disagrees with a national court as long as they get the outcomes they like. This is equally, and sometimes more, true for those who are generally skeptical of European institutions, such as individuals with exclusive nationalist and authoritarian leanings. These findings are consistent with the idea that the correlation between exclusive national identity and support for European institutions runs through the effect these institutions are perceived to have on immigration and other policies that ethno-cultural nationalists dislike rather than an innate preference for national over European institutions. That is: public opposition to or support for European human rights adjudication is more about the content of decisions than the location of authority.

The climate example

Even if the public doesn't care about deference per se, taking a more deferential approach may still keep a Court out of trouble with governments. But this comes at a price. At the same time that there are regressive trends in Europe with regard to some human rights issues, there are also progressive trends. Human rights based climate litigation is perhaps the most important example. Various domestic courts have reached far-reaching judgments based in part on articles 2 and 8 of the European Convention. Several cases where domestic courts have refused to rule in alignment with climate goals are now in the ECtHR's docket.

The ECtHR may be tempted by a deferential approach. Climate mitigation policies are complex and have considerable economic consequences. One could make the case that such policy decisions are best left to executives and legislatures. Yet, the Bundesverfassungsgericht, the Dutch Supreme Court, and courts in a growing number of other European countries have reached the conclusion that national climate mitigation plans that fall short of a country's individual share of the global responsibility constitute violations of the fundamental rights protected by the Convention. There is no indication that these courts have suffered a backlash as a result of these rulings. Vast majorities of European citizens indicate in public opinion polls that they want their governments to act more decisively. For example, the 2021 Eurobarometer found that 90% of EU citizens agree that Green House Gas emissions should be reduced to make the EU climate neutral by 2050 and 75% think their national governments are not doing enough to tackle climate change.

Subsidiarity and Living Instrument

The Court has long taken a dynamic and evolutive interpretive approach to interpreting the Convention. Using a "living instrument approach" the Court has found domestic laws and practices that once raised no human rights concerns to contravene the Convention when later re-evaluated in light of progressive regional trends in law, policy and public opinion. Rulings on lesbian, gay, bisexual and transgender rights are a good example. Arguably, such rulings established the Court's reputation as a safeguard for human rights in Europe. The living instrument doctrine is procedural only in a narrow sense: it allows the Court to assess substantive trends in opinion and policy. However, the Court has never been comfortable applying this doctrine to regressive trends, at least not explicitly.

Subsidiarity avoids some of the pitfalls that come with explicit considerations of substantive trends. While there are some tensions between a strong emphasis on subsidiarity and the living instrument

doctrine, they do coexist. Even if the Court rules against the applicants on the existing climate cases, it may still signal a willingness to change its mind if progressive trends evolve, as it did on LGBT cases. Regardless of the merit of the cases currently under consideration at the Court, if we interpret the current backlash as being about substance rather than process, then the political challenges to the Court should not be the reason why the Court could not take an evolutive approach to climate cases.

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