Backlash and Judicial Restraint: Evidence from the European Court of Human Rights

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August 30, 2018

1 Introduction

The European Court of Human Rights (ECtHR) is increasingly facing scrutiny from consolidated democracies. After the 2005 *Hirst* judgment, British politicians have led efforts to curtail the Court and have even threatened to leave the Court’s jurisdiction [Madsen 2017]. Governments in Denmark, the Netherlands, Austria, Switzerland, and elsewhere have also publicly argued that the Court has gone too far in its interpretation of the European Convention on Human Rights and have supported reforms that would curtail the Court [Popelier, Lambrecht and Lemmens 2016]. Both the British and the Danish governments used their Council of Europe chairmanships to propose institutional reforms that would restrain the Court, although the final Brighton and Copenhagen Declarations were much more moderate than the draft declarations.

The Court has long faced criticisms to its rulings. What is new is that the challenges are now directed at the Court’s institutional authority and that they originate in powerful consolidated democracies.

How does this changed political environment affect Court judgments? We answer this question using a large new dataset covering all judgments until June 2016. Figure 1 shows that the proportion of judgments that go beyond simply applying existing case law\(^1\) in which the Court has found at least one violation has dropped by about fifteen percentage points since 2005. This could reflect a change in the kinds of cases. But we also consider two other explanations for this finding: that the changing political environment affects the appointment of judges and that the Court – as an institution – is exercising strategic deference when deciding

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\(^1\)This restriction is based on the classification of cases according their importance made by the ECtHR’s registry. Throughout the paper we ignore so-called level 3 judgments, defined as cases that simply apply existing case law or are settled amicably by the parties. These cases do not raise new legal issues for the Court to consider.
cases brought against its traditional supporters. We first briefly summarize our findings before discussing the normative implications.

Figure 1: Change in the proportion of judgments with at least one violation finding

2 Are Governments Nominating More Restrained Judges?

The ECtHR bench consists of one judge per Member State. The Council of Europe’s Parliamentary Assembly selects each judge from a government-supplied list of three candidates. This appointment process is a primary way for governments to influence the ECtHR (Dunoff and Pollack, 2017). We examine whether as governments have become more critical of the ECtHR, they have advanced more candidates that they expect to be more deferential to state interests. In the late 1990s and early 2000s, governments in relatively new democracies often nominated candidates with explicit records as human rights activists, perhaps to signal their commitment to human rights law (Voeten, 2007). Public criticism of the ECtHR by consolidated democracies may have signaled that nominating more restrained judges would be acceptable and perhaps even desirable in the eyes of many governments in consolidated democracies.

To assess this expectation, we collected the text of all dissenting opinions by scraping the corpus of ECtHR judgments. We then manually coded each dissenting opinion for which aspect of the majority decision it disagreed with. Here, we only use the information on whether the dissenting opinion expressed that the Court should have been more favorable to the applicant or the respondent government. For example, we coded a dissenting opinion as “pro-government” if it argued that the majority found violations (on a specific article) where it should not have. By contrast, if the dissent argued that the majority erred in not finding violations on specific articles then we coded the dissent as “pro-respondent.” More precisely, what we observe here is not that a dissenting opinion is “pro-government” or “pro-respondent” per se but that a subset of judges on a Chamber wanted the Court to show more (less) restraint on a case than
their colleagues. We are interested in identifying these coalitions. If judgments invited multiple dissents, we coded the different coalitions using the principles outlined above.2

Following Voeten (2007), we use this data to estimate the ideal point of all ECtHR judges based on an item-response theory model. Figure 2 displays the estimated ideal points for judges appointed since 1998, when the permanent Court was established, and their 95% credible intervals. The ideal points are scaled on a standardized normal distribution, meaning that the average judge is at 0 and a value of 1 indicates a judge who is one standard deviation above the mean in her level of restraint. Since judges serve overlapping terms, we can compare the voting tendencies of judges.

The figure shows that there is still considerable variation in the judicial philosophy of judges. There is, however, evidence that governments have started to appoint judges that are – on average – more deferential towards respondent states. Notably, five of the six most restrained judges have

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2Because judges are much more likely to dissent in cases involving their own government, we exclude such dissents from our analysis.
judges were appointed in 2012 or thereafter. The average judge is now more restrained than at any time since the new Court’s founding in 1998. In the full version of our paper, we also show that appointment politics have become more politicized around a left-right dimension, with right-wing governments increasingly nominating more restrained judges.

3 Has the Court started exercising more restraint towards consolidated democracies?

The changing political environment may also affect ECtHR decision-making if judges, independently of their policy preferences, act strategically to avoid non-compliance (Vanberg, 2001, 2005) or political challenges to its legitimacy (Clark, 2010; Larsson and Naurin, 2016). The ECtHR relies on the support of consolidated democracies to function as an effective bulwark for human rights in Europe. The implementation of ECtHR judgments is not automatic: it requires cooperation from governments and domestic courts. Often state compliance is slow and imperfect (Hillebrecht, 2014; Hawkins and Jacoby, 2010). Holding governments to their human rights promises involves accountability politics (Simmons, 2009). Such accountability politics depends on the ability of international and/or domestic actors to advance the argument that defying a Court order would undermine a government’s credibility or at least its reputation as being strongly committed to human rights. For instance, Kowalik-Bańczyk (2016, 202-203) notes that Polish politicians have found it difficult to challenge the ECtHR due to concerns that this would undermine their own reputations as committed to human rights and democracy. Such reputations are always relative. At the very least, the importance of a reputation depends on consequential outsiders caring about that reputation. If the UK and Scandinavian countries argue that the Court should show more deference, that its decisions need not be implemented, or even that they may leave the Court, then the claim that the Polish government might lose credibility with Europe’s established democracies if it defies the ECtHR becomes less plausible. Fears of losing its traditional supporters may incentivize judges to exercise more restraint in new cases against consolidated democracies, and especially the UK, since the outburst of criticism in the mid-2000s. Figure 3 provides evidence for this. Panel A examines all judgments posing new legal questions. Since the mid-2000s, the proportion of judgments in which there is at least one finding of a violation has decreased for both groups of countries. Yet, the decline is much sharper among consolidated democracies.

The greater likelihood of violation findings in non-consolidated democracies could simply reflect that human rights violations in those countries are more severe (Grewal and Voeten, 2015). Panel B corrects for such differences by matching on observed characteristics of cases brought in consolidated and non-consolidated democracies. After matching, there is little difference between violation rates in judgments on consolidated democracies and other CoE member states until the mid-2000s. Yet, after 2005 these differences appear to increase considerably. There
is thus evidence that the ECtHR has started showing a greater deference towards consolidated democracies since the mid-2000s. Our full paper shows more evidence for this conclusion.

4 Are vulnerable minorities particularly affected by the ECtHR’s strategic restraint?

Is the Court particularly restrained on cases where they might expect political backlash? Identifying politically sensitive cases presents a significant informational problem for judges (Clark 2010) and this challenge might be particularly strong for international court judges that are not intimately familiar with the politics of respondent states (Lupu 2013, Huneeus 2015). The Court may have simply not foreseen that the *Hirst* and *Lautsi* judgments would create the kind of backlash that they did. Thus, even if ECtHR judges are sensitive to the controversies that
have arisen in consolidated democracy, they may find it hard to predict which judgments will further undermine its support within those states.

If judges adapt their approach to specific groups of cases, we would expect more restraint in cases involving the issues that have tended to spur controversy across multiple states. Much of the criticism against the ECtHR relates to judgments concerning groups that have been targeted by right-wing politicians, such as refugees, foreign criminals, and suspected terrorists (Donald 2017, 98).

We examined whether there has been a drop in the violation rate for cases against consolidated democracies involving prisoner and refugee/asylum seeker applicants. We consider both changes after 2005, when criticism of the Court first erupted in the United Kingdom, and after 2010, when criticism had intensified and spread to a broader set of consolidated democracies. All models control for a range of other case characteristics.

Our models provide no evidence for the expectation that the ECtHR is exercising particular restraint in cases involving prisoner or refugee/asylum seeker applicants. One plausible explanation for this non-finding is that judges find it too difficult to predict the type of judgments that prompt resistance and backlash. Rather than adapting their approach to the type of judgments that have been controversial in the past, judges might therefore be tempted to adopt a more general policy of restraint towards those states it relies on support from. As argued by Larsson and Naurin (2016, 378), one result of this inability to predict which cases are associated with political risk is that international judges can become “unnecessarily’ constrained” in their decision-making.

5 Normative Implications

Our evidence suggests that public challenges coming from the UK and other consolidated democracies has at least partially succeeded in restraining the ECtHR. The normative implications of these findings are not straightforward. On the one hand, our evidence supports assertions by critics that the Court has slowed or even reversed the progressive expansion of convention rights that characterized its case law during the 1990s and early 2000s. Yet, the Court cannot operate in splendid isolation from its political environment.

First, the responsiveness of judicial appointments to the electoral fortunes of governments provides some democratic accountability for the Court. Obviously, judges ought to be selected based on their competence, character, experience, and sound judgment. Yet, especially in larger countries, there should be multiple qualified candidates. There are institutional guarantees for judicial independence after elections, such as the nine year non-renewable term. Within that context, some responsiveness in judicial philosophies to broader political trends is not an unqualified bad.

Second, the living instrument interpretation of the Convention implies that the Court should be sensitive to social trends. It is difficult to argue that the Court should only pay attention
to such trends when these lean in a more progressive direction.

Third, the Convention’s goal is to advance and cement human rights in Europe. This goal can be undermined by a Court that is too restrained but also by a Court that has lost its political support. It is difficult to ascertain whether the Court gets its balancing act ’just right’ but it is naive to presume that the balancing act does not exist.

There is, however, a danger that the Court is perceived as maintaining a ’variable geometry’ in which less consolidated democracies are held to a higher standard than consolidated democracies. Our evidence, especially figure 3, provides ammunition for that claim. These perceptions could help leaders in countries like Hungary or Poland legitimize non-compliance or even exit from the Court’s jurisdiction.

References


