Ebb *and* Flow

A discussion of how human rights protections in the European Union are evolving under the pressures of a global pandemic and rising populism

IN THEIR ARTICLE *Walking Back Human Rights in Europe?* (European Journal of International Law, Vol. 31 No. 3 (2020)), **LAURENCE R. HELFER**, the Harry R. Chadwick, Sr. Professor of Law at Duke University, and **ERIK VOETEN**, the Peter F. Krogh Professor of Geopolitics and Justice in World Affairs at Georgetown University, examine minority opinions of the European Court of Human Rights (ECtHR) to better understand the Court's trajectory on human rights protections. Their analysis finds that dissenting and concurring opinions increasingly claim that the Grand Chamber majority has tacitly overturned prior rulings or settled doctrine to narrow individual liberties and expand government discretion.

New Zealand Court of Appeal Justice **DAVID COLLINS**, chair of *Judicature International's* editorial board, talked with Professor Helfer in February 2022 about the study's findings, what they indicate about the Council of Europe's record on human rights protections, and how that record may shift further under the pressures of a global pandemic and the rise of nationalist populism around the world. Their discussion follows.

DAVID COLLINS: I found your article really fascinating. I wonder if I could start by asking some questions that go beyond the scope of your paper. I found this ratchet approach to precedent that you observe in the European Court of Human Rights really interesting. You looked at decisions spanning the past 20 years or so, but I wondered if this approach is now under even greater pressure as a result of possible challenges to restrictions on things like freedom of association or other restrictions being introduced by various states in relation to their responses to the pandemic.

LAURENCE HELFER: You've really gone to the heart of the matter, and I think it is worth starting there, because it's the big question that animates the theoretical and empirical contribution that my co-author and I hope we're making.

So let me respond to your question in a couple of different ways. The most foundational idea is that the European Court of Human Rights is, at least to some extent, responsive to contemporary needs and circumstances, particularly advances in international human rights law.

I would say this is true for bills of rights clauses of national constitutions as well. This implicates a bigger debate, probably most acutely occurring within the United States, over originalist versus living constitutionalism approaches. But I think it's fair to say that outside the United States, courts are more or less of the view that constitutions are living.

The question is, how animated are they? Are they just occasionally mov-

ing forward a little bit, or are they quite aggressively changing over time? If we assume that the interpretation of rights evolves to some extent — with precedent and prior rulings being a very important part of how courts decide cases, especially in a common law legal system like that of New Zealand or the United States — the question then becomes, if they are going to evolve, how do they evolve with respect to changes in society?

With regard to most national constitutions, there always was an understanding that some rights might be in tension with each other. And so the broad interpretation of one right might result in potentially a narrowing of the enjoyment of some liberty or freedom by another group.

In the European human rights system, the way that these concepts evolved from the very first cases in the 1950s and 1960s was the assumption — which until recently has largely been unexamined — that rights protections would only expand over time. And that was accepted as conventional wisdom because, in interpreting the European Convention on Human Rights, the first question was whether it should be interpreted narrowly in line with the sovereignty of states or in line with more progressive developments. And if you look at cases from the '60s through the '70s, '80s, and '90s, the developments were by and large all toward the expansion of rights.

If circumstances are changing but the protections of rights are contracting, can the European Court really say that there is only a trajectory of increasing rights protections while rights in national law are staying the same or decreasing?

So the European Court of Human Rights' approach was to say, essentially, our foundational background principle is not a hard rule of stare decisis, but rather a rule that, for reasons of certainty, predictability and equality among similarly situated litigants, we normally follow our own precedents. However, we are also committed to having this regional human rights treaty be a "living instrument." That's the phrase the Court uses.

So the "living" was thought to be in a progressive direction, and the Court has not been shy about overruling precedent to expand the protection of rights. And your question, forgive me for taking a little bit of time to tee it up, is this: If circumstances are changing but the protections of rights are contracting, can the European Court really say that there is only a trajectory of increasing rights protections while rights in national law are staying the same or decreasing? My own personal view is that you can't let that separation [between the Court's decisions and a society's practices] become too wide or the Court will lose its authority and legitimacy.

COLLINS: It seemed to me that the ratchet approach to precedent, in which human rights would only be expanded and not contracted, was really a buttress against political whims, the tides of political change that come and go and change and fluctuate. The COVID pandemic is not a political whim. It is a very serious public health phenomenon, and it seemed to me that it must call into question some of those fundamental concepts that underpinned the ratchet approach to human rights jurisprudence.

I regard myself as a pretty liberal jurist, yet I have issued judgments in which we have upheld quite restrictive legislation and orders from the government that restrict people's freedom of movement or freedom of association, but for that greater good of trying to control the pandemic. And thus far, the public health measures that have been put in place in this country have worked. But it is com- ▸

ing at a big cost to human rights, and I suspect the same will be happening in Strasbourg. [The European Court of Human Rights sits in Strasbourg, France, and is often referred to as the Strasbourg Court.]

HELFER: Yes. As it happens, this is something I have written about elsewhere. And I think it's quite relevant in this context because international human rights agreements do have a kind of safety valve for this sort of situation where governments need to respond in a way that does in fact diminish rights protections.

Quite a few human rights treaties — in Europe, in the Americas, and also at the UN level — contain provisions that allow governments, during times of public emergency, to suspend rights if doing so is designed to meet such an emergency and if the measures adopted are necessary and proportionate. For countries that have followed this route, the Strasbourg Court has been more deferential, especially on the question of whether there is an emergency, but even on the question of whether the measures are necessary and proportional.

So one way of thinking about this is that if you invoke this exceptional circumstances provision, known as a "derogations clause," you are slotting yourself into a set of reduced standards of protection that would not be permissible during ordinary times. And so it's still possible to have an evolutionary approach, a ratcheting-up approach, but you'd be doing it from a lower baseline.

The challenge is what happens to a state that makes use of this provision but simply imposes widespread lockdowns or prevents, say, political rallies during COVID. And to make it even harder, imagine a kind of mixed-motive scenario where, yes, there's lots of COVID in the country but it happens to be the case that the government is taking more stringent measures to prevent protests or marches or whatever the case may be against an opposition political party.

This is where you're likely to see a tremendous amount of pressure, because the Strasbourg Court would normally say, "We're the ones that will decide whether that kind of restriction of the right to freedom of association is permissible. And we have a test that goes to whether the restrictions satisfy a pressing social need and are necessary in a democratic society." And if there in fact was a pattern of disparate enforcement against, say, an opposition party, the Court would, based on its precedents, look very much askance at that. The fundamental question is, is *that* the Court's role in an emergency situation? If a state has not suspended guarantees under the emergency clause or at least narrowed the measures it takes to fit within the requirements of necessity and proportionality, then maybe the Court should take the political heat and say, "This is just not permissible."

There's a fine line between the Court being responsive to changes in society and the kinds of governmental interests that might legitimately restrict individual rights protections on the one hand, and backsliding away from its fundamental function on the other.

In other words, there's a fine line between the Court being responsive to changes in society and the kinds of governmental interests that might legitimately restrict individual rights protections on the one hand, and backsliding away from its fundamental function on the other.

COLLINS: That is very interesting, and quite remarkable. It will be interesting to see how Strasbourg responds over the next couple of years.

HELFER: Yes, there are COVID cases in the pipeline, so we will see them soon.

COLLINS: Another topic I wanted to ask about was your reference to the 2012 Brighton conference, in which the 47 member states unanimously adopted a set of reforms to impose greater deference by the Strasbourg Court to national courts. I was of course pretty familiar with the British reaction to the Strasbourg Court's decisions, but wouldn't the walking-back jurispru-

dence have developed even without the Brighton meeting?

HELFER: That's a great question. And I should say it's a point of debate among scholars and commentators who focus on the Court. A word about Brighton that might be helpful here: The Strasbourg Court has, in some sense, been a victim of its own success, in that there are tens of thousands of applications filed every year, many that don't meet the requirements to be heard on the merits. But even after those are screened out, there is still a very large number of cases, and there was at the time, around 2010 or so, a really growing and alarming backlog of some 150,000 petitions or complaints.

Member states of the Council of Europe were working to try to find ways to deal with the backlog in terms of providing more efficiencies, such as creating three-judge panels or single-judge units that could act more quickly. But at the same time, the Court had in the previous few years adopted a number of very bold decisions, some of which really had rankled a number of member states, the UK in particular.

It's worth noting that the UK has always had a kind of love-hate relationship with Strasbourg. And this is not the first time that the UK had found itself wondering, "Why on Earth did we help create the Court [with strong pressure from Winston Churchill, I should add]? Why did we create this system? And why are we a member of it? Don't we have very good justice in Britain?

Having said all that, some of the decisions that really rankled the UK involved questions of prisoner voting, questions of whether convicted or suspected terrorists who had been detained could be returned to their country of origin, and the rights of criminal defendants. There was a range of different issues, especially in the criminal justice and the immigration context. And the UK found that there was an opportunity to combine the efforts that were being undertaken to reform the system to make it more efficient, to make it human rights-enhancing as it were, with sending a signal to the Strasbourg Court that the judges were going too far and too fast.

The initial draft of the Brighton Declaration was very much a shot across the bow. The good news for the Court is that the final version was much more measured, and reaffirmed the Court's role as the supreme interpreter of the European Convention. But at the same time, the declaration stressed subsidiarity, which in the Strasbourg system is known as the margin of appreciation [a doctrine that gives some deference to member states in implementing the Convention]. There have also been subsequent declarations, most recently adopted in Copenhagen in 2018, where other member states have made similar statements — yes, we recommit to the system, we commit to compliance and implementation, we commit to institutional reforms, but we also wish the Strasbourg Court would give us more leeway in appropriate cases. And actually, I think the Court has done that.

So your question is, regardless of these declarations, would the Court have given governments more leeway anyway? And my co-author's and my view in the paper is, yes, the Brighton Declaration is just one among many signals that are being sent to the Strasbourg Court to be more deferential to the member states in appropriate cases.

What are some of the other signals? First of all, there are the political statements — of course in the UK, but also in Scandinavia, Russia, and some other countries — in which government officials and the public are skeptical and in some cases openly critical of the Strasbourg Court.

The second signal is that many member states, especially in Eastern Europe, but not exclusively, are imposing restrictions in areas that are tied up with the recent rise in nationalist populism — such as immigration, and rights for certain minority groups, criminal defendants, and LGBT individuals — and now those cases are getting litigated in Strasbourg.

And finally, and in some ways perhaps most tellingly, the national judges in many of these countries have themselves said, "Look, we understand we're part of a system. And the European Convention is part of our law, whether directly or by having been incorporated into an act of the parliament or legislature or as part of the national constitution. And so when we apply in good faith the Strasbourg Court's interpretations of the rights and freedoms that are protected in our legal systems, and we do that in a way that maybe Strasbourg doesn't agree with, it at least applies the right test and employs the right legal framework. That's the kind of case where the response should be, "This is within our margin of your discretion." And ▸

I would say the Strasbourg Court has largely listened to that.

Other scholars have talked about good-faith countries and bad-faith countries. In other words, there are some countries that are taking the principles in prior cases, the Strasbourg precedents, if you will, and they are really trying to wrestle with them and apply them to new circumstances, or they're coming up with procedural approaches that are intended to address an underlying systemic issue. And by and large — although not for every right in every area, but by and large — especially where there is a balancing act to be done between, say, public order and freedom of assembly or the privacy right and national security or public health — the Strasbourg Court is giving these countries the benefit of the doubt.

Whereas in countries within the Council of Europe that are more repressive, much less open in terms of their democratic bona fides, the Strasbourg Court is much more willing to say, "You didn't even try. You didn't do it in good faith, and we're not going to give you that deference."

COLLINS: If we could just focus on two countries: First, the United Kingdom, with the Supreme Court of England and the *Hirst* judgment.

HELFER: Yes, that's the prisoner voting judgment, the *Hirst* No. 2 judgment.

COLLINS: And then Portugal. You refer to a case in your paper where the Strasbourg Court was completely unimpressed by what the highest court of Portugal had done. So those two vignettes I think encapsulate what you're saying, tier-one versus tier-two countries: We'll try and give you a bit more latitude if you're Britain or France or Germany. But if you're a country that we're a little more suspicious of, we're not going to give you that same degree of latitude. I wonder just how such an approach reflects on the overall credibility of the Court.

HELFER: You're absolutely right. It's a fantastic question, David, and it's one that I really worry about. And I would say it's always been a latent issue in the system, but one that has really come to the fore now. Let me say a little bit more about what I mean.

For any international court, the formal rule is that the court's judgment is binding on the parties. It's not binding on anyone else, although it may be persuasive and have influence on other states. But you will often see cases where the same issue is litigated against multiple countries. Outside of the Strasbourg system, for example, cases were litigated before the International Court of Justice [ICJ] regarding the notification that has to be given under the Vienna Convention on Consular Relations to foreign nationals who are arrested and detained. These were cases brought by Germany against the United States, by Mexico against the United States, and by Paraguay against the United States.

Countries kept bringing these cases over and over again, and the ICJ was mostly consistent. It didn't seem to matter who the respondent state was or who the applicant state was, the principles were the same.

Now, there have been similar scenarios within the Strasbourg system, and the principle has always been this: Once we give a particular interpretation or a particular analysis, we will extend that across the system. The one example that I always use has to do with the prohibition on consensual same-sex sexual conduct, so-called sodomy laws, that existed in a few countries in Europe even as late as the 1980s.

The first case, *Dudgeon v. United Kingdom*, the Court found that those laws violate the right of privacy in the Convention. And then several years later, they came to the same result against Ireland, and then again in a third case against Cyprus — with Cyprus being a rather different and arguably more conservative society. And the Court has said — and this is true in a variety of different areas —"Here's the principle. The principle is a legal norm of general application that applies to all our member states." They don't say that in so many words, but that's what they do.

The idea of "good faith" and "bad faith" countries breaks with that legal principle and says, "Well, there's one rule for one set of countries and another rule for another." So then of course that raises the question of who gets to decide who's in the "good" group and who gets to decide who's in the "bad" group? Presumably the Strasbourg Court. But then how do we say there's a neutral, generally applicable legal rule or legal norm if in fact it only applies some of the time to some of the relevant actors?

Now, there's at least a plausible answer to that: The Court, if it's

doing its job right, can articulate certain principles at a fairly high level of generality, or can articulate a series of factors or considerations to be balanced. And you can imagine that the specific application of those factors or principles in different countries could come out different ways.

And in fact, in the prisoner voting scenario that you raise, one of the challenges was that the Court in the *Hirst* case adopted a bright-line rule that says, "It doesn't matter, prisoners have to vote. They have to be given the right to vote. Full stop." I'm exaggerating a little bit, but pretty much that's what the rule was.

And then in subsequent litigation against Italy and also against the UK, they walked that back a little bit and said, "Well, actually, what we meant is there needs to be a recognition that prisoners can't be disenfranchised entirely, by which we mean that there might be some temporary cessation of the right to vote in some instances, or perhaps that could even be permanent during the time of incarceration if you've been convicted of rape or murder, for example."

So one way for the Court to approach these issues is not to give a bright-line, categorical rule but instead have either a process-based jurisprudence or kind of a multifactor test that then allows for variation in application in different countries.

Now, if you think about it for a moment, compared to a categorical approach, that is a retrenchment of rights in a certain way, at least compared to a bright-line rule, because now you're going to have to have litigation over what those factors mean and how they apply in different contexts.

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In the Portuguese case, for example, it's not inconsequential that this was a very closely divided decision of the Grand Chamber of the Strasbourg Court. And one way in which different governments try to harmonize jurisprudence across what is, after all, a 47-member court — although they never all sit together, they sit for most judgments in panels of three or seven and occasionally in 17 — is the Grand Chamber, which offers a sort of appeals process. The Grand Chamber can say, wait a minute, rather than having a particular approach that we will just take in one case, we can invite other countries and civil society groups to weigh in, and then we can adopt a comprehensive legal standard that is a little bit more contextually flexible.

COLLINS: I was trying to think about other instances in which courts have formally tried to influence or even rebel against — perhaps that's overstating it — or have subtly tried to influence another court that is responsible for issuing binding decisions. And again, rather flippantly, I thought of the U.S. Court of Appeals for the Fifth Circuit [which recently issued an order to uphold a Texas law that many argued violates an American woman's constitutional right to an abortion]. It may be a reflection of the fact that we're dealing with a transnational institution made up of multiple countries and representatives of multiple countries and a vast array of political and social participants. But if we did try to draw a comparison with the Fifth Circuit's decision, it does ultimately affect not only that court, but also seems intended to influence the court that is responsible for precedent concerning abortion rights — the Supreme Court. In the case of prisoners' rights and the Strasbourg Court, it does create the impression that there's one rule for some and then slightly different levels for others. I find that quite troubling.

PROFESSOR HELFER: I think that's right. That makes me think about two different things that might be helpful to discuss.

One is the question of the relationship of courts one to another. If you're ▸

dealing with courts that have a predetermined relationship within a single legal system, such as federal and state courts or an appellate court and the Supreme Court, there are certain built-in requirements about who has the last word and what are the relations between actors within the same judicial system. And, of course, there are contentious issues, as you point out. The Fifth Circuit is a great example in the abortion context, but there have been other cases where, in the U.S., for example, the Ninth Circuit was for a long time far more progressive than the Supreme Court and its reversal rate was extremely high. But for the large majority of cases, once the Supreme Court made its determination, the lower courts adhered.

The difference in the relationship between the Strasbourg Court and national courts is they're not part of the same legal system exactly. It's more complicated. In the old days, there was an international judgment. Let's go back to one of the very first judgments finding a violation of the convention. It was a case involving the language of instruction in schools in Belgium, whether it should be in Flemish or French. And you can imagine that that's a pretty fundamental question to Belgian society.

The Strasbourg Court essentially said, after quite a bit of litigation, "You've adopted a parliamentary act with a set of principles on language instruction. For the most part, we see what you're doing and we endorse it, but there are some ways in which what you're doing is discriminatory to some French-speaking groups." I'm making a very complicated case very simple. But the Belgian government at that point had a choice. The Strasbourg Court didn't say, "And we therefore strike down the legislation." They have no such power. What the court said was, "There's a violation of the convention. And there's an obligation to provide a remedy." The Belgian government ultimately said, "Well, actually, all the Strasbourg Court asked for was a few tweaks in certain areas and, okay, we're willing to do that."

Strasbourg judges are trying to find ways to subtly engage and encourage national courts to take their case law into account, but they also recognize that not all courts are going to do that to the same degree.

In the old days, the relationship of national judge and international judge was very attenuated. Of course, the Strasbourg Court could review national court decisions, and sometimes the highest national court decision. But Strasbourg wasn't as prescriptive in terms of what it expected national judges to do.

During the period from the end of the Cold War up to about 2005, the Strasbourg Court began to envision itself as a kind of pan-European constitutional court, which had, in practice if not formally, a hierarchically superior relationship to national courts. And some national judges never bought into that vision. And I think what you are seeing with the "good faith" / "bad faith" division in the jurisprudence is the inability of Strasbourg to maintain that claimed de facto superiority.

The challenge is — and this goes to your point — does the system break down if the Strasbourg Court were to walk back rights? If the judges were to say essentially, "We made a mistake, we shouldn't have claimed that power, and we give it back." That would be a very remarkable and retrograde move.

So to some extent, Strasbourg judges are trying to find ways to subtly engage and encourage national courts to take their case law into account, but they also recognize that not all courts are going to do that to the same degree.

In Russia, for example, a constitutional court adopted a ruling, subsequently codified in a constitutional amendment in 2020, that said, "If we think a Strasbourg judgment contravenes our basic constitutional norms, we don't have to comply at all." Consequently, the judgments against Russia are extremely pointed because the Strasbourg Court already knows that Russia is often not listening anymore, whereas the UK Supreme Court is still listening, even if it's somewhat skeptical.

COLLINS: When Strasbourg issues a judgment involving Russia as a party, are the judgments considerably shorter than if it were a United Kingdom defendant? Do they just simply say in two lines, "This is why you are in breach," and sign it off, or do they

actually try and engage with them in a reasoned and structured way?

HELFER: I would say they try as much as they can, especially for new legal issues, to engage. Having said that, when Russia raises questions about its more conservative society on a variety of different topics — greater need for centralized control over the army, for example, or the more traditional place of women in Russian society — the court will try to faithfully convey in its decision what the arguments of the government are, and then it will engage with those arguments, at least to the extent of explaining why it is not persuaded.

However, there are certain issues relating to, for example, the right to property or questions relating to the minutia of the criminal justice system where the court does not always rule against Russia. But what does tend to happen now in some of these areas is that the court will issue a ruling and will have taken the government's arguments seriously, although mostly rejected them, but maybe not at every step. They might say, "Well, yes, the rights of religious groups in the country are a legitimate interest, and it's also the case that the restriction is part of your law." So it meets the first two requirements for limiting a human right. But the restriction also has to be necessary and proportionate.

And on that last issue the court will say, "Here's why we think the restriction isn't necessary," or "Here is what you might have done differently. So if you really were worried about" — to come back to freedom of assembly and association — "if you're really worried about violence from a protest, that's absolutely legitimate, but the way you do that is you bolster police presence or you find ways to separate the contending sides having protests and counter protests, or perhaps you impose reasonable time, place, and manner restrictions." So the court may actually say to the government, "Look, we're not saying you can't impose these restrictions, we're just saying you have to do it with a lighter touch and in a way that is more balanced and non-discriminatory."

But rather than responding to that, the Russian government will not make many changes. It will pay the damages awarded by a judgment. The Strasbourg Court can issue monetary damages. They're not very large, but if they say, "You need to pay 20,000 euro, 40,000 euro," Russia will pay the judgment. They do that regularly. But they won't really change their law or practice, which means the next case comes along, and the next case, and by the time you get to the third and the fourth case, at that point, the court largely stops trying to engage. So they say, "We've talked about this in the X case versus Russia, the Y case versus Russia, the Z case, and now we're just going to repeat what we've said and simply award damages."

COLLINS: Well, your findings and observations are fascinating, particularly to me as a judge who is deeply interested in understanding these broader trends that maybe aren't so obvious to those of us who work in the trenches of the judiciary. So thank you very much, for your work and for taking time to talk with me about it.

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