Can Human Rights Judges Travel in Time?

Considerations on the ability of the European Court of HR to assess risks

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Introduction: risk and (human rights) law

Law = risk regulation system

Law influences future human behaviour and reduces uncertainty.
Introduction: risk and (human rights) law

Here, focus on Human Rights law (ECtHR case law).

Human rights law is a part of this risk regulation system.

Many cases concern a risk of harm (injury, death, etc.) that could hurt a HR (right to life, prohibition of ill-treatments, etc.)

ECHR can be the legal basis of an obligation for the States to (try to) prevent some risks.
Introduction: risk and (human rights) law

ECtHR is a last instance body: it does not manage risks, but sometimes controls how states authorities do.
Introduction: risk and (human rights) law

Two main research questions:

1) how does the ECtHR proceed when it has to deal with cases involving the notion of risk?

2) should the ECtHR (and other human rights judges) be guided by the scientific methodologies of risk analysis and assessment?
Introduction : risk and (human rights) law

Structure of the presentation

I. Risk as a ubiquitous concept

II. Risk in the ECtHR case law
Section 1

RISK AS A UBIQUITOUS CONCEPT
Risk as a ubiquitous concept

Risk society (facts)

The concept of risk is everywhere.

1) In the 21st century everyday life, individuals are expected to take into consideration the potential consequences of almost each of their decisions or actions.
Risk as a ubiquitous concept

**Risk society** (facts)

The concept of risk is everywhere.

1) In the 21st century **everyday life**, individuals are expected to take into consideration the potential consequences of almost each of their decisions or actions.

2) The ubiquitous nature of risk is also clearly visible in the **major current global issues** (climate change, nuclear energy or commercial war between superpowers, etc.).
Risk as a ubiquitous concept

Risk society (literature)

1981

1986

1991

1996
Risk as a ubiquitous concept

**Risk as a hardly definable concept**

Difficult to define for lay people and controversial for specialists.

However, two components of risk can be highlighted:

- Potentiality of an event: choices under uncertainty

- Adversity: possibility that the choice may lead to a negative consequence
Risk as a ubiquitous concept

**Risk analysis and risk assessment**

If risk is related to uncertainty, how can we analyse it? Is it possible to assess the level of a risk to take it adequately into consideration in our decisions?

**Complex and controversial questions:**
- Development of a vast literature (*Risk analysis*, etc.)
- Definition of the basic concepts is not achieved (AVEN)
- Scepticism
« the applications of the sciences of uncertainty to real-world problems has had ridiculous effects »
Risk as a ubiquitous concept

**Risk analysis and risk assessment**

Traditional principles of the risk analysis theory:

The level of a risk depends on two factors:

1. **Severity** of the potential damage
2. **Likelihood** of the occurrence of this damage

$$R \ (\text{risk}) = S \ (\text{severity}) \times L \ (\text{likelihood})$$
<table>
<thead>
<tr>
<th>Likelihood</th>
<th>Negligible</th>
<th>Minor</th>
<th>Medium</th>
<th>Major</th>
<th>Disastrous</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very unlikely</td>
<td>Very low risk</td>
<td>Very low risk</td>
<td>Low risk</td>
<td>Moderate risk</td>
<td>Significant risk</td>
</tr>
<tr>
<td>Unlikely</td>
<td>Very low risk</td>
<td>Low risk</td>
<td>Moderate risk</td>
<td>Significant risk</td>
<td>High risk</td>
</tr>
<tr>
<td>Quite likely</td>
<td>Low risk</td>
<td>Moderate risk</td>
<td>Significant risk</td>
<td>High risk</td>
<td>Very high risk</td>
</tr>
<tr>
<td>Very likely</td>
<td>Moderate risk</td>
<td>Significant risk</td>
<td>High risk</td>
<td>Very high risk</td>
<td>Critical risk</td>
</tr>
<tr>
<td>Almost certain</td>
<td>Significant risk</td>
<td>High risk</td>
<td>Very high risk</td>
<td>Critical risk</td>
<td>Critical risk</td>
</tr>
</tbody>
</table>
Risk as a ubiquitous concept

**Risk analysis and risk assessment**

Traditional principles of the risk analysis theory:

The level of a risk depends on two factors:

(1) Severity of the potential damage
(2) Likelihood of the occurrence of this damage
(3) Acceptability / tolerability

A risk is acceptable if

Expected **benefit** > risk level
Risk acceptance: **cultural** dimension
Risk acceptance: local dimension
Risk acceptance: individual/political dimension
Section 2

RISK IN THE ECtHR CASE LAW
Risk in the ECtHR

Context of the risk assessment by the Court

Most common issues addressed in the case law:
- **suicides** of individuals who were under states authorities control (prison or military service),
- **violence** on individuals who were notoriously threaten by other people,
- **damages** on persons and properties caused by natural disaster or industrial accident,
- **ill-treatment** or torture of persons **returned** against their will to their country of origin, **etc.**
Risk in the ECtHR

Context of the risk assessment by the Court

Concerning the chronology, two types of situations may arise:

- the Court is seized with regard to an alleged current risk (the possible damage is future) and must assess the current attitude of the public authority towards this risk.

- the Court is seized with regard to an alleged past risk (the possible damage - which may or may not have finally occurred - is also past) and the Court has to examine a posteriori how the authority has reacted to it.
CURRENT RISK

Assessment of the Court

Initial facts or decision  Judgement  Potential damage

Uncertainty

Risk in the ECtHR
Risk in the ECtHR

Assessment of the Court

Initial decision or action → Potential damage → Judgement

Uncertainty

PAST RISK
Risk in the ECtHR

**Risk reasoning**

As a **legal body**, the ECtHR does not assess the level of the risk as a risk manager would: the Court seeks **evidence of a relevant risk**.

Is (was) there a **real (and immediate) risk** that the authorities should prevent (or should have prevented)?
Risk in the ECtHR

**Risk reasoning**

Nevertheless, traces of the application of the risk analysis theory can be found in the ECtHR reasoning.

**SEVERITY**

- **Admissibility**: Court must check whether the applicant has suffered or could suffer a “significant disadvantage”.
- **Merits**: in many cases, the Court examines whether the (potential) damage exceeds a “minimum level of severity”.
Risk in the ECtHR

**Risk reasoning**

Nevertheless, traces of the application of the risk analysis theory can be found in the ECtHR reasoning.

**Likelihood**

- ECtHR seeks for evidence of the *plausibility of the potential damage*

- Example: when the return of a person to his/her country of origin is at stake, the Court analyses reports which describe the situation regarding the compliance with human rights in this country.
Risk in the ECtHR

Binary risk matrix of the ECtHR

<table>
<thead>
<tr>
<th>Likelihood</th>
<th>Severity</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>No relevant risk</strong></td>
</tr>
<tr>
<td></td>
<td><strong>Real (and immediate) risk</strong></td>
</tr>
</tbody>
</table>

- **Likelihood** represents the probability of a risk occurring.
- **Severity** indicates the potential impact of the risk.
- The green area represents no relevant risk, while the red area indicates a real (and immediate) risk.
Risk in the ECtHR

**Risk reasoning**

What about the notion of ACCEPTABILITY?

Cultural, local, individual and political dimensions.

If the risk analysis science can help for the assessment of the severity and of the likelihood of a potential damage, we are here more dependent on the *intuitions of judges*.

These dimensions are reflected in the « *margin of appreciation* » that the ECtHR allows to the States.
Risk in the ECtHR

Risk reasoning

(1) Some risks are acceptable because the States have a limited material capacity.

The positive obligation “must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities”. In particular, the Court takes into consideration “the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”.

Risk in the ECtHR

Risk reasoning

(2) Some risks are acceptable because the States have a limited legal capacity.

For example, the Court takes into account

“the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention [which respectively prohibit arbitrary arrests and protect private and family life]”
Risk in the ECtHR

**Risk reasoning**

Technologies available today are reducing *material* limitations. **Legal** limitations are therefore more important than ever.

2001

![Tom Cruise](image1)

**MINORITY REPORT**

2019

![PredPol](image2)

*PredPol provides targeted, real-time crime prediction designed for and successfully tested by officers in the field.*
Thank you for your attention

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