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International Law and Global Risks: Current Challenges in Theory and Practice

The challenge of risk assessment by the ECtHR

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extended abstract

We live in a 'risk society', as Ulrich Beck stated a few decades ago. Law, in general, can be seen as a risk regulation system. If legal rules are conceived as a means to influence future human behaviour, they aim to reduce the fundamental uncertainty that characterises the future interactions between individuals. This contribution focuses on the notion of risk as it is developed in the field of human rights and, more precisely, in the European Court of Human Rights (ECtHR) case law. Both the terminology used by the Court and its reasoning are studied to better understand the nature of the obligations imposed on European States with regard to the prevention of certain risks that are linked to fundamental rights.

ECtHR and risk: general considerations

Like other institutions, the ECtHR is often called upon to deal with complex situations where the notion of risk is at stake. The most common issues addressed in the case law include suicides of individuals who were under state authorities' control (prison or military service), violence against individuals who were notoriously threatened by other people, damages to persons and properties caused by natural disasters or industrial accidents and the (expected) ill-treatment or torture of persons (about to be) returned against their will to their country of origin. In these cases, applicants often claim that they are or had been exposed to a particular risk and allege that a State fails or had failed to react adequately in order to prevent damage (death, injury, etc.) from occurring. The ECtHR must then examine this alleged risk in order to check whether the situation leads to a violation of a provision of the Convention.

In this context, the way in which the Court understands the concept of risk and carries out risk analysis in practice can be decisive for the outcome of its reasoning. The risk analysis that judges have to produce is, however, a complex intellectual challenge. Judges have to identify and assess a past or present risk and consider if the authorities gave (when the risk occurred in the past) or are giving (when the risk is present) an appropriate response with regard to human rights. It means that they need to connect past or current decisions or actions taken by State authorities with their potential consequences (which, themselves, could happen in the past or in the future from the time of judgment). They have to make a decision about situations that

are characterised by uncertainty. This could be seen as a kind of intellectual time travel. My ambition is to better understand how judges proceed when they practice this kind of complex exercise. In particular, I wonder if the ECtHR is guided by scientific methodologies of risk analysis and assessment (that may have been developed by other scientific disciplines, like economics) or if it applies a rather intuitive approach.

In order to provide some answers to this question, I propose to examine the ECtHR case law in two complementary ways. On the one hand, I analyse the terminology used by the Court when a question of risk is at stake. On the other hand, I try to examine the reasoning of the Court through a reading grid based on the basic elements that structure risk assessment theory, i.e., the concepts of severity, likelihood and acceptance.

ECtHR and risk: terminology

The word "risk" appears very frequently in the case law of the ECtHR. It is of interest to examine with which other words and especially with which adjectives the noun "risk" is used, since it can help to understand the approach of the Court when it has to deal with the concept of risk. The most frequent formulas that can be found in the relevant case law are "real and immediate risk" or simply "real risk". In many situations, the obligation for a State to act depends on the existence of a risk qualified as such.

The key question is what the adjectives "real" and "immediate" mean. The Court, however, does not provide a general definition of these terms. According to the *Oxford Dictionary* online, something "real" is "actually (…) occurring in fact"; it is "not imagined or supposed". Understood in this way, the adjective "real" in the relevant case law (translated as "réel" or sometimes "certain" in the French versions of the judgments) would not indicate a particular level of risk, but could mean that the Court only takes into consideration a potential damage whose occurrence is objectively demonstrable, as a possible consequence of a situation over which the authorities have or had some control. As for the "immediate" nature of the risk, it possibly implies that the potential damage is in the process of materialising. It is understandable, from the reading of some judgments, that the criterion is satisfied when threats appear to lead to "imminent materialisation". The court, as an official body composed of lawyers, not of risk managers, is primarily interested in the question of *evidence*, and this is reflected in the terminology that it favours. A real risk would be a risk whose existence can be strongly demonstrated, independently of its level. When the Court requires the existence of an immediate risk, it refers to a risk that is clearly apparent, almost obvious, due to the chronological proximity of its potential materialisation. It may be helpful here to refer to the distinction between *ontological* uncertainty (we know that something produces uncertain consequences in certain circumstances) and *epistemic* uncertainty (we do not know – or we are not sure to know – what consequences something produces in certain circumstances). It could be argued that the ECtHR requires a reaction from States whenever there is a

risk for which epistemic uncertainty is low, since there are sufficient data on the causality between a situation and a potential harmful effect, even if an ontological uncertainty remains. This interpretation seems to be confirmed by the analysis of cases where a decision or the execution of a decision, which could lead to damage, is still to come. This configuration most often occurs in cases where the expulsion of a person to a foreign State is about to be executed. In these situations, the Court requires an appropriate reaction of the relevant state as soon as there is a "real risk", without using the adjective "immediate". The absence of reference to the notion of immediacy seems logical here: when one examines the situation of someone before a decision is taken, the risk that he or she will suffer the harmful consequences of that decision is of course not perceived as immediate – in the sense of imminent – since its materialisation depends, among other things, on a decision that is still to be taken.

These interpretations are certainly not indisputable. A detailed study of the terminology used in the case law, both in English and French, reveals some inconsistencies which suggest an unsystematic approach. However, the linguistic analysis does not reveal that the court seeks to assess risk according to criteria typically used in other disciplines. In particular, it is not common for the Court to use words that express the level of the risk on a scale, as a risk analysis specialist would. The terms frequently employed by the ECtHR suggest that it is guided by intrinsically legal considerations.

ECtHR and risk: reasoning

When one extends the analysis beyond terminology to the overall reasoning of the Court in its judgments, references to some key elements of the risk literature can be found. To elaborate on this idea, some basic concepts need to be explained. Firstly, the common risk analysis is fundamentally based on the determination of two elements: the *likelihood* and the *severity* of the potential damage. The level of a risk is the product of the values of these two factors, such that R (risk) = L (likelihood) × S (severity). Secondly, once a risk has been identified and analysed, the next step is to examine the *acceptance* of this risk. It remains to be decided whether or not to take this risk, which raises the question of whether it is acceptable or not. This exercise is partially influenced by the first operation: a low risk is *in abstracto* more acceptable than a high risk. However, evaluating acceptance also involves other parameters, so that, *in concreto*, a significant risk may be more acceptable than a lower one. This is because the *benefit* – understood here broadly, not only in the financial sense – that is expected when taking that particular risk is an essential element to be included in the analysis. This operation is necessarily subjective: it is above all a question of perception, which involves cultural and psychological factors.

Even if the reasoning of the Court, in the relevant case law, is not systematically based on these three concepts (severity, likelihood and acceptance), it is arguable that all of them play a role, explicitly or implicitly, when compliance to fundamental rights is discussed in combination with the notion of risk.

Regarding the first concept, it can be observed that the Court often examines whether the (potential) damage exceeds a “minimum level of severity”; this operation means that the degree of severity must be assessed and that, below a certain level, the situation is presumed not to involve a violation of the Convention. On the other hand, when the bar is crossed, an alert level is reached. When a sufficiently serious (potential) damage is identified, the other parameters (likelihood and acceptance) can be used to decide whether a violation of the Convention is finally found. A particular difficulty arises from the fact that, according to the Court, the assessment of the minimum level of severity is itself relative and depends on the factual data in the case under consideration. In my view, this reflects a certain aggregation, or even confusion, between two parts of the reasoning: that of the severity of the potential damage and that of the risk acceptance.

The assessment of the likelihood of damage is at the heart of many cases involving risk. To examine if the occurrence of a harmful event is more or less probable, the Court refers to various data, provided by the parties or collected by itself. For example, when the Court has to assess the risk of ill-treatment in the event of the expulsion of a person to another country, it relies on reports, produced by various governmental or non-governmental sources, which describe the situation in that country regarding the compliance with human rights. Furthermore, the Court sometimes seems to assume that some non-European States are not safe, which is a presumption that the likelihood of damage is higher in such States.

Finally, the examination of the elastic notion of risk acceptance could provide explanations for legal concepts that also have an elastic character, such as legitimacy, proportionality or margin of appreciation of States. We outline here two kinds of considerations. First, the Court regularly holds that not every risk implies an obligation on the part of the State to prevent it. The positive obligation “must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities”. Since the States do not have infinite capacity, particularly in terms of human and financial resources, it must be accepted that they cannot react to and manage all the risks that could raise questions under the Convention. As to how they should allocate their resources, the Court leaves the States a relatively wide margin of appreciation in determining their priorities and the potentiality of some damages must be accepted. Secondly, it can be observed that other considerations, which derive from the overall dynamics of the Convention, are likely to make some risks acceptable. Even if the authority has the resources to identify and respond to a particular risk, it does not have the right to do everything possible to achieve its ends – even the most legitimate ones, such as protecting people's lives. For example, with regard to the prevention of violence, 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 (...)”. This implies that States cannot be on the alert for every risk, even if they have the resources to do so, and that some risks must be accepted.