Abhandlungen

'To me, fair friend, you can never be old', William Shakespeare, 'Sonnet 104'[1]: ECHR at 70 Rudolf Bernhardt Lecture, 2020

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Abstract

This article undertakes a survey of the changes in the structure of the interpretive doctrines of the European Court of Human Rights (the Court) over time in an exploration of the aging of the European Convention on Human Rights (ECHR or the Convention) on its 70th anniversary. It argues that the Court's interpretive doctrines that seek to give due deference to national rights traditions, canons and institutions have become increasingly pervasive in the Court's procedural and substantive case law in the last two decades. This, in particular, has come at a loss for interpretative doctrines that interpret the Convention as a practical and effective living pan-European instrument. This argument is built in four parts. First it

1 William Shakespeare, *All the Sonnets of Shakespeare*, Paul Edmondson and Stanley Wells eds, (Cambridge: Cambridge University Press 2020).

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offers a defence of why a study of the interpretive doctrines of the Court over time is a good proxy for studying the ECHR's ageing process. In the second part, it discusses the rich doctrinal forms of due deference and effective interpretation in the case law of the Court – both young and mature. Part three explains how the judicialisation and expansion of the European human rights system in late 1990 s transitioned to a more heightened and sophisticated focus on due deference doctrines in the Court's case law. Finally, part four examines whether the recent judicial innovations under the Court's Article 18 case law and the widely celebrated success of increased ownership of the Convention by domestic courts can act as counter points to the argument that the effective interpretation principle has suffered a loss as the Convention has aged, concluding that none of this may offset the fact that the Convention at 70 is more conservative in spirit than its younger self.

Keywords

European Convention on Human Rights – European Court of Human Rights – effective interpretation – due deference

I. Introduction

In the spirit of this well-known sonnet of Shakespeare and on the occasion of the third Bernhardt lecture, dedicated to late Professor and Judge Rudolf Bernhardt on his 95th birthday, this article asks the following question: As the European Convention on Human Rights (ECHR or the Convention) turns 70, how has the interpretation of the Convention by the European Court of Human Rights (ECtHR or the Court) aged? Has the Court become a different institution to its 20-year-old or 50-year-old self in its interpretation of the Convention? The article answers this question by offering a survey of the changes in the structure of the interpretive doctrines that the Court has employed to steer its case law under the Convention over time.

The central argument of the article is twofold. First, I argue that the Convention's interpretation by the Court can be traced back to a foundational binary of objectives that the Court's interpreters have set for themselves: the objective of offering effective and real protections to the human rights of individuals that come before it, and the objective of respecting

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national rights protecting traditions, canons and institutions. The various articulations of many of the well-known interpretative doctrines of the Court developed since the 1960 s can be traced back to either of these binary objectives and attempts at their mediation in the case law of the Court. Second, I argue that, particularly in the last two decades, the latter of these objectives, that of respect for national rights traditions, canons and institutions, has become a dominant presumption and the breadth and nature of due deference doctrines that give effect to this objective has proliferated. This has come at a loss for the effective interpretation objective and, in turn, the Court's effective interpretation doctrines have narrowed down in scope. This was a process. It has been driven both by reforms of the European human rights system and by domestic developments in the member states of the Council of Europe. The former aspect of the process can be traced back to the expansion of the Council of Europe in the late 1990s[2] and the subsequent exponential increase in the number of cases brought before the Court, decreasing the appetite of the Court to follow effective interpretation, in particular at the admissibility stage. The latter is manifested in the demands for more deference, primarily but not exclusively by western European states, on the grounds that the most national authorities are not only well equipped to apply the Convention standards, but also enjoy legitimate authority to do so, leading the Court to respond to these calls by taking a more deferential stance in this substantive case law to respect the domestic formulations of rights protections by domestic judiciaries and parliaments.[3]

The article is composed of four parts. In the first part I provide a defence for studying the process of ageing of the Convention through an account of the changes in the structure of the interpretive doctrines of the Court over time, and also point to the weaknesses of this choice of method. In the second part I focus on how setting the interpretive task of the Convention as one of equally seeking to satisfy two competing objectives of effective interpretation of human rights and respect for national rights traditions and institutions has been the 'European way' of developing human rights law interpretation, traditionally setting it aside from other human rights law interpreters in

2 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Art. 19, 5 November 1994, E. T. S. 155.

3 On the embeddedness of the Convention in national legal orders, see, Laurence R. Helfer, 'Redesigning the European Court of Human Rights; Embeddedness as a Deep Structural Principle of the European Human Rights Regime', EJIL 19 (2008), 125-159; Hellen Keller and Alec Stone Sweet: *A Europe of Rights: The Impact of ECHR on National Legal Systems* (Oxford: Oxford University Press 2008).

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international law. In part three, I lay out how due deference doctrines have proliferated in the last two decades across procedural and substantive case law at the expense of effective interpretation. In part four, I consider some objections to this thesis.

II. Interpretive Doctrines as Proxies for Appraising the Aging of the Convention

There can be two initial concerns as to whether the Convention's process of aging can be appraised by focussing on a survey of the structure of the doctrines the ECtHR employs. The first of these concerns is the risk of an under-inclusive appraisal of the Court's wide-ranging case law over time. The second concern is the risk of producing a politically insular account of the Convention's aging history through a focus on the structure of interpretive doctrines.

The ECtHR to date has delivered nearly one million judgements and decisions.[4] What emerges from this extra-ordinary production of judgements and decisions is no doubt a fine-grained jurisprudence on each of the individual rights set out in the Convention in terms of the admissibility of complaints, conditions for establishing violations of the Convention and remedies.[5] One may hold that studying the aging of the Convention with a focus on the objectives underpinning the interpretive doctrines risks missing out how the Court's interpretation of the Convention has developed under its individual provisions over time. This is, of course, correct. The analysis of case law under individual provisions are capable of revealing more nuance as to the development of the jurisprudence over time.[6] It is also the case, however, that questions about what objectives the Convention serves is a

4 To be precise, according to the statistics of the Court, the ECtHR has decided on the examination of around 921,200 applications through a judgment or decision, or by being struck out of the list. See, European Court of Human Rights, 'ECHR Overview: 1959-2020', <https://www.echr.coe.int/>, accessed 9 March 2021.

5 For surveys of Court's case law under its individual provisions, see, generally, William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press 2015); Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford: Oxford University Press 2017); David J. Harris, Michael O'Boyle, Ed P. Bates and Carla M. Buckley, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford: Oxford University Press 2018).

6 See for example, Stefan Kirchner, 'The Personal Scope of the Right to Life Under Article 2 (1) of the European Convention on Human Rights After the Judgment in A, B and C v. Ireland', GLJ 13 (2012), 783-792; Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' HRLR 13 (2013), 99-124.

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starting point of the analyses of individual provisions.[7] The overarching interpretive doctrines of the Court set out an outlook for the interpretation of individual provisions individually or as part of the whole. As a matter of a practice-based understanding of the Convention, too, assessments of whether the Court has been loyal to its interpretative objectives or whether it has employed its interpretive powers correctly in individual cases or overtime is central to academic commentary[8] on the ECHR as well as the majority, separate and dissenting positions of the judges on the bench.[9] Whilst a focus on interpretive doctrines cannot account for the totality of the changes under all the individual provisions of the Convention interpreted by the Court, they offer a proxy for making sense of the general orientation of the Court's case law and can supplement research that offers quantitative analyses of the Court's case law[10] or the tracing of the development of the court's case law over time.[11] As such, the attempt to compose a study of the aging of the Convention through interpretive doctrines offers a theory building exercise.

The second concern points to a different challenge. Is it possible to appraise the aging process of a human rights convention and a court without paying fuller attention to its broader context, specifically, the broader politi-

7 For a comprehensive account of the systemic importance of interpretive principles, see, Janneke Gerards, *General Principles of the European Convention on Human Rights.* (Cambridge: Cambridge University Press 2019). For a review of how the two objectives of the Court pull and push the Convention interpretation in the field of migration, see, Başak Çalı, Ledi Bianku and Iulia Motoc (eds), *Migration and the European Convention on Human Rights* (Oxford: Oxford University Press 2021).

8 See, for example, Eva Brems (ed.), *Diversity and European Human Rights: Rewriting the Judgments of the ECHR* (Cambridge: Cambridge University Press 2012); Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press 2015); Marie-Bénédicte Dembour, *When Humans Become Migrants Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press 2015).

9 See, for example, the Partly Dissenting Opinion of Judge Serghides discussing that the case does not adequately account for the effective interpretation objective, in ECtHR (Grand Chamber), *Khlaifia and Others v. Italy*, judgment of 15 December 2016, no. 16483/12, paras 17-19, and the Partly Concurring, Partly Dissenting Opinion of Judge Saadet Yüksel holding that the Court failed to respect the subsidiarity principle when finding a violation in ECtHR (Grand Chamber), *Selahattin Demirtaş v. Turkey*, judgment of 22 December 2020, no. 14305/17, para. 26.

10 Mikael Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?', Journal of International Dispute Settlement 9 (2018), 199-222; Laurence R. Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?', EJIL 31 (2020), 797-827.

11 Oddný Mjöll Arnardóttir, 'The Brighton Aftermath and the Changing Role of the European Court of Human Rights', Journal of International Dispute Settlement 9 (2018), 223-239.

cal context in which the Convention has aged in the past seventy years? I also recognise this concern, which points to the need to take human rights law's broader political context seriously. I propose, however, that a focus on interpretive principles of the ECtHR is well placed to explore how the ECtHR seeks to respond to its broader context as these broad principles can be understood as an attempt to bring extra-legal concerns into the law. In other words, interpretive principles can also be understood as conduits between the Convention and the extra-legal demands on it[12] and studying them offers a way of understanding how law, through legal doctrine, responds to extra-legal challenges.

III. The Structure of the Interpretive Principles of the ECtHR

The structure of the interpretive principles of the ECtHR is unique, particularly when compared to interpretive principles developed by other regional human rights courts and the United Nations Treaty Bodies. The ECtHR stands out in its effort to structurally seek to satisfy its dual objectives in some measure in its case law. These competing objectives have been providing an effective interpretation of human rights as protected by the Convention, and at the same time allowing a space for human rights interpretation to develop and violation determinations to be carried out in their own ways in the national legal and political contexts of individual European states. In other words, the ECtHR has long identified the task of interpreting the Convention by taking both human rights standard-setting and respect for national diversity seriously.

Effective protection of human rights is an objective that the ECtHR shares with all other international human rights law interpreters.[13] This is an objective that is part and parcel of the global interpretive ethos of human rights arising in the aftermath of the World War II, seeing human rights as a way of both assessing and reforming domestic legal arrangements as well as the overall legal and political attitude to the purpose of human rights law. The preamble of the ECHR also nods to this global universalist outlook when it states that the Universal Declaration of Hu-

12 This proposal builds on approaches that conceive law as a semi-autonomous social field. See, Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', L. & Soc. Rev. 7 (1973), 719-746.

13 Başak Çalı 'Specialized Rules of Treaty Interpretation: Human Rights' in: Duncan B. Hollis (ed.), *The Oxford Guide to Treaties,* (Oxford: Oxford University Press 2020), 525-550.

man Rights of 1948 aims to 'secure the universal and effective recognition and enjoyment of rights'.[14]

Effective interpretation has been what the Court has called 'a general aim' of the Convention.[15] It is indeed one of the most well-known mantras of the ECtHR that the 'Convention was intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective' articulated in *Airey v. Ireland* in 1979.[16] The Court's mantra of effective interpretation has seen at least four interpretive articulations in the Court's case law over time.

The first form is the way in which the Court has developed a doctrine of flexibility regarding the rules concerning the admissibility requirements of a case, to ensure that the individual access to the Court is not hampered by domestic authorities.[17] In this vein, the Court has indicated that the individuals should only exhaust domestic remedies that are effective in law and practice.[18] It has emphasised that although the victim status is a necessary condition of admissibility, this status can also expand to include a potential victim that is someone that has not yet been judicially sanctioned, but is under a constant threat to being sanctioned under domestic law.[19] Despite its strict design as a court that excepts petitions only from direct victims themselves, it has also recognised the rights of Non-Governmental Organisations (NGOs) to petition on behalf of individuals, who are unable to have legal representation under some specific conditions.[20] It has recognised that reservations to the Convention that are against the object and purpose of the treaty are not a bar to admissibility.[21]

The second of these forms is the doctrine of autonomous concepts. The doctrine of autonomous concepts in essence holds that in order to provide an effective interpretation of the Convention, the Court cannot be bound by how legal concepts are defined as a matter of domestic law in each of its member states. To accept how a domestic legal order defines criminal

14 Preamble, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, E. T. S. 5.

15 ECtHR, *Belgian Linguistics Case*, judgment of 23 July 1968, no. 1474/62, para. I. B.5.

16 ECtHR, *Airey v. Ireland*, judgment of 9 October 1979, no. 14038/88, para. 87.

17 ECtHR (Grand Chamber), *Mamatkulov and Aksarov v. Turkey*, judgment of 4 February 2005, nos 46827/99 and 46951/99, paras 100-101 and 122.

18 ECtHR (Grand Chamber), *Sejdovic v. Italy*, judgment of 1 March 2006, no. 56581/00, para. 469; ECtHR (Grand Chamber), *D.H. and Others v. the Czech Republic*, judgment of 13 November 2007, no. 57325/00, paras 116-118.

19 ECtHR (Grand Chamber), *Roman Zakharov v. Russia*, judgment of 4 December 2015, no. 47143/06, para. 171.

20 ECtHR (Grand Chamber), *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, judgment of 17 July 2014, no. 47848/08, para. 96.

21 ECtHR, *Belilos v. Switzerland*, plenary, judgment of 29 April 1988, no. 10328/83.

charges,[22] association,[23] and family[24] amongst others, is to strip the interpretive authority of the Court to afford an effective interpretation of the Convention rights. Starting with *Engels v. Netherlands*,[25] the Court has developed this doctrinal formulation of the definition of autonomous concepts in the Convention as a way of offering effective protection to rights.

The third effectiveness doctrine in the Court's case law is to treat the Convention as a living instrument. Going back to the 1970 s, in *Tyrer v. United Kingdom*, the Court has embraced the principle of living instrument holding that the 'Convention must be interpreted in present day conditions'.[26] In other words, the Court has held that it has a responsibility to sync the Convention with moral and political progress in European societies. This has, for example, enabled the Court to address discrimination based on sexual orientation,[27] human trafficking,[28] and human rights in the digital sphere.[29]

The fourth doctrinal form is the Court's recognition that whether a Convention right engages a negative obligation to respect or a positive obligation to protect is a fine line,[30] and that the Court may find violations of more than one positive obligation even when it may not find violation a negative obligation to respect violation of the Convention.[31] This latter doctrine seeks to give effect to the basic idea that not only the scope of rights, but also the duties of individual states, cannot be interpreted in a static fashion, and that the scope of the duties owed to individuals must stand the test of time and be responsive to evolving conditions, capabilities, and vulnerabilities,[32] including risks arising from the sphere of individual relations[33] or actions other non-state actors pose to the protection of Convention rights.[34]

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22 ECtHR, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

23 ECtHR, *Chassagnou and Others v. France*, judgment of 29 April 1999, nos. 25088/94, 28331/95 and 28443/95, para. 100.

24 ECtHR, *Marckx v. Belgium*, plenary, judgment of 13 June 1979, no. 6833/74.

25 ECtHR, *Engel and Others* (n. 22).

26 ECtHR, *Tyrer v. United Kingdom*, judgment of 25 April 1978, no. 5856/72, para. 31.

27 Laurence R. Helfer and Eric Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', IO 68 (2014), 77-110.

28 ECtHR, *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965, paras 277-278.

29 ECtHR, *Bărbulescu v. Romania*, judgment of 12 January 2016, no. 61496/08.

30 ECtHR (Grand Chamber), *Hatton and Others v. the United Kingdom*, judgment of 8 July 2003, no. 36022/97,
para. 98.

31 ECtHR, *Tagayeva v. Russia*, judgment of 13 April 2017, no. 26562/07 and 6 other applications.

32 ECtHR, *Dink v. Turkey*, judgment of 14 September 2010, no. 7124/09, para. 137.

33 ECtHR, *X and Y v. the Netherlands*, judgment of 26 March 1985, no. 8978/80, para. 23.

34 ECtHR, *Fadeyeva v. Russia,* judgment of 9 June 2005, no. 55723/00, paras 89, 92.

In comparison to the overarching objective of effectiveness, the objective of respecting the national development of human rights and decision-making procedures has a distinctly European flavour. Other international human rights interpreters do not show an explicit overarching commitment to the latter objective.[35] The centrality of this uniquely European objective can be traced to the history of the constitutional rights protections in Europe as also reflected in the preamble of the Convention, where it states that European nations 'have a common heritage of political traditions, ideals, freedom, and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.'[36] Historians of the drafting of the Convention further point out that the limited content of the rights protected under the Convention is also a reflection of common constitutional traditions.[37]

The Court's accommodation of this second objective, respect for national rights traditions and institutions to determine the scope and violation conditions of rights has traditionally been addressed and analysed under the broad umbrella of the doctrine of the margin of appreciation in scholarship.[38] Yet, there are wide ranging interpretive forms of due deference doctrines in the case law of the Court speaking to different aspects of and reasons for deference to national authorities in Europe.[39]

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35 Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', EJIL 21 (2010), 585; Jorge Contesse, 'Contestation and Deference in the Inter-American Human Rights System', Law & Contemp. Probs. 78 (2016), 123-145. Having said this, the literature also points to the fact that the due deference doctrines of the ECtHR have exerted influence on other human rights regimes. See, Yuval Shany, 'All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee', Journal of International Dispute Settlement 9 (2018), 180-198; Başak Çalı, 'Regional Protection' in: Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press 2017), 411-424.

36 Preamble, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol Nos 11 and 14, 4 November 1950, E. T. S. 5.

37 Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford: Oxford University Press 2017).

38 See generally, Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in: Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe* (Cambridge: Cambridge University Press 2013), 62-105.

39 Dean Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?', Cambridge Yearbook of European Legal Studies 14 (2012), 381-418; Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights', NQHR 29 (2011), 324-357 (325).

The first formulation of a due deference doctrine goes back to the first inter-state cases before the former Commission. In *Greece v. United Kingdom*[40] in 1958, whilst the Commission held that it has the authority to interpret the necessity of a declaration of a state of emergency, it has also held that the government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation.[41] This notion of deference was then taken up by the Court in *Ireland v. United Kingdom*.[42] It has, therefore, held that the European Court of Human Rights cannot replace the national authorities in deciding whether a public emergency threatens the life of the nation. For reasons of epistemic superiority of making factual assessments, it has thus created its first deference doctrine as a form of epistemic deference. Subsequently, the Court has also recognised that the domestic courts are epistemically better placed to interpret domestic laws[43] and assessment of facts as a court of first instance.[44]

The second formulation of due deference has been the Court's recognition that national authorities may be better placed to assess how much moral or political progress is possible within a political community due to their 'better contact with the forces in a national community'.[45] The *Handyside* judgement has laid out this principle, even though it is obvious that the 'better placed to assess moral progress' outlook may be in direct conflict with its living instrument doctrine. This line of approaching questions of moral progress are also reflected in the Court's case law concerning abortion,[46] assisted suicide,[47] and same sex marriage.[48] As such, the Court has held that the fact that a right is not provided for in national law can be understood as a matter for national law and domestic procedures to resolve.

The third formulation of the due deference doctrine has turned to essential domains that need to be left to democratic prerogatives and the need to

40 ECHR, *Greece v. the United Kingdom*, report of the European Commission of Human Rights of 26 September 1058, no. 176/56.

41 *Greece* (n. 40), 138. Also, see, Dean Spielmann, 'Whither the Margin of Appreciation?', Current Legal Probs. 67 (2014), 49-65.

42 ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, § 207, Series A, no. 25.

43 ECtHR, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A, no. 33, para. 46; ECtHR (Grand Chamber), *Slivenko v. Latvia*, judgment of 9 October 2003, no. 48321/99, para. 105, ECHR 2003-X.

44 ECtHR, *Klaas v. Germany*, judgment of 22 September 1993, Series A, no. 269.

45 ECtHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A, no. 24, para. 48.

46 ECtHR, *A, B, & C v. Ireland*, judgment of 16 December 2010, no. 25579/05.

47 ECtHR, *Pretty v. United Kingdom*, judgment of 29 April 2002, no. 2346/02.

48 ECtHR, *Schalk and Kopf v. Austria*, judgment of 24 June 2010, no. 30141/04; ECtHR, *Hämäläinen v. Finland*, judgment of 16 July 2014, no. 37359/09; and ECtHR, *Chapin and Charpentier v. France*, judgment of 9 June 2016, no. 40183/07.

leave resolving conflicts between competing rights and public interests to national decision-making procedures and to nationally appointed judges in such domains. As it is well known, the Court has explained this as states enjoying a wide margin of appreciation when the public interest at stake is the economic wellbeing of the country.[49] The Court has also followed a similar line of reasoning in recent times with respect to litigation that concerned austerity policies in the aftermath of the economic crisis in Europe in 2008 or health policies in the context of compulsory vaccination programmes.[50]

The fourth formulation of the due deference doctrine is a newer addition to Court's reformulation of due deference, to which I shall return later. It focusses on the quality of decision-making at the domestic level and, in particular, whether the quality of decision making can be characterised as a sound democratic or judicial process, where the national authorities take into account competing interests as relevant to human rights balancing in their procedures. This quality-based due deference has been employed in *Animal Defenders v. UK*[51] as well as in *SAS v. France*[52] with respect to parliamentary processes, and to constitutional and apex courts in the case of *von Hannover v. Germany* with respect to judicial decision-making processes.[53] This variant of due deference, in principle, recognises that human rights are subject to difficult balancing exercises at the national level, and therefore, the Court should not interfere in such exercises so long as the national authorities can furnish evidence that they had a sound process in making these decisions. This variant has given way to what is now termed 'process-based review' of the European Court of Human Rights.[54] This form of deference is distinct

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49 *Hatton* (n. 30).

50 On austerity measures, see, ECtHR, *Koufaki and Adedy v. Greece*, judgment of 7 May 2013, nos 57665/12 and 57657/12; ECtHR, *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal,* inadmissibility decision of 8 October 2013, nos 62235/12 and 57725/12. Also see, ECtHR, *Savickas v. Lithuania and Others*, inadmissibility decision of 15 October 2013, no. 66365/09. On compulsory vaccination programmes, ECtHR (Grand Chamber) *Vavřička and Others v. the Czech Republic*, judgment of 8 April 2021, nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15, and 43883/15.

51 ECtHR (Grand Chamber), *Animal Defenders International v. the United Kingdom*, judgment of 22 April 2013, no. 48876/08, para. 111.

52 ECtHR (Grand Chamber), *SAS v. France*, judgment of 1 July 2014, no. 43835/11, para. 154.

53 ECtHR (Grand Chamber), *Von Hannover v. Germany (no. 2)*, judgment of 7 February 2012, nos. 40660/08 and 60641/08, para. 107.

54 Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law', HRLR 18 (2018), 473-494; Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights between Subsidiarity and Dynamics Evolution', ICLQ 68 (2019), 91-110 (68).

from deference on grounds that the nature of rights at stake or nature of competing interests invite due deference to national authorities as there is a heightened focus on the procedural and deliberative qualities of domestic institutions rather than the substantive issue at stake.

As would be seen from the juxtaposition of these doctrines giving voice to competing objectives of the European Court of Human Rights case law, they can be understood as binaries pulling the Convention interpretation in opposite directions. It is in this light that we may also revisit the 'European consensus' and 'global consensus' doctrines of the Court. These two doctrines are primarily mediating doctrines in that they seek to iron out the tensions between objective competition. The European consensus doctrine seeks to establish when the Court will act as an effective interpreter of rights. It holds that if the Court is capable of establishing a 'European consensus' the objections of national authorities calling for country by country assessments of national moral progress or due deference on democratic grounds may yield to a non-deferential approach by the Court. This allows the Court to defend legal outcomes against the backdrop of the evolving nature of European legal traditions. In this respect, the case law of the court in transgender identity rights,[55] for example, can be read as the ECtHR asserting itself as merely an endorsing body of European progress at national levels. As such, the Court's role can also be understood as assuming a self-assigned role of codifying regional customary international law. However, a finding of lack of European consensus also signals due deference reasoning gaining weight in the judicial deliberations of the Court. The Court's employment of what may be termed as a 'global consensus' doctrine also has similar effects, either giving an upper hand to effective interpretation or due deference. *Demir Baykara v. Turkey* immediately comes to mind: in this case, the Court clearly indicated that global consensus in the development of rights, in this case labour rights, must have a bearing on what is a real and practical interpretation of the Convention.[56] In this sense findings of the development of global human rights law may strengthen the hand of the Court against objections based on calls for due deference.

55 ECtHR, *A. P., Garçon and Nicot v. France*, judgment of 6 April 2017, nos 79885/12, 52471/13 and 52596/13, paras 124-125.

56 ECtHR, *Demir and Baykara v. Turkey*, judgment of 12 November 2008, no. 34503/97, para. 85. It should also be noted, however, that the Court may invoke global or European consensus in tandem with each other, see, for example, ECtHR (Grand Chamber), *Bayatyan v. Armenia,* judgment of 7 July 2011, no. 23459/03, paras 103-105.

IV. The Aging Convention: The Road to More Due Deference, Less Effective Interpretation

The preceding discussion has aimed to demonstrate that the ECtHR has, over time, created a complex constellation of doctrines which are capable of lending support to either of the competing objectives of the Court: effective interpretation or due deference to national political communities to find their own ways of protecting human rights. This is a central structural feature to make sense of the Court's case law and it is one that is significantly distinct from other human rights interpreters. Now, as the Convention turns 70, we see important shifts in the rhythm of the Court's long-term struggle to give voice to both of these competing objectives, increasing the distinctness of the European approach to human rights law interpretation even further.

The process of the Court's interpretive outlook become more preoccupied with due deference has manifested itself both in its admissibility and substantive case law over time. In the field of admissibility, due deference to national authorities has seen an important shift in emphasis, starting in 1998. This is when the jurisdiction of the ECtHR significantly expanded to eastern and central Europe, and the Court lost its filtering mechanism, the European Commission on Human Rights, with the coming into force of Protocol 11 and the establishment of the ECtHR into a full time and compulsory court for all member states of the Council of Europe.[57] In this context and in the space of a very short period of time the Court inherited a major backlog of cases which continues to hamper it even today.[58] This backlog of cases, following the massive expansion of the Convention membership, has put a significant pressure on the application of the effectiveness objective on to the admissibility criteria of the Convention, which has defended flexibility in the interpretation of the admissibility criteria alongside multiple dimensions.

The President of the Court following Judge Bernhardt in this transformative period was the late Judge Wildhaber of Switzerland, who presided over the Court between 1998 and 2007. Having a first-hand experience of the backlog of the Court, he was a leading figure in spearheading the discussion

57 Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, 11 May 1994, E. T. S. 155.

58 According to the 2020 Annual Report of the European Court of Human Rights, at the end of 2020, there were a total of 62,000 pending cases, of which 23,300 were pending before a Chamber or the Grand Chamber, 34,100 before a Committee, and 4,600 before a Single-judge formation. European Court of Human Rights, Annual Report 2020, <https://www.echr.coe.int/>.

of how the ECtHR were to deal with its case backlog. Given the limited resources at the Court's disposal to address this backlog, Judge Wildhaber provided an important solution: the Court should move away from the ideal of aiming to decide in each and every case before it, and instead repurpose itself as offering constitutional justice, that is the provision of standards that can be then employed by national authorities.[59] A practical manifestation of this broader agenda was the introduction of the pilot judgement procedure by the Court in 2004, allowing it to pick one case emblematic of many to deliver a judgement and ask the national authorities to offer remedies to the rest of the individuals based on guidance provided in that judgement.[60]

It is due to this real and structural problem that the effective interpretation doctrine took its first trimming at the admissibility stage. The requirement to reduce the backlog of cases has meant that the Court had to abandon flexibility in its rules for processing new applications[61] and to exercise more due deference towards national authorities when processing applications or sending them back under the pilot judgement procedure. Significantly, the Court's exercise of deference at the admissibility stage has had effects across rights protected under the Convention. Kurban's 2016 study demonstrates the prevalence of the deferential view in the two early pilot judgements of *Doğan v. Turkey*[62] and *İçyer v. Turkey*,[63] in the context of gross human rights violations.[64] It has also been shown that the incentive to speedily dispose of cases before the merits stage has led to deferential reviews of applications in the context of expulsions of migrants.[65]

The expansion of due deference at the admissibility stage has taken many forms in the Court's case law since the early 2000 s. In the case of *Burmych v. Ukraine*, the Court has created a new form of due deference doctrine, by giving up on individual cases even when states do not implement the pilot

59 Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "Constitutionalising" the European Court of Human Rights', HRLR 12 (2012), 655-687.

60 Lise Glas, 'The Functioning of the Pilot Judgment Procedure of the European Court of Human Rights in Practice', NQHR 34 (2016), 41-70.

61 Revised version of Rule 47 of the Rules of Court concerning the contents of a new application was introduced on 1 January 2014. See, Registry of the Court 'Rules of Court' (1 January 2020) <https://www.echr.coe.int/>.

62 ECtHR, *Doğan and Others v. Turkey*, judgment of 29 June 2004, nos 8803-8811/02, 8813/02, and 8815-8819/02.

63 ECtHR, *İçyer v. Turkey*, admissibility decision of 12 January 2006, no. 18888/02.

64 Dilek Kurban, 'Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations', HRLR 16 (2016), 731-769.

65 Anuscheh Farahat, 'Enhancing Constitutional Justice by Using External References: The European Court of Human Rights' Reasoning on the Protection against Expulsion', LJIL 28 (2015), 303-322.

judgement delivered by the Court.[66] More recently in the case of *Köksal v. Turkey* the Court has expanded its due deference doctrine in the admissibility stage into a novel territory, where it has considered that a domestic remedy that was not in place at the time of its inadmissibility decision was viewed as capable of attracting due deference.[67] More recently, the Court has now made friendly settlements prior to the admissibility stage a formal requirement for applicants, thereby signalling to all its constituents that it requires domestic authorities to address rights violations even prior to considering the admissibility of a case that comes before it.[68]

These developments intersect with the call for more due deference at the merits stage by the political masters of the Convention in the last two decades.[69] These calls for more deference have relied primary on legitimacy arguments, both social and normative.[70] As a matter of social legitimacy, illustrated vividly by the United Kingdom Parliament's reaction to the ECtHR judgements concerning the voting rights of prisoners, political masters of the ECtHR have called on the court to exercise caution against overextending the rights of the Convention by way of effective interpretation. As a matter of the normative legitimacy of the Court, scholars of the Convention have also put forward the argument that the case law of the Court ought to be sensitive to a democratic reading of the Convention.[71] In other words, the Convention rights in Europe do not stem from 'nowhere', but must be made coherent with the efforts of democratically legitimate national institutions, be they domestic parliaments or judiciaries, to give effect to the Convention under conditions of reasonable disagreement in national democratic contexts.

There is important evidence in the case law of the Court that these calls were heard, as the Court's review standards in its case law have embraced

66 ECtHR, *Burmych and Others v. Ukraine*, judgment of 12 October 2017, no. 46852/13, para. 159. Also, see, Eline Kindt, 'Giving up on Individual Justice? The Effect of State Non-Execution of a Pilot Judgment on Victims', NQHR 36 (2018), 173-188.

67 ECtHR, *Köksal v. Turkey*, inadmissibility decision of 6 June 2017, no. 70478/16.

68 European Court of Human Rights 'Procedure following communication of an application non-contentious phase' (30 July 2020), <https://www.echr.coe.int/>.

69 High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (20 April 2012).

70 On the distinction between the social and the normative legitimacy of the Court, see, Basak *Çali*, Anne Koch and Nicola *Bruch,* 'The Social Legitimacy of Human Rights Courts: A Grounded Interpretivist Theory of the Elite Accounts of the Legitimacy of the European Court of Human Rights', HRQ 35 (2013), 955-984.

71 Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights', EJIL 25 (2014), 1019-1042; Alain Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "Democratic Society"', Global Constitutionalism 5 (2016), 16-47.

procedural review rather than substantive review standards. In *von Hannover v. Germany* in 2012, the Grand Chamber of the Court has doctrinally formulated this position in the context of competing qualified rights, when it held that it would require 'strong reasons' not to respect the evaluative exercises carried out by the German Constitutional Court, so long as these are done with reference to Court's interpretive standards.[72] Later on, the Court's emphasis on due deference to responsible courts and parliaments has made inroads to wide-ranging aspects of its case law, not only when two rights compete, but also when rights compete with public interests, in fields such as the rights of workers,[73] religious freedom,[74] collective expulsion,[75] or deportation.[76] The Court, therefore, has adopted a trusting and decentralised view of the interpretation of the Convention, making due reference to responsible national authorities into a more predominant feature of the Court's interpretive outlook.

As this discussion has shown, the emphasis on more deference in the Court's case law stems from a combination of otherwise distinct reasons. These range from the instrumental need to save the Court from its caseload problem to celebrate the success of the embeddedness of the Court in national legal orders and to put breaks on the supranational development of human rights law by the Court, when support and consensus is lacking amongst the Council of Europe member states. Despite the important differences between these reasons, all of these calls are now commonly couched under the broad umbrella of the 'age of subsidiarity'.[77]As such, the respect for the diversity across national communities is no longer understood as one of the two objectives of the Court, but as an overarching interpretative ethos, seen not only as a survival technique, but also as a way of managing backlash and increasing the normative legitimacy of the Court.

V. Objections

The preceding section argued that the due deference doctrines have become more prevalent as a structural feature of the human rights interpretation

72 *Von Hannover* (n. 53).

73 ECtHR *Palomo Sanchez v. Spain*, judgment of 12 September 2011, nos. 28955/06, 28957/06, 28959/06, and 28964/06.

74 *SAS* (n. 52).

75 *Khlaifia* (n. 9).

76 ECtHR, *Ndidi v. United Kingdom*, judgment of 14 September 2017, no. 41215/14.

77 Roberto Spano, 'Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity', HRLR 14 (2014), 487-502.

landscape in Europe, specifically at a loss for the effective interpretation of the Convention. In this section, I aim to consider two objections to the overall thesis of the article, one descriptive and one normative. The first of these objections is that effective interpretation is live and present in the case law of the Court and that my account may underplay recent important developments in the case law of the Court, in particular, under Article 18 of the Convention.[78] The second objection is that whilst the effective interpretation has indeed taken a back seat, this need not be understood as a matter of loss, but instead as a matter of the maturing of a regional human rights system in Europe.

1. Effective Interpretation Strikes Back?

One may hold that the ways in which the deference doctrine has found more and more echoes in the Court's case law in the two decades – ranging from admissibility to the merits reasoning – does not mean that the Court has stopped to pursue its effectiveness objective in this case law. Both continue to be present in a constellation of 'variable geometry'.[79] Indeed, there have been case law developments under various provisions of the Court's case law, where the ECtHR has progressively developed its case law into uncharted waters.

An important development in this respect is the novel development of Court's case law under Article 18 of the Convention, in particular in recent years. Significantly, the development of Article 18 case law by the Court has not only been a process of breathing life into this long-forgotten provision,[80] but also a strong rejection of due deference to national authorities. When the Court finds an Article 18 violation in conjunction with another Article of the Convention, it underscores how real and effective rights are undermined by

78 See, Helen Keller and Corina Heri, 'Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights' Untapped Potential to Protect Democracy', HRLJ 36 (2016), 1-10; Floris Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?', GoJIL 9 (2018), 109-141 (140); Aikaterini Tsampi, 'The New Doctrine on Misuse of Power Under Article 18 ECHR: Is It About the System of contre-pouvoirs Within the State After All?', NQHR 38 (2020), 134-155.

79 Başak Çalı 'Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights', Wis. Int'l L. J. 35 (2018), 237-276.

80 Başak Çalı and Kristina Hatas 'History as an Afterthought: The (Re)discovery of Article 18 in the Case Law of the European Court of Human Rights' in: Helmut Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (Cheltenham UK and Northampton MA, USA: Edward Elgar 2021), 158-176.

domestic authorities that seek to restrict them for ulterior illegitimate purposes, understood both as ulterior economic motives or political ones.[81] In twenty judgements that the Court has delivered in Azerbaijan, Russia, Turkey, Moldova, Georgia, Bulgaria, and Ukraine between 2004 and 2021, the Court has not only refused to grant due deference to the interpretation and application of national laws by domestic judges, but further held that national judicial authorities abused their powers when restricting rights. In addition, what the Court is doing under its new bad faith review standard which it has developed under Article 18 is to find aggravated violations of human rights, in particular in the domain of arbitrary deprivation of liberty. That is, in most of these cases, the Court would have already found a clear violation of one of the substantive rights of the Article. What the Article 18 violation does is to show that the Convention is violated in pursuit of ulterior motives undermining the spirit of the Convention.

Whilst the employment of Article 18 in the case law of the ECtHR is indeed new and innovative, whether it acts as a counter point to the argument that due deference has a dominant presumptive position in the Court's case law is suspect. There are four reasons for this. First, the development of the bad faith review with respect to a small group of states is in fact capable of reinforcing the structural case for due deference for the rest.[82] Article 18 case law of the Court only sets out a new and narrow case for non-deference in cases of flagrant abuses of power by national authorities. Second, the Court's deferential attitude to those states that breach the very spirit of the Convention remains intact at the admissibility stage. Those individuals whose cases are found to be treated by domestic courts that are implicated in the abuse of power are still required to exhaust all domestic remedies before coming before the ECtHR. This means that the due deference at the admissibility stage is not only at work with respect to good faith interpreters of the Convention, but also with respect to interpreters whose judiciaries are found to be operating to serve ulterior purposes. Finally, the Court's current case law on Article 18 is marred with contradictions and important disagreements, in particular with respect to the introduction of the dual tests of sole purpose and predominant purpose in assessing evidence for Article 18 violations in

81 For cases where the Court found ulterior economic motives, see, ECtHR, *Gusinskiy v. Russia*, judgment of 19 May 2004, no. 70276/01. For cases where the Court spelt out ulterior political motives, specifically, the silencing of dissent, see, ECtHR, *Mammadov v. Azerbaijan*, judgment of 22 May 2014, no. 15172/13, para. 143; ECtHR, *Jafarov v. Azerbaijan*, judgment of 17 March 2016, no. 69981/14, para. 162; ECtHR, *Yunusova and Yunusov v. Azerbaijan (No. 2)*, judgment of 16 July 2020, no. 68817/14, para. 194; of suppressing political pluralism, ECtHR, *Navalnyy v. Russia (No. 2)*, judgment of 9 April 2019, no. 43734/14, para. 98; *Demirtaş v. Turkey* (n. 9), para. 437.

82 Çalı (n. 79).

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Merabishvili.[83] Whilst in cases where the Court operates with the sole purpose test presumption of non-deference is strong in the assessment of evidence, as seen by the series of findings of Article 18 violations against Azerbaijan,[84] in other cases, the Court finds political influence over the domestic judiciary to be present in some cases and lacking in others with respect to the same country.[85] Under its predominant purpose test, the Court is open to deferring to national authorities at some point in time.[86] Finally, the Court has, so far, rejected the argument that rights that do not contain any express or implied restrictions, can be subject to non-deferential bad faith review standards under Article 18.[87] Taken together, therefore, the emerging Article 18 case law of the Court, too, is in the process of development under the shadow of the presumptive significance the Court affords to its due deference objective.

2. Deference as a Success Story

The second objection against this account focusses not only on recent developments in the case law of the Court, but also on the overall success of the Convention throughout its seventy-year existence in embedding the Convention in most of its member states' legal orders. According to this

83 See, for example, the joint concurring opinion of Judges Yudkivska, Tsotsoria, and Vehabović, where they do not subscribe to the introduction of 'predominant purpose' test for the interpretation of Article 18, concurring opinion of Judge Serghides holding that the introduction of the 'predominant purpose' test undermines the effective interpretation of Article 18 and the joint partly dissenting opinion of Judges Raimondi, Spano, Kjølbro, Grozev, Ravarani, Pastor Vilanova, Poláčková, and Hüseyinov endorsing the 'predominant purpose' test, but holding that the very high threshold required by the 'predominant purpose' test was not applied properly to the facts of the case. *Merabishvili v. Georgia*, judgment of 28 November 2017, no. 72508/13.

84 *Mammadov* (n. 81); ECtHR, *Mammadli v. Azerbaijan*, judgment of 19 April 2018, no. 47145/14; ECtHR, *Hasanov and Others v. Azerbaijan*, judgment of 7 June 2018, no. 48653/13; ECtHR, *Aliyev v. Azerbaijan*, judgment of 20 September 2018, nos 68762/14 and 71200/14; ECtHR, *Natig Jafarov v. Azerbaijan*, judgment of 7 November 2019, no. 64581/16; ECtHR, *Ibrahimov and Mammadov v. Azerbaijan*, judgment of 13 February 2020, no. 63571/16; ECtHR, *Khadija Ismayilova v. Azerbaijan (No. 2)*, judgment of 27 February 2020, no. 30778/15.

85 See the dissenting opinion of Judge Kūris protesting that the majority did not find an Article 18 violation in the case of ECtHR, *Sabuncu and Others v. Turkey*, judgment of 10 November 2020, no. 23199/17 and ECtHR, *Şık v. Turkey (No 2)*, judgment of 24 November 2020, no. 36493/17.

86 ECtHR (Grand Chamber), *Navalnyy v. Russia*, judgment of 15 November 2018, no. 29580/12.

87 *Navalnyy v. Russia*, judgment of 17 October 2017, no. 101/15, para. 88.

objection, the reason why we are in an 'age of subsidiarity' is because the Court has largely been successful in its role as a standard setter of human rights law in what is now regarded as its well-established case law.[88] If many domestic laws and judges who interpret such laws in Europe have indeed become Convention-compliant judges, taking seriously the Convention and the case law of the Court, it is only natural that these actors are respected as such by the ECtHR.

However, whether national judges can successfully discharge the role of a Strasbourg judge, even in well-established rule of law democracies, needs closer scrutiny. A first concern with regard to this is that it is difficult for national judges to act as impartial arbiters of regional (and global) human rights contestations domestically. A second concern is that most domestic courts may follow the case law of the ECtHR, but they may not find themselves well-placed to develop international human rights law. As articulated in the maxim of 'no more, but no less' in *Ullah* by the British Supreme Court in 2004,[89] this point underlines that while most independent national judges may accept the fact that they have a duty to follow the clear and well established case law of the Court, their task is not to develop the Convention case law for a European polity.[90] The ECtHR's pervasive employment of due deference doctrines, be they procedural or substantive, therefore, risks creating a situation whereby no-one speaks in the name of the progressive development of human rights interpretation in Europe. There are indeed notable signals that rights claimants are well aware of this problem, with many petitions being brought before the United Nations human rights treaty bodies against countries that are also members of the Council of Europe and thus under the compulsory jurisdiction of the Court. A recent empirical study, for example, found that about half of all the non-refoulement case law before the four United Nations Treaty Bodies are brought against states that are subject to the compulsory jurisdiction of the European Court of Human Rights.[91] Other studies further show that individuals who have been turned away based on procedural or substantive due deference before the ECtHR have then turned to United Nations human rights treaty bodies, and have received decisions in their favour, precisely because the United Nation treaty bodies did not employ due

88 Spano (n. 77).

89 House of Lords, *Regina v. Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)*, judgment of 17 June 2004, para. 20.

90 BVerfG, Judgment of the First Senate of 19 May 2020 – 1 BvR 2835/17, para. 97.

91 Başak Çalı, Cathryn Costello and Stewart Cunningham 'Hard Protection Through Soft Courts? Non-Refoulement Before the United Nations Treaty Bodies', GLJ 21 (2020), 355-384.

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deference doctrines.[92] Individuals in Europe turning more and more to 'soft courts' at the United Nations, therefore, suggests that individuals are seeking to compensate for the reduction of ECtHR's normative leadership in the progressive development of human rights law in a wide range of pressing human rights contexts.

VI. Conclusion

This article has addressed the question of how to make sense of the aging process of the ECHR as it turned 70 and whether the interpretive outlook the Court has set itself for interpreting the Convention has transformed, in particular in the last two decades. In so doing, the article has argued that one way of appraising the process of the aging of the Convention is through an analysis of the changes in the structure of the interpretive doctrines developed by the Court. It has further argued that a dual structure comprised of effective interpretation of human rights and allowing a breathing space for national protections of human rights to develop its member states has overtime given way to a strong presumption of deference to national authorities both in admissibility and merits review. The most vibrant and fast developing case law of the Court in the last two decades, under Article 18 of the Convention, focussing on detection of abuse of powers by member states of the Council of Europe, does not change this course of development, and may further entrench the due deference presumption, save for in the most egregious cases. This reading of the aging of the Convention has two important implications. First, the Convention is no longer seen as an *avant garde* developer of human rights law, but as a conservative protector of minimum safeguards for the functioning of national democratic orders. The Court's interpretive outlook may indeed be at the crossroads of settling into a new structural binary between rewarding what it deems to be good faith national interpreters of existing standards and seeking to remain vigilant towards the egregious bad faith interpreters of the Convention. Second, the Court's economical use of effective interpretation doctrines make the Court vulnerable to the historic charge of the civilisational standard complacency in Europe by perpetuating the understanding that old Europe and its institutions are more or less capable of protecting human rights in Europe. There is, however, no doubt that as the Convention

92 Stephanie Berry, 'A "Good Faith" Interpretation of the Right to Manifest Religion? The Diverging Approaches of the European Court of Human Rights and the UN Human Rights Committee', LS 37 (2017), 672-694.

continues to age, the calls for its effective interpretation and adaption to ever shifting context of human rights-based demands will continue.[93] Whether the bottom-up human rights movements across Europe, be they in the field of migrants rights, the climate crisis, digital rights or anti-discrimination demanding that the Court leads rather than follows would once again create a new impetus for re-imagining effective interpretation will thus remain an open question for years to come.

93 See, ECtHR, *Cláudia Duarte Agostinho and others v. Portugal and 32 states*, communicated on 13 November 2020, no. 39371/2; ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, communicated on 17 March 2021, no. 53600/20.

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