Coping with crisis: whither the variable geometry in the jurisprudence of the european court of human rights+

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ABSTRACT

This article offers a new take on the diagnosis of the crisis of the European human rights system by focusing on the diversification of the attitudes towards the European Court of Human Rights by national compliance audiences, namely domestic executives, parliaments, and judiciaries. This diagnosis holds that national compliance audiences of the European Court of Human Rights can no longer be characterized as lending overall support to the human rights acquis of Europe, that centers around the European Court of Human Rights as the ultimate authoritative interpreter of the Convention. Instead, alongside states that continue to lend overall support to the Court's authority over the interpretation of the Convention, two new attitudes have developed towards the Convention across the Council of Europe. First, there are now national compliance audiences that demand co-sharing of the interpretation task with the European Court of Human Rights. Second, there are national compliance audiences that flaunt well-established Convention standards, not merely by error, or lack of knowledge of adequate application, but with suspect grounds of intentionality and lack of respect for the overall Convention acquis. Following this diagnosis, I argue that instead of holding on to a business as usual attitude, the Court has also developed coping strategies in order to handle this fragmentation by investing in a human rights jurisprudence of a variable geometry, recognizing differentiation in the individual circumstances of states as a basis for human rights review.

INTRODUCTION

The European Court of Human Rights, its continuously evolving case law, and the effects of its judgments in domestic, transnational, and international contexts have attracted significant academic attention from multidisciplinary perspectives. Scholars of the European Court of Human Rights

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have studied the genesis and development of the Convention system,[1] issue-specific contributions of the Court's case law to human rights interpretation over time,[2] and the interpretive canons of the European Court of Human Rights.[3] Academic work has also focused on the reception of the

1 *ED BATES,* THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2010); THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS (*Jonas Christoffersen & Mikael Rask Madsen* (eds.) 2011; *Mikael Rask Madsen*, From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics, 32 LAW SOC. INQ. 137 (2007) [hereinafter From Cold War Instrument to Supreme European Court].

2 See generally *MARIE-BÉNÉDICTE DEMBOUR,* WHEN HUMANS BECOME MIGRANTS: STUDY OF HUMAN RIGHTS WITH AN INTER-AMERICAN VIEWPOINT (2015); DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR (*Eva Brems* (ed.), 2012); *JAMES A. SWEENEY,* THE EUROPEAN COURT OF HUMAN RIGHTS IN THE POST COLD WAR ERA: UNIVERSALITY IN TRANSITION (2013); *Antoine Busye*, Dangerous Expressions: The ECHR, Violence and Free Speech, 63 INT'L & COMP. L.Q. 491 (2014); *Lourdes Peroni & Alexandra Timmer*, Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law, 11 INT'L J. CONST. L. 1056 (2013).

3 See generally *Yutaka Arai-Takahashi*, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002); *Andreas Føllesdal, Birgit Peters & Geir Ulfstein* (eds), CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN, AND GLOBAL CONTEXT (2013); *Jonas Christoffersen*, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2009); *Laurens Lavrysen,* HUMAN RIGHTS IN A POSITIVE STATE: RETHINKING THE RELATIONSHIP BETWEEN POSITIVE AND NEGATIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2016); *GEORGE LESTAS,* A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007); ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004); *DIMITRIS XENOS,* THE POSITIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS (2012); *Oddný Mjöll Arnardóttir,* Rethinking the Two Margins of Appreciation, 12 EUR. CONST. L. REV. 27 (2016); *Eva Brems*, The 'Logics' of Procedural Review by the European Court of Human Rights, in: PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES 17 (*Janneke Gerards & Eva Brems* (eds.), 2017); *Eva Brems & Laurens Lavrysen,* Procedural Justice in Human Rights Adjudication: The European Court of Human Rights, 35 HUM. RTS. Q. 176 (2013); *Başak Çalı*, Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions, 29 HUM. RTS. Q. 251 (2007); *Kanstantsin Dzehtsiarou*, European Consensus and the Evolutive Interpretation of the European Convention on Human

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Strasbourg case law in domestic contexts,[4]compliance with the judgments of the European Court of Human Rights,[5] as well as the normative and social legitimacy of the Court.[6]

A central theme in these studies is the nature of the European Convention on Human Rights as a "living instrument" and the necessity for the case law of the European Court of Human Rights, as the authoritative interpreter of human rights for its forty-seven member states to respond to its wider political and legal contexts. The case law of the European Court

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Rights, 12 GER. L.J. 1730 (2011); *Janneke Gerards*, How to Improve the Necessity Test of the European Court of Human Rights, 11 INT'L J. CONST. L. 466 (2013); *Laurence R. Helfer*, Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, 19 EUR. J. INT'L L. 125 (2008); *George Letsas*, The Truth in Autonomous Concepts: How to Interpret the ECHR, 15 EUR. J. INT'L L. 279 (2004); *Alastair Mowbray*, A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights, 10 HUM. RTS. L. REV. 289 (2010); *Dean Spielmann*, Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine; Waiver of Subsidiarity of European Review?, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381 (2012).

4 *Helen Keller & Alex Stone Sweet* (eds)., A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (2008); ALICE DONALD, JANE GORDON & PHILIP LEACH, EQUAL & HUMAN RIGHTS COMM'N, THE UK AND THE EUROPEAN COURT OF HUMAN RIGHTS (2012); *David Kosar*, Nudging Domestic Judicial Reforms from Strasbourg: How the European Court of Human Rights Shapes Domestic Judicial Design, 13 UTRECHT L. REV. 112 (2017).

5 *DIA ANAGNOSTOU*, EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTING STRASBOURG'S JUDGMENTS ON DOMESTIC POLICY (2013); *COURTNEY HILLEBRECHT*, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE (2014); *PHILIP LEACH ET AL.*, RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF 'PILOT JUDGMENTS' OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL (2010).

6 *Patricia Popelier, Sarah Lambrecht & Koen Lemmens* (eds), CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS (2016); *Richard Bellamy*, The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights, 25 EUR. J. INT'L L. 1019 (2014); *Başak Çali, Anne Koch & Nicola Bruch*, The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights, 35 HUM. RTS. Q. 955 (2013); *Andreas Føllesdal*, The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights, 40 J. SOC. PHIL. 595 (2009); *Mikael Rask Madsen*, The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash, 79 LAW & CONTEMP. PROBS. 141 (2016).

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of Human Rights has shown, and continues to show, that interpretation of the Convention by the Court does not take place ina legal and political vacuum. The Court's case law, for better or worse, has always shown sensitivity, not only to what is a desirable moralinterpretation of rights,[7] but also what is a reasonable and a feasible interpretation of the Convention, given the type of rights at stake,[8] the state of the European[9] or international consensus[10] on the scope of specific rights, and whether the complexity of issues at stake may besuch that "opinions within a democratic society might reasonably differ widely" on the interpretation of the scope of a right.[11]

A central debate that the European Court of Human Rights has grappled with in the past fifteen years has been whether it has been, and is, facing a crisis and whether it needs further reform.[12] The crisis talk about the European Court of Human Rights is multifaceted. Some focus on the unprecedented rise of repetitive cases, numbering hundreds of thousands, in the docket of the Court that has precipitated ongoing reforms as to how the Court handles its caseload.[13] Others focus on the backlash against the Court, in particular from parliaments and judiciaries of well-established democracies, who argue that the European Court of Human Rights may have gone too far in its (expansive) interpretation of rights as a living instrument, at the expense of the margin of appreciation that domestic

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7 Rantsev v. Russia, 2010-I Eur. Ct. H.R. 65, 123.

8 Hatton v. United Kingdom, 2003-VII Eur. Ct. H.R. 189, 217 (discussing wide margin of appreciation when economic development projects are at stake).

9 A v. Ireland, 2010-VI Eur. Ct. H.R. 185, 189; Bayatyan v. Armenia, 2011-IV Eur. Ct. H.R. 1, 4; X v. Austria, 2013-II Eur. Ct. H.R. 1, 6.

10 Demir v. Turkey, 2008-V Eur. Ct. H.R. 395, 398.

11 Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, 380.

12 COUNCIL OF EUR. STEERING COMM. FOR HUMAN RIGHTS, THE LONGER-TERM FUTURE OF THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2015), https://book.coe.int/usd/en/online-bookshop/7178-pdf-the-longer-term-future-of-the-system-of-the-european-convention-on-human-rights.html (last accessed 6 december 2021); *Spyridon Flogaitis, Tom Zwart & Julie Fraser* eds., THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS: TURNING CRITICISM INTO STRENGTH (2013); *STEVEN GREER*, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS (2006); *Steven Greer*, What's Wrong With the European Convention on Human Rights?, 30 HUM. RTS. Q. 680 (2008).

13 EUROPEAN LAW INST., STATEMENT ON CASE OVERLOAD AT THE EUROPEAN COURT OF HUMAN RIGHTS 11–12 (2012), http://www.europeanlawinstitute.eu/projects/publications/.

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authorities should be given.[14] Yet, others focus on the "implementation crisis" of the judgments of the European Court of Human Rights, emphasizing that the number of states outright ignoring or arguing that they do not need to comply with all judgments of the Court have considerably increased over the years.[15]

In this article, I have two aims. First, as a point of departure, I aim to offer a new take on the diagnosis of the crisis of the European human rights system by focusing on the diversification of the attitudes towards it by national compliance audiences, namely domestic executives, parliaments and judiciaries. This diagnosis holds that national compliance audiences of the European Court of Human Rights can no longer be characterized as lending an overall support to the human rights acquis of Europe, that centers around the European Court of Human Rights as the ultimate authoritative interpreter of the Convention. Instead, alongside states that continue to lend overall support to the Court's authority over the interpretation of the Convention, two types of new attitudes have developed towards the Convention across the Council of Europe. First, there are now national compliance audiences that demand co-sharing of the interpretation task of the Convention with the European Court of Human Rights. These audiences demand to share the interpretive work with respect to the scope of, and restrictions on, Convention rights based on the quality of their own decision-making procedures for human rights interpretation nationally.

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14 *Katja Ziegler, Elizabeth Wisk & Loveday Hodson* (eds.) THE UK AND EUROPEAN HUMAN RIGHTS: A STRAINED RELATIONSHIP? (2015); *Tilmann Altwicker,* Switzerland: The Substitute Constitution in Times of Popular Dissent, in *Patricia Poperlier, Sarah Lambrecht & Koen Lemmens* (eds.), CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 385 (2016); *B. M. Oomen,* A Serious Case of Strabourg-bashing? An Evaluation of the Debates of the Legitimacy of the European Court of Human Rights in the Netherlands, 20 INT'L J. HUM. RTS. 407 (2016); *Michael Reiersten*, Norway: New Constitutionalism, New Counter-Dynamics?, in CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 361 (*Patricia Poperlier, Sarah Lambrecht & Koen Lemmens* (eds.), 2016); *Hendrik Wenander*, European Court of Human Rights Endorsement with Some Reservations, in CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS 239 (*Patricia Poperlier, Sarah Lambrecht & Koen Lemmens* (eds.)) (2016).

15 In 2016, the Committee of Ministers reported that the total number of unimplemented cases was just fewer than 10,000. See COMM. OF MINISTERS, COUNCIL OF EUR., ANNUAL REPORT 2016: SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS 9 (2016), https://rm.coe.int/1680706a3d/; see also *Nils Muiznieks,* The Future of Human Rights Protection in Europe, 24 SEC. & HUM. RTS. 43, 45 (2013).

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Second, there are national compliance audiences that flout the well-established Convention standards, not merely by error, or lack of knowledge of adequate application, but with suspect grounds of intentionality and lack of respect for the overall Convention acquis. Following this diagnosis, I argue that instead of holding on to a business as usual attitude, the Court has developed coping strategies in order to handle the fragmentation of the attitudes of its audiences, adjusting itself to the demands for less Strasbourg interpretive interference or none at all.[16]

This article's central argument is that the European Court of Human Rights has responded to the fracture of the overall attitudes of its national audiences towards the Convention by investing more in a human rights jurisprudence of a variable geometry, recognizing differentiation in the individual circumstances of states as a basis for human rights review.[17] Specifically, the Court has developed two novel lines of substantive rights jurisprudence: (1) new procedural review standards that allow the European Court of Human Rights to defer to national authorities who are deemed to act in good faith when applying the Convention and interpreting the Convention; and (2) an emerging novel bad faith jurisprudence under Article 18 of the Convention through which the Court is able to

16 The responses of the Court to its repetitive case law crisis also has an important remedial response dimension, in the form of the development of the pilot judgment procedure and as well as the introduction of the yet never practiced infringements proceedings under Article 46 of the European Convention for states that do not comply with the judgments of the Court. This remedial jurisprudential response is beyond the scope of this study. On the evolving remedy jurisprudence of the European Court of Human Rights, see Philip Leach, No Longer Offering Fine Mantras to a Parcel Child? The European Court's Developing Approach to Remedies, in: *Andreas Follesdal & Geir Ulfstein* (eds.), CONSTITUTING EUROPE: THE EUROPEAN CONVENTION IN A NATIONAL, EUROPEAN AND NATIONAL CONTEXT 142 (2013). On the infringement proceedings, see *Fiona de Londras & Kanstantsin Dzehtsiarou*, Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights, 66 INT'L & COMP. L.Q. 467 (2017).

17 See, e.g., *Andrew Cornford*, Variable Geometry for the WTO: Concept and Precedents, UNCTAD/OSG/DP/2004/5 (2004); *Mike Goldsmith*, Variable Geometry, Multilevel Governance: European Integration and Subnational Governance in the New Millenium, in: THE POLITICS OF EUROPEANIZATION (*Kevin Featherstone & Claudio Maria Radaelli* (eds.), 2003); *Craig Van Grasstek & Pierre Sauvé*, The Consistency of WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?, 9 J. INT'L ECON. L. 837 (2006); *John A. Usher*, Variable Geometry or Concentric Circles: Patterns for the European Union,46 INT'L & COMP. L.Q. 243 (1997).

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identify not only that a Convention right was violated, but that it was violated in bad faith[18]

In what follows, Part I lays out the fracture of the attitudes of the Court's national audiences towards the European Court of Human Rights, in particular since the 2000s. It shows that demands for more good-faith deference to national institutions, led by the United Kingdom, and practices of bad faith disrespect of the Convention that have arisen inthe case of reversed or stalled democratic transitions in Eastern Europe and the Caucasus have simultaneously put the Court's ability to treat all the national audiences it faces equally under strain. Part II analyzes how the Court has coped with this fracture through its substantive case law, first by elucidating a novel standard in respect of the margin of appreciation based on who the Court deems to be good faith interpreters and thus guardians of the Convention and, secondly, by developing a badfaith jurisprudence under Article 18 for those states that show disrespect for the Convention values. Part III assesses the implications of what may now be termed as a more pronounced variable geometry of jurisprudence of the Court that differentiates between the underlying attitudes of national authorities to the Convention. In conclusion, I reflect on whetherthese coping strategies will enable the Court's jurisprudence to incentivize better human rights interpretation nationally, or whether this new multi-faceted jurisprudence may deepen the crisis by leaving the Court vulnerable to charges of double standards.

I. A CONVENTION EUROPE THAT NO LONGER IS

The evolution of the European Court of Human Rights from a Cold War institution with a small national audience and hardly any cases in

18 Merabishvili v. Georgia, App. No. 72508/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-178753; Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-161416; Mammadov v. Azerbaijan, App. No. 15172/13, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-144124; Tymoshenko v. Ukraine, App. No. 49872/11, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-119382; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-112013; Cebotari v. Moldava, App. No. 35615/05, Eur. Ct. H.R. (2008), http://hudoc.echr.coe.int/eng?i=001-83247; Gusinskiy v. Russia, 2004- IV Eur. Ct. H.R. 129; see also Helen Keller & Corina Heri, Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights Untapped Potential to Protect Democracy, 36 HUM. RTS. L.J. 1

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its docket in its early days of the 1960s[19] to an influential human rights court right through the 1970s and 1980s is well documented.[20] A central feature of the rise in the influence of the European Court of Human Rights in the 1970s and throughout the 1980s was its relatively homogenous domestic audiences in Western Europe.[21] The old and founding members of the Convention demonstrated respect for the Court's interpretive authority of the Convention, even if at times, they offered slow or begrudging compliance with its judgments.[22] That the Court was delivering a European public good, for all the members of the Council of Europe, through its development of European human rights law, however, was not fundamentally contested.[23] This overall support for the Convention enabled commentators, in the mid-1990s, to hail the Convention system as a "remarkable success" and a model forcomparative learning.[24]

The expansion of the jurisdiction of the European Court of Human Rights beyond Western European states started in 1990 with Turkey accepting the Court's compulsory jurisdiction.[25] For most of its early years under the jurisdiction of the Court, Turkey was under a state of emergency and carried out policies that were suspected of constituting gross human rights violations,[26]cases unfamiliar to the Court's docket at that time. A flood of gross human rights violations cases against Turkey followed the acceptance of compulsory jurisdiction.[27] Through the Turkish cases, the European Court of Human Rights started to address large volumes of right

19 From Cold War Instrument to Supreme European Court, supra note 1.

20 Id.

21 From 1953 to 1990 twenty-one Western European member states accepted the optional compulsory jurisdiction of the ECtHR – Denmark (1953), Ireland (1953), Netherlands (1954), Belgium (1955), Germany (1955), Austria (1958), Iceland (1958),Luxembourg (1958), Norway (1964), United Kingdom (1966), Malta (1967), Italy (1973), France (1981), Switzerland (1974), Sweden (1976), Portugal (1978), Greece (1985), Spain (1981), Lichtenstein (1982), Cyprus (1988), San Marino (1989). See COUNCIL OF EUR., 1994 Y.B. EUR. CONV. ON H. R 1, 21.

22 See *DAVID HARRIS ET AL*., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 29–31, 3d ed. (2014).

23 *Çali, Koch & Bruch,* supra note 6.

24 *Laurence R. Helfer & Anne-Marie Slaughter,* Toward a Theory of Effective Supranational Adjudication, 103 YALE L.J. 273 (1997).

25 See COUNCIL OF EUR., supra note 21.

26 See *Aisling Reidy, Françoise Hampson & Kevin Boyle*, Gross Violations of Human Rights, Invoking the European Convention on Human Rights in the Case of Turkey, 15 NETH. Q. HUM. RTS. 161 (1997).

27 *Başak Çali,* The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before

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to life, torture, and disappearance cases, bringing its jurisprudence closer to that of the Inter-American Court of Human Rights.[28] The extension of the Court's reach to Turkey and the flood of cases this caused may have been a signal of things to come, with the expansion of the Convention to an audience of Eastern, Central European, and Caucasus states in various stages of transition from communist regimes to rule of law democracies in the 1990s and 2000s. That expansion, of course, also covered Russia. But with the end of the Cold War, bringing the Convention to the states of a new and wider Europe was seen as worth the risks this may bring to the relatively homogenous Convention audience of the 1980s.[29] The Court's jurisdiction covered eighteen states in 1990.[30] This expanded to thirty-six states in 1997[31] and to forty-seven by 2007.[32] In line with this expansion, the caseload of the Court, too, saw a significant increase, often made up of repetitive violations of the Convention, pointing to systemic and structural problems in ensuring respect for the Convention.[33]

The initial expansion of the Council of Europe to cover Eastern and Central Europe took place at the time when the Council of member states also opted for a stronger judicialisation of the Convention system. The Commission and the opt in Court system was abandoned in 1998 and the Court became a compulsory full-time Court for all members of

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the European Court of Human Rights, 1996-2006,35 LAW & SOC. INQ. 311, 312 (2010).

28 Id.

29 *Pamela A. Jordan*, Does Membership Have its Privileges? Entrance into the Council of Europe and Compliance with Human Rights Norms, 25 HUM. RTS. Q. 660 (2003). But see *Mark Janis*, Russia and the Legality of Strasbourg Law, 8 EUR. J. INT'L L. 93 (1997).

30 See COUNCIL OF EUR., supra note 21.

31 Finland (1990), Turkey (1990), Czech Republic (1992), Bulgaria (1992), Slovak Republic (1992), Hungary (1992), Poland (1993), Romania (1994), Slovenia (1994), Lithuania (1995), Estonia (1996), Albania (1996), Andorra (1996), Latvia (1997), Moldova (1997), FYROM(1997), Ukraine (1997), Croatia (1997).See Chart of signatures and ratifications of Treaty 005, COUNCIL OF EUR. TREATY OFFICE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=vFZ7AeW4 (last accessed Jan. 6, 2018).

32 Finland (1990), Turkey (1990), Czech Republic (1992), Bulgaria (1992), Slovak Republic (1992), Hungary (1992), Poland (1993), Romania (1994), Slovenia (1994), Lithuania (1995), Estonia (1996), Albania (1996), Andorra (1996), Latvia (1997), Moldova (1997), FYROM(1997), Ukraine (1997), Croatia (1997), Russian Federation (1998), Georgia (1999), Armenia (2002), Azerbaijan (2002), Bosnia and Herzegovina (2002), Serbia (2004), Montenegro (2004), Monaco (2005). Id.

33 See EUR. COURT OF HUMAN RIGHTS, ANNUAL REPORT 2010 14 (2011), http://www.echr.coe.int/Documents/Annual_report_2010_ENG.pdf.

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the Council of Europe,[34] showing the strong support for the European Court of Human Rights amongst its Western European members as the ultimate interpreter of the Convention at the time. Supported by its Western European founders, the European Court of Human Rights has thus embarked on the role of a transmission belt of human rights values developed through its case law to its new and enlarged national compliance audiences. In this process, the Committee of Ministers of the Council of Europe, the political arm that supervises the execution of human rights judgments, further confirmed the centrality of the role of the European Court of Human Rights by asking for more guidance from it in the execution process of human rights judgments.[35] In other words, even in the first half of the 2000s, the central presumption was that the Court enjoyed overall support and backing from its old member states and the central task of the Court was understood as diffusing Convention norms, as interpreted by the Court, for all.

A. FRACTURES AMONGST WESTERN EUROPEAN FOUNDERS: THE UNITED KINGDOM IN THE LEAD

This attempt to cultivate a unified attitude towards the Convention system in the new members, however, faced what may have been an unexpected challenge from one of the original founders of the Convention system, the United Kingdom, from the mid-2000s onwards. This challenge, over time, has gathered support, even if less vocal, outside of the UK,[36] and, thus, has been an important catalyst in the subsequent division in attitudes of overall support towards the Convention system among the Western European founders. It is for this reason that a more detailed tracing of the UK's destabilization of the Western European human rights acquis requires attention.

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

35 Comm. of Ministers, Resolution of the Comm. of Ministers on Judgments Revealing an Underlying Systemic Problem, 114th Sess., Doc. No. Resolution Res (2004)3 (2004), https://wcd.coe.int/ViewDoc.jsp?p=&id=743257&Lang=fr&direct=true.

36 See *Oomen* supra note 14; see also *Altwicker*, supra note 14; *Reiertsen*, note 14; *Wenander*, supra note 14.

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The UK accepted the compulsory jurisdiction of the Court in 1966.[37] Following on from that, the Court has played an important role in the UK human rights scene, both domestically and with respect to its colonies and extra territorial military presence.[38] Whilst the UK had raised its disagreements with cases decided against it by the Court throughout engagement, it has remained a complier with the judgments, even if it was, at times, a begrudging complier.[39] Despite this, it was only in 2000 that the Human Rights Act came into force in the UK, incorporating the Convention into the British domestic legal order and making the Convention rights directly justiciable in UK courts.[40] An intense domestic engagement with the Convention in the domestic courts, including the then UK House of Lords, followed.[41]

In 2005, two particular events kick-started a debate in the UK concerning the European Court of Human Rights as the rightful and ultimate interpreter of the Convention. First, on July 7, 2005, London faced the most serious terrorist attack on its soil since the time of the conflict in Northern Ireland.[42] In response to this, the UK Government began a concerted effort

37 Declarations made to the Secretary-General of the Council of Europe by the Government of the United Kingdom of Great Britain and Northern Ireland Recognizing the Competence of the European Commission of Human Rights to Receive Individual Petitions and Recognizing as Compulsory the Jurisdiction of the European Court of Human Rights, (Strasbourg, 14 Jan. 1966), http://treaties.fco.gov.uk/docs/fullnames/pdf/1966/TS0008%20(1966)%20 CMND-%202894%201966%2014%20 JANUARY%20 STRASBOURG%3B%20 DECLARATIONS%20TO%20SECRETARY-GENERAL%20OF%20COUNCIL%20OF%20EUROPE%20BY%20NI%%2020RECOGNISING%2%200COMPETENCE%20OF%20%20HUMAN%20RIGHTS.PDF

38 *Donald, Gordon & Leach*, supra note 4. 39 Courtney Hillebrecht, Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights, 13 HUM. RTS. REV. 279 (2012).

39 *Courtney Hillebrecht*, Implementing International Human Rights Law at Home: Domestic Politics and the European Court of Human Rights, 13 HUM. RTS. REV. 279 (2012).

40 Section 6 of the Human Rights Act requires all public authorities to act in a way which is compatible with the Convention rights unless primary legislation requires them to act otherwise. Human Rights Act 1998, c. 42, § 6 (UK).

41 Th*omas Poole & Sangeeta Shah,* The Law Lords and Human Rights, 74 MOD. L. REV. 79 (2011).

42 7 July London Bombings: What happened that day?, BBC NEWS (July 3, 2015), http://www.bbc.com/news/uk-33253598.

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to deport individuals who may pose a national security risk to the UK.[43] This policy included the securing of diplomatic assurances from receiving states prior to the deportation of non-nationals suspected of posing security risks.[44] This received pushback from the European Court of Human Rights with respect to deportations to countries where the Court saw risks of torture and inhuman treatmentand unfair trials.[45] Second, on October 6, 2005, the European Court of Human Rights delivered the *Hirst v. UK* judgment, which found that the UK ban on prisoner voting was incompatible with the Convention.[46] Thisjudgment was seen as too intrusive by the UK Parliament on its prerogative to decide on the distribution of democratic rights across its citizenship.[47] Whilst the Labour Party was still in power, in 2006, a Conservative Party backbencher, Douglas Carswell, submitted a report to the Joint Parliamentary Committee on Human Rights entitled "Why the Human Rights Act must be scrapped" signaling that the UK rights culture was under threat from Strasbourg.[48] Whilst this report did not at the time register any shockwaves in Strasbourg, in 2009, a widely circulated speech by Lord Hoffman, a member of the House of Lords, did.[49] In this speech, Lord Hoffman epitomized the decay of the European human rights acquis in the UK. In what has subsequentlybecome a core (and unfortunately worded) objection to the ultimate interpreter role of the European Court of Human Rights Lord Hoffman stated, "it cannot be right that the balance we in this country strikebetween freedom of the press and privacy should be decided by a Slovenian judge saying of a decision of the German Constitutional Court."[50]

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43 Full text: The prime minister's statement on anti-terror measures, GUARDIAN (Aug. 5, 2005), https://www.theguardian.com/politics/2005/aug/05/uksecurity.terrorism1.

44 Id.

45 See Othman (Abu Qatada) v. United Kingdom, 2001-I Eur. Ct. H.R. 159.

46 Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187.

47 A motion was passed in the UK's House of Commons on 10 February 2011 in which it was noted that the issue of prisoners' voting rights was a matter for 'democratically elected lawmakers.' *Alexander Horne & Isobel White*, PRISONERS' VOTING RIGHTS (2005 TO MAY 2015)33–37 (2015), http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01764#fullreport.

48 JOINT COMMITTEE ON HUMAN RIGHTS, THIRTY-SECOND REPORT, 2005–06, (HOUSE OF COMMONS) (UK).

49 *Leonard Hoffman*, Lord of Appeal in Ordinary, The Universality of Human Rights, Address at the Judicial Studies Board Annual Lecture (Mar. 19, 2009).

50 Id. at 36.

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Soon after this pushback to the ultimate interpretive authority of the European Court of Human Rights, the Conservative Party came into power in the UK in May 2010.[51] Commenting on the *Hirst v. UK* judgment, the new UK Prime Minister went on record to say that the judgment made him "physically ill," thus signaling that the executive branch, too, had grave concerns over the Strasbourg Court which aligned with the criticisms made by Lord Hoffman.[52] By this time, non- compliance with the *Hirst* judgment had filled the docket of the Strasbourg Court with repetitive cases from prisoners in the UK.[53] The European Court of Human Rights, therefore, delivered a pilot judgment, a procedure devised primarily for the new Eastern and Central European members in democratic transition,[54] in the *Greens and MT v. UK* asking the UK authorities to find a legislative solution to the repetitive cases from prisoners within six months.[55] To date, this judgment remains unimplemented, although twelve years after *Hirst*, the UK authorities submitted an action plan in November 2017 to implement the judgment.[56]

This move by the Court, treating the UK like any other member of the Convention acquis, resulted in a third backlash, this time from the UK Parliament. On February 10, 2011, MPs voted overwhelmingly in favour of maintaining a blanket ban on preventing prisoners from voting.[57] This cross-party vote against a judgment of the European Court of Human Rights was justified by many in the UK Parliament due to a sense that Strasbourg was unduly expanding the scope of interpretation of the

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51 Election 2010, BBC NEWS, http://news.bbc.co.uk/2/shared/election2010/results/ (last accessed Mar. 3, 2018).

52 *Andrew Hough*, Prisoner vote: what MPs said in heated debate, TELEGRAPH (Feb. 11, 2011, 6:45 AM), https://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in- heated-debate.html.

53 Greens. v. United Kingdom, 2010-VI Eur. Ct. H.R. 57; see also Firth v. United Kingdom, App. No. 47784/09, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-146101; McHugh v. United Kingdom, App. No. 51987/08, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-151005; Millbank v. United Kingdom, App. No. 44473/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng/?i=001-163919.

54 *Antoine Buyse*, The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges, 57 NOMIKO VIMA 1890 (2009).

55 Greens, 2010-VI Eur. Ct. H.R. at 78.

56 Communication from the United Kingdom to the Council of Europe concerning the Action Plan to implement the Hirst (No. 2) v. the United Kingdom ((Application No. 74025/01) and other prisoner voting cases, 2 November 2017, DH-DD(2017)1229, https://rm.coe.int/1680763233.

57 523 PARL. DEB., H.C. (2011) col. 584 (U.K.).

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Convention rights at the expense of the well qualified domestic national authorities.[58] By 2015, the Conservative Party included the denunciation of the European Convention on Human Rights in its election manifesto.[59]

The questioning, by the UK, of the ultimate authority of the European Court of Human Rights to lead human rights interpretation in Europe did not remain a domestic affair. The UK also brought this domestic change in the attitudes towards the Convention system to the Council of Europe and demanded a concerted political reaction to the Court's expansive interpretation from other member states. A culmination of this has been the High Level Conference on the Future of the European Convention of Human Rights hosted by the UK in Brighton in 2012.[60] At this conference, after much political and diplomatic talk to keep the human rights acquis intact, the UK won a concession from the supporters of the Convention system to insert a paragraph into the Preamble of the Convention, which places a special emphasis on subsidiarity and margin of appreciation in the Convention system.[61] The newly found heightened emphasis on the concept of subsidiarity was a call to the Court to let go of its claim to be the sole interpreter of the Convention and to recognize the domestic

58 Id. at cols. 498–505.

59 U.K. CONSERVATIVE PARTY, CONSERVATIVE PARTY MANIFESTO 2015 73 (2015).

60 *Vaughne Miller & Alexander Horne,* THE UK AND REFORM OF THE EUROPEAN COURT OF HUMAN RIGHTS 1 (2012).

61 EUR. COURT OF HUMAN RIGHTS, High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration, para. 12(b) (2012) [hereinafter Brighton Declaration], http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

> The States Parties and the Court share responsibility for realizing the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, inter alia, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.

Id. Protocol 15, which shall incorporate this into the preamble of the Convention has not yet come into force as the Protocol has not yet been ratified by all forty seven members of the Council of Europe. For the status of ratifications of Protocol 15, see Chart of signatures and ratifications of Treaty, TREATY OFFICE (Feb. 31, 2018), https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=aCWRGPbJ.

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authorities as co-interpreters of the Convention rights.[62] The Brighton Declaration and resulting protocols thus turned the UK's specific demands into a European political document signaling a demand for deferential directionto good faith domestic interpreters in the jurisprudence of the Court.

B. THE NEW EUROPE: RISE OF REVERSE TRANSITIONS AND ILLIBERAL DEMOCRACIES

The Convention system's expansion eastward, all the way to Vladivostok and the Caspian Sea, was based on the assumption that the Convention principles would in time be diffused in the laws, judicial decisions, and political attitudes in newly emerging European democracies. For most of Eastern and Central Europe, the accession to the European Convention system pre-dated the accession process to the European Union (EU).[63] The EU funded major training projects on the European Convention System in all the new member states of the Council of Europe with a view to entrench the Convention acquis in the new Europe.[64] Whilst the cases coming from the new member states of the Council of Europe steadily increased over the years, this has not been seen as posing an "attitude problem" towards the Convention system or the role of the Court in interpreting the Convention for the new members of the European fam-

62 On normative support for the co-interpreter theory for the Convention, see *Samantha Besson*, Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 279 (*Rowan Cruft, S. Matthew Liao & Massimo Renzo* eds., 2015).

63 Hungary, Poland, Bulgaria, Estonia, Slovenia, Czech Republic, Lithuania, Slovakia, Romania, Latvia and Croatia all joined the Council of Europe between 1990 and 1996. Most of the above joined the EU in 2004, with Romania and Bulgaria joining in 2007 and Croatia in 2013. See COUNCIL OF EUR, supra note 21.

64 For an overview of ongoing and completed projects in Eastern and Southern Europe, including the Russian Federation and Turkey, see Southeast Europe and Turkey, COUNCIL OF EUR., http://www.coe.int/en/web/national-implementation/projects-by-geographical-area/south-east-europe-turkey (last visited Jan. 28, 2018). See also Eastern Partnership Countries and the Russian Federation, COUNCIL OF EUR., http://www.coe.int/en/web/national-implementation/projects-by-geographical-area/eastern-partnership-countries-and-russian-federation (last visited Jan. 28, 2018).

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ily.[65] In this process, the Court's jurisprudence, too, has become richer and focused on new terrain, such as institutionaljudicial reform[66] and transitional justice.[67] In effect, the Convention system was broadly regarded as helping the new member states to democratize and restructure their administration of justice systems.[68] Given the lack of outright challenges to the Convention system by itsnew members, the Court's crisis from the perspective of the new members has often appeared to be one of inadequate implementation,lack of knowledge of the Convention, or lack of capacities or resourcesto give effect to the Convention.[69]

Attitudes amongst the newer members towards the Convention, however, have seen significant changes since the early 2000s. In particular, in the past decade, instead of steady democratic transitions, Europe has seen the emergence of new forms of national governance that range from authoritarian or semi/competitive authoritarian regimes to illiberal democracies.[70] Whilst categorizing different states is often amatter of debate both as regards empirical accuracy and political correctness – be they called stalled/reversed democratic transitions or semi/competitive authoritarian regimes – these anti-democratic governance structures that stand in direct conflict with the Convention acquis extend to the Caucasus, Russia, Turkey, Ukraine, and also into European Union member states, such as Hungary and Poland.

What is common in this new terrain of national compliance audiences is not just their minimal commitment to formal democratic institutions, such as elections, but their attitude in favour of limiting protections of civ-

65 *Helen Keller & Alex Stone Sweet* (eds.), A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (2008); *Leonard M. Hammer & Frank Emmert* (eds.), THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN CENTRAL AND EASTERN EUROPE (2012).

66 *David Kosa & Lucas Lixinski*, Domestic Judicial Design by International Human Rights Court, 109 AM. J. INT'L L. 713, 715 (2015).

67 *James Sweeney,* Restorative Justice and Transitional Justice at the ECHR, 12 INT'L CRIM. L. REV. 313.

68 *Cali, Koch and Bruch*, supra note 6.

69 *Lisa McIntosh Sundstrom*, Advocacy Beyond Litigation: Examining Russian NGO Efforts on Implementation of European Court of Human Rights Judgments, 45 COMMUNIST & POST- COMMUNIST STUD. 255 (2012).

70 See *Steven Levitsky & Lucan A. Way*, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR (2010); See also *Marina Ottaway,* DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM (2013).

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il and political rights if opposition groups demand these rights.[71] What is more, semi-authoritarian regimes typically exercise strong control over the judiciary or curb the powers of the judiciary and thus prevent the Convention standards from having any real purchase as domestic legal remedies.[72] For semi-authoritarian regimes, the attitude towards the Convention system is no longer a good faith acceptance of the standards developed by the European Court of Human Rights. Instead, these regimes offer a systemic challenge to the authority of the Convention system and the Convention's non- negotiable structural requirement of pluralist democracy and rule of law as underpinning human rights protections. In 2015, for example, the Russian Federation amended the Federal constitutional law on the Constitutional Court of Russian Federation to empower the Constitutional Court to decide whether the judgments of the ECtHR are 'enforceable' under the Russian Constitutional system.[73] Similarly, Turkey's President Erdoğan vowed to bring back the death penalty in Turkey, despite the fact that the abolishment of death penalty is a non-negotiable value of the Convention acquis and a prerequisite to membership to the Council of Europe.[74] The European Court of Human Rights' ever-rising repetitive

71 Id.

72 See Cengiz v. Turkey, Apps. Nos. 48226/10 & 14027/11, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-159188.

73 See *Ilya Nuzov*, Russia's Constitutional Court Declares Judgment of the European Court "Impossible" to Enforce, INT'L JOURNAL OF CONSTITUTIONAL LAW BLOG (May 13, 2016), http:// www.iconnectblog.com/2016/04/russias-constitutional-court-declares-judgment-of-the-european-court-impossible-to-enforce. Following on from this, the Russian Constitutional Court declared Anchugov v. Russia and Yukos v. Russia as judgments impossible to enforce in 2016 and 2017 respectively. See Judgment of the Constitutional Court of the Russian Federation regarding the constitutionality of execution of the European Court of Human Rights judgment of July 14, 2015 in the case of Anchugov and Gladkov, 2016, No. 12-П/2016 (Russ.); Judgment of the Constitutional Court of the Russian Federation regarding the constitutionality of execution of the European Court of Human Rights judgment of 31 July 2014 in the case OAO Neftyanaya Kompaniya Yukos v. Russia, 2017, No. 1-П (Russ.), http://www.ksrf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf; see also *Iryna Marchuk,* Flexing Muscles (Yet) Again: The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case, EJIL: TALK! (Feb. 13, 2017), https://www.ejiltalk.org/flexing-muscles-yet-again-the-russian-constitutional-courts-defiance-of- the-authority-of-the-ecthr-in-the-yukos-case/.

74 Claiming victory, Turkey's Erdogan says may take death penalty to referendum, REUTERS (Apr. 16, 2017), http://www.reuters.com/article/us-turkey-referendum-erdogan-idUSKBN17I0SP. In 1989, the Council of Europe made the abolition of the death penalty a condition of accession for all new member states. See

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case law also reflects the domestic decay of rule of law in member states. The Court now deals with cases that concern interference of the executive and legislature with the judiciary,[75] detention and imprisonment of journalists[76] and human rights defenders,[77] as well as the targeting of opposition politicians.[78] The assumption that more training and awareness of the Convention system will lead to enduring respect for Convention standards at the national level no longer stands up to scrutinyin this new geography.

II. COPING WITH THE FRACTURED CONVENTION ACQUIS

What has been the response of the European Court of Human Rights towards the fracture of the overall attitudes of its national audiences towards the Convention? The Court has responded to these attitudinal changes both through formal channels of communication with its political masters,[79] as well as in writing and speeches by its individual judges.[80] It has, however, also gone beyond these communicative gestures and shown increased willingness to respond to the attitudinal shifts in its fractured national audiences through its substantive case law, departing from what

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COUNCIL OF EUR., DEATH PENALTY FACTSHEET, https://rm.coe.int/16800 8b914 (last visited Mar. 3, 2018).

75 See Baka v. Hungary, App. No. 20261/12. Eur. Ct. H.R. (2016), http://hudoc.echr .coe.int/eng?i=001-144139; Salov v. Ukraine, 2005-VIII Eur. Ct. H.R. 143; Volkov v. Ukraine, 2013-I Eur. Ct. H.R. 73.

76 See Fatullayev v. Azerbaijan, App. No. 4098/07, Eur. Ct. H.R. (2010), http://hudoc .echr.coe.int/eng?i=001-98401; Şener v. Turkey, App. No. 38270/11, Eur. Ct. H.R. (2014) (Fr.), http://hudoc.echr.coe.int/eng?i=001-145343.

77 Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. (2016), http://hudoc.echr. coe.int/eng?i=001-161416.

78 Merabishvili v. Georgia, App. No. 72508/13, Eur. Ct. H.R. (2017), http://hudoc. echr.coe.int/eng?i=001-178753; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-112013.

79 The ECtHR's contribution to the 2015 Brussels conference explained that the principle of subsidiarity is about the sharing, and not the shifting, of responsibility for human rights protection in Europe. See EUR. COURT OF HUMAN RIGHTS, CONTRIBUTION OBRUSSELS CONFERENCE (Jan. 26, 2015), https:/ /www.echr.coe.intDocuments/2015_Brussels_Conference_Contribution_Court_E NG.pdf.

80 Robert Spano, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, 14 HUM. RTS. L. REV. 487 (2014).

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may be termed as its "standard jurisprudence."[81] In other words, the Court has chosen to accept that the national compliance audiences are indeed different from each other in terms of how much trust the Court can place on them and that they need to be treated as such in the case law of the Court. This new outlook – emphasizing different treatment for different national institutional arrangements and national cultures of human rights in terms their domestic ability and willingness to respect the Convention acquis – has led the Court to develop sui-generis forms of good faith and bad faith jurisprudence in its substantive case law, alongside its own standard jurisprudence which continues to bethe major output, in terms of number of cases.[82]

To see how the Court's jurisprudence diversified based on the trust it has on the audiences it interacts with, it is first helpful to clarify what constitutes the general characteristics of the "standard jurisprudence" of the European Court of Human Rights. After all, the European Court of Human Rights has long been well known for its variable standards of review related to its long-standing employment of the margin of appreciation doctrine carving out exceptions to uniform applications of a single standard. What, then, is new in its sensitivity to the differing attitudes of national audiences?

The standard jurisprudence of the European Court of Human Rights may be identified through two important features: (1) it speaks to all states

81 Scholars of the European Court of Human Rights have recently started to use the term 'standard jurisprudence' partly in an attempt to capture the qualitative changes in the Court's case law in its newly changing political environment. See, e.g., *Oddný Mjöll Arnardóttir*, Organised Retreat? The Move from 'Substantive' to 'Procedural' Review in the ECtHR's Case Law on the Margin of Appreciation, EUR. SOC'Y OF INT'L L. 2015 ANN. CONF. (2015), http://ssrn.com/abstract=2709669; see also *Matthew Saul*, Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights, 20 I.J.H.R. 1077 (2016). A further distinction introduced in the scholarship is between substantive review under the standard case law of the Court and procedural review under the institutional deferential case law of the Court. See *Patricia Popelier*, The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights, in THE ROLE OF CONSTITUTIONAL COURTS IN MULTI-LEVEL GOVERNANCE 249 (*Patricia Popelier et al*. eds., 2013); PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES (*Janneke Gerards & Eva Brems* eds., 2017); Brems & Lavrysen, supra note 3.

82 Total number of judgments delivered by the Court in 2016 was 1926. See EUR. COURT OF HUMAN RIGHTS, ANNUAL REPORT (2016), http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf.

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in one voice;[83] and (2) it has developed specific interpretive approaches and tests for each right in the Convention with the presumption that these interpretive approaches will have *erga omnes*effect throughout the Convention system.[84]

Speaking in one voice to all member states of the Council of Europe requires the Court to use the same interpretive tests for all similar cases before it when determining the scope and limitation conditions of rights. These interpretive tests are often framed in specific Strasbourg jargon and are repeated in judgments in highly stylized forms. For example, in assessing the justifiability of a right's limitation by a state the Court looks at the case as a whole, exploring whether the domestic law that led to the limitation was foreseeable or accessible, whether the interference served a legitimate aim, whether it was necessary in a democratic society, and whether it was proportionate.[85] Equally, the Court asks whether the reasons given by national authorities to justify their decisions are relevant and sufficient, without discriminating between who the authorities are and the quality of their domestic decision making processes.[86] At the end of each judgment, the Court concludes by either finding or not finding a violation, without going into further detail as to whether the violation was a grave one.[87]

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83 In the Court's standard language, even the margin of appreciation doctrine seeks to speak to states in one voice, holding that some Convention rights may attract a narrow, whilst others attract a wide margin of appreciation for all states. See *HOWARD CHARLES YOUROW*, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996).

84 For an account of rights-based jurisprudence of the Convention, see Case-law analysis, EUR. COURT OF HUMAN RIGHTS, http://echr.coe.int/Pages/home.aspx?p=caselaw/analysis&c=#n14278064742986744502025_pointer (last accessed Jan. 28, 2018).

85 On authoritative exposés of these texts, see *PHILIP LEACH*, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS (2017); WILLIAM SCHABAS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A COMMENTARY (2015).

86 See Coster v. United Kingdom, Eur. Ct. H.R. (2001), http://hudoc.echr.coe.int/eng?i=001-59156; Nikula v. Finland, Eur. Ct. H.R. (2002), http://hudoc.echr.coe.int/eng?i=001-60333; Sidibras v. Lithuania, 2004-VIII Eur. Ct. H.R. 367; Axel Springer AG v. Germany, Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/eng?i=001-109034.

87 This has been the case even for gross human rights violations perpetrated by state actors. *Çali*, supra note 27.

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For every Convention article, there exist fine-grained tests, transferable from country to country, accounting for the scope of rights, and, in the case of qualified rights, approaches for distinguishing justifiable limitations from violations.[88] Despite this, the Court's standard case law also recognizes that national authorities may enjoy a margin of appreciation with respect to assessing the scope and limitations of certain rights.[89] In identifying the scope of rights, the Court pays due attention to whether there exists a European consensus in developing new implied rights for Convention articles and holds that, where the European consensus is lacking, states may have a margin of appreciation as to defining the scope of rights.[90] How the Court verifies such consensus is subject to debate.[91] In identifying conditions for the restrictions of rights, the Court has also indicated whether states enjoy a narrow or a wide margin of appreciation depends on their proximity to the facts of a case or national authorities' proximity to the local forces.[92] This, too, attracted much criticism due to the risks of over-determination of such proximity.[93] In situations where the Court has identified a narrow margin of appreciation, however, it has employed the same tests, namely necessity in a democratic society and proportionality, for all cases coming from all countries of the Council of Europe.[94] That is, when the margin is narrow, like cases are treated alike regardless of which country they come from. In other words, both the lack of European consensus and presence of a wide margin of appreciation due to subsidiarity concerns simply signaled that the Court was not yet able to develop uniform standards that ought to have an *erga omnes* effect across the Convention system.

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88 See EUR. COURT OF HUMAN RIGHTS, supra note 82.

89 *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? (2011- 2012), 14 CAM. Y.B. EUR. LEGAL STUD. 381 (2012).

90 *KANSTANTSIN DZEHTSIAROW*, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEANCOURT OF HUMAN RIGHTS (2015).

91 *Janneke Gerards & Hanneke Senden*, The Structure of Fundamental Rights and the European Court of Human Rights, 7 INT'L J. HUM. RTS. 619, 651 (2009).

92 See, e.g., Buckley v. United Kingdom, App. No. 20348/92, 1996-IV Eur. H.R. Rep. 1291–93.

93 *Kevin Boyle*, Human Rights, Religion and Democracy: The Refah Party Case, 1 ESSEX HUM. RTS. REV. 1, 14 (2004).

94 *Tarlach McGonagle* (ed..), EUROPEAN AUDIOVISUAL OBSERVATORY, FREEDOM OF EXPRESSION, THE MEDIA AND JOURNALISTS: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (2013).

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A. LETTING GOOD FAITH INTERPRETERS BE

A central feature of the Western European pushback against the European Court of Human Rights has concerned the need for adequate recognition of the domestic institutions, in well-established rule of law respecting states, as the co-appliers and co-interpreters of the European Convention on Human Rights. The argument has been that, if domestic institutions in rights-respecting states approach the Convention with good faith, why should the European Court of Human Rights always be the winner in reasonable disagreements with these domestic good faith interpreters? In its case law of the 2000s, the Court has taken this pushback seriously and embarked upon a path that offers deference to thegood faith interpreters of the European Convention on Human Rights, whether judiciaries or parliaments, provided that a level of quality assurance of their domestic rights interpretation is in place.

This new good faith jurisprudence is qualitatively different from the operation of the margin of appreciation in the "standard review" case law of the Court. In the latter, the reason to defer to a national decision- maker is based on the nature of the right itself or the specific facts of the case or the lack of a European consensus. In this new good faith jurisprudence, the quality assurances provided by domestic decision makers in respecting the Convention takes center stage. It is for this reason that some commentators have categorized this new form of deference under the umbrella of procedural review of domestic authorities, rather than a substantive review of whether the right is appropriately protected by domestic authorities.[95] This new type of procedural deference to domestic authorities has shown itself as deference both to domestic courts and to parliaments, who are seen,prima facie, as engaging with the Convention in good faith. How then does the Court identify who is a good faith domestic interpreter of the Convention?

The *Von Hannover* case of 2012 is one of the first cases that displayed a normative account of deference to good faith interpreters, where the reasons for deference to national authorities shifted from substantive review concerns to procedural concerns based on the quality of the reasoning of the judicial decision makers.[96] The case is unique in the sense that Germany has been a strong supporter of the Convention acquis, even

95 PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES, supra note 81.

96 Von Hannover v. Germany (No. 2), 2012-I Eur. Ct. H.R. 399.

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though the German Constitutional Court, in a 2004 judgment, recognized that in the case of a hypothetical conflict with a Strasbourg interpretation and the Constitutional Court's interpretation flowing from the German Constitution, the latter would prevail.[97]

The *Van Hannover* case involved the question of whether the German courts correctly balanced the right to privacy of Princess Caroline of Monaco and the freedom of expression of German newspapers.[98] A novelty of this case was that this was the second time that the applicant appeared before the European Court of Human Rights due to similar, but not identical facts. In the first case, decided in 2004, the European Court of Human Rights found a violation of the Convention by holding that the domestic judges did not strike a fair balance between right to privacy and freedom of expression.[99] In this second case, the German Constitutional Court indicated that it had taken into account the principles laid down by the Court in balancing rights.[100] In response, the Court carefully stated that "where the balancing exercisehas been undertaken by the national authorities in conformity with the criteria laid down in the Courts case law, the Court would require strong reasons to substitute its view for that of the domestic courts."[101] In other words, the Court signaled that it would not review the actual substantive balance of considerations by German domestic courts, so long as the German Courts paid due attention to such considerations. This approach was decisive in the Court's finding that there was no violation of theright to privacy in this case, as the Court did not find strong reasons to substitute the decision reached by domestic courts. The Court, therefore, acknowledged that the German courts had responsibly engaged in abalancing exercise.[102]

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97 See BVerfG (Federal Constitutional Court), 2 BvR 1481/04, Oct. 14, 2007.

98 Von Hannover (No. 2), 2012-I Eur. Ct. H.R. 399.

99 Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. 41.

100 See BVerfG (Federal Constitutional Court), 1 BvR 1602/07, Feb. 28, 2008.

101 Von Hannover (No 2), 2012-I Eur. Ct. H.R. 399. For cases with similar reasoning structures, see Obst v. Germany, App. No. 425/03, Eur. Ct. H.R. (2010) (Fr.), http://hudoc.echr.coe.int/eng?i=001-100463; Schüth v. Germany, 2012-V Eur. Ct. H.R. 397; Siebenhaar v. Germany, App. No.18136/02, Eur. Ct. H.R. (2011) (Fr.), http://hudoc.echr.coe.int/eng?i=001-103236.

102 Due to the emphasis on responsible action by domestic courts, I have elsewhere called this new doctrine, "the responsible courts" doctrine. See *Başak Çali,* From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights, in*: Oddný Mjöll Arnardóttir & Antoine Buyse* (eds.), SHIFTING CENTRES OF GRAVITY IN HU-

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This form of reasoning constitutes a departure from thesubstantive review doctrine of the European Court of Human Rights and shows that the calls for subsidiarity of the Court in favour of domestic courts when applying the Convention had struck a chord. Instead of scrutinizing the reasons given by domestic courts to justify their decisions, the requirement, instead, opts for strong reasons to trigger the Court's substantive review. Evidence for due regard to the interpretive standards developed by the Court lets the responsible domestic interpreters be as to the outcome of a case. As co-appliers of humanrights standards, responsible domestic courts were thus given deference to determine whether the Convention is violated or not.

In *Palomo Sanchez v. Spain*, the European Court of HumanRights employed its quality of decision-making focused good faith deference standard to a case. This case was a first in terms of a judicial dialogue between Spanish Courts and Strasbourg because the issues at stake had never previously arisen before the European Court of Human Rights.[103] Unlike *Von Hannover*, therefore, what was at stake in this case was whether responsible domestic courts could be trusted to interpret the Convention and balance competing rights, in the absence of Strasbourg having ruled on the principled issues and considerations in advance.[104]

In *Palomo Sanchez*, domestic courts (and subsequently the European Court of Human Rights) had to balance the freedom of expression rights of workers with the right to privacy of managers and co- workers.[105] Delivery workers who were dismissed from their jobs by an industrial bakery company in Barcelona had earlier brought proceedings against the company before Spanish employment tribunals seeking recognition of their status as salaried workers (rather than self- employed or non-salaried delivery workers), in order to be covered by the corresponding social security regime.[106] Representatives of a committee of non-salaried delivery workers within the same companyhad testified against the applicants in those proceedings.[107] The applicantsset up the trade union *Nueva Alternativa Asamblearia* (NAA) in 2001 to defend their interests and subsequently published a cartoon in the NAA newsletter showing the company manager

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MAN RIGHTS PROTECTION: RETHINKING RELATIONS BETWEEN THE ECHR, EU AND NATIONAL LEGAL ORDERS 144 (2016).

103 Sánchez v. Spain, 2011-V Eur. Ct. H.R. 187.

104 Id.

105 Id.

106 Id. at 11.

107 Id.

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and two workers who testified against them in an undignified position.[108] They were dismissed from work as a result of this cartoon.[109]

In this case, similar to *Von Hannover* (2), the Grand Chamber signaled that it would defer to domestic courts that are deemed to act responsibly in discharging the domestic interpretation of theConvention.[110] It went on to decide that the domestic courts had duly recognised the importance of freedom of expression and that the decisionof the domestic courts was not "manifestly disproportionate."[111] With this decision, the European Court of Human Rights signaled that so long as a domestic court was prima facie viewed as giving due recognition to the Convention, the Court would not lay out how a substantive review of competing interests must be carried out.[112] Furthermore, the Court has introduced a new concept to its jurisprudence of procedural deference: manifest disproportionality as opposed to standard proportionality.[113] Dissenting judges in the *Palomo Sanchez* case took issue with the Court's willingness to assign such a carte blanche co-interpretation role to domestic courts without itself clarifying the full range of jurisprudential considerations substantively at stake in a case that gives rise to potentially new issues.[114] In particular, the dissenting judgments highlighted the absence of a fulsome discussion by the Court of the freedom of expression standards in the labor rights and trade unions dispute context.[115] This distinguishes the *Palomo Sanchez* case from *Von Hannover* where the issues at stake had previously been considered bythe Court. In other words, by deferring to good faith interpreters of the Convention in this instance, the Court has forgone its right to develop the Convention interpretation for Council of Europe countries as a whole andduly placed itself in a subsidiary role for the interpretation of the Convention.

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108 Id. at 195–96.
109 Id. at 196.
110 Id. at 214–15.
111 Id. at 220.
112 Id. at 218–219.
113 Id. at 220. In more recent case law, the Court has also started to employ the formula of "neither arbitrary nor manifestly unreasonable" to justify its deference. See Alam v. Denmark, App. No. 33809/15, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-175216; Ndidi v. United Kingdom, App. No. 41215/14, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-
114 See Sánchez, 2011-V Eur. Ct. H.R. at 221 (dissenting opinion of Tulkens, J. et al.).
115 Id.

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The 2017 Grand Chamber judgment in the case of *Hutchinson v. United Kingdom* points to the ongoing expansion of the deference to domestic courts into a new direction. In this case, at stake was whether the European Court of Human Rights should reconsider its own previous findings concerning the application of Article 3 (torture, inhuman or degrading treatment) of the Convention to cases concerning life prisoners if domestic courts give assurances that their understanding of the treatment of life prisoners in said country coheres with the Convention.[116] On July 9, 2013, the European Court of Human Rights held, in *Vinter and Others v. United Kingdom*, that whole life orders in the UK violate Article 3 of Convention.[117] In so doing, the Court held that the legal framework in the UK failed to provide legal certainty as to when lifers can ask for a review of their sentence.[118] It also pointed to the absence of a dedicated review mechanism to this end under UK law.[119] In 2014, the UK Court of Appeal in *R v. McLoughlin* considered the *Vinter andOthers* judgment of the European Court of Human Rights and held that even though the legal framework drawn up by the Home Secretary for reviewing parole for life prisoners may seem restricted, the executive is under a duty to take into account the Convention and any failure to do so would be subject to appeal before UK Courts.[120] In the light of this assurance by the Court of Appeal of the United Kingdom, the European Court of Human Rights overturned its *Vinter* decision in Hutchinson and found the UK legal framework compatible with Article 3 of the Convention.[121] In so doing, the Court emphasized that "the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities."[122] The *Hutchinson* case is a further expansion of the deference to good faith interpreters, as the Court treated the UK courts' assurances to take into account the Convention as a reason to reverse its own previous jurisprudence on the matter.[123]

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116 Hutchinson v. United Kingdom, App. No. 57592/08, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-150778.
117 Vinter v. United Kingdom, 2013-III Eur. Ct. H.R. 317.

117 Vinter v. United Kingdom, 2013-III Eur. Ct. H.R. 317.

118 Id. at 350–53

119 Id. at 353.

120 R v. McLoughlin [2014] EWCA Crim 188 (Eng.).

121 Hutchinson, App. No. 57592/08, Eur. Ct. H.R.

122 Id. para. 71.

123 As Judge Sajo pointed out in his separate opinion, this further put the Courts at odds with its decision delivered against the Netherlands on the irreducibility of life sentence in the case of Murray v. Netherlands, App. No. 10511/10, Eur. Ct.

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The deference of the Court towards good faith interpreters that it trusts has also been apparent in cases where the Court has interacted with national Parliaments.[124] The *Animal Defenders v. United Kingdom* case of 2013 and the *SAS v. France* judgment of 2015 are two examples in which the Court has forgone the carrying out of a substantive proportionality analysis of the measures taken by parliaments based on the quality of decision-making procedures in the legislative contexts.[125] The *Animal Defenders* case concerned the blanket ban on political advertising by the UK Parliament and whether this violated freedom of expression.[126] The Court first started out by holding that in the field of freedom of expression states enjoy a narrow margin of appreciation.[127] Under its standard case law this should have led to a substantive proportionality analysis of the impugned law. It, however, held that an almost blanket ban on political advertising was not disproportionate because of thequality of the parliamentary and the judicial debates in the UK context.[128] In so doing, the Court held that in instituting a blanket ban the Parliamenthad duly considered other options and that was sufficient to ensure compliance with the Convention.[129] In this respect, the Court found that adebate taking place in Parliament was worthy of deference without a substantive review of proportionality.

The *SAS v. France* case concerned the banning of face veil in public places by both houses of the French Parliament with an overwhelming majority.[130] Whilst the ECtHR emphasized the autonomy of women to choose their own dress and the importance of the protection of minority cultural identities for political pluralism and the potential Islamophobic motives to introduce such as ban,[131] it nevertheless relied on the fact that the law was introduced by the legislature based on a concern for covered faces and noted its subsidiary role and the direct democratic legitimacy of the national legislature.[132] The latter meant that the government had a wide margin of appreciation when considering whether limitations on

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H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-138893. See Hutchinson, App. No. 57592/08, Eur. Ct. H.R. (Sajo, J., separate opinion).

124 *Matthew Saul*, The European Court of Human Rights' Margin of Appreciation and the Processes of National Parliaments, 15 HUM. RTS. L. REV. 745 (2015).

125 S.A.S. v. France, 2014-III Eur. Ct. H.R. 341.

126 Animal Def. Int'l v. United Kingdom, 2013-II Eur. Ct. H.R. 203.

127 Id. at 232.

128 Id. at 233–34.

129 Id. at 235–37.

130 S.A.S., 2014-III Eur. Ct. H.R. at 354.

131 Id. at 370–71, 378–79.

132 Id. at 373–74, 380.

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the right to manifest one's beliefs were"necessary."[133] In the *SAS* case, the Court, therefore, indicated that the duly established parliamentary deliberations are a trigger for the employment of its margin of appreciation. It thus held that the blanket ban on the burka in France meet the procedural review standards espoused by the Court.[134]

What these cases show is that the ECtHR has started to develop procedural deference standards that focus on the trust it has to domestic judges and parliaments to interpret the Convention on their own right. The *Van Hannover* case aside, all other cases further point to the Court letting good faith domestic interpreters be, even when the Court's prior substantive review of the issues at stake are absent or even when the Court's prior substantive review of the issues in previous cases are at odds with the preferences of the domestic interpreters. There is, therefore, a much larger substantive interpretive space carved for domestic judiciaries and parliaments based on the procedural qualities of their decision-making processes.

B. TURN TO BAD FAITH JURISPRUDENCE

Since the mid-2000s, a second novel preoccupation of the Court's substantive case law has been the question of how to address states' use of their powers for reasons that are not themselves grounds forlegitimate restrictions of rights in the Convention. States' bad faith use oftheir powers is prohibited under Article 18 of the Convention, which states that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they are prescribed."[135] The *travaux preparatoires* of the Convention show that insertion of Article 18 to the Convention was a conscious choice on the part of drafters to ban misuse of state power in restricting rights.[136]

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133 Id. at 381.

134 Eva Brems, SAS v. France: A Problematic Precedent, STRASBOURG OBSERVERS (July 9, 2014) https://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/.

135 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 18, Nov. 4, 1950, 213 U.N.T.S. 221. No other regional or international human rights treaty has a provision equivalent to Article 18 save for Article 30 of the Inter American Convention on Human Rights.

136 *Keller & Heri,* supra note 18.

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Despite the concerns of the drafters that pre-World War II (WWII) practices of using state power to undermine rights may be a possibility in the post-WWII Europe, the (former) European Commission on Human Rights and the European Court of Human Rights treated"Article 18 risks" to be not relevant in their pre-2004 jurisprudence and instead operated under a strong presumption of the good faith of the stateparties when analyzing Convention violations.[137] In the first ever casethat discussed Article 18, *Kamma v. Netherlands*, the Commission approached the article in a narrow way and imposed a high threshold for proving bad faith on the part of the applications.[138] It held that Article 18 is not an autonomous article and, therefore, can only be raised in conjunction with other articles of the Convention that allow for restrictions to be placed on rights.[139] The Commission further held that suspicion by applicants that an illegitimate pretexts/hidden agendas exist cannot be enough, and that the applicants has a duty to establish such agendas.[140] The Commission, therefore, made the trigger of Article 18 a very onerous task by applicants.

This narrow reading of Article 18 was followed by the Court. It also cohered with the Court's commitment to developing its standard jurisprudence. The Court saw itself as developing the interpretation and application of the individual rights for the Council of Europe as a whole without seeing the need to point the finger at particular states for having illegitimate agendas domestically. Taking for granted the underlying commitment of all member states to the Convention, the Court thusrefused to imagine its audience as intentionally seeking to undermine the Convention. Not only did the Court not find any violations of Article 18 until 2004, it has also often been the case that the Court did not consider the examination of Article 18 claims necessary.[141]

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137 A review of the database of the case law of the European Court of Human Rights, HUDOC, shows that neither the Commission nor the Court found any violations of Article 18, together with any of the rights protected under the Convention, until 2004. On the Court's recognition of a strong presumption of good faith, see also Khodorkovskiy v. Russia, App. No. 5829/40, Eur. Ct. H.R. para. 255 (2011), http://hudoc.echr.coe.int/eng?i=001-104983.

138 Kamma v. The Netherlands, App. No. 4771/71, Eur. Comm'n on H.R. (1974), http://hudoc.echr.coe.int/eng?i=001-95625.

139 Id. at 9.

140 Id. at 10.

141 See Engel v. Netherlands, App. No. 5100/71, 1 Eur. H.R. Rep. 647 (1976); Sunday Times v. United Kingdom, App. No. 6538/74, 2 Eur. Ct. H.R. 245 (1979); Sporrong v. Sweden, App. No. 7151/75, 5 Eur. Ct. H.R. 35 (1983); Bozano v. France, App. No. 9990/82, 9 Eur. Ct. H.R. 297 (1986); United Communist Party

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This lack of interest in Article 18 shifted in 2004, when a Chamber of the Court for the first time ever found a violation of Article 18, in conjunction with Article 5 (right to liberty and security of person) in *Gusinskiy v. Russia*.[142] The case concerned the detention of a Chairmanof the Board of and majority shareholder in ZAO Media Most, a private Russian media holding company, which also owned NTV, a popular television channel.[143] The detention of the applicant ended when he agreed to sell his company to Gazprom, a Russian state controlled energy company, under favourable conditions.[144] Following on from this, Gusinskiy argued that his detention was an abuse of power by the authorities and that the authorities detained him in order to force him to sell his company.[145] Gusinskiy further argued that the authorities intended to silence his media outlets through this forced sale, due to its critical views of the government.[146]

The Court's initial approach when finding a violation under Article 18, in conjunction with Article 5 in the Gusinksiy case wascautious and brief. The Court, following *Kamma*, emphasized that Article 18 of the Convention does not have an autonomous role and thatit could only be applied in conjunction with other Articles of the Convention.[147] The Court, however, found that the direct evidence provided by the application was compelling to prove bad faith on the partof the state authorities. This evidence included the fact that Gazprom asked the applicant to sign an agreement when he was in prison, and a State minister endorsed such an agreement.[148] All charges against the applicant were dropped as soon as he signed the agreement.[149] Russian authorities also did not contest this direct evidence.[150] All of these facts, the Court held suggested that "the applicant's prosecution was used to intimidate him."[151]

Following on from Gusinskiy, the Court has continued to consider Article 18 cases in conjunction with other articles, primarily with respect

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of Turkey v. Turkey, App. No. 19392/92, 26 Eur. Ct. H.R. 121 (1998); Ipek v. Turkey, 2004-II Eur. Ct. H.R. 1.

142 Gusinskiy v. Russia, 2004-IV Eur. Ct. H.R. 129.
143 Id. at 136.
144 Id. at 136, 138–40.
145 Id. at 150.
146 Id. at 150–51.
147 Id. at 151.
148 Id. at 150.
149 Id. at 138–40.
150 Id. at 151.
151 Id.

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to cases coming from Eastern Europe and the Caucasus. Thecountries from which Article 18 cases come from are also the countries with repetitive rights violations cases[152] and those that have fallen off the democratic transition track. In six cases that followed *Gusinskiy*, *Cebotari v. Moldova* (2007), *Lutsenko v. Ukraine* (2012), *Tymoshenko v. Ukraine* (2013), *Mammadov v. Azerbaijan* (2014), *Jafarov v. Azerbaijan* (2016), and *Merabshivili v. Georgia* (2016), the Court also found aviolation of Article 18, in conjunction with Article 5.[153]

Cebotari, the then-head of a Moldovan state-owned power distribution company called Moldtranselectro, argued that likeGusinskiy, his arrest and subsequent release from custody was made conditional upon making statements desired by the government, which constituted a violation of Article 18.[154] The Court agreed with Cebotori.[155] Starting from *Lutsenko,* the Article 18 cases of the Court turned to a particular problem in decaying democracies, that of controlling or punishing opposition political

152 See generally Country Factsheets, COUNCIL OF EUR., http://www.coe.int/en/web/execution/country-factsheets (last visited Jan. 3, 2018).

153 Merabishvili v. Georgia, App. No. 72508/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-178753; Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-161416; Mammadov v. Azerbaijan, App. No. 15172/13, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-144124; Tymoshenko v. Ukraine, App. No. 49872/11, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-119382; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-112013; Cebotari v. Moldava, App. No. 35615/05, Eur. Ct. H.R. (2008), http://hudoc.echr.coe.int/eng?i=001-83247; In Khodorovskiy and Lebedev, the Court did not find a violation. Khodorovskiy v. Russia, Apps. Nos. 11082/06 & 13772/05, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-122697. In Tchankotadze v. Georgia, the Court found the Article 18 claim manifestly ill founded. Tchankotadze v. Georgia, App. No. 15256/05, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-163799. In Navalnyy and Ofitservo v. Russia, where Article 18 violations were brought in conjunction with Article 6 (right to fair trial) and Article 7 (no punishment without any law), the Court observed that these two provisions, in so far as relevant to cases, did not contain any express or implied restrictions that can trigger an Article 18 examination. Navalnyy v. Russia, Apps. Nos. 46632/13 & 28671/14, Eur. Ct. H.R. (2016), http://hudoc.echr.coe.int/eng?i=001-161060. In Navalnyy v. Russia, the Court did not find a violation of Article 18 in conjunction with Article 11 (freedom of assembly). See also Navalnyy v. Russia, App. No. 29580/12, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-170655 (currently pending before the Grand Chamber). 154 Cebotari, App. No. 35615/06, Eur. Ct. H.R. paras. 5, 47. 155 See id paras. 52–53.

154 Cebotari, App. No. 35615/06, Eur. Ct. H.R. paras. 5, 47.

155 See id. paras. 52–53.

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movements or civil dissent. Of these cases,three concern the detention of politicians who held high government positions prior to changes in government in Ukraine and Georgia.[156] Lutsenko was a former Minister of the Interior and the leader of the opposition party Narodna Samooborona, in Ukraine,[157] Tymoshenko was a former Ukrainian Prime Minister and one of the leaders of the Orange Revolution,[158] and Merabishvili was a former Prime Minister andMinister of the Interior in Georgia.[159] These politicians argued that their detention was a form of retribution by the incoming governments andhad the aim of preventing them from taking part in the political life of their countries.[160] In relation to Azerbaijan, the two Article 18 casesbrought before the European Court of Human Rights concerned the silencing of civil dissent through criminal law.[161] Ilgar Mammadov was a political activist and an academic[162] and Rasul Jafarov was a well-known civil society activist and human rights defender.[163]

In all of the seven cases where Article 18 was raised and violations found by the Court, the applicants were detained under variousprovisions of domestic criminal law.[164] Applicants argued not only that these detentions did not have a legitimate aim, therefore not meeting the criteria laid out by the Court in its Article 5 case law, but also that the detention of the applicants in these cases served illegitimate aims pursued by the

156 Merabishvili, App. No. 72508/13, Eur. Ct. H.R. paras. 6–7; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. para. 9; Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. para. 7.

157 Lutsenko, App. No. 6492/11, Eur. Ct. H.R. para. 7.

158 Tymoshenko, App. No. 49872/11, Eur. Ct. H.R paras. 8–12.

159 Merabishvili, App. No. 72508/13, Eur. Ct. H.R. para. 6.

160 See id: Tymoshenko, App. No. 49872/11, Eur. Ct. H.R.; Lutsenko, App. No. 6492/11, Eur. Ct. H.R.

161 Jafarov v. Azerbaijan, App. No. 69981/14, Eur. Ct. H.R. para. 106 (2016), http://hudoc.echr.coe.int/eng?i=001-161416; Mammadov v. Azerbaijan, App. No. 15172/13, Eur. Ct. H.R. paras. 83–84 (2014), http://hudoc.echr.coe.int/eng?i=001-144124.

162 Mammadov, App. No. 15172/13, Eur. Ct. H.R. para. 6.

163 Jafarov, App. No. 69981/14, Eur. Ct. H.R. para. 6.

164 See Merabishvili, App. No. 72508/13, Eur. Ct. H.R. para. 13; Jafarov, App. No. 69981/14, Eur. Ct. H.R. para. 11; Mammadov, App. No. 15172/13, Eur. Ct. H.R. paras. 16, 29; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. para. 14; Lutsenko, App. No. 6492/11, Eur. Ct. H.R. paras. 8– 9; Cebotari v. Moldava, App. No. 35615/05, Eur. Ct. H.R. paras. 31–32 (2008), http://hudoc.echr.coe.int/eng?i=001-83247.

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domestic authorities, removing the applicants from thefull protection of the Convention as a whole.[165]

In response to these cases, the Court's approach to the standard of proof for finding a violation of Article 18 has started to shift from a more to a less onerous one. In *Cebotari v. Moldova*, the Court continued to employ an exacting standard of proof test and held that no objective person could identify the commission of an offence by Cebotari and the applicant convincingly showed the existence of a hidden agenda.[166] In the two Ukranian cases, *Lutsenko* and *Tymoshenko* as well as in *Mammadov v. Azerbajian*, the Court did not require direct proof of bad faith, but also pointed out that immediate facts surrounding the cases can provide evidence for finding a violation of Article 18.[167]

In the 2016 cases of *Jafarov v. Azerbaijan* and *Merabishvili v. Georgia*, the Court started to debate whether the high burden of proof on the applicants in showing fact-specific illegitimate purposes is adequate in reversed democratic transitions and whether more contextual evidence as to what goes on in a country is also relevant.[168] The case of *Jafarov v. Azerbaijan*, which concerns the continuing detention of human rights defenders in the country, the Court, for the first time, took a more expansive contextual approach, not only looking at the specificimmediate facts surrounding the case, but also the general conditions of treatment of human rights defenders in the country.[169] In so doing, it was willing to adduce evidence from the general context of the systemic difficulties that human rights NGOs are facing in Azerbaijan as an Article 18 trigger condition.[170] In the case of *Merabishvili v. Georgia*, the Chamber held that the burden of proof does not necessarily have to rest on the applicant to show the pursuance of illegitimate purposes by state authorities.[171] Some of the burden of

165 Merabishvili, App. No. 72508/13, Eur. Ct. H.R. paras. 69, 93; Jafarov, App. No. 69981/14, Eur. Ct. H.R. paras. 85, 145; Mammadov, App. No. 15172/13, Eur. Ct. H.R. paras. 80, 133; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. paras. 249, 289; Lutsenko, App. No. 6492/11, Eur. Ct. H.R. paras. 49, 100; Cebotari, App. No. 35615/05, Eur. Ct. H.R. para. 41.

166 Cebotari, App. No. 35615/06, Eur. Ct. H.R. paras. 52–53.

167 Mammadov, App. No. 15172/13, Eur. Ct. H.R. para. 137; Tymoshenko, App. No. 49872/11, Eur. Ct. H.R. para. 294; Lutsenko, App. No. 6492/11, Eur. Ct. H.R. para. 104.

168 See Jafarov, App. No. 69981/14, Eur. Ct. H.R. paras. 153–63; see also Merabishvili, App. No. 72508/13, Eur. Ct. H.R. paras. 102–07.

169 See Jafarov, App. No. 69981/14, Eur. Ct. H.R. paras. 159–61.

170 See id.

171 See Merabishvili, App. No. 72508/13, Eur. Ct. H.R. para. 83.

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proof for disproving a hidden agenda may also fall on the government authorities, if the facts of thecase so require.[172] In this case the Court also, for the first time, found that even if the Court finds no violation of a substantive article by itself, (in this case Article 5) that does not mean that there may not be a violationof that Article in conjunction with Article 18.[173]

The Grand Chamber judgment of the European Court of Human Rights in 2017 has gone further than the previous case law on Article 18. It has decided that the burden to prove bad faith should be identical to proving violation of any other provision of the Convention.[174] It should therefore not be exclusively "borne by one or the other party"[175] and governed by the standard of "beyond reasonable doubt."[176] This decisive lowering of the standard of proof for bad faith violations gives a new flexibility to the Court to investigate bad faith violations.[177] Despite this, however, the Court has not so far developed a more principled view about what it means to find bad faith violations as opposed to good faith violations and what responses are owed to bad faith violations of the Convention.[178] Given the rise of Article 18 cases at the Court's door, not only focusing on detention as a tool to suppress dissent, but also on other rights such as freedom of movement, freedom of assembly, and freedom of expression,[179] we are likely to see further developments in the bad faith jurisprudence of the Court.

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172 Id. paras. 311–12.

173 Id. para. 102.

174 See id paras. 310, 316.

175 Id. para. 311.

176 Id. para. 314.

177 In the Court's own words, however, circumstantial evidence "means information about the primary facts, or contextual facts or sequences of events which can form the basis for inferences about the primary facts." Id. para. 317.

178 For a criticism of the Grand Chamber judgment, see *Basak Çali,* Merabishvili v. Georgia: Has the Mountain Given Birth to a Mouse? VERFASSUNG BLOG (Dec. 3, 2017), http://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a- mouse/.

179 See Ecodefense v. Russia, App. No. 9988/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-173049; Ganbarova v. Azerbaijan, App. No 1158/17, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-177540; Todorova v. Bulgaria, App. No. 40072/13, Eur. Ct. H.R. (2017) (Fr.), http://hudoc.echr.coe.int/eng?i=001-175880.

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III. WHITHER THE VARIABLE GEOMETRY IN THE EUROPEAN COURT OF HUMAN RIGHTS SUBSTANTIVE CASE LAW?

The above analysis shows that the substantive case law of the European Court of Human Rights since the mid and late 2000s hasshown a heightened degree of awareness of the changing attitudes towards the Convention system amongst its domestic audiences. This newly emerging case law takes account of the fact that the Convention now has an increasingly heterogeneous, fractured audience. On the one hand, the UK- led criticism of the Court as micro-managing the domestic life of the Convention in well-established democratic states with strong judiciaries has led to the shifting of more interpretive powers to national authorities that the Court trusts. This practice is heightened, in particular,after the Brighton Declaration of 2010. On the other hand, the Court is recognizing that some states' formal commitment to the Convention maybe a façade hiding bad faith circumvention of the Convention by domestic authorities. The standard jurisprudence of the European Courtof Human Rights is now sandwiched between two types of case law that operate under differentiated logics of trust: a principled deference tostates that demand to be seen as Convention-respecting in their ownways, and a new tendency to identify bad faith attitudes towards the Convention protections.

This two-headed development shows that the European Court of Human Rights has opted for a new variable geometry of its substantive case law. Variable geometry is a concept often used in regional integration and global trade contexts in order to address irreconcilable differences between states through differentiated commitments to a single legal order.[180] In the case of the European Union, the term is used to describe the idea of differentiated integration in the EU and it acknowledges that, in light of the expansion of the EU, not all states may be able or willing to integrate at the same speed.[181] In the case of the World Trade Organization, it refers to inserting flexibility of commitments into the free trade regime.[182] The new variable geometry in the case of European human rights points to differentiation based ongood and bad faith of domestic Convention

180 Cornford, supra note 17 (on variable geometry and the World Trade Organization); Goldsmith, supra note 17 (on variable geometry and the European Union).

181 *Constantinos Yanniris*, Diversified Economic Governance in a Multi-Speed Europe: A Buffer Against Political Fragmentation?, 13 J. CONTEMP. EUR. RES. 1412 (2017).

182 Cornford, supra note 17.

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interpreters: whether a state is found in violation of the Convention and how this violation is classified (standard or in bad faith) depends on the attitudes of domestic institutions to the Convention and the degree to which the Court isconvinced that states do not operate with illegitimate purposes when restricting Convention rights. In other words, the European Court ofHuman Rights no longer speaks to all Council of Europe member statesin one voice, but recognizes that different tracks of jurisprudence may be applicable, which range from the quality-based deference approach, to standard case law interpretations, to findings of bad faith violations. The voice that the Court chooses to speak to states thus depends on how thesestates approach the Convention and its underpinning values. This is what we may call a realist turn in the case law of the Court as the Court develops an increasing awareness of whom it interacts with instead of imagining a homogenous nondescript audience.

This new realist turn in the jurisprudence of the European Court of Human Rights to respond to its fractured domestic terrain comes with risks and opportunities. Two risks of the new variable geometry jurisprudence of the European Court of Human Rights are apparent: (1) politicization of the European Court of Human Rights in the eyes of its national audiences (an external risk); and (2) the increased heterogeneity of the case law of the Court, undercutting its *avant-garde* role to develop the Convention as a living instrument for all Council of Europe member states (an internal risk). Both risks can have effects on the authority perception of the European Court of Human Rights not only amongst states, but also amongst members of civil society and individual applicants.

The risk of politicization of the European Court of Human Rights is due to the support that the new variable geometry jurisprudencemay lend to the charge that the Court is seen to be an institution of double standards. An aspect of the new good and bad faith jurisprudence of the Court is the distribution of this case law between states. Whilst Western European states have been on the receiving end of good faith deference to domestic interpreters, Eastern European states have been on the receiving end of the bad faith jurisprudence.[183] This is not to suggest that the Court has intentionally distributed the cases along this axis. It may, however, easily be seen to draw a "civilizational standard" betweenwest and east Europe by those who would like to promote a deeply political vision of the European Convention system. This may, however, be countered by holding that this is not a new risk as such. The Court's case law, even un-

183 Keller & Heri, supra note 18.

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der the standard margin of appreciation doctrine, has generated a similar debate.[184] In addition, it may be an unfair demand to ask the Court to pretend that "all is quiet on the Western front."[185]

Perhaps a deeper risk of politicization of the Court lies in the increased likelihood of the Court using its new good faith and bad faith jurisprudence inadequately. For example, the Court has backtracked from previous findings in its standard case law with respect to cases brought against the UK on at least two occasions discussed here, first in *Animal Defenders* and then in *Hutchinson*, admitting that its standard jurisprudence did not apply in its entirety to the UK.[186] Given the UK's public and well-known criticism of the Court, the increased use of the good faith track with respect to the UK may support the impression that the use of the doctrine is deeply political and without a core normative content.

This concern around backtracking from the Court's standard jurisprudence with respect to the UK, has been raised in the dissenting opinions of the Court, in particular, with respect to the consolidation of its deference to trusted domestic human rights interpreters.[187] In the *Animal Defenders* case, this concern was raised by the dissenting opinionof Judges Ziemele, Sajó, Kalaydijeva, Vucinic, and de Gaetano, who queried how a blanket ban on political advertising can be proportionate only because the UK Parliament has found it so after deliberating on the matter.[188] In the context of the case, the judges stated that "we find it extremely difficult to understand this double standard within the context of a Convention whose minimum standards should be equally applicable throughout all the States parties to it."[189] In the *Hutchinson* case, the dissenting opinion by Judge Albuquerque employed a much stronger dissent to what he saw as the Court creating a special jurisprudence for the UK when he stated that:

> The present judgment may have seismic consequences for the European human-rights protection system. The majority's decision repre-

184 Arnardóttir, supra note 3.

185 The phrase inspired by Erich Maria Remarque's 1929 novel originally entitled in German Im Westen nichts Neues.

186 Hutchinson v. United Kingdom, App. No. 57592/08, Eur. Ct. H.R. paras. 70–73 (2017), http://hudoc.echr.coe.int/eng?i=001-150778; Animal Def. Int'l, 2013-II Eur. Ct. H.R. 203, 233– 35 (2013).

187 See Hutchinson, App. No. 57592/08, Eur. Ct. H.R. para. 29; Animal Def. Int'l, 2013-II Eur. Ct. H.R. at 249.

188 Animal Def. Int'l, 2013-II Eur. Ct. H.R. at 249.

189 Id. 190 Hutchinson, App. No. 57592/08, Eur. Ct. H.R. at 29 (Albuquerque, J., dissenting).

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> sents a peak in a growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards. If the Court goes down this road, it will end up as a non-judicial commission of highly qualified and politically legitimised 47 experts, which does notdeliver binding judgments, at least with regard to certain Contracting Parties, but pronounces mere recommendations on "what it would be desirable" for domestic authorities to do, acting in an mere auxiliary capacity, in order to "aid" them in fulfilling their statutory and international obligations. The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment, which shows an increasing hostility to the Court.[190]

Yet, it is not only the deference to trusted states that risks politicizing the judicial function of the Court. The simultaneous and nascent development of the Article 18 case law of the Court too poses a similar risk. The Article 18 case law of the Court, by its preference to distinguish between ordinary and bad faith violations of the Convention, may fuel criticism from European states that bad faith is not evenly considered in the case law of the Court or denials of bad faith by state authorities.

In *SAS v. France*, for example, commentators pointed out that a hidden agenda or a pretext was not beyond reasonable doubt.[191] This case, however, fell on the the good faith track, and not the bad faith. In response to the finding of a violation of Article 18 in the *Merabishvili* Grand Chamber case, it was reported that Georgia's Minister of Justice Tea Tsulukiani said that "the state considers the case to have been decided in its favour."[192] The lowering of the standard of proof for Article 18 in this case may thus make it less likely for governments to accept guilt. There are yet strong voices at the bench of the Court saying that thebad faith case law must go even further. Some judges insist that the original founders of the Convention meant for this differentiation ofblame and that the Court must speak up when states structurally backslide from rule of law and democratic

190 Hutchinson, App. No. 57592/08, Eur. Ct. H.R. at 29 (Albuquerque J., dissenting).

191 *Saila Ouald Chaib & Eva Brems*, Doing Minority Justice Through Procedural Fairness: Face Veil Bans in Europe, 2 J. MUSLIMS IN EUR. 1 (2013), p. 11–13.

192 *Philip Leach*, Georgia: Strasbourg's scrutiny of the misuse of power, OPEN DEMOCRACY (Dec. 2017), https://www.opendemocracy.net/od-russia/philip-leach/georgia-strasbourgs-scrutiny-of-the-misuse-of-power.

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governance.[193] Judge Küris stated, in his separate yet concurring opinion in the case of *Tchankotadze v. Georgia*, in which the Court found the Article 18 claim manifestly ill- founded, that the use of legal systems for illegal ends in some member states of the contemporary Council of Europe is a case of "every school boy knows."[194] In such cases, Küris argued, merely declaring a violation of the Convention does not adequately account for the root causes of the violation and the Court must seize an active role in identifying democratic decay.[195] Given that bad faith is now out of the Pandora'sbox, however, the central challenge for the Court is to identify how this doctrine can have purchase across Convention rights and what consequences should follow from finding Article 18 violations.

The second risk for the simultaneous emergence of good and bad faith jurisprudence is the impact this will have on the development of the Convention standards by the European Court of Human Rights. For most of its existence the core function of the European Court of Human Rights has been the emission of Europe-wide standards to national decision makers in all aspects of the Convention. The new variable geometry jurisprudence complicates this mission because in considering whether there has been a violation of the Convention in new cases, the Court will now not only review the nature of the right, and the availability of European consensus on the scope of the right, but also the attitudes of the domestic convention interpreters and the quality of their decision-making procedures. The deference accorded to some states based on the quality of their decision-making procedures will mean that in some Convention rights, the Court no longer imposes uniform standards. Engaging in an assessment of the quality of domestic decision-making is thus in conflict with the carrying out of a substantive review of the act or omission of the state to push the Convention standards further as a living instrument.[196] Engaging in bad faith jurisprudence, on the other hand, requires the Court to deepen its substantive review in order to uncover hidden agendas for restricting rights.

The newly found interest in good and bad faith in the case law of the Court, however, also presents opportunities for the Court. The diversity of the countries under the jurisdiction of the European Court of Human Rights is not of the Court's own doing. The European landscape has

193 *Keller & Heri*, supra note 18.

194 Tchankotadze v. Georgia, App. No. 15256/05, Eur. Ct. H.R. para. 9 (2016) (Küris, J., concurring), http://hudoc.echr.coe.int/eng?i=001-163799.

195 Id. paras. 48–51 (Küris, J., concurring).

196 Animal Def. Int'l, 2013-II Eur. Ct. H.R. 203, 249 (2013).

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indeed shifted by developments in the UK, on the one hand, and in Russia, Turkey, and other Eastern European states on the other. The Court's new variable geometry jurisprudence merely takes thesefundamental changes into account rather than pretending that Europe continues to have – more or less – the same attitude towards the Convention acquis. The Court is seeking to operate more deferentially towards well-established democracies with strong rule of law systems and focus more robustly on serious violations of human rights where domestic health of democracies are under threat.[197] These new developments can, therefore, be seen as a continuum of the Court'sstrategic responses to managing diversity and universality through its variable use of margin of appreciation[198] and not a break from them. The Court, having taken a realist turn in its case law, is now in a unique position to develop normatively defensible good and bad faith approaches to the Convention and human rights interpretation. The current patchwork of cases discussed here so far shows a piecemeal case- by-case approach that is in need of a more principled defense of distinguishing between good and bad faith attitudes towards the Convention by the Court.

IV. CONCLUSION

This article argued that shifts in the underlying attitudes of domestic states towards the European Court of Human Rights could be understood as an alternative frame to understand the "crisis" of the European Convention regime. This alternative framing does not replace other framings of the Court's crisis as being related to its increase in caseload, the non-implementation of judgments or a backlash. Rather it complements them by pointing to the fact that the diversity of attitudes towards the Convention in the European political and legal landscape is part of the ensuing crisis of the European Court of Human Rights. As a corollary to this, it was further argued that the European Court of Human Rights has been responsive to these attitudinal changes and has, through its substantive case law, aimed

197 See Brighton Declaration, supra note 61; see *also Mikael Rask Madsen*, Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?, J. INT'L DISP. SETTLEMENT (forthcoming 2018).

198 For a recent example of Court's long standing efforts to manage universality and diversity, see A.P. v. France, Apps. Nos. 79885/12, 52471/13 & 52596/13, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-172913.

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to address its increasingly heterogeneous audience through embracing the realities of its new terrain. It has done so by seeking to award the good faith interpreters with deference to them in the interpretation and application of the Convention and by signaling the bad faith interpreters by delivering Article 18 violation judgments. These twin developments, in turn, created a novelty in the international human rights landscape by giving way to a new variable geometry in human rights case law where trust to domestic authorities is central. This new variable geometry, however, also means that the Court now offers tailor made jurisprudential responses to its diverse audience, and has opened itself to new risks of not getting it right.

This argument may be countered by arguing that the small handful of cases discussed in this article do not disturb, in significant ways, the reach and breadth of the standard jurisprudence of the Court and the authority of that case law. After all, the Court continues todeliver a significant amount of judgments canvassing its well-establishedcase law in repetitive cases, for example, in favour of the protection of asylum seekers and non-refoulement,[199] or in cases related to discrimination on the grounds of sexual orientation.[200] Compared to the number of judgments delivered by the Court each year, the case law discussed in this Article may be regarded as marginal in numbers. Whilst not high in number, however, these cases show fundamental shifts in the underlying logic of the standard jurisprudence of the case law and (at least currently) they are saturated across two opposite geographical contexts. As such, their effects on the perception of the Court's authority are significant compared to the large volume of repetitive judgments the Court delivers each year.

In this new jurisprudential era of variable geometry, the Court's clarity of reasoning will continue to be its most important arsenal against its highly-fractured audience, in offsetting the risks of its jurisprudence being seen as randomly tailor made for certain countries. In this respect, the Court must work to normatively connect its rights-based deference doc-

199 Khlaifia v. Italy, App. No. 16483/12, Eur. Ct. H.R. (2015), http://hudoc.echr.coe.int/eng?i=001-170054; Sharifi v. Italy, App. No. 16643/09, Eur. Ct. H.R. (2014) (Fr.), http://hudoc.echr.coe.int/eng?i=001-147287; Tarakhel v. Switzerland, 2014-VI Eur. Ct. H.R.195; Trabelsi v. Belgium, 2014-V Eur. Ct. H.R. 301; Sufi v. United Kingdom, App. No. 8319/07, 54 Eur. H.R. Rep. 9 (2012).

200 For a detailed list of recent cases related to discrimination on the grounds of sexual orientation see EUR. COURT OF HUMAN RIGHTS, SEXUAL ORIENTATION ISSUES (Feb. 2018), http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf.

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trines with its institutional quality-based procedural deference doctrines in more coherent ways rather than offering separate tracks of reasoning for different sets of states. On bad faith case law, too, the Court should have a consistent approach towards investigating the hidden agendas undermining human rights, wherever they may occur. Whether the Court will succeed in speaking in one voice through its new variable geometry case law will continue to be tested in years to come.

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My iCourts experience

Tribute to Mikael Madsen

I met Mikael Madsen, the socio-legal scholar of the European Court of Human Rights, much earlier than Mikael Madsen, the person and the director of iCourts. Mikael's 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics', published in the *Law and Social Inquiry* in 2007, is one of the most influential pieces on my own field of scholarship - the European Court of Human Rights. In this seminal piece, Mikael blended doctrinal studies of the case law of the European Court of Human Rights with a broader political and historical contextual analysis of the emergence of the institutional architecture of human rights in Europe in a pathbreaking way. His venue of publication was also inspiring. I think it is because I read this piece in 'Law and Social Inquiry' that I submitted my first socio-legal piece on the Strasbourg Court, 'The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006' to the same journal. So, a double thank you, Mikael.

I met Mikael the person and the institution-builder of iCourts much later. I think the first time we met in person was when we were both invited as panellists to a conference on the backlash towards the European Court of Human Rights in 2012 in the Netherlands, a phenomenon that since then had a prominent place in Mikael's scholarship. I still recall how we greeted each other as long-time friends and colleagues at this first encounter. And I think the first thing Mikael told me, with great excitement, was that he was about to establish iCourts with his colleagues in Copenhagen and what his plans were to deepen and broaden the empirical study of international courts and tribunals at this new institution. I replied with the usual joke, 'what is it with you Nordics and the study of international courts?' I also remember that we then immediately proceeded to cook up a research project that we may be able to pursue together. It was clear to both of us that we needed to go comparative in the study of regional human rights courts and commissions, but the question was how. I think the rest of the encounter was about ways of figuring this out. This short, but incredibly familiar encounter on a cold, snowy day

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in the Netherlands led to our now near decade-long collaboration seeking to better understand the comparative law and politics of regional human rights courts.

My first meeting with iCourts the institution was through the first workshop we held on comparative human rights courts in Copenhagen. This first workshop needed a follow up – which led to a memorable gathering of scholars at my then home institution, the Centre for Global Public Law at Koç University in Istanbul. I still have dazzling memories of this workshop, yes, for the exchange of intellectual thoughts, but more particularly for the dinner in a cosy old-school fish restaurant in the fish market in Beşiktaş. It goes in my memory as one of the most fun workshop dinners I have ever attended, and much credit for this goes to Mikael. Six years on, in 2018, our collaborative work with Frans Viljoen, Alex Huneeus, Laurence Bourgorgue-Larsen and Larry Helfer culminated in a special issue in the *International Journal of Constitutional Law* on Comparative Regional Human Rights Courts and Commisions. This opened up a new research agenda for the study of the law and politics of human rights courts in a space sandwiched between comparative constitutionalism and comparative international law.

My first impressions of the then young iCourts were that of a dynamic welcoming research institution filled with energy and enthusiasm. The Centre expanded significantly since then and has produced important scholarship and empowered many researchers, both early career and more experienced. To this day, I remain very impressed with the ability of the iCourts team to retain that energy, enthusiasm, collegiality and good humour. Mikael's and my research paths also continue to cross, thankfully. In 2021, we collaborated one more time on a special issue, this time in *ECHR Law Review*, on the comparative responses of the Council of Europe organs, beyond its court, to the decay of rule of law and human rights protections in Europe. We asked Mikael how his 2007 piece speaks to the legal and political context of human rights decay in Europe of the 2020s. In this piece, Mikael engages in a conversation between his 2007 take on the origins and the development of the European human rights law and 2020s Europe. I for one look forward to many more conversations with Mikael, over written word, or in person in an old-school Istanbul fish restaurant.

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