COPING WITH CRISIS: WHITHER THE VARIABLE GEOMETRY IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS*

BAŞAK ÇALI*

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.

* I would like to thank the organizers of and participants at the Wisconsin Journal of International Law Annual Symposium on Regional Human Rights Systems in Crisis (31 March 2017), the WZB Berlin Colloquium on Global and Comparative Public Law (30 May 2017), Mikael Madsen, Mattias Kumm, and Matej Avbelj for comments on earlier versions of this paper, and to Stewart Cunningham for his excellent research assistance.

* Professor of International Law, Hertie School of Governance, Berlin and Director, Center for Global Public Law, Koç University, Istanbul.
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 have studied the genesis and development of the Convention system, issue-specific contributions of the Court’s case law to human rights interpretation over time, and the interpretive canons of the European Court of Human Rights. Academic work has also focused on

1 E D B ATE S, 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].


3 See generally YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002); CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN, AND GLOBAL CONTEXT (Andreas Føllesdal, Birgit Peters & Geir Ulfstein eds., 2013); JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2009); LAURENS LAVRYSEN, HUMAN RIGHTS IN A

---

Wisconsin International Law Journal

Abstract

Introduction

I. A Convention Europe That No Longer Is
   A. Fractures Amongst Western European Founders: The United Kingdom in the Lead
   B. The New Europe: Rise of Reverse Transitions and Illiberal Democracies

II. Coping with the Fractured Convention Acquis
   A. Letting Good Faith Interpreters Be
   B. Turn to Bad Faith Jurisprudence

III. Whither the Variable Geometry in the European Court of Human Rights Substantive Case Law?

IV. Conclusion
the reception of the 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 of Human Rights has shown, and continues to show, that interpretation of the Convention by the Court does not take place in a legal and political vacuum. The Court’s case law, for better or worse, has always shown sensitivity, not only to what is a desirable moral interpretation of rights, but also what is a reasonable and a feasible interpretation of the Convention, given the type of rights at stake, the state of the European or international consensus on the scope of specific rights, and whether the complexity of issues at stake may be such that “opinions within a democratic society might reasonably differ widely” on the interpretation of the scope of a right.

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. 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. 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 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. 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


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

---

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 CONFIRMING EUROPE: THE EUROPNE CONVENTION IN A NATIONAL, EUROPEAN AND NATIONAL CONTEXT 142 (Andreas Follesdal & Geir Ulfstein eds., 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).


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 in the 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 bad faith 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 whether these 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 its docket in its early days of the 1960s to an influential human rights court right through the 1970s and 1980s is well documented. 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. The old and
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. 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, 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. Through the Turkish cases, the European Court of Human Rights started to address large volumes of right to life, torture, and disappearance cases, bringing its jurisprudence closer to that of the Inter-American Court of Human Rights. 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

---

23 Çali, Koch & Bruch, supra note 6.
28 Id.
homogenous Convention audience of the 1980s. The Court’s jurisdiction covered eighteen states in 1990. This expanded to thirty-six states in 1997 and to forty-seven by 2007. 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.

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 the Council of Europe, 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

30 See COUNCIL OF EUR., supra note 21.
it in the execution process of human rights judgments. 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, 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.

The UK accepted the compulsory jurisdiction of the Court in 1966. 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. 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. Despite this, it was only

36 See Oomen supra note 14; see also Altwicker, supra note 14; Reiertsen, note 14; Wenander, supra note 14.
38 DONALD, GORDON & LEACH, supra note 4.
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. An intense domestic engagement with the Convention in the domestic courts, including the then UK House of Lords, followed.

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. In response to this, the UK Government began a concerted effort to deport individuals who may pose a national security risk to the UK. This policy included the securing of diplomatic assurances from receiving states prior to the deportation of non-nationals suspected of posing security risks. 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 treatment and unfair trials. 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. This judgment was seen as too intrusive by the UK Parliament on its prerogative to decide on the distribution of democratic rights across its citizenship. 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

---

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).
43 *Id.*
46 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.
culture was under threat from Strasbourg. 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. In this speech, Lord Hoffman epitomized the decay of the European human rights acquis in the UK. In what has subsequently become 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 strike between freedom of the press and privacy should be decided by a Slovenian judge saying of a decision of the German Constitutional Court.

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. 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. 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. 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, 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. To date, this judgment remains

50 Id. at 36.
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 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

---

\(^{56}\) 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.


\(^{58}\) Id. at cols. 498–505.


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
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 authorities as co-interpreters of the Convention rights.\textsuperscript{62} The Brighton Declaration and resulting protocols thus turned the UK’s specific demands into a European political document signaling a demand for deferential direction to 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).\textsuperscript{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.\textsuperscript{64} Whilst the cases coming from the new member states of 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.

\textit{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.


\textsuperscript{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 \textit{COUNCIL OF EUR., supra note 21}.

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 family. In this process, the Court’s jurisprudence, too, has become richer and focused on new terrain, such as institutional judicial reform and transitional justice. In effect, the Convention system was broadly regarded as helping the new member states to democratize and restructure their administration of justice systems. Given the lack of outright challenges to the Convention system by its new 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 resources to give effect to the Convention.

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. Whilst categorizing different states is often a matter 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

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


68 Cali, Koch and Bruch, supra note 6.


institutions, such as elections, but their attitude in favour of limiting protections of civil and political rights if opposition groups demand these rights. 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. 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. 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. The European Court of Human Rights’ ever-rising repetitive 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, detention and imprisonment of journalists and human rights defenders, as well as the targeting of opposition politicians. 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 scrutiny in 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, as well as in writing and speeches by its individual judges. 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 may be termed as its “standard jurisprudence.”

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 OF THE COURT TO THE BRUSSELS CONFERENCE (Jan. 26, 2015), https://www.echr.coe.int/Documents/2015_Brussels_Conference_Contribution_Court_ENG.pdf.
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 ECHR’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
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 be the 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 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

---

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.
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).
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

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

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).
87 This has been the case even for gross human rights violations perpetrated by state actors. Çali, supra note 27.
88 See EUR. COURT OF HUMAN RIGHTS, supra note 82.
subject to debate. 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. This, too, attracted much criticism due to the risks of over-determination of such proximity. 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. 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.

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 the good 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. 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. The case is unique in the sense that Germany has been a strong supporter of the Convention acquis, even 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.

The Von 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. 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

95 PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES, supra note 81.
balance between right to privacy and freedom of expression. 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. In response, the Court carefully stated that “where the balancing exercise has 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.” 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 the right 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 a balancing exercise.

This form of reasoning constitutes a departure from the substantive 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 human rights 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 Human Rights employed its quality of decision-making focused good faith deference standard to a case. This case was a first in terms of a judicial

100 See BVerfG (Federal Constitutional Court), 1 BvR 1602/07, Feb. 28, 2008.
102 Due to the emphasis on responsible action by domestic courts, I have elsewhere called this new doctrine, “the responsible courts” doctrine. See Başak Çağ, From Flexible to Variable Standards of Judicial Review: The Responsible Domestic Courts Doctrine at the European Court of Human Rights, in SHIFITING CENTRES OF GRAVITY IN HUMAN RIGHTS PROTECTION: RETHINKING RELATIONS BETWEEN THE ECHR, EU AND NATIONAL LEGAL ORDERS 144 (Oddný Mjöll Arnardóttir & Antoine Buyse eds., 2016).
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 company had testified against the applicants in those proceedings.107 The applicants set 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 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 the Convention.110 It went on to decide that the domestic courts had duly recognised the importance of freedom of expression and that the decision of 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

104 Id.
105 Id.
106 Id. at 11.
107 Id.
108 Id. at 195–96.
109 Id. at 196.
110 Id. at 214–15.
111 Id. at 220.
competing interests must be carried out.\textsuperscript{112} Furthermore, the Court has introduced a new concept to its jurisprudence of procedural deference: manifest disproportionality as opposed to standard proportionality.\textsuperscript{113} Dissenting judges in the \textit{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.\textsuperscript{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.\textsuperscript{115} This distinguishes the \textit{Palomo Sanchez} case from \textit{Von Hannover} where the issues at stake had previously been considered by the 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 and duly placed itself in a subsidiary role for the interpretation of the Convention.

The 2017 Grand Chamber judgment in the case of \textit{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.\textsuperscript{116} On July 9, 2013, the European Court of Human Rights held, in \textit{Vinter and Others v. United Kingdom}, that whole life orders in the UK violate Article 3 of Convention.\textsuperscript{117} In so doing, the Court held that the legal framework in the UK failed to provide legal certainty as to when lifers

\textsuperscript{112} Id. at 218–19.
\textsuperscript{115} Id.
can ask for a review of their sentence.\textsuperscript{118} It also pointed to the absence of a dedicated review mechanism to this end under UK law.\textsuperscript{119} In 2014, the UK Court of Appeal in \textit{R v. McLoughlin} considered the \textit{Vinter and Others} 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.\textsuperscript{120} In the light of this assurance by the Court of Appeal of the United Kingdom, the European Court of Human Rights overturned its \textit{Vinter} decision in Hutchinson and found the UK legal framework compatible with Article 3 of the Convention.\textsuperscript{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.”\textsuperscript{122} The \textit{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.\textsuperscript{123}

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.\textsuperscript{124} The \textit{Animal Defenders v. United Kingdom} case of 2013 and the \textit{S.A.S 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.\textsuperscript{125} The \textit{Animal Defenders} case concerned the blanket ban on political advertising by the UK Parliament and whether this violated freedom of expression.\textsuperscript{126} The Court first started out by holding that in the field of freedom of

\begin{itemize}
  \item \textsuperscript{118} \textit{Id.} at 350–53.
  \item \textsuperscript{119} \textit{Id.} at 353.
  \item \textsuperscript{120} \textit{R v. McLoughlin} [2014] EWCA Crim 188 (Eng.).
  \item \textsuperscript{121} \textit{Hutchinson}, App. No. 57592/08, Eur. Ct. H.R.
  \item \textsuperscript{122} \textit{Id.} para. 71.
  \item \textsuperscript{126} \textit{Animal Def. Int’l v. United Kingdom}, 2013-II Eur. Ct. H.R. 203.
\end{itemize}
expression states enjoy a narrow margin of appreciation. 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 the quality of the parliamentary and the judicial debates in the UK context. In so doing, the Court held that in instituting a blanket ban the Parliament had duly considered other options and that was sufficient to ensure compliance with the Convention. In this respect, the Court found that a debate 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. 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 a ban, 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. The latter meant that the government had a wide margin of appreciation when considering whether limitations on the right to manifest one’s beliefs were “necessary.” 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.

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

---

127 Id. at 232.
128 Id. at 233–34.
129 Id. at 235–37.
131 Id. at 370–71, 378–79.
132 Id. at 373–74, 380.
133 Id. at 381.
Coping With Crisis

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 for legitimate restrictions of rights in the Convention. States’ bad faith use of their 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.”

The travaux préparatoires 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.

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 state parties when analyzing Convention violations.

In the first ever case that 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. It held that Article 18

---

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.


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.\textsuperscript{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.\textsuperscript{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 thus refused 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.\textsuperscript{141}

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 \textit{Gusinskiy v. Russia}.\textsuperscript{142} The case concerned the detention of a Chairman of the Board of and majority shareholder in ZAO Media Most, a private Russian media holding company, which also owned NTV, a popular television channel.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145} Gusinskiy further argued that the authorities intended

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at 9.
\item \textsuperscript{140} \textit{Id.} at 10.
\item \textsuperscript{142} Gusinskiy v. Russia, 2004-IV Eur. Ct. H.R. 129.
\item \textsuperscript{143} \textit{Id.} at 136.
\item \textsuperscript{144} \textit{Id.} at 136, 138–40.
\item \textsuperscript{145} \textit{Id.} at 150.
\end{itemize}
to silence his media outlets through this forced sale, due to its critical views of the government.\footnote{146}

The Court’s initial approach when finding a violation under Article 18, in conjunction with Article 5 in the Gusinskii case was cautious and brief. The Court, following Kamma, emphasized that Article 18 of the Convention does not have an autonomous role and that it could only be applied in conjunction with other Articles of the Convention.\footnote{147} The Court, however, found that the direct evidence provided by the application was compelling to prove bad faith on the part of 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.\footnote{148} All charges against the applicant were dropped as soon as he signed the agreement.\footnote{149} Russian authorities also did not contest this direct evidence.\footnote{150} All of these facts, the Court held suggested that “the applicant’s prosecution was used to intimidate him.”\footnote{151}

Following on from Gusinskii, the Court has continued to consider Article 18 cases in conjunction with other articles, primarily with respect to cases coming from Eastern Europe and the Caucasus. The countries from which Article 18 cases come from are also the countries with repetitive rights violations cases\footnote{152} and those that have fallen off the democratic transition track. In six cases that followed Gusinskii, Cebotari v. Moldova (2007), Lutsenko v. Ukraine (2012), Tymoshenko v. Ukraine (2013), Mammadov v. Azerbaijan (2014), Jafarov v. Azerbaijan (2016), and Merabishvili v. Georgia (2016), the Court also found a violation of Article 18, in conjunction with Article 5.\footnote{153}

\footnote{146} Id. at 150–51.  
\footnote{147} Id. at 151.  
\footnote{148} Id. at 150.  
\footnote{149} Id. at 138–40.  
\footnote{150} Id. at 151.  
\footnote{151} Id.  
Cebotari, the then-head of a Moldovan state-owned power distribution company called Moldtranselectro, argued that like Gusinskiy, 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 Cebotari.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 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 and Minister of the Interior in Georgia.159 These politicians argued that their detention was a form of retribution by the incoming governments and had the aim of preventing them from taking part in the political life of their countries.160 In relation to Azerbaijan, the two Article 18 cases brought before the European Court of Human Rights concerned the silencing of civil dissent through criminal law.161 Ilgar Mammadov was a

---

155 See id. paras. 52–53.
political activist and an academic and Rasul Jafarov was a well-known civil society activist and human rights defender. In all of the seven cases where Article 18 was raised and violations found by the Court, the applicants were detained under various provisions of domestic criminal law. 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 domestic authorities, removing the applicants from the full protection of the Convention as a whole.

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. In the two Ukrainian cases, Lutsenko and Tymoshenko as well as in Mammadov v. Azerbaijan, 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.

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. 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 specific immediate facts surrounding the case, but also the general conditions of treatment of human rights defenders in the country. 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. 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. Some of the burden of proof for disproving a hidden agenda may also fall on the government authorities, if the facts of the case so require. 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 violation of that Article in conjunction with Article 18.

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. It should therefore not be exclusively “borne by one or the other party” and governed by the standard of “beyond reasonable doubt.” This decisive lowering of the standard of proof for bad faith violations gives a new flexibility to the Court to investigate bad faith violations. 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. Given the rise of Article 18 cases at the Court’s door, not

---

170 See id.
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 Çalış, Merabishvili v. Georgia: Has the Mountain Given Birth to a Mouse?, VERFASSUNGS BLOG (Dec. 3 2017), http://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/.
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.

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 has
shown 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 may
be a façade hiding bad faith circumvention of the Convention by
domestic authorities. The standard jurisprudence of the European Court
of Human Rights is now sandwiched between two types of case law that
operate under differentiated logics of trust: a principled deference to
states that demand to be seen as Convention-respecting in their own
ways, 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

180 Cornford, supra note 17 (on variable geometry and the World Trade Organization); Goldsmith,
supra note 17 (on variable geometry and the European Union).
acknowledges that, in light of the expansion of the EU, not all states may be able or willing to integrate at the same speed. In the case of the World Trade Organization, it refers to inserting flexibility of commitments into the free trade regime. The new variable geometry in the case of European human rights points to differentiation based on good and bad faith of domestic Convention 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 is convinced that states do not operate with illegitimate purposes when restricting Convention rights. In other words, the European Court of Human Rights no longer speaks to all Council of Europe member states in 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 these states 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 jurisprudence may 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

182 Cornford, supra note 17.
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” between west 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 under 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 opinion of 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

183 Keller & Heri, supra note 18.
184 Arnardóttir, supra note 3.
185 The phrase inspired by Erich Maria Remarque’s 1929 novel originally entitled in German Im Westen nichts Neues.
matter. 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.” 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 represents 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 experts, which does not deliver 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.

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. 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

---

189 Id.
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 the bad faith case law must go even further. Some judges insist that the original founders of the Convention meant for this differentiation of blame and that the Court must speak up when states structurally backslide from rule of law and democratic 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’s box, 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

¹⁹³ Keller & Heri, supra note 18.
¹⁹⁵ Id. paras. 48–51 (Küris, J., concurring).
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.\footnote{Animal Def. Int’l, 2013-II Eur. Ct. H.R. 203, 249 (2013).} 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 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 these fundamental 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.\footnote{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).} These new developments can, therefore, be seen as a continuum of the Court’s strategic responses to managing diversity and universality through its variable use of margin of appreciation\footnote{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.} 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.

\section*{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 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 to deliver a significant amount of judgments canvassing its well-established case 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


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.
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 doctrines 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.