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Legitimate Aims, Illegitimate Aims and the E.Ct.H.R.: Changing Attitudes and Selective Strictness

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ABSTRACT

This article aims to trace the recent changes in the case law of the European Court of Human Rights, pertaining to the legitimate aim test, which has so far not been appropriately considered in existing jurisprudence. It first shows that the legitimate aim test is not just a paper tiger, and has a bigger bite than it has been given credit for, especially for the last ten years. Furthermore, despite its "procedural turn", the Court has recently been more inclined to take the legitimate aim disputes to a factual level by questioning the governments' assertions of legitimate aims with regard to not only their legal justificatory capacities but also as to their factual accuracy. However, this shift towards a stricter, more sceptical approach is only observable against certain member states. This finding aligns with recent scholarship on the Court's differentiated approach towards Member States, often called "the variable geometry".

KEYWORDS

Legitimate Aims; European Court of Human Rights; European Convention on Human Rights; Bad Faith Jurisprudence; Selective Strictness

EDITORIAL NOTE
The Bluebook rules (21st ed., 2020) require the avoidance of a final bibliography or list of cases. May the reader note that - given the peculiar expressivity of Annex I - he will find a list of cases at the end of the article. For further details, please refer to the footnote 68.

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INTRODUCTION

The institution and the case law of the European Court of Human Rights [hereinafter E.Ct.H.R.] has undergone numerous significant changes over the years. These changes were often made in response to criticisms and emerging problems and they have attracted considerable academic attention.[1]

[1] *See generally*, James A. Sweeney, The European Court of Human Rights in the Post-Cold War Era: Universality in Transition (2013). Ed Bates, The Evolution of the European Convention on Human Rights (2011). Jonas Christoffersen & Mikael Rask Madsen, The European Court of Human Rights between Law and Politics (2011). ; Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the Human Rights Regime*, 19 Eur. J. Int'l. L. 125 (2008). John Hedigan, *The European Court of Human Rights: Yesterday, Today and Tomorrow*, 12 Ger. L. J. 1716 (2011). Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 Ger. L. J. 1730 (2011) ; Noreen O'meara, *Reforming the ECtHR: The Impacts of Protocols 15 and 16 to the ECHR*, Icourts Working Paper Series No:31 (2015); Evaluation Group, *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* at 39 (2001); Steven Greer, *What's Wrong with the European Convention on Human Rights?*, 30 Hum. Rts Q. 680 (2008). Lord Woolf, *Review of the Working Methods of the European Court of Human Rights* 67-70 (2005); Marie-Aude Beernaert, *Protocol 14 and new Strasbourg Procedures: Towards Greater Efficiency? And at What Price?*, 5 Hum. Rts L. Rev. 544, 545 (2004). Eur. Consult. Ass., *Implementation of judgments of the European Court of Human Rights*, Doc. No. 2075, at 7 (2015). *See also* Helen Keller & Cedric Marti, *Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments* 26(4) EUR. J. INT. LAW 830 (2015); George Stafford, *The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part II: The Hole in the Roof*, EJIL:Talk! (2019); L.ucy Moxham, *Implementation of ECHR judgments – have we reached a crisis point?*, UK Human Rights Blog (2017); Robert Harmsen, *The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights in* The European Court of Human Rights between Law and Politics 119 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011) ; Lize R. Glas, *From Interlaken to Copenhagen: What Has Become of the Proposals Aiming to Reform the Functioning of the European Court of Human Rights* 20 Hum. Rts L. Rev. 121, 128 (2020) ; L.R. Glas, "Unilateral Declarations and the European Court of Human Rights" 25(5) Maast. J. Eur. Comp. L. 629 (2018).

Among these changes, arguably the biggest, is the Court's recent shift towards a more deferent stance in favour of domestic authorities. This shift came after some Member States', led by the U.K.,[2] voiced growing criticism towards the Court with regard to its alleged "intrusive" and "expansionist" approach that disregards its subsidiary function.[3] As a response to these criticisms,[4] the Court's case law has undergone a well-documented change, which is often called the "procedural turn" of the E.Ct.H.R. .[5] In brief, this "procedural turn" marks the Court's transition from a court that is mostly concerned with the substance of the arguments and their justificatory capacities for the limitation in question, towards a court that primarily focuses on the quality of the national decision-making process leading up to that limitation, without giving decisive importance to the outcome of the decision made.[6] This new deferent approach provides more substantive freedom to national decision-makers, provided that they make an assessment "in conformity with the criteria laid down in the Court's case law."[7] That being so, there is growing doubt in the literature whether all Member States enjoy this recent freedom. There are both qualitative and quantitative studies showing that after the "procedural turn", the Court has started to apply different standards for different

[2] For an elaborate analysis on the criticisms of the European Court of Human Rights in the United Kingdom, *see* Roger Masterman, *The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights? in* CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS : SHIFTING THE CONVENTION SYSTEM : COUNTER-DYNAMICS AT THE NATIONAL AND EU LEVEL 447 (Patricia Popelier et al. eds., 2016).

[3] *See* SARAH LAMBRECHT, *Assessing the Existence of Criticism of the European Court of Human Rights*, in Popelier et al., *supra* note 2, at 511.

[4] Some authors find this change to be more linked to the case overload rather than criticism. Oddný M. Arnardóttir, *Rethinking the Two Margins of Appreciation*, 12 EUR. CONST. L. REV. 27, 51 (2016).

[5] *See generally*, JANNEKE GERARDS & EVA BREMS , PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES (2017); PATRICIA POPELIER ET AL., *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 MULTILEVEL GOVERNANCE (Patricia Popelier et al. eds., 2012); Oddný Mjöll Arnardóttir, *The 'Procedural Turn' under the European Convention on Human Rights and Presumptions of Convention Compliance*, 15 INT'L J. CONST. L. 9 (2017); BAŞAK ÇALI, *Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Court Judgments in* SHIFTING CENTRES OF GRAVITY IN HUMAN RIGHTS PROTECTION (Oddny Mjö Arnardóttir & Antooine Buyse eds., 2016); Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, 35 HUM. RTS. Q. 176 (2013); Patricia Popelier & Catherine Van De Heyning, P*rocedural Rationality: Giving Teeth to the Proportionality Analysis*, 9 EUR. CONST. L. REV. 230 (2013); Robert Spano, *The Future of the European Court of Human Rights - Subsidiarity, Process-based Review and the Rule of Law*, 18 HUM. RTS. L. REV. 473 (2018). Leonie M. Huijbers, *The European Court of Human Rights' Procedural Approach in the Age of Subsidiarity*, 6 CAMB. INT'L L.J. 177 (2017); Patricia Popelier & Catherine Van De Heyning, *Subsidiarity Post-Brighton: Procedural Rationality as Answer?*, 30 LEIDEN J. INT'L L. 5 (2017); Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. R. 487 (2014).

[6] *See* JANNEKE GERARDS, *Procedural Review by the ECtHR: A Typology* in GERARDS & BREMS, *supra* note 5, at 128.

[7] A search for this phrase and its counterpart in French "dans le respect des critères établis par la jurisprudence de la Cour" in HUDOC database returns a total of ninety-three judgments, all decided after 2012.

states and the new deferent approach is mostly limited to Western European consolidated democracies.[8] Notably, Çalı argued that the Court has developed a differentiated approach between Member States through the new "bad faith jurisprudence", that is, the increasing number of violations decided under Article 18 of the European Convention on Human Rights [hereinafter E.C.H.R. or Convention].[9] Çalı's strong and later quantitatively supported[10] position comes to an end with the following note: "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."[11]

This article aims to contribute to this very end. It does so by looking beyond the *official* bad faith jurisprudence, that is the Article 18 case law, which attracted considerable academic attraction recently. Instead, this paper focuses on its closely connected and grossly ignored little sister, the legitimate aim test [hereinafter L.A.T.]. It argues that, despite what is often suggested, the Court's legitimate aim inquiry has never been a toothless test. In fact, the Court has found more than a hundred violations when applying this test. Moreover, about two thirds of all legitimate aim violations were decided in the last ten years, which indicates a greater scrutiny on the Court's part in recent years. Indeed, while the recent "procedural turn" of the Court essentially means less substantive judicial scrutiny, the L.A.T. has undergone a shift towards a more evidence-based *in concreto* assessment. That is to say, the grounds that the Court relied on when finding a breach of the legitimate aim condition are gradually changing from an *in abstracto* assessment of the invoked aims' justificatory capacity towards an *in concreto* examination based on the factual circumstances surrounding the case.

Also, it further finds that this increased judicial scrutiny of legitimate aims is noticeably selective, since it is only directed on certain Member States. While for each region the ratios of legitimate aim violations to all violations were similar before 2010, there are significant differences between Northern and Western States, and Southern and Eastern States after 2010. In fact, for Eastern European States, this ratio is now about ten times higher than Northern and Western European States. More importantly, after 2010, the legitimate aim frequency ("legitimate aim violations/all violations" decided against all Member States of the region) decreased significantly for Northern and

[8] Başak Çalı, *Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights*, 35, Wisc. Int'l. L. J. 237 (2018). Øyvind Stiansen & Eric Voeten, *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights*, 64 Int'l. Stud. Q. 770 (2020). Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, 9 J. Int'l. Disp. Settlement 199, 219 (2018).

[9] Çalı, *supra* note 8, at 270.

[10] Stiansen & Voeten, *supra* note 8; Madsen, *supra* note 8.

[11] Çalı, *supra* note 8, 274.

Western European States; but it increased significantly for Southern and Eastern European States. These findings -which are elaborated below- show that the increasing intensity of scrutiny in terms of the L.A.T. is not directed against all states, and it rather seems concentrated on certain Southern and Eastern European States.

This Work is the product of an extensive study on the Court's case law, with a particular focus on its practice within the legitimate aim inquiry. In the scope of this study, the violations found by the Court owing to the breach of the legitimate aim condition [hereinafter legitimate aim violations or L.A. violations] decided until November 2020 have been noted, categorized and evaluated. In addition to that, the cases where the Court raised doubts on the legitimacy of the invoked aims or raised particular concerns on the legitimate aim question were noted and referred to where necessary, as can be seen below. The numbers given in Parts 1 and 2 can be verified by consulting Annex I, which presents the full list of the legitimate aim violations found under this study.

Examining recent changes in the Court's jurisprudence through the L.A.T. has two major benefits that make this study a contribution to the existing literature. First, it, in fact, eliminates the problem of small sample sizes. Some studies, both qualitative and quantitative,[12] suffer from inferring wide-reaching results from a small number of cases. On the other hand, there are thousands of cases where the Court conducted a legitimate aim analysis and more than a hundred of violations resulting from a breach of the legitimate aim requirement. Second, since the legitimate aim question is closely connected to the bad faith analysis, examining that question covers both novelties in the case law, namely the increased judicial deference and the emergence of the new Article 18 case law. As opposed to that, most existing literature is bound to cover only the former or the latter.

To that end, Part 1 discusses the importance of the L.A.T. and especially violations found under it. Section 1.1 is dedicated to the numbers and presents the total number of legitimate aim violations found under this study, their dispersion over time and over substantive articles. That section demonstrates that the L.A.T. has much more teeth than it has been given credit for and there are enough legitimate aim violations to work on for the following analyses. Then Section 1.2 introduces three different types of legitimate aim violations and shows that different types of violations indicate different levels of strictness on the Court's part, while Section 1.3 shows that the dispersion of these types of legitimate aim violations over time suggests an increasing judicial strictness in the 2010s. The final Part 2 shows that this increased judicial strictness is only directed against some Member

[12] Both Çalı and Madsen admit that this might be seen as a deficit in their works, *see Id.* at 275; Madsen, *supra* note 8, at 218.

States. It shows that the Court in fact adopts a "variable geometry", but the article takes it one step further: it also shows that for those states that are deemed to be disrespectful towards the Convention values, the Court's *selective strictness* goes beyond Article 18 cases and extends to the legitimate aim analysis as well. Conclusion summarizes the findings of the study.

1. LEGITIMATE AIM VIOLATIONS: NUMBERS, FORMS AND CHANGES

The Convention does not contain a uniform mechanism of restrictions for all rights guaranteed under it. Some articles explicitly stipulate that any interference with the corresponding right should pursue a legitimate aim, and some do not. While not every article in the Convention explicitly stipulates that condition, as the Court stated repeatedly, "any interference with the enjoyment of a right or freedom recognized by the Convention must pursue a legitimate aim".[13] Accordingly, the Court regularly examines the aim(s) of the interferences with Convention rights as to whether those aims are legitimate in the sense of the Convention, notwithstanding whether the underlying article explicitly stipulated that condition or not. Thus, the L.A.T. has a vast scope of application.

That being so, there is only a small number of studies specifically focused on this test.[14] There are some comprehensive studies on accommodation clauses, but often with only a brief part dedicated to the L.A.T. .[15] There are also studies that specifically focus on certain legitimate aims individually, but without dwelling on the L.A.T. itself.[16]

[13] Broniowski v. Poland, 2004-V Eur. Ct. H.R. 1, 58.

[14] To my knowledge, two brief studies by Richard Gordon and Peter Kempees and a relatively longer article by Wojciech Sadurski. *See* Richard Gordon, *Legitimate Aim: A Dimly Lit Road*, 7 Eur. Hum. Rts. L. Rev. 428 (2002). PePeter Kempees,*"Legitimate Aims" in the Case-Law of the European Court of Human Rights, in* Protecting Human Rights: The European Perspective: Studies in Memory of Rolv Ryssdal 659 (2000). Wojciech Sadurski, *Is There Public Reason in Strasbourg?*, Legal Studies Research Paper No: 14/46 (2015). I wish to express my gratitude towards Mr. Gordon for taking his time to share his work with me when I had problems getting to it.

[15] *See* Jukka Viljanen, The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law: A study of the Limitations Clauses of the European Convention on Human Rights (2003). Loukēs G. Loukaidēs, *Restrictions or Limitations on the Rights Guaranteed by the European Convention on Human Rights*, 4 Finn. Y. B. Int'l. L. 334 (1993).

[16] See, for example, Marta Szuniewicz, *The State's Security as a Legitimate Aim of Limitation of Foreigners' Human Rights - Are There Any Boundaries?,* 12 Us-China L. Rev. 76 (2015). Roberto Perrone, *Public Morals and the European Convention on Human Rights,* 47 Isr. L. Rev. 361 (2014).

General commentaries on the E.C.H.R. refer to this test, but again often to a very limited degree.[17] This scarcity of research, I believe, is mostly due to the widespread belief that the legitimate aim inquiry is remarkably easy to satisfy and does not cause significant problems for the states.[18] The Court itself pointed out that its practice is "quite succinct when it verifies the existence of a legitimate aim".[19]

I beg to -somewhat- differ, especially when considering the last ten-fifteen years. While it is evidently true that the Court still does not dwell on the L.A.T. as much as the other inquiries, I argue that the test has always been more relevant than it has been given credit for, and recently, much more so. This assertion, I believe, holds true even against the recent "procedural turn"[20] of the Court, and maybe even *stronger* with that turn. Indeed, the current President of the Court Judge Spano recently suggested that the recent trend in the Court's case law towards a more *process-based review* might raise the question "whether the Court should engage in a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims."[21] This seems like an interesting take when one thinks of the nature of the procedural turn, but -at least against some states- it actually holds true, as what follows will show.

1.1. THE NUMBERS: IS THE L.A.T. REALLY *A PAPER TIGER*?

As mentioned, scholarship seems to accept that the L.A.T. is rather abstract and often easy to satisfy.[22] When arguing for its ineffectiveness, there seems to be an almost universal ground: the scarcity of violations found under this regime.[23] This is certainly not without merit. Found breaches of the legitimate aim condition are significantly lower than the breaches found of the other two conditions of the so-called threefold test.

[17] *See generally* David J. Harris et al., Law of the European Convention on Human Rights (3d ed. 2014). Pieter van Dijk et al., Theory and Practice of the European Convention on Human RigHts (5th ed. 2018). William A. Schabas, The European Convention on Human Rights: A Commentary (2d ed. 2017). Christoph Grabenwarter, European Convention on Human Rights: Commentary (2014). Philip Leach, Taking a Case to the European Court of Human Rights (4th ed. 2017). Bernadette Rainey et al., Jacobs, White and Ovey: The European Convention on Human Rights (8th ed., 2017).

[18] All the commentaries mentioned in fn. 17 commonly suggest that the Court gets satisfied easily when conducting the L.A.T. .

[19] Y.Y. v. Turkey , App. No. 14793/08, 461, 481(June 10, 2015), https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-153134%22].

[20] Arnardóttir, *supra* note 5.

[21] Spano, *supra* note 5, at 61.

[22] All numbers given in this section are valid as of 05.11.2020. Judgments delivered after that date are not included. The reader is kindly invited to verify all data provided under this study by resorting to Annex I.

[23] Another, but less common ground is the broad wording of the legitimate aims and the Court's flexible handling of them. But it is ultimately the Court that gives meaning to these terms and thus the broad wording of the legitimate aims can be overcome by the interpretation of the Court.

That being so, the number of violations found under the L.A. assessment is often undersold, and the number has been on the rise recently.

A detailed review of the case law reveals -at least- 111 judgments in which the Court held a clear violation of the legitimate aim requirement under a substantive article (for the full list, see Annex I).[24] This number is much higher than it has ever been suggested. For example, Van Dijk et al. refer to four violations.[25] Harris, O'Boyle and Warbrick cite only one.[26] Jacobs, White and Ovey merely mention a couple of cases where the Court doubted the legitimacy of the invoked aim.[27] Schabas, cites four.[28] Grabenwarten refers to none when examining Articles 8 to 11, and only cites a limited number under Article 14.[29] Even a study that is specifically dedicated to arguing against the lenient approach of the Court concerning the L.A.T. only cites cases in which the Court "expressed some mild doubts", without mentioning any of the violations under that regime.[30] Admittedly, none of those studies claims to offer a complete number.[31] Again, admittedly, 111 is not a particularly impressive number, given that the Court had found more than 15.000 violations in approximately sixty years. But it should not be forgotten that since the Court's case law is now mostly comprised of "repetitive" cases, distinctive judgments are *destined* (emphasis added) to be in relatively small numbers.

What follows are three charts and accompanying data that show the dispersion of the legitimate aim violations across time and over substantive articles.[32] Chart I below illustrates the legitimate aim violations by year.[33]

[24] Sometimes the Court raised its "doubts" under the L.A.T. or found the justifiability of the interference by the invoked aim "questionable". Similarly, and predominantly in cases concerning Article 14, the Court sometimes found a lack of "objective and reasonable justification" without specific reference to the aim or purpose of the distinction. These are legitimate aim "problems" rather than violations, and for that reason they are not included in this number.

[25] *See* Van Dijk et al. , *supra* note 17, at 314-15.

[26] *See* Harris et al. , *supra* note 17, at 510.

[27] *See* Rainey et al. , *supra* note 17, at 347-48.

[28] *See* Schabas , *supra* note 17, at 405, 436 and 513. There is no separate chapter for limitation clauses in that study, thus it is possible that the number I give is lower than the actual.

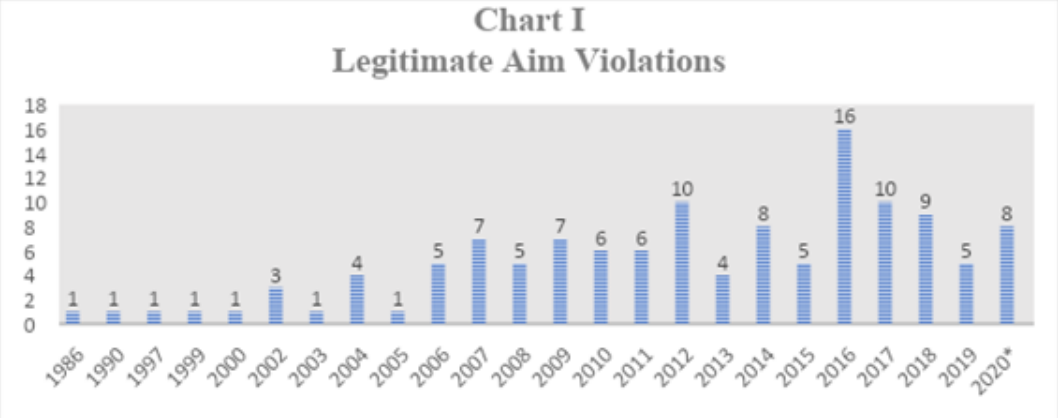
[29] *See* Grabenwarter , *supra* note 17, at 350-51.

[30] *See* Sadurski, *supra* note 14, at 3.

[31] Neither do I, actually. But I am convinced that I cover most of them.

[32] Since citing each and every case comprising the data on the following charts would hamper the main text, the reader is kindly asked to verify those numbers by resorting to Annex I. All numbers are valid as of November 2020.

[33] Article 18 violations are included. If a case included a legitimate aim violation in a substantive article as well as an Article 18 violation, it is counted as one.



As can be seen, before 2000, the Court found violations under the legitimate aim regime only in four different years and found only one violation in each of those years. Of all legitimate aim violations, about 85% (106 of 125) were decided in the last twenty years; more than 77% (ninety-seven of 125) were decided in the last fifteen years; and about 65% (eighty-one of 125) were decided in the last ten.

One can argue that this data may be misleading since the total number of judgments delivered by the Court each year differs significantly and that the number is significantly higher than before the 2000s. To answer this possible objection, it is thus necessary to resort to Chart II below, which clearly illustrates that, after around 2010, there is a gradual increase in the proportion of legitimate aim violations to all violations.[34]

As can be seen, there has been a noticeable increase in the proportion of legitimate aim violations to all violations after around 2016. Furthermore, Chart III below shows the

[34] Only Chamber and Grand Chamber judgments are taken into account for both data. All numbers are obtained from the HUDOC database.

number of L.A. violations for each substantive article[35] including a comparison between violations decided before and after 2010.

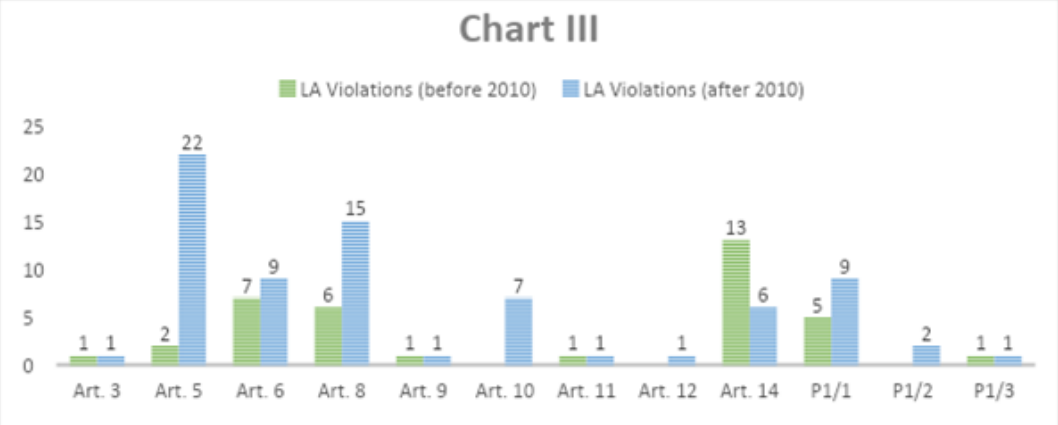


Chart II confirms that the large majority of all L.A. violations had been decided after 2010. The second insight is that after 2010, the Court found L.A. violations in respect to three new articles, namely Arts. 10, 12 and Art. 2 of Protocol No. 1. In fact, arguably, the Court now found a violation in respect to all articles of which an L.A. violation is possible.[36] The increase of the L.A. violations in respect to Arts. 5 and 10 also stands out. This is also meaningful, because the violations under these articles often include much more evidence-based discussion on the substance of the case and require a more *in concreto* assessment on the part of the Court, especially compared to L.A. violations decided under Article 14, which are mostly outcomes of an *in abstracto* assessment and value-based rejection of the aims invoked by the Government to justify the differential treatment in question.[37] Note that, accordingly, Article 14 is the only article as to which the legitimate aim violations decided under is decreased in the last ten years.

Thus, the number of legitimate aim violations is much higher than it has been suggested, and both the number of violations and the ratio of the L.A. violations to all

[35] Article 18 violations found in connection with a substantive right are excluded if there was no separate legitimate aim violation found under the corresponding article. The grand total here is 112 due to the case of Mozer v. Moldova and Russia, App. No. 11138/10 (Feb. 23, 2016), https://hudoc.echr.coe.int/fre#%22itemid%22:[%22002-10885%22] (last visited Jan. 4, 2022), where the Court found legitimate aim violations both under Articles 8 and 9.

[36] It can be argued that the prohibition of torture in Article 3 is not open to L.A. violations. While it is possible to make a conceptual and theoretical discussion on this point (in which I would align with the doubters), in a case law standpoint, I kindly invite the doubters to see Ciorap v. Moldova, App. No. 12066/02, Paras. 83 and 89, (June 19, 2007), http://hudoc.echr.coe.int/fre?i=001-161263 (on substantive limb, last visited Jan. 4, 2022) and Oleksiy Mykhaylovych Zakharkin v. Ukraine, App. No. 1727/04, Para. 74 (June 24, 2010), http://hudoc.echr.coe.int/eng?i=001-99626 (on procedural limb, last visited Jan. 4, 2022).

[37] *See, e.g., Emel Boyraz v. Turkey, App. No. 61960/08, Para. 56 (Dec. 2, 2014),* http://hudoc.echr.coe.int/eng?i=001-148678 (last visited Jan. 4, 2022); Kurić and others v. Slovenia, 2012-IV Eur. Ct. H.R. 1, 69; Thlimmenos v. Greece, 2000-IV Eur. Ct. H.R., 263, 279.

violations are growing gradually. But not all legitimate aim violations are the same, as the next section will show.

1.2. DIFFERENT TYPES OF LEGITIMATE AIM VIOLATIONS

While there is a considerable number of L.A. violations, not all violations tell the same story. Some of them indicate a stricter approach on the Court's part, and some do not. Some involve a direct confrontation with governments on the aims pursued by the interference, some are merely official declarations of the obvious. Thus, it is necessary to make a distinction between the different types of legitimate aim violations.

An in-depth examination reveals that the legitimate aim violations can be categorized under three groups:[38] (1) violations where the national authorities did not invoke a legitimate aim (Type A); (2) violations where invoked aims were unable to justify the measure, while there is no doubt on the Court's part that the invoked aims were in fact pursued (Type B); (3) violations where the government did not actually pursue the invoked aim (Type C).

What follows is the introduction of each category and explanation of what they reveal about the Court's approach to the legitimate aim question.

1.2.1. TYPE A VIOLATIONS: NO AIM INVOKED BY NATIONAL AUTHORITIES

The first type of L.A. violations mainly result from a lack of justification by the government,[39] the domestic courts,[40] or sometimes both.[41] When the domestic decision-makers or the government in question do not raise any argument as regards to the aim pursued by the interference in question, the Court usually "declares" this failure and finds a violation of the legitimate aim requirement. Needless to say, this is the least controversial type of L.A. violations. When the governments do not claim any aim whatsoever, the task of the Court becomes significantly easier and such judgments are significantly less likely to create controversy since they involve no substantive assessment on the part of the Court.

[38] Categorisation of each L.A. violation can be found in Annex I.

[39] *See e.g.*, Bochev v. Bulgaria, App. No. 73481/01, Para. 97 (Nov. 13, 2008), http://hudoc.echr.coe.int/eng?i=001-89608 (last visited Jan. 4, 2022).

[40] *See* Mihal v. Slovakia, App. No. 22006/07, Para. 55 (July 5, 2011), http://hudoc.echr.coe.int/eng?i=001-105513. Pla and Puncernau v. Andorra, 2004-VIII Eur. Ct. H.R. 215, 237-38.

[41] *See* Kostadin Mihaylov v. Bulgaria, App. No. 17868/07, Para 42 (June 27, 2008), http://hudoc.echr.coe.int/eng?i=001-85609; Yanakiev v. Bulgaria, App. No. 40476/98, Eur. Ct. H.R. para. 72 (2006), http://hudoc.echr.coe.int/eng?i=001-76682.

Because of the lack of a substantive assessment, it seems *prima facie* that these violations cannot tell anything about the strictness of the approach of the Court. But this is not quite true. This is because in some cases, old and new, the Court substituted the governments' lack of explanation on the legitimate aim question and found one or several legitimate aims for the interference *proprio motu*, letting the governments pass the L.A.T. without themselves submitting any legitimate aim claim. For example, in *Young, James and Webster v. the United Kingdom*, the Government expressly stated that if the Court finds an interference with a convention right, they would not seek to justify that interference, but the Court found a legitimate aim on their behalf anyway.[42] In the same vein, in *Ciubotaru*, the government did not refer to any legitimate aim, but the Court found one for them.[43] Another example is *Kimlya and Others v. Russia*, where the Government "omitted" to indicate any legitimate aim, the Court was "prepared to assume that the interference complained of pursued a legitimate aim, namely that of the protection of public order".[44] Then, in *Surikov v. Ukraine*, the Court found not one, but four different legitimate aims on behalf of the Government, while the Government "have not commented on the aims",[45] and finally in *National Federation of Sportspersons' Associations and Unions (FNASS) and others v. France*, the Court added a new aim to the ones already invoked by the government.[46] Note that in some of these cases, applicants did not raise an objection in terms of the aims for the interference,[47] which can justify the Court's helping hand to the governments. But in some others, despite that the applicants did raise an objection to the legitimate aims, the Court did not hesitate to fill that gap on behalf of the respondent state.[48]

The practice of substituting governments on the legitimate aims when they were silent on the question, therefore, complicates things, because in more than forty legitimate aim violations,[49] the Court found a violation because the government in

[42] *See* Young, James and Webster v. the United Kingdom, App. Nos. 7601//76 & 7806/77, Para. 60 (Aug. 13, 1981), http://hudoc.echr.coe.int/eng?i=001-57608. Judge Evrigenis dissented to this justification made on behalf of the Government, see (Evrigenis, J, Concurring Opinion).

[43] *See* Ciubotaru v. Moldova, App. No. 27138/04, Para. 55 (Apr. 27, 2010), http://hudoc.echr.coe.int/eng?i=001-98446.

[44] Kimlya and Others v. Russia, 2009-IV Eur. Ct. H.R. 319, 350-51.

[45] Surikov v. Ukraine, App. No. 42788/06, Para. 82 (Jan. 26, 2017), http://hudoc.echr.coe.int/eng?i=001-170462.

[46] National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France, App. Nos. 48151/11 & 77769/13, Para. 166 (Jan. 18, 2018), http://hudoc.echr.coe.int/eng?i=001-180442.

[47] *See*, for example, Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 1, 56; Fratanoló v. Hungary, App. No. 29459/10, Para. 14 (Nov. 3, 2011), http://hudoc.echr.coe.int/eng?i=001-107307; Berrehab v. the Netherlands, App No. 10730/84, 1988 Y.B. Eur. Conv. on H.R. Para. 25 (Eur. Court on H.R.) http://hudoc.echr.coe.int/eng?i=001-57438.

[48] *See*, for example, Frodl v. Austria, App. No. 20201/04, Para. 28 (Apr. 8, 2010), http://hudoc.echr.coe.int/eng?i=001-98132; Young, James and Webster v. the United Kingdom, App. Nos. 7601//76 & 7806/77, Para. 60 (Aug. 13, 1981), http://hudoc.echr.coe.int/eng?i=001-57608.

[49] *See* Annex I.

question failed to invoke a legitimate aim. It is hard to infer whether in those cases the Court saw no proper legitimate aim to substitute the governments with, or it simply adopted a stricter approach against them. It gets all the more complicated when one thinks of the wording it used in some of those legitimate aim violations. For example, in one case against Russia, after noting that the Government did not invoke any legitimate aim for the interference, the Court stated that it is "not *prepared* to substitute the Government on that account".[50] One may tend to infer from this that the criterion here is the "Court's preparedness", but in the absence of further elaboration of this in the jurisprudence, it is still not clear what renders the Court "prepared" as to filling a gap left by the governments.

Interestingly, the Courts' practice of substituting governments for their lack of explanation on the legitimate aim question was contested by one of the "substituted" governments as well. In the Grand Chamber case *Sindicatul "Păstorul cel Bun" v. Romania*, the Romanian government objected to the new aim of "preventing disorder" added by the Chamber. They claimed that the Chamber's *proprio motu* reference to public order was immaterial to the case and the sole aim of the refusal to register the applicant trade union was the one that was originally claimed, which was protecting the rights of the Romanian Orthodox Church.[51] Interestingly enough, the Grand Chamber agreed with the Romanian Government, seeing no reason to take the aim of preventing disorder into account.[52]

1.2.2. TYPE B VIOLATIONS: NO JUSTIFICATION OF MEASURE THROUGH PURSUED AIM

This group of L.A. violations comprises cases in which the respondent government attempted to offer a justification for the interference in question, but the Court rejected that justification. In cases falling under this category, the Court found the problem at the invoked aim itself, without doubting on whether it was in fact pursued by the government. In such cases, the Court found that the invoked aims were incapable of justifying the measure, either because they were not legitimate in the sense of the right

[50] Bezymyannaya v. Russia, App. No. 21851/03, Para. 33 (Dec. 22, 2009), http://hudoc.echr.coe.int/eng?i=001-96486 (emphasis added).
[51] *See* Sindicatul "Păstorul cel Bun" v. Romania, 2013-V Eur. Ct. H.R. 1, 56, para.102.
[52] *Id.* para. 158.

in question[53] or the interference in question was evidently incapable of promoting the invoked legitimate interests.[54]

In *Nolan and K. v. Russia*, for instance, the applicant was excluded from Russia because his religious activities were found to be "of a destructive nature and posed a threat to the security of the Russian Federation" and thereby there was a threat to the national security that "resulted from the applicant's [religious] activities".[55] The Court found a violation since the only aim invoked by the Government throughout all of the proceedings was the protection of national security, which was not, unlike Articles 8, 10 and 11, a legitimate aim prescribed under Article 9.[56] Likewise, in *Karajanov v. the Former Yugoslav Republic of Macedonia*, where the applicant complained about the public disclosure of the Lustration Commissions's decision convicting him for collaborating with the former regime's security service before it became final, the Court found that the aims of "ensuring public access to documents in the applicants file and public scrutiny of the Commission's decision-making" were not capable of being "subsumed under any of the aims listed in Article 8 § 2 of the Convention".[57] As can be noticed, in these two cases the problem was that the invoked aims were not legitimate in the sense of the right in question.

In another case, *Maširević v. Serbia*, an appeal lodged by the applicant, who was himself a lawyer by profession, was dismissed by the Serbian Supreme Court on the grounds that according to the law in force, the appeals could only be lodged through the help of a lawyer. The Court noted that the strict interpretation of that law created a situation that the applicant, who can lodge appeals on behalf of others as a lawyer, could not lodge one for himself. It held that despite what the government had claimed, the dismissal of the appeal therefore "did not serve the aims of legal certainty or the proper administration of justice".[58] Moreover, in *X and Y v. Croatia*, the Court found the institution of the domestic court proceedings with a view to divesting the applicant of

[53] *See*, for instance, Nolan and K. v. Russia, App. No. 2512/04, Eur. Ct. H.R. para. 73 (2009), http://hudoc.echr.coe.int/eng?i=001-91302, where the Russian Government attempted to justify an interference with the right to freedom of religion in reference to the protection of national security, which is not one of the exhaustively listed legitimate aims in the second paragraph of Article 9.

[54] The situation where an interference is evidently incapable of promoting a legitimate interest closely resembles the "suitability" problem under the proportionality assessment. However, there are several examples in the case law where the Court saw it as a problem of legitimacy in regard to invoked aims. See, for example, Karajanov v. the Former Yugoslav Republic of Macedonia App. No. 2229/15 ¶ 75 (April 6, 2017) https://hudoc.echr.coe.int/eng?i=001-172563.

[55] Nolan and K. v. Russia, App. No. 2512/04, Eur. Ct. H.R. para. 73 (2009), http://hudoc.echr.coe.int/eng?i=001-91302.

[56] *Id.*

[57] Karajanov v. the Former Yugoslav Republic of Macedonia App. No. 2229/15 ¶ 75 (April 6, 2017). https://hudoc.echr.coe.int/eng?i=001-172563.

[58] Maširević V. Serbia, 51 Eur. CT. H.R. (ser. B) at 51 (2014)http://hudoc.echr.coe.int/eng?i=001-140775.

legal capacity did not satisfy the L.A.T, because it had never been shown that the applicant was a threat to the rights and interests of anyone, including hers.[59] In these two, the problem was that while the invoked aims were legitimate *in general*, the interferences in question were not capable of serving them, thereby they were not justifiable by those aims.

Just as the Type A violations, Type B violations are rarely controversial as they usually do not involve a direct confrontation with governments on the factual matrix based on factual evidence, but rather a rejection of the invoked aims' capability of justifying the measure in question.

1.2.3. TYPE C VIOLATIONS: NO ACTUAL PURSUIT OF INVOKED AIMS

These violations are different from the ones explained in the previous two sections in the way that in cases categorized here the Court directly challenged the governments' legitimate aim claim on a factual matrix, and found that the aim invoked by the government was not the actual aim pursued by them. In some of these Type C cases, the Court restrained itself to simply holding that the invoked aim was not the actual aim of the interference, without indicating what were the actual aims pursued (Type C.1). In others, it held not only that the invoked aim was not actually pursued, but that there was another aim pursued by the interference and identified what other "ulterior" aim was (Type C.2).

The Type C violations are generally more prone to controversy. This is because, as will be discussed further below, in these cases the Court often carries out an actual *fact-check* by either a) drawing significantly different conclusions from certain evidence than what national decision-makers drew from them, insomuch as to indicate an arbitrariness and/or an ulterior purpose on the latter's part; or by b) engaging with new (direct and/or circumstantial) evidence which had not been referred by national decision-makers which indicate that another aim ("bad faith" or "ulterior purpose") than invoked was pursued.

[59] *See* X and Y v. Croatia, 113-116 Eur. CT. H.R. (ser. B) at 113-116 (2011), https://hudoc.echr.coe.int/eng?i=001-107303.

1.2.3.1. CASES WHERE THE ULTERIOR PURPOSE WAS NOT IDENTIFIED (TYPE C.1 VIOLATIONS)

In these cases, the Court held that the aims invoked by the governments were not actually pursued, but it did not identify whether an ulterior purpose was pursued by the interference.

In *Baka v. Hungary*, a former E.C.H.R. judge and former President of the Hungarian Supreme Court complained about his dismissal from the latter position allegedly as a result of the criticisms he expressed publicly against the constitutional and legislative reforms made in Hungary.[60] The Government attempted to explain the termination of the applicant's mandate with reference to the legitimate aim of "maintaining the authority and impartiality of the judiciary", arguing that the applicant's election for the office was of "governmental nature" and the new method of election after applicant's dismissal would increase the independence of the judiciary. The government denied the alleged link between the applicant's earlier criticisms against the government and his dismissal. The Grand Chamber considered it necessary to "recall the sequence of events". It first noted that the proposal for his dismissal was submitted to the Parliament and adopted by it "within a strikingly short time" after his public criticisms. The Court also made reference to the articles published in Hungarian and foreign press and some Council of Europe documents, all indicating a causal link that exists between the criticisms and the dismissal. After establishing this *prima facie* causal link, the Grand Chamber held that the burden of proof shifted to the government, which, in turn, was unable to convince the Court that the reforms in question were of such fundamental nature to justify the premature termination of the applicant's mandate. Thereby identifying the link between the applicant's exercise of freedom of expression and his dismissal from the post as the President of the Supreme Court of Hungary, the Grand Chamber found that the premature termination of the applicant's mandate defeated the very purpose of maintaining the independence of the judiciary, rather than serving it. It thus held that the interference did not pursue a legitimate aim.[61] In that case, the Grand Chamber did not put the actual purpose of the dismissal into words, but by an evidence-based assessment, it debunked the claims of the government in regard to the actual aim of the dismissal.

Likewise, In *Tkachevy v. Russia*, the applicants claimed that their (centrally located) flat in Moscow was expropriated with no public interest and it was used contrary to the project's declared goals. The Court first noted that the Moscow

[60] *See* Baka v. Hungary, App No. 20261/12 ¶ 123 (June, 23 2016) https://hudoc.echr.coe.int/eng?i=001-163113.
[61] *Id.*

Government justified the expropriation with the public interest of safety with reference to a report delivered by a public agency which found that the building in question was unsafe to live in.[62] Then the Court went onto an *in concreto* assessment of the facts. It first noted that the survey report in question was prepared only after an expropriation decision was already taken.[63] Also, the drafters of the report admitted that someone from the Moscow Government had asked them to classify the flat as unsafe.[64] Furthermore, after the reconstruction, the applicants were not allowed to reoccupy the flat (as it would be fit if the authorities' only concern was the safety of the building). In fact, it was sold to a third party (Tverskaya Finance). Moreover, while the Government stated that the building is now an office space, the Court, by resorting to *a self-conducted internet-search* on the website owned by Tverskaya Finance, found that it had become residential premises, which were commercialized by being prestigious and centrally located.[65] Adding all these considerations together, the Court held that whilst the interest of protecting the safety of the applicants "is in itself legitimate, in the circumstances of the present case, there is a number of inconsistencies that do not permit the conclusion that that interest was held genuinely".[66]

Many more examples underline this point.[67] As can be seen, in the above cases the Court did not find the governments' legitimate aim assertions genuine and questioned whether they actually pursued those aims. But while it found that the invoked aims were not actually pursued, it did not explicitly state that there was another ulterior purpose or a bad faith on the part of the government when interfering. The cases where it did so will be examined below.

[62] *See* Tkachevy v. Russia, App. No. 35430/05, Eur. Ct. H.R. para. 39 (2012),http://hudoc.echr.coe.int/eng?i=001-109060.
[63] *Id.* para. 40.
[64] *Id.* para. 41.
[65] *Id.* paras. 44-48.
[66] *Id.* para. 39.
[67] See, for example, Emin Huseynov v. Azerbaijan, App. No. 59135/09 | 87 (May 7, 2015), http://hudoc.echr.coe.int/eng?i=001-154540; Izmir Savaş Karşıtları Derneği and Others v. Turkey, Eur. Ct. H. R., 36-37, 2006; Nowicka v. Poland, Eur. Ct. H. R., 75-77, 2002.

1.2.3.2. CASES WHERE AN ULTERIOR PURPOSE WAS IDENTIFIED (TYPE C.2 VIOLATIONS)

In at least twenty-four cases,[68] when finding a legitimate aim violation under the substantive article, the Court did not limit itself only to holding that the government in question invoked an aim that they did not actually pursue. It took one step further and held that the government actually pursued an aim other than the one that was invoked by them. In these cases, therefore, the Court found some other agenda that was hidden behind the interference in question.

[68] Since citing all these cases fully would seriously hamper the main text, please find full info for these cases in Annex I. Short citations of them are: *See, e.g.* Hakobyan and others v. Armenia, Eur. Ct. H. R., 123, 2012; Nemtsov v. Russia, Eur. Ct. H. R., 103, 2014; Gafgaz Mammadov v. Azerbaijan, App. No. 60259/11 |108 (September 22, 2015), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Gafgaz%20Mammadov%20v.%20Azerbaijan%22], %22itemid%22:[%22001-157705%22]; Ibrahimov and others v. Azerbaijan, App. Nos. 69234/11, 69252/11 and 69335/11 | 127 (February 11, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Ibrahimov%20and%20others%20v.%20Azerbaijan%22], %22itemid%22:[%22001-160430%22]; Huseynli and others v. Azerbaijan, App. Nos. 67360/11, 67964/11 and 69379/11 | 147 (February 11, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Huseynli%20and%20others%20v.%20Azerbaijan%22],% 22itemid%22:[%22001-160429%22]; Ahad Mammadli v. Azerbaijan, App. Nos. 69456/11 and 48271/13 | 57 (June 16, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Ahad%20Mammadli%20v.%20Azerbai jan%22],%22itemid%22:[%22001-163613%22]; Hajibeyli and others v. Azerbaijan, App. Nos. 5231/13, 8193/13, 8204/13, 8468/13, 14226/13, 14249/13, 17447/13, 17569/13, 17575/13, 17626/13, 31201/13, 45211/13 and 51930/13 | 56 (June 30, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Hajibeyli%20and%20others%20v.%20Azerbaijan%22],% 22itemid%22:[%22001-164198%22]; Huseynov and others v. Azerbaijan, App. Nos. 34262/14, 35948/14, 38276/14, 56232/14, 62138/14 and 63655/14 | 66 (November 24, 2016), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Huseynov%20and%20others%20v.%20Azerbaijan%22], %22itemid%22:[%22001-168865%22]; Jamil Hajiyev v. Azerbaijan, App. Nos. 42989/13 and 43027/13 | 68 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Jamil%20Hajiyev%20v.%20Azerbai jan%22],%22itemid%22:[%22001-171488%22]; Bayramli v. Azerbaijan, App Nos. 72230/11 and 43061/13 | 73 (February 16, 2017), https://hudoc.echr.coe.int/eng; Babak Hasanov v. Azerbaijan, App. Nos. 43137/13 and 43153/13 | 65 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Babak%20Hasanov%20v.%20Azerbaijan%22],%22 itemid%22:[%22001-171489%22]; Abbasli v. Azerbaijan, App. No. 5417/13 and 73309/14 | 66 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Abbasli%20v.%20Azerbaijan%22],%22itemid%22: [%22001-171487%22]; Bayram Bayramov v. Azerbaijan, App. Nos. 74609/10 57737/11 67351/11 67977/11 69411/11 and 69421/11 | 74 (February 16, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Bayram%20Bayramov%20v.%20Azerbaijan%22],%22 itemid%22:[%22001-171484%22]; Babayev and Hasanov v. Azerbaijan, App. Nos. 60262/11 69437/11 53662/13 | 89 (July 20, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Babayev%20and%20Has anov%20v.%20Azerbaijan,%22],%22itemid%22:[%22001-175973%22]; Tural Hajibeyli v. Azerbaijan, App. No. 69180/11 | 65 (September 28, 2017), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Tural%20Hajibeyli%20v.%20Azerbaijan%22],% 22itemid%22:[%22001-177124%22]; Bozano v. France, App. No. 9990/82 | 60 (December 2, 1987), https://hudoc.echr.coe.int/eng#%22fulltext%22:[%22Bozano%20v.%20France%22],%22itemid%22:[%22001-57447%22]; Campagnano v. Italy, Eur. Ct. H. R., 49, 2006; Ciorap v. Moldova, Eur. Ct. H. R., 89, 2007; Cebotari v. Moldova, Eur. Ct. H. R., 53 2007; Maltseva v. Russia, Eur. Ct. H. R., 36, 2008; Yerogova v. Russia, Eur. Ct. H. R., 36, 2008 Khodorkovskiy v. Russia, Eur. Ct. H. R., 142, 2011); Lutsenko v. Ukraine, Eur. Ct. H. R., 63, 2012; Catan and others v. Moldova and Russia, Eur. Ct. H. R., 144, 2012.

Note that the ulterior purpose detected in these cases were found under substantive articles of the Convention, and not under Article 18.[69]

In a series of Article 5 violations decided against Azerbaijan between October 2015 and September 2017, in a case decided against Armenia in 2012 and in a case decided against Russia in 2014, the Court detected clear "bad faith" when deciding that the applicants of those cases were detained arbitrarily. The common phrase that the Court used in all of them reads: "[The detention of the applicants] had pursued aims unrelated to the formal ground relied on to justify the deprivation of liberty and implied an element of bad faith".[70] The language itself puts these cases to the category of "bad faith jurisprudence", regardless of the fact that they include no violation decided under Article 18.

The Grand Chamber once stated in an Article 18 case that "although *bad faith* and *ulterior purpose* are related notions, they are not necessarily equivalent in each case".[71] This is a confusing take, and the Court's apparent interchangeable usage of these words in the same case does certainly not help to clarify the separation either. But for the sake of the argument, I accept this separation. Here are the "ulterior purposes"[72] that the Court detected in substantive articles:

- *Bozano v. France*: The deprivation of liberty in question "amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of [a domestic court]".[73]

[69] In two of these twenty-four cases, Article 18 violations were found as well: *See* Cebotari v. Moldova, App. No. 35615/06 Eur. Ct. H.R. (2007), http://hudoc.echr.coe.int/eng?i=001-83247 and Lutsenko v. Ukraine, App. No. 6492/11, Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/eng?i=001-112013.

[70] Hakobyan and others v. Armenia, 123 Eur. CT. H.R. at 123 (2012) https://hudoc.echr.coe.int/eng?i=001-110263; Nemstov v. Russia, 103 Eur. CT H.R. at 103 (2014); Gafgaz Mammadov v. Azerbaijan, App. No. 60259/11, para.108 (Mar. 14, 2016) https://hudoc.echr.coe.int/eng?i=001-168439; Ibrahimov and others v. Azerbaijan, App. No. 69234/11, 69252/11, 69335/11, para. 127 (May 11, 2016) https://hudoc.echr.coe.int/eng?i=001-160430; Huseynli and others v. Azerbaijan, App. No. 67360/11, 67964/11, 69379/11, para. 56 (Feb. 11, 2016) https://hudoc.echr.coe.int/eng?i=001-160429; Huseynov and others v. Azerbaijan, 66 Eur. CT H.R. at 66 (2012) https://hudoc.echr.coe.int/eng?i=001-166154; Jamil Hajiyev v. Azerbaijan, App. No. 9626/14, 9717/14, para. 68 (Apr. 22, 2021) https://hudoc.echr.coe.int/eng?i=001-212032; Bayramli v. Azerbaijan, App. Nos. 72230/11 and 43061/13, para. 73 (Feb 16, 2017); Babak Hasanov v. Azerbaijan, App. No. 6814/13, para. 65 (2013); Abbasli v. Azerbaijan, 66 Eur CT H.R. (ser. B) at 66 (2021); Bayram Bayramov v. Azerbaijan, App. No. 74609/10, para. 74 (2014); Babayev and Hasanov v. Azerbaijan, App. No. 60262/11, para. 89 (July 20, 2019); Tural Hajibeyli v. Azerbaijan, App. Nos. 6477/08 and 10414/08, para. 65 (july 19, 2018).

[71] Merabishvili v. Georgia, App No. 72508/13 ¶ 283 (November 28, 2017) https://hudoc.echr.coe.int/eng?i=001-178753.

[72] Cases where the Court did not use the term "bad faith" but found that there was another aim pursued than the one invoked by the government and identified what that aim was.

[73] Bozano v. France, App No. 9990/82, 60 Eur. Comm'n H.R. Dec. Rep. (1986) , https://hudoc.echr.coe.int/eng?i=001-57448.

- *Campagnano v. Italy*: The law that disenfranchises persons who have been declared bankrupt "has no purpose other than to belittle persons who have been declared bankrupt, reprimanding them simply for having been declared insolvent".[74]

- *Ciorap v. Moldova*: The force-feeding of the applicant was "not prompted by valid medical reasons but rather with the aim of forcing the applicant to stop his protest".[75]

- *Cebotari v. Moldova*: "The real aim of the criminal proceedings and of the applicant's arrest and detention was to put pressure on him in a view to hindering [a company affiliated with the applicant] from pursuing its application before the Court".[76]

- *Maltseva v. Russia & Yerogova v Russia*: Reopening of proceedings after quashing a binding and enforceable final judgment "was not aimed at correcting a judicial error or a miscarriage of justice but rather was an abuse of procedure used merely for the purpose of obtaining a rehearing and fresh determination of the case".[77]

- *Khodorkovskiy v. Russia*: "The circumstances of the applicant show that, albeit formally, he was apprehended as a witness . . . the investigator's real intent was to charge the applicant as a defendant and, thus, to change the venue of the eventual detention proceedings to a more convenient one".[78]

- *Lutsenko v. Ukraine*: The real purpose behind the applicant's deprivation of liberty was "not to bring him before a competent legal authority within the same criminal case, but to ensure his availability for . . . a different set of criminal proceedings".[79]

- *Catan and others v. Moldova and Russia*: The language policy adopted by the Moldavian Republic of Transnistria (which was effectively controlled by Russia), as it appears, "was intended to enforce the Russification of the language and culture of the Moldovan community living in Transnistria".[80]

[74] Campagnano v. Italy, 2006-IV Eur. Ct. H.R. 197, 212.
[75] Ciorap v. Moldova, Eur. Ct. H. R., 89, 2007.
[76] Cebotari v. Moldova, Eur. Ct. H.R. at 11 (2007).
[77] Maltseva v. Russia, Eur. Ct. H.R. at 8 (2008); Yerogova v. Russia, Eur. Ct. H.R. at 8 (2008).
[78] Khodorkovskiy v. Russia, Eur. Ct. H.R. at 37 (2011).
[79] Lutsenko v. Ukraine, Eur. Ct. H.R. at 27 (2012).
[80] Catan and others v. Moldova and Russia, 2012-V Eur. Ct. H.R. at 52 (2012).

As can be seen, these are clearer detections of hidden agendas under substantive articles.[81] Thus, although most of them do not involve a violation under Article 18, they well-deserve to be categorized as "bad faith jurisprudence".

Concluding this section, we have seen that the legitimate aim violations in the Court's case law can be classified under three groups based on the grounds that the Court relied on when finding a breach of the legitimate aim condition. The first type of violations (Type A) often involved no discussion on the legitimate aim question other than the Court's noting that the government did not invoke a legitimate aim claim for the interference. In the second type of violations (Type B), the Court focused on the claimed aim itself, on a rather abstract basis, rather than questioning the government's intentions. In the third type (Type C), the Court carried out a vigilant scrutiny on factual grounds, discussing direct and circumstantial evidence, raising doubts when sequences of events suggest an aim other than invoked and inferring results from incoherencies. In some of them it even explicitly detected an ulterior purpose and identified what that purpose was (Type C.2). Thus, different types of L.A. violations indicate different degrees of judicial strictness. Next section discusses the changes in the dispersion of these types over time and what it tells us.

[81] One can ask that if these are clear ulterior purposes, then why the Court had not decided a violation under Article 18? In two of them (See Ceboatri v. Moldova, ¶53; See Lutsenko v. Ukraine), it did. In most of the others, Article 18 was not brought up by the applicants. But for the ones that they did, the answer is neither short nor straightforward. In here, therefore, I will limit myself merely noting that I find Tsampi's *countre-pouvoirs* approach highly convincing. According to that approach, the Court finds an Article 18 violation only if 1) the interference was made for the purpose of eroding (economic, social, political) *counter-pouvoirs* within that state; and 2) all institutional powers within that state are in failure to effectively counter that erosion. *See* Aikaterini Tsampi, *The New Doctrine on Misuse of Power Under Article 18 ECHR: Is it About the System of Contre-Pouvoirs Within the State After all?* 38 Neth. Q. Hum. Rts. 134 (2020).

1.3. THE CHANGING MIEN OF THE LEGITIMATE AIM VIOLATIONS OVER TIME

When one examines the L.A. violations decided before 2010, two points are clear even at first glance: Most - around 75% - of them do not include a discussion on the facts of the case based on the evidence in hand. They are either Type A violations where no legitimate aim was invoked, or Type B cases involving an *in abstracto* discussion on whether the invoked aim(s) could *theoretically* (emphasis added) be considered legitimate for the right(s) in question.[82] In other words, the overwhelming majority of the legitimate aim violations decided before 2010 are either Type A or B violations.[83]

After around 2010, there is an observable change. The E.Ct.H.R. recently seems more and more inclined to challenge the governments' genuineness on the legitimate aim question. It appears to be more willing to take the dispute onto a factual matrix rather than contemplating in an abstract, theoretical realm as it usually did before. When it sees fit to take the dispute onto a factual matrix, it does so either by making its own individual assessment of the same facts and thereby challenging the reasoning given by the national decision-makers, or by resorting to other evidence and "telltale signs" signifying a deceit or an ulterior aim (Type C violations).[84]

The relative increase of Type C violations over Types A and B is not the only indicator of this change. The increases in legitimate aim violations decided under Article 5 (two to twenty-two, before and after 2010) and Article 10 (zero to seven, before and after 2010) themselves are important indicators,[85] because the rights under Articles 5 and 10 require an *in concreto* assessment of the facts by their nature. Of course, the

[82] It should be noted that it is certainly true that there are cases decided before 2010 in which the Court questioned the legitimacy of the invoked aim on an evidentiary basis, and thus conducted an *in concreto* assessment, but these cases are in the clear minority. According to my findings, of thirty-seven L.A. violations decided before 2010, only nine cases include an L.A. assessment with some regard to the factual circumstances of the case: *See* İzmir Savaş Karşıtları Derneği and Others v. Turkey, Eur. Ct. H.R. at 5-6 (2006); Campagnano v. Italy, 2006-IV Eur. Ct. H.R. (2006);Tuleshov and others v. Russia, Eur. Ct. H.R. at 7-8 (2007); Zagorodnikov v. Russia, Eur. Ct. H.R. at 4-5 (2007); Ciorap v. Moldova, Eur. Ct. H.R. at 22-23 (2007); See Maltseva v. Russia, ¶ 34-36; See Yerogova v. Russia, ¶ 34-36; Khuzhin and others v. Russia, Eur. Ct. H.R. at 24 (2008); Glor v. Switzerland, 2009-III Eur. Ct. H.R. 33, 57.

[83] Annex I shows my classification of all L.A. violations as Type A, B or C.

[84] It is impossible to cite the whole list, but to cite a few examples: *See* Khodorkovskiy v. Russia, Eur. Ct. H.R. at 37 (2011); Shimovolos v. Russia, Eur. Ct. H.R. at 12 (2011); Catan and others v. Moldova and Russia, 2012-V Eur. Ct. H.R. at 52 (2012); Dimitrovi v. Bulgaria, App. No. 12655/09, ¶ 53-55 (March 3, 2015), http://hudoc.echr.coe.int/eng?i=001-152624; Baka v. Hungary, App. No. 20261/12, ¶ 148-49, 156-57 (June 23, 2016),http://hudoc.echr.coe.int/eng?i=001-163113; Bayev and others v. Russia, App. Nos. 67667/09 and 2 others, ¶ 65-83 (June 20, 2017), http://hudoc.echr.coe.int/eng?i=001-174422; Navalnyy v. Russia, App. Nos. 29580/12 and 4 others, ¶ 124-26 (November 15, 2018), http://hudoc.echr.coe.int/eng?i=001-187605. The reader is kindly invited to resort to Annex I for the full list.

[85] See Chart III above.

growing number of Article 18 violations in the case law is another sign, proving that the Court is recently much more active in the legitimate aim discussion.

The changing mien of the L.A.T. in the 2010s gets much more interesting when one thinks that much of that decade is commonly referred as the "Age of Subsidiarity".[86] The term refers to a new era for the Court in which it tends to limit itself to reviewing whether the issue has been properly handled by the domestic decision-makers in compliance with the principles already set out by the Court (*process based review*), rather than carrying out an individual assessment of the issue itself (*substance based review*).[87] The new deferent approach in favour of the national decision-makers should *prima facie* mean an even less judicial scrutiny on the L.A.T., because one of the main reasons of the relative lack of strictness of this test has always been the difficulty of fact-checking the real intention of the governments,[88] as it requires the Court to actively engage with circumstantial evidence,[89] indicators showing deceitfulness on the governments' part[90] and such. Thus, directly confronting the governments as to their real intentions hardly seems fitting to this new era. President Spano, the *proclaimer* of the "Age of Subsidiarity", does not seem to agree with this. In an article presenting his take on the process based review, he wrote:[91]

> Looking to the future, it is interesting to ponder whether the Court's traditional approach of applying a very formal and rational relations-type analysis to a Government's invoked legitimate aim, thereby leaving all the legwork of the necessity assessment to the test of proportionality, needs some reformulation: in other words, whether the Court should engage in a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims
> . . .

There is no doubt that an evidence-based assessment would improve the strictness of the L.A.T. . But as indicated above, it is hard to understand how it would fit in the general trend of the process based review, which can be characterized by the Court's deference from engaging in an individual assessment of the evidence at hand and instead focusing on the domestic decision-makers' handling of the issue. Interestingly enough, whether it

[86] Spano, *Universality or Diversality*, *supra* note 5, at 491. Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 Hum. Rts. L. Rev. 487, 491 (2014).
[87] *Id.* at 480.
[88] *See also* Tsampi, *supra* note 81, at 140.
[89] *See* Tănase v. Moldova, 2010-III Eur. Ct. H.R. 361, 409; Tkachevy v. Russia, Eur. Ct. H.R (2012).
[90] *See* Makhmudov v. Russia, Eur. Ct. H.R. at 14 (2007).
[91] Spano, *The Future of . . .* , *supra* note 5, at 488 (fn. 61).

fits or not, we do observe "a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims",[92] as shown above.

However, the next section questions whether this confusing shift is directed against all states or it is concentrated only on certain states.

2. A SELECTIVE STRICTNESS?

Since the first L.A. violation in 1986,[93] the Court found an L.A. violation in at least one case against at least twenty-eight different Member States. As far as my study goes, the states that breached the legitimate aim condition the most are Russia with twenty-five violations and Azerbaijan with nineteen violations. Bulgaria was found in violation of that condition in twelve cases. Poland and Turkey follow them by five violations each. Hungary violated this requirement four times. Then come Armenia, Croatia, France, Italy, Moldova, Romania, Slovakia and Ukraine, each with three violations. The United Kingdom, the Netherlands and Germany have two violations each. Eleven Member States violated the L.A. requirement once: Sweden, Cyprus, Greece, Austria, Malta, Georgia, Switzerland, Slovenia, Serbia, Macedonia and Andorra.[94]

Table I shows the number of L.A. violations decided against each member state, as well as the regions they are in and the year the judgments were decided (divided as "prior or after 2010").[95]

[92] *Id.*
[93] *See* Bozano v. France, App No. 9990/82, 59-60 Eur. Comm'n H.R. Dec. Rep. (1986) https://hudoc.echr.coe.int/eng?i=001-57448.
[94] All numbers can be verified by resorting to Annex I.
[95] Violations decided in 2010 are in the "after 2010" group.

Region[96]	Member States[97]	L.A. Violations (before 2010)	L.A. Violations (after 2010)	Total
Northern Europe	Sweden	1		1
	The UK	1	1	2
	Total	2	1	3
Western Europe	Austria	1		1
	France	3		3
	Germany	1	1	2
	Switzerland	1		1
	The Netherlands	2		2
	Total	8	1	9
Southern Europe	Andorra	1		1
	Croatia		3	3
	Greece	1		1
	Italy	1	2	3
	Malta	1		1
	North Macedonia		1	1
	Serbia		1	1
	Slovenia		1	1
	Total	4	8	12
Eastern Europe	Armenia		3	3
	Azerbaijan		19	19
	Bulgaria	4	8	12
	Cyprus	1		1
	Georgia	1		1
	Hungary	1	3	4
	Moldova	2	1	3
	Poland	3	2	5
	Romania		3	3
	Russia	8	17	25
	Slovakia	1	2	3
	Turkey	2	3	5
	Ukraine		3	3
	Total	23	64	87
Grand Total		37	74	111

Table I: Dispersion of the L.A. violations over Time, Member States and Regions.

[96] The Regions section is largely based on the grouping made by the United Nations Statistics Division, https://unstats.un.org/unsd/methodology/m49/ (last accessed on 28.10.2020). The only difference is that while Armenia, Azerbaijan, Cyprus, Georgia and Turkey are classified as Western Asia on that data, they are included in Eastern Europe in this list since they are commonly considered Eastern European in the Council of Europe sphere.

[97] Only the states against which the Court found a L.A. violation at least once.

The most significant data Table I provides us are the following:

- While the number of L.A. violations has dropped in Northern and Western Europe, it has increased in Southern and Eastern Europe. Especially in Eastern Europe, the increase is remarkable.[98]
- After 2010, only two legitimate aim violations were decided against Northern and Western European States, while this number is eight for Southern and sixty-one for Eastern European States.
- After 2010, eight new states were added to the L.A. violations list from Southern and Eastern Europe, while there is no new addition in Northern and Western Europe.
- Most increases are against Azerbaijan (zero to nineteen) and against Russia (eight to seventeen).

These are interesting findings, especially the remarkable difference between Northern and Western Europe, and Southern and Eastern Europe. However, a careful reader might respond by indicating that the evident increase might simply be the result of the recent increase of overall number of the Southern and Eastern European cases before Strasbourg. In other words, the L.A. violation numbers may only be high because the total number of judgments decided against those states are high. This is an important objection, and needs to be addressed.

In order to do so, Table II illustrates the proportion of L.A. violations to total number of judgments delivered against all Member States of each region.

Region	L.A. Violations/All Judgments (before 2010)	L.A. Violations/All Judgments (after 2010)
Northern Europe	0,0023	0,0017
Western Europe	0,0049	0,0012
Southern Europe[99]	0,0011 (0,0021)*	0,0054 (0,0052)*
Eastern Europe	0,0036	0,0135

Table II: Ratio of L.A. violations/All judgments before and after 2010, by region.

[98] It is not to be forgotten that most Southern and Eastern European States are new members to the Court's jurisdiction. But the effect of this should not be overestimated. Until 2002, which is the year that almost all Eastern European States (apart from Montenegro and Serbia, which in total have one violation against) were now covered by the Court's jurisdiction, there were only a total of five legitimate aim violations decided by the Court anyway.

[99] The numeral deviation in respect to Southern Europe is most probably due to vast bulk of cases in the '90s against Italy concerning the right to trial within reasonable time. When Italy is neglected in the calculation, the ratios are 0,0021 and 0,0052, before and after 2010 respectively.

Table II provides us with some important data as well. Accordingly,

- Before 2010, the ratios were relatively close for all regions. After 2010, there were significant differences as Eastern European States were remarkably more likely to be found in violation of the L.A. condition.

- Internal analyses of each region confirm that the Court is significantly stricter against Southern and especially Eastern European States after 2010. The ratio has dropped by about 28% for Northern European; and about 73% for Western European States after 2010. The same ratio increased by about 250% for Southern European[100] and by 375% for Eastern European States.

- Overall, after 2010, Eastern European Member States have been found in violation of the L.A. condition about eleven times more than Western European; eight times more than Northern European; and 2.5 times more than Southern European States. In addition to that, internally, the frequency of the L.A. violations against Eastern European States after 2010 has almost quadrupled in comparison to the same frequency before 2010.

In sum, the overall ratio of legitimate aim violations has increased significantly in the last ten years. This increase suggests a stricter approach on the part of the Court. That being so, the increase in strictness is, as above data show, *selective*, i.e. it covers the jurisprudence against some states, and not the others.

The L.A.T. case law under Article 5 confirms this point from a qualitative aspect. As already remarked, Article 5 case law, especially when it involves the question whether the detention at hand was arbitrary or not, by its nature, requires a substantive, *in concreto* assessment. Almost all, if not all legitimate aim violations found under Article 5, therefore, include an *in concreto* assessment and thereby indicate a stricter approach by the Court. In the *Merabishvili* case, the Court made a list of the cases showing that "a deprivation of liberty was chiefly meant for an ulterior purpose".[101] When one examines the Court's list, an interesting fact stands out: except for one case, which was decided about thirty-

[100] When calibrated in accordance with fn 99.

[101] Merabishvili v. Georgia, App. No. 72508/13, ¶ 301 (November 18, 2017), http://hudoc.echr.coe.int/eng?i=001-178753. While the wording suggests otherwise, this list was not a complete list of such cases up until then. It lacks the case of Giorgi Nikolaishvili v. Georgia, Eur. Ct. H.R. at 15 (2009), in which the Court found that the applicant's arrest "served to acquire additional leverage over the unrelated criminal proceedings" and the case of Khodorkovskiy v. Russia, *supra* note 78, para. 142 where the Court found "albeit formally [the applicant] was apprehended as a witness . . . the investigator's real intent was to charge the applicant as a defendant and, thus, to change the venue of the eventual detention proceedings to a more convenient one".

five years ago,[102] all cases in the list were decided against four Eastern European States, namely Azerbaijan, Russia, Armenia and Ukraine.[103]

These findings clearly show that while there is an observable change in the Court's case law towards a stricter and *in concreto* judicial scrutiny in terms of the L.A.T., this change is directed towards certain, mostly Eastern European States. Significantly, this finding corresponds to the general trend of weakening democracies in Southern and Eastern Europe, as reports indicate,[104] as has been noted by the high-level officers of the Council of Europe,[105] and as literature shows.[106]

The findings of this article thus provide output supporting the argument that the Court indeed seems to adopt a more heterogeneous approach towards Member States. In that sense, it acknowledges its subsidiary position against Convention-respecting, mostly Northern and Western European States; and adopts a more intrusive, suspicious approach towards suffering democracies in Southern and Eastern Europe.[107] And that approach against Eastern European States does not present itself only in the Article 18 jurisprudence; it extends to the legitimate aim assessment as well.

CONCLUSION

This article argued several points. First, it aimed to show that the L.A.T. is not a dormant test as it has often been suggested, and as the figures show, it has more teeth than ever, in particular in recent times. In fact, within the scope of this study, 111 legitimate aim violation decisions were found in the body of case law. Moreover, about two thirds of all legitimate aim violations were decided in the last ten years.

[102] *See* Bozano v. France, App No. 9990/82, 59-60 Eur. Comm'n H.R. Dec. Rep. (1986),https://hudoc.echr.coe.int/eng?i=001-57448.

[103] Merabishvili v. Georgia, supra note 101, para. 301.

[104] *See*, Freedom House, *Nations in Transit: Dropping the Democratic Facade*, 2020, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf (last accessed on 28.10.2020), See also, European Intelligence Unit, *Democracy Index 2019*, https://www.eiu.com/topic/democracy-index (last accessed on 28.10.2020).

[105] Eur. Consult. Ass., *Piotr A. Świtalski, Democracy on the Precipice,* at 14 (2011-2012) https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046eb9b.

[106] Attila Ágh, Declining Democracy in East-Central Europe: The Divide in the EU and Emerging Hard Populism (2019). Vedran Džihić, *Grey Zones Between Democracy and Authoritarianism: Rethinking the Current State of Democracy in Eastern and South-Eastern Europe, in* Problems of Representative Democracy in Europe 21, 23-25 (Jan Marinus Wiersma, Ernst Stetter & Sebastian Schublach eds., 2014). Licia Cianetti et al., *Rethinking "Democratic Backsliding" in Central and Eastern Europe - Looking Beyond Hungary and Poland*, 34 East Eur. Pol. 243 (2018).

[107] Çalı, *supra* note 8, at 275.

Second, while the recent "procedural turn" of the Court essentially means less substantive judicial scrutiny, the L.A.T. has undergone a shift towards a more evidence-based *in concreto* assessment and the Court accordingly seems to apply a stricter judicial review under the L.A.T. . The grounds that the Court relied on when finding a breach of the legitimate aim condition are gradually changing from *in abstracto* assessments of the invoked aims' justificatory capacities for the measure in question towards an *in concreto* examination based on the factual circumstances surrounding the case. Thus, it now engages "in a methodological shift towards a more strict, evidentiary-based assessment of invoked legitimate aims", as the current President of the Court once conceived.[108] This shift means an increased intensity of judicial review under the legitimate aim inquiry.

Third, this increased intensity is obviously selective. While the ratio of legitimate aim violations to all violations for each region was similar before 2010, there are significant differences between Northern and Western States, and Southern and Eastern States after 2010. In fact, for Eastern European States, this ratio is about ten times higher than Northern and Western European States. More importantly, while the legitimate aim frequency ("legitimate aim violations/all violations" decided against all Member States of the region) decreased significantly for Northern and Western European States after 2010; it increased significantly for Southern and Eastern European States. These findings show that the increasing intensity of scrutiny in terms of the L.A.T. is not applied to all states, but seems rather concentrated on certain Southern and Eastern European States.

Furthermore, These results fit perfectly with the recent scholarship arguing that the Court's recent case law exhibits two distinct approaches against different states. Stiansen and Voeten found that, after 2010, the Court has become less inclined to find violations against the 'consolidated democracies' that were publicly critical of the Court, while the same cannot be said for the other publicly critical states that are not consolidated democracies.[109] Madsen showed that margin of appreciation requests coming from certain Western European States are more likely to be accepted by the Court compared to same requests coming from certain Eastern European States.[110] Çalı argued that the Court now has a multi-faceted jurisprudence, allowing more interpretational room for right-respecting states while developing a bad faith jurisprudence for those states that are disrespectful towards the convention values. The domestic bodies in the former states, which are mostly the Western European founders,

[108] Spano, *The Future of . . .*, *supra* note 5, at fn. 61.
[109] *See* Stiansen & Voaten, *supra* note 8, at 780.
[110] *See* Madsen, *supra* note 8, at 219.

now enjoy a broader margin of appreciation and the Court limits itself to reviewing the procedural justice in their decision-making process.[111] On the other hand, for the "bad faith interpreters", which are mostly comprised of the semi-authoritarian Eastern European States' domestic bodies who "flout the well-established Convention standards, not merely by error . . . but with suspect grounds of intentionality and lack of respect for the overall Convention acquis",[112] it formed a bad faith jurisprudence by developing a broader read of Article 18.[113] My findings substantially concur with this argument and add that the Court's differentiated judicial strictness against the latter states is not limited to the Article 18 case law, but extends to the legitimate aim inquiry as well. At one point of her study, Çalı states that the Court's jurisprudence now "ranges from the quality-based deference approach, to standard case law interpretations, to findings of bad faith violations."[114] My study therefore proposes a minor tweak to that statement, because "standard case law interpretations" seem not *that* (emphasis added) standard recently, either.

ANNEX 1

Case Name	First App. No	Judgment Date	Paragraph	Article	Violation Type
Bozano v. France	9990/82	18.12.1986	59-60	5	C
Darby v. Sweden	11581/85	23.10.1990	33-34	14(P1/1)	A
Van Raalte v. the Netherlands	20060/92	21.02.1997	43-44	14(P1/1)	B
Larkos v. Cyprus	29515/95	18.02.1999	31	14(8)	B
Thlimmenos v. Greece	34369/97	6.04.2000 1.	47	14(9)	A
A.B. v. the Netherlands	37328/97	29.01.2002	83	8	A
S.A. Dangeville v. France	36677/97	16.04.2002	57-58	P1/1	B
Nowicka v. Poland	30218/96	3.12.2002	75-77	8	A
Sommerfeld v. Germany	31871/96	8.07.2003	46 ; 93	14(8)	A
Broniowski v. Poland	31443/96	22.06.2004	158, 175	P1/1	A

[111] Çalı, *supra* note 8, at 256-63.
[112] *Id.* at 241.
[113] *Id.* at 263-69.
[114] *Id.* at 270.

Pla and Puncernau v. Andorra	69498/01	13.07.2004	61	14(P1/1)	A
Ünal Tekeli v. Turkey	29865/96	16.11.2004	68	14	B
P.M. v. the United Kingdom	6638/03	19.07.2005	28	14(P1/1)	B
İzmir Savaş Karşıtları Derneği v. Turkey	46257/99	2.03.2006	37	11	B
Campagnano v. Italy	77955/01	23.03.2006	49	P1/3	C
Zarb Adami v. Malta	17209/02	20.06.2006	82	14(4)	A
Zeman v. Austria	23960/02	29.06.2006	40	14(P1/1)	A
Yanakiev v. Bulgaria	40476/98	10.08.2006	72	6	A
Aon Conseil et Courtage S.A. and another v. France	70160/01	25.01.2007	46	P1/1	B
Tuleshov and others v. Russia	32718/02	24.05.2007	47	P1/1	A
Zagorodnikov v. Russia	66941/01	7.06.2007	26	6	B
Ciorap v. Moldova	12066/02	19.06.2007	89	3	C
F.C. Mretebi v. Georgia	38736/04	31.07.2007	48	6	A
Cebotari v. Moldova	35615/06	13.11.2007	53	5	C
Luczak v. Poland	77782/01	27.11.2007	59	14(P1/1)	B
Kostadin Mihaylov v. Bulgaria	17868/07	27.03.2008	42	6	A
Maltseva v. Russia	76676/01	19.06.2008	36	6	C
Yerogova v. Russia	77478/01	19.06.2008	36	6	C
Bochev v. Bulgaria	73481/01	13.11.2008	97	8	A
Alekseyenko v. Russia	74266/01	8.01.2009	88	8	A
Nolan and K. v. Russia	2512/04	12.02.2009	73	9	B
Weller v. Hungary	44399/05	31.03.2009	35, 38	14(8)	A
K.H. and others v. Slovakia	32881/04	28.04.2009	53	8	B
Glor v. Switzerland	13444/04	30.04.2009	85	14(8)	B
Tsonkovi v. Bulgaria	27213/04	2.07.2009	26	P1/1	B
Bezymyannaya v. Russia	21851/03	22.12.2009	33	6	A
Jaremowicz v. Poland	24023/03	5.01.2010	60	12	B
Oleksiy Mykhaylovych Zakharkin v. Ukraine	1727/04	24.06.2010	74	3	A
Georgieva and Mukareva v. Bulgaria	3413/05	2.09.2010	38	P1/1	B

Maria Atanasiu and others v. Romania	30767/05	12.10.2010	184	6	A
Boris Popov v. Russia	23284/04	28.10.2010	104	8	A
Putter v. Bulgaria	38780/02	2.12.2010	55	6	A
Maggio and others v. Italy	46286/09	31.05.2011	48	6	C
Khodorkovskiy v. Russia	5829/04	31.05.2011	142	5	C
Shimovolos v. Russia	30194/09	21.06.2011	57	5	C
Mihal v. Slovakia	22006/07	5.07.2011	55	6	A
Stoycheva v. Bulgaria	43590/04	19.07.2011	59	P1/1	A
X and Y. v. Croatia	5193/09	3.11.2011	116	8	B
Kerimli and Alibeyli v. Azerbaijan	18475/06	10.01.2012	41	P1/3	B
Tkachevy v. Russia	35430/05	14.02.2012	50	P1/1	C
Hakobyan and others v. Armenia	34320/04	10.04.2012	123	5	C
Kuric and others v. Slovenia	26828/06	26.06.2012	394	14(8)	B
Lutsenko v. Ukraine	6492/11	3.07.2012	65	5	C
Koch v. Germany	497/09	19.07.2012	67	8	A
Najafli v. Azerbaijan	2594/07	2.10.2012	69	10	A
Catan and others v. Moldova and Russia [G.C.]	43370/04	2.10.2012	144	P1/2	C
P. and S. v. Poland	57375/08	30.10.2012	133	8	A
Hode and Abdi v. the United Kingdom	22341/09	6.11.2012	53	14(8)	A
Karabet and others v. Bulgaria	38906/07	17.01.2013	347	P1/1	A
M.S. v. Croatia	36337/10	25.04.2013	106	8	A
Nataliya Mikhaylenko v. Ukraine	49069/11	30.05.2013	40	6	B
Franek v. Slovakia	14090/10	11.02.2014	54	6	A
Masirevic v. Serbia	30671/08	11.02.2014	51	6	B
Velyo Velev v. Bulgaria	16032/07	27.05.2014	42	P1/2	B
Krupko and others v. Russia	26587/07	26.06.2014	40	5	B
Nemtsov v. Russia	1774/11	31.07.2014	103	5	C
Atudorei v. Romania	50131/08	16.09.2014	154	5	B
Emel Boyraz v. Turkey	61960/08	2.12.2014	56	14(8)	B
Dimitrovi v. Bulgaria	12655/09	3.03.2015	53-55	P1/1	B
Emin Huseynov v. Azerbaijan	59135/09	7.05.2015	86-87	5	B

Chiragov and others v. Armenia [G.C.]	13216/05	16.06.2015	201	P1/1	A
Oliari and others v. Italy	31443/96	21.07.2015	185	8	B
Gafgaz Mammadov v. Azerbaijan	60259/11	15.10.2015	108	5	C
Salamov v. Russia	5063/05	12.01.2016	47	P1/1	A
Ibrahimov and others v. Azerbaijan	69234/11	11.02.2016	77, 81, 85, 127	5	C
Huseynli and others v. Azerbaijan	67360/11	11.02.2016	147	5	C
Mozer v. Moldova and Russia	11138/10	23.02.2016	194, 199	8 ; 9	A
Pajic v. Croatia	68453/13	23.02.2016	83	14(8)	A
Domazyan v. Armenia	22558/07	25.02.2016	43	6	A
Ahad Mammadli v. Azerbaijan	69456/11	16.06.2016	57	5	C
Baka v. Hungary [G.C.]	20261/12	23.06.2016	155-157	10	B
Hajibeyli and others v. Azerbaijan	5231/13	30.06.2016	56	5	C
Tomov and Nikolova v. Bulgaria	50506/09	21.07.2016	51	P1/1	B
Chakalova-Ilieva v. Bulgaria	53071/08	6.10.2016	41	6	A
Kasparov v. Russia	53659/07	11.10.2016	56	5	B
Ermenyi v. Hungary	22254/14	22.11.2016	37	8	B
Huseynov and others v. Azerbaijan	34262/14	24.11.2016	66	5	C
Jamil Hajiyev v. Azerbaijan	42989/13	16.02.2017	68	5	C
Bayramlı v. Azerbaijan	72230/11	16.02.2017	73	5	C
Babak Hasanov v. Azerbaijan	43137/13	16.02.2017	65	5	C
Abbaslı v. Azerbaijan	5417/13	16.02.2017	66	5	C
Bayram Bayramov v. Azerbaijan	74609/10	16.02.2017	74	5	C
Karajanov v. Macedonia	2229/15	6.04.2017	75-76	8	B
Bayev and others v. Russia [G.C.]	67667/09	20.06.2017	83	10	B
Babayev and Hasanov v. Azerbaijan	60262/11	20.07.2017	89	5	C
Tural Hajibeyli v. Azerbaijan	69180/11	28.09.2017	65	5	C

Magyar Ketfarku Kutya Part v. Hungary	201/17	23.01.2018	40-46	10	B
Aleksandr Aleksandrov v. Russia	14431/06	27.03.2018	29	14(5)	A
Hülya Ebru Demirel v. Turkey	30733/08	19.06.2018	35	14(8)	B
Aliyev v. Azerbaijan	68762/14	20.09.2018	184-187	8	B
Navalnyy v. Russia [G.C.]	29580/12	15.11.2018	126	11	B
Resin v. Russia	9348/14	18.12.2018	41	8	A
Khadija İsmayilova v. Azerbaijan	65286/13	10.01.2019	147	8	A
Navalnyy v. Russia (no.2) [G.C.]	43734/14	9.04.2019	80-81	10	B
Kamoy Radyo Televizyon Yay. v. Turkey	19965/06	16.04.2019	50-51	P1/1	A
Khodorkovskiy and Lebedev v. Russia (no.2)	11082/06	25.07.2013	596-597	8	A
Kövesi v. Romania	3594/19	5.05.2020	196-199	10	A
P.T. v. Moldova	1122/12	26.05.2020	29	8	A
OOO Flavus and others v. Russia	12568/15	23.06.2020	38, 44	10	B
Yunusova and Yunusov v. Azerbaijan	68817/14	16.07.2020	152-157	8	B