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Published in:
 Netherlands Quarterly of Human Rights

DOI:
[10.1177/0924051920923606](https://doi.org/10.1177/0924051920923606)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
 Publisher's PDF, also known as Version of record

Publication date:
 2020

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Tsampi, K. (2020). The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of contre-pouvoirs within the State after all? *Netherlands Quarterly of Human Rights*, 38(2), 134-155.
<https://doi.org/10.1177/0924051920923606>

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The new doctrine on misuse of power under Article 18 ECHR: Is it about the system of *contre-pouvoirs* within the State after all?

Netherlands Quarterly of Human Rights
2020, Vol. 38(2) 134–155
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DOI: 10.1177/0924051920923606
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Abstract

The case-law on Article 18 of the European Convention on Human Rights has been evolving recently in a dramatic fashion. This evolution, which shaped a new doctrine on the misuse of power, focuses on the criminalisation of dissent within a State where undemocratic tendencies arise. The purpose of this article is to highlight these undemocratic tendencies and demonstrate that Article 18 ECHR addresses the systemic deficiencies in the balance of powers within a State. A violation of Article 18 ECHR occurs when the executive branch of government *male fide* tries to erode the social, political and economic *contre-pouvoirs* within a State and when the institutional *contre-pouvoirs*, namely the judicial and the legislative branch of government, fail to avert this erosion.

Keywords

European Court of Human Rights, European Convention on Human Rights, Article 18, misuse of power, *détournement de pouvoir*, *contre-pouvoirs*, rule of law, democracy, bad faith, ulterior purpose, reasons of state, chilling effect

Mots clés

Cour européenne des droits de l'homme, Convention européenne des droits de l'homme, article 18, *détournement de pouvoir*, *contre-pouvoirs*, état de droit, démocratie, mauvaise foi, but inavoué, raisons d'état, effet dissuasif

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I. INTRODUCTION

An honest man does not become a gangster in twenty-four hours. When an honest man suddenly does something very wicked, it means that he has long been corrupted by evil. In thought and conscience he succumbed to temptation. (...) Democracies do not become nazi countries in one day. Evil progresses cunningly, with a minority operating, as it were, to remove levers of control.¹

The creation of the system of the European Convention on Human Rights ('Convention' or 'ECHR') was largely inspired by the need to address this 'cunning progression of evil' as enthralingly depicted by Pierre-Henri Teitgen, during the first session of the Consultative Assembly of the Council of Europe in 1949. The intention of the founding fathers of the Convention was to avoid giving 'evilly disposed persons the opportunity to create a totalitarian Government which will destroy human rights altogether'.² The establishment of a collective guarantee of essential liberties and fundamental rights in Europe would thus 'allow Member-States to prevent – before it is too late – any new member who might be threatened by a rebirth of totalitarianism from succumbing to the influence of evil, as has already happened in conditions of general apathy'.³

During the near seven decades that have passed since the first session of the Consultative Assembly of the Council of Europe, the interpretation and application of the Convention by the European Court of Human Rights ('Court' or 'ECtHR') has largely contributed to the protection of democracy and the rule of law in Europe. The fear of the rebirth of totalitarianism in Europe is not, however, a thing of the past. Many European States are currently facing democracy and rule of law challenges. The rule of law crisis in Hungary and Poland, pertaining in particular to certain reforms of the judicial systems, or the post-coup measures adopted in Turkey and the 2017 Turkish constitutional reform are but a few examples.

In this conjuncture, the Court recently reinvigorated its case law on Article 18 of the Convention (limitations on use of restrictions on rights). This Article more specifically, provides that '[t]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed'. The turning point in the Court's jurisprudence came when the Grand Chamber judgment *Merabishvili v Georgia* was delivered in November 2017.⁴ This new case law can qualify as a doctrinal response to the cunning progression of the evil of totalitarianism.⁵ Surely, the term of 'evil', which appears as a *leitmotiv* in the preparatory works of the Convention, is not a legal one. Interestingly enough, though, one can argue that it alludes to the notion of 'bad faith' to the extent that it reflects the idea of a profoundly immoral and wicked spirit.

'Bad faith' constitutes a focal point in the new case-law of the Court on the limitations on use of restrictions on rights that the present article aspires to conceptualise. Drawing inspiration from the doctrine on the *détournement de pouvoir* in French Administrative Law, this provision on what

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1. Pierre-Henri Teitgen (France) during the first session of the Consultative Assembly in 1949: *Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, vol I (Martinus Nijhoff 1975) 292.
 2. Sir David Maxwell-Fyfe (United-Kingdom) during the first session of the Consultative Assembly in 1949: *ibid* 118.
 3. Report presented in 1949 by Pierre-Henri Teitgen (France) in the name of the Committee for Legal and Administrative Affairs: *ibid* 192.
 4. *Merabishvili v Georgia* App no 72508/13 (ECHR, 28 November 2017).
 5. Laurence Helfer, 'Populism and International Human Rights Institutions: A Survival Guide' (2018) iCourts Working Paper Series No. 133/2018 <<https://ssrn.com/abstract=3202633>> accessed 10 September 2019, 11–13.

could be roughly translated in English as ‘misuse of power’ or ‘misapplication of power’,⁶ prohibits the limitation of rights in bath faith for ulterior purposes based on reasons of State.⁷

What is, though, precisely at stake in Article 18 cases? This is the focal research question that the present article intends to address, by critically assessing the Court’s relevant case-law, especially following *Merabishvili*.⁸ The existing literature, cited in the following sections, has already contributed to the understanding of some of the fundamental features of Article 18 and the critical analysis of *Merabishvili*. It has been, indeed, rightly pointed out that the findings of violations on the basis of Article 18 ‘stigmatise intentional and systematic abuses of power by one State party’⁹ and prevent undemocratic tendencies of the contracting States.¹⁰ In general, such systematic undemocratic tendencies may indeed vary and/or relate to violations of the Convention found on the basis of other provisions. Building on the existing scholarly work, the current study seeks to identify the overarching idea underlying an Article 18 violation, specifying, thus, the nature of these undemocratic tendencies. Considering both the factual background of the relevant cases and the solutions proposed by the Court, there are good reasons to suggest that Article 18 is connected to the functioning of the system of *contre-pouvoirs* within a State.

The understanding of the *contre-pouvoirs* approach under Article 18 of the Convention inevitably necessitates the delineation of the term *contre-pouvoirs* itself. Ironically, even though this term is commonly used in its French version, its conception comes from the other side of the Atlantic. Its origin is to be found in the English term ‘countervailing power’ coined by the Canadian-born economist John Kenneth Galbraith, to describe a theory of political modification of markets.¹¹ The term was imported to France in the 1970s. Unlike the original English term, *contre-pouvoirs* is commonly employed in constitutional law¹² to denote every organised centre of decision, control, interest or influence, which by its very existence or action, and notwithstanding its objective, results in the limitation of the power of the governing apparatus of the State.¹³

In this sense, the notion of *contre-pouvoirs* has a broader connotation than the one of ‘checks and balances’, which is considered to be its source of inspiration.¹⁴ The status of *contre-pouvoirs* may indeed vary. Under the category of *contre-pouvoirs* fall not only those ‘institutional’ powers which check the political power in a State within a formal system of checks and balances/separation of powers, namely the judicial and the legislative branch of government, but also other

6. Commentary on the single text of the Convention proposed by the Conference of senior officials (8-17 June 1950): *Collected edition of the ‘Travaux préparatoires’ of the European Convention on Human Rights*, vol IV (Martinus Nijhoff 1977) 258.

7. See Article 6 of the Report presented by Pierre-Henri Teitgen (France) in September 1949 before the Consultative Assembly: *Collected edition of the ‘Travaux préparatoires’ of the European Convention on Human Rights* (n 1) 200.

8. The case law and the relevant materials were last updated on 10 September 2019.

9. Helmut Satzger, Frank Zimmermann and Martin Eibach, ‘Does Art. 18 ECHR Grant Protection against Politically Motivated Criminal Proceedings? – Rethinking the Interpretation of Art. 18 ECHR against the Background of the New Jurisprudence of the European Court of Human Right’ (2014) 4 *European Criminal Law Review* 91, 112.

10. Helen Keller and Corina Heri, ‘Selective Criminal Proceedings and Article 18 ECHR. The European Court of Human Rights’ Untapped Potential to Protect Democracy’ (2016) 36 *Human Rights Law Journal* 1, 1.

11. John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (Houghton Mifflin 1952).

12. Elisabeth Zoller, ‘Le cas des États-Unis’ in ‘Le juge constitutionnel est-il un contre-pouvoir? Table ronde du Centre français de droit comparé (Paris, 21 juin 2010)’ (2010) 62 *Revue internationale de droit comparé* 788, 802.

13. Ferdinand Mélin-Soucramanien and Pierre Pactet, *Droit constitutionnel* (37th edn, Sirey 2019) 85. See also, Fabrice Hourquebie, *Sur l’émergence du contre-pouvoir juridictionnel sous la Ve République* (Bruylant 2004) 64.

14. Elisabeth Zoller, ‘La justice comme contre-pouvoir: regards croisés sur les pratiques américaine et française’ (2001) 53 *Revue internationale de droit comparé* 559, 561.

political or social/economic powers.¹⁵ The prevailing attribute of these *contre-pouvoirs* is their vocation to counter-balance the omnipotence of the political power. They might fulfil this aim either by participating in the exercise of the power (exercising functions of control) or – while positioned outside of the political power – by having a real influence and the possibility to resist in the abusive exercise of the power.¹⁶

In the pages that follow, it will be argued that what is at stake in Article 18 cases, where the Court finds a violation of the Convention, is the obliteration of the *contre-pouvoirs* by the executive branch of government within a State. To substantiate this argument, it is necessary to firstly elaborate on the progression of Article 18 in time. The first part of this study will, thus, scrutinise the general economy of Article 18 with reference to the consecutive stages of its evolution within the system of the Convention (2). In the second part, the author will analyse this jurisprudential evolution on the misuse of power through the lens of the *contre-pouvoirs* within a State. To corroborate the claim that Article 18 pertains to the systemic deficiencies in the balance of powers within a State, it needs to be proven that not only all the *contre-pouvoirs* individually but also the whole system of *contre-pouvoirs* is suffering within that particular State' (3).

2. ARTICLE 18 ECHR: A CLAUSE 'SUBSISTING JUST IN CASE...'

Even though the founding fathers decided to include Article 18 in the text of the Convention, the positioning of this provision in the case-law of the Court remained unsettled for many years. Given the scarcity of its application until very recently, the exact purpose of this provision was rather obscure. In his commentary on Article 18 ECHR, in 1999, Professor Coussirat-Coustère asserted that Article 18 was neither obsolete nor out-dated but that it 'persisted just in case...'.¹⁷ This assertion is fully confirmed nowadays by the recent jurisprudential evolution on Article 18.

The sections that follow will show how Article 18 generally evolved through time. The first section will focus on the preparatory works of the ECHR, to demonstrate how a provision on the misuse of power made it to the text of the Convention and how it is connected to the French doctrine of *détournement de pouvoir*. The second section will present how Article 18 has been perceived by the Court by also explicating how *Merabishvili* contributed to a dramatic jurisprudential evolution.

2.1. THE INCLUSION OF ARTICLE 18 IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Unlike the texts of its day¹⁸ and its source of inspiration – the Universal Declaration of Human Rights – the ECHR contains a provision, that of Article 18, which pertains to the limitations on use of restrictions on rights. Only later would equivalent provisions be included in international

15. Mélin-Soucramanien and Pactet (n 13) paras 29-32.

16. *ibid* para 27.

17. Vincent Coussirat-Coustère, 'Article 18' in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds), *La Convention européenne des droits de l'homme: commentaire article par article* (Economica 1999) 527. The translation of the quote belongs to the author of the present article.

18. Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, OUP 2017) 127.

instruments for the protection of human rights,¹⁹ notably in the American Convention on Human Rights²⁰ and in the European Social Charter,²¹ but also in the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights.²²

The inclusion of Article 18 into the Convention is directly linked to the French influence of the time, as evidenced by the Convention's *travaux préparatoires*.²³ The drafting of Article 18 was a compromise between the French and British approaches on the restrictions of rights.²⁴ Unlike the French approach, the British one was hostile to the inclusion of a general restriction clause.²⁵ While it was finally the British approach that prevailed, this did not mean that the French approach was completely rejected.²⁶ On the contrary, the partisans of the French approach secured an important victory since it was their draft provision on the power of interference – Article 18 today – that found its way to the adopted Convention text.²⁷

But much more than that, the French influence can be felt in the very content of the clause. As also acknowledged by the Grand Chamber itself,²⁸ Article 18²⁹ was described by the Conference of Senior Officials on Human Rights as an application of the *détournement de pouvoir* theory.³⁰ This explains why Article 18 bears its current name of 'clause *anti-détournement*'.³¹ In French Administrative Law, a *détournement de pouvoir* takes place when an administrative authority uses its powers to serve a different purpose than the one for which those powers were conferred

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19. The EU Charter of Fundamental Rights (Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389) does not contain a similar provision. See, Frédéric Sudre, 'Article 54. Interdiction de l'abus de droit' in Fabrice Picod and Sébastien van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne: commentaire article par article* (Bruylant 2018) 539. The same goes for the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.
 20. American Convention on Human Rights (Pact of San José, Costa Rica) (signed 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36, 1144 UNTS 123, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 25 (1992), Article 30.
 21. European Social Charter (Revised) (opened for signature 3 May 1996, entered into force 1 July 1999) ETS 163, Article G(2); European Social Charter (opened for signature 18 October 1961, entered into force 28 February 1965) ETS 35, Article 31(2). As specified in the preparatory works of the Charter, Article 18 of the European Convention on Human Rights constitutes the source of inspiration of Article 31(2) of the European Social Charter (Council of Europe, 'Collected (Provisional) Edition of the "Travaux Préparatoires" Volume 4' (1957) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c1d01>> accessed 10 September 2019, 181) and '[n]o corresponding provisions are to be found either in the ILO Constitution or in international labour Conventions' (Council of Europe, 'Collected (Provisional) Edition of the "Travaux Préparatoires" Volume 5' (1958) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c1d02>> accessed 10 September 2019, 307).
 22. UNCHR 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (28 September 1984) E/CN.4/1985/4, para 6.
 23. For the relevant analysis of the preparatory works see, Vincent Coussirat-Coustère, 'Article 8 para 2' in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert (eds), *La Convention européenne des droits de l'homme: commentaire article par article* (Economica 1999) 325.
 24. *ibid.*
 25. *ibid.*
 26. *ibid.*
 27. *ibid.*
 28. *Merabishvili v Georgia* (n 4) paras 154 and 283.
 29. Article 13(2) of the draft at the time.
 30. Commentary on the single text of the Convention proposed by the Conference of senior officials (8-17 June 1950): *Collected edition of the "Travaux préparatoires" of the European Convention on Human Rights* (n 6) 258-259.
 31. Coussirat-Coustère (n 17) 523.

to it.³² While the State authorities abide by the letter of the law, they nonetheless step outside the ‘spirit of [their] functions’.³³

The *détournement de pouvoir* doctrine has a purely jurisprudential origin without a precise textual basis³⁴ and is not *per se* known to the system of common law. As pointed out in scholarly writings:

although the English courts will not typically quash an ‘acte administratif’ on the grounds of bad faith alone, it is true that they often arrive, by an elaborate process of statutory construction, at a result similar to that which would have been reached in the *droit administratif* by a simpler route.³⁵

Notwithstanding this observation, the theory of misuse of power is traditionally linked to French Administrative Law. In investigating *détournement de pouvoir* the reviewing court must assess ‘the mental processes of the administrator’³⁶ in order to define the ulterior purpose of the challenged act. This is precisely the type of inquiry that the Anglo-American courts have refused to admit that they may make.³⁷

The parallel drawn up with the *détournement de pouvoir*, that is the misuse of power *à la française*,³⁸ offers some preliminary guidance as per the content of Article 18 ECHR. Nonetheless, it should be acknowledged that the historic interpretation based on the preparatory works is of limited importance to the Court, which indeed uses it but will more often rely on other methods of interpretation. The misuse of power is associated with the control of the internal legality of an administrative act and more precisely of its purpose. Two hypotheses of misuse of power are mainly envisaged: either the administrative act is foreign to any public interest (primary *détournement de pouvoir*) or it is taken in a public interest, but not in the one for which the powers necessary to take the act have been conferred to its author (secondary *détournement de pouvoir*).³⁹ It is the first hypothesis, considered as the more serious case of misuse of power,⁴⁰ which recalls the principle, that was to be the precursor to Article 18. This principle was formulated by the Legal Committee at the Consultative Assembly and provided for the ‘prohibition of any restriction on a guaranteed freedom for motives based, not on the common good or general interest, but on reasons

32. Pascale Gonod and Mattias Guyomar, ‘Détournement de pouvoir et de procédure’ in *Répertoire de contentieux administratif* (Daloz 2008) 2.

33. Maurice Hauriou, *Précis de droit administratif: contenant le droit public et le droit administratif* (2nd edn, L. Larose et Forcel 1893) 203. The translation of the quote belongs to the author of the present article.

34. Jean-Marie Auby and Roland Drago, *Traité des recours en matière administrative* (Librairie de la Cour de Cassation-Litec 1992) 534.

35. Neville Brown and John Bell, *French Administrative Law* (5th edn, Clarendon Press 1998) 246 and 248.

36. Bernard Schwartz, *French Administrative Law and the Common-law World* (The Lawbook Exchange, Ltd 2006) 219.

37. *ibid.*

38. The French term ‘*détournement de pouvoir*’ corresponds to the English term ‘misuse of power’. In the preparatory works of the Convention the term ‘misapplication of power’ is also employed: Commentary on the single text of the Convention proposed by the Conference of senior officials (8-17 June 1950) in *Collected edition of the ‘Travaux préparatoires’ of the European Convention on Human Rights* (n 6) 258-259. Some authors use the term ‘abuse of power’ to designate the ‘*détournement de pouvoir*’: Jean-Marie Auby, ‘The Abuse of Power in French Administrative Law’ (1970) 18(3) *American Journal of Comparative Law* 549-564; Schwartz (n 36).

39. Marceau Long, Prosper Weil, Guy Braibant, Pierre Delvolvé and Bruno Genevois, *Les grands arrêts de la jurisprudence administrative* (22nd edn, Daloz 2019) 30-32; Auby (n 38) 556-558.

40. Long, Weil, Braibant, Delvolvé and Genevois (n 39) 30.

of State'.⁴¹ The principle formulated by the founding fathers can potentially correspond to all four categories of cases where primary *détournement de pouvoir* takes place:

1. the actor has acted on his own personal interests;
2. the actor wanted to harm a private person;
3. the administrative agency acted for the purpose of benefiting some particular person; and
4. the administrative agency ignored the general public interest, even though it has not, strictly speaking, served private interests.⁴²

The drafters of the Convention wanted to exclude the possibility that the State 'intervenes to suppress, to restrain and to limit these freedoms for (...) reasons of state',⁴³ especially if it was 'to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous'.⁴⁴ The conscious pursuit of such political motives is particularly detrimental to the democratic principle,⁴⁵ the fundamental ideal of the conventional system.

As in French Administrative Law, the misuse of power in the Strasbourg system implies an additional reproach of a moral nature. Indeed, the review of internal legality under the misuse of power became a 'morality check', as the renowned French legal theorist Dean Hauriou⁴⁶ pointed out. The censorship for misuse of power 'took the form of a moral condemnation of the most serious excesses of public authority'⁴⁷ because the error of law is accomplished in bad faith. Contrary to 'perfectly excusable'⁴⁸ miscarriages of justice, the misuse of power is related to the abuse of law involving a reproach for a conscious breach of duty,⁴⁹ for 'particularly scandalous'⁵⁰ attitudes of the administration.

Despite the aforementioned, the application of the concept of *détournement de pouvoir* is a rather demanding task, considering especially the difficulty to determine the legal purpose (*but légal*) of the administrative act and prove the purpose pursued by its actor, which is a psychological element hard to identify.⁵¹ After all, the improper purpose must be 'susceptible of exerting

41. Report of the Legal Committee to the Consultative Assembly (5 September 1949): *Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights* (n 1) 200.

42. Auby (n 38) 556-557. Political and ideological purposes are also envisaged: Jean Waline, *Droit administratif* (27th edn, Dalloz 2018) 737.

43. Pierre-Henri Teitgen (France) orally presenting the report of the Legal Committee during the Plenary sitting on 7 September 1949: *Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights* (n 1) 278.

44. *ibid.*

45. See the intervention of Pierre-Henri Teitgen (France) before the Consultative Assembly, during the session of 16 August 1950 who claimed that 'the internal legality of the restrictions which any State may impose upon an individual freedom will beyond doubt depend upon whether its nature is democratic or totalitarian': *Collected edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, vol V (Martinus Nijhoff 1979) 292.

46. As quoted by René Chapus, *Droit administratif général*, Tome 1 (15th edn, Montchrestien 2001) 1049.

47. Gonod and Guyomar (n 32) 4.

48. Rudolf Laun, 'Le pouvoir discrétionnaire' in *Annuaire de l'Institut international de droit public* (PUF 1935) 155.

49. *ibid.*

50. Long, Weil, Braibant, Delvolvé and Genevois (n 39) 37.

51. Jean Waline, *Droit administratif* (27th edn, Dalloz 2018) 738. Since 1957, the Conseil d'État accepts that a case of misuse of power can be proven when the relevant allegations of the applicant are not contradicted by the administration: Gilles Lebreton, *Droit administratif général* (Dalloz 2019) 515. See, *mutatis mutandis*, *Merabishvili v Georgia* (n 4) paras 312-313.

some influence on the very substance of the administrative order'.⁵² The censorship for *détournement de pouvoir* qualifies, thus, as an *ultimum refugium* for the French administrative judge which comes into the fray only when there is no other ground for sanction.⁵³ Just like Dean Vedel pondered: 'why to engage with a superfluous *détournement de pouvoir*?'.⁵⁴ This judicial practice seems to bear strong similarities to the one adopted by the Strasbourg organs, and it is to this practice that we shall now turn our attention.

2.2. THE TRANSITION TOWARDS A NEW ERA FOR ARTICLE 18

The idea that the examination of a claim under Article 18 ECHR is superfluous, and therefore the Article itself is without any real scope of application or reason of existence, has been raised in scholarly debate. This view was based on the fact that issues of misuse of power were absorbed by the examination of the interferences with substantive rights.⁵⁵ According to this view, Article 18 plays a supplementary role, inspiring and informing the interpretation of the other provisions of the Convention, but not being the primary provision under consideration. Its spirit was allegedly diffused in the general mechanisms of control and interpretation of the Convention.⁵⁶

Until recently commonly received as a 'dormant' clause, Article 18 has indeed been scarcely applied by the Convention organs.⁵⁷ In 1974 the European Commission on Human Rights, without however finding a violation of Article 18, established two crucial points for the interpretation of the clause:

- a. although Article 18 cannot apply alone, it can nevertheless be breached even if there is no violation of the Article in conjunction with which it is applied; and
- b. it can only be contravened if the Convention right which has been interfered with is subject to restrictions – that is, is qualified rather than absolute.⁵⁸

Ever since and for fifty years, nothing in the case-law of the Court would suggest that Article 18 ECHR had any particular practical significance whatsoever. It would be only in 2004, in *Gusinskiy v Russia*, that the Court finds a violation of Article 18 in conjunction with Article 5 of the Convention for the first time ever, considering that the fact that the applicant, a media tycoon, had been offered a commercial agreement whilst in prison in exchange for the dropping

52. Auby (n 38) 553.

53. Laun (n 48) 155-156; Long, Weil, Braibant, Delvolvé and Genevois (n 39) 37.

54. George Vedel, 'Excès de pouvoir administratif et excès de pouvoir législatif (II)' (1997) 2 Cahiers du Conseil constitutionnel <<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-2/exces-de-pouvoir-administratif-et-exces-de-pouvoir-legislatif-ii.52882.html>> accessed 10 September 2019, para 39. The translation of the quote belongs to the author of the present article.

55. See Frédéric Sudre, 'La première affaire française devant la Cour européenne des droits de l'homme: l'arrêt *Bozano* du 13 décembre 1986' (1987) 3 Revue générale de droit international public 533, 582; Satzger, Zimmermann and Eibach (n 9) 105-109; Yutaka Arai and Joachim Meese, 'Prohibition of the Misuse of Power (Article 18)' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2018) 1097. With respect to Article 18 as a provision *ex abundanti cautela*, see the concurring opinion of Judge Serghides in *Merabishvili v Georgia* (n 4) para 18.

56. Coussirat-Coustère (n 17) 524, 526 and 527.

57. Concurring opinion of Judge Kūris in *Tchankotadze v Georgia* App no 15256/05 (ECHR, 21 June 2016) paras 13-42.

58. *Kamma v Netherlands* (1974) 1 DR 4, 9.

of charges against him, suggested that his prosecution pursued the ulterior purpose of intimidating him.⁵⁹

Gusinskiy offered optimism about the merit of Article 18⁶⁰ which was, up until that moment, nothing more than a ‘neutralised’ clause.⁶¹ However, the new era ushered through the 2004 *Gusinskiy* judgment did not dramatically alter the status of Article 18 in the case-law of the Court. Even post-*Gusinskiy*, the solutions adopted by the Court when dealing with Article 18 cases would still be marked by a wide variability.⁶² The typology of the Strasbourg case law under Article 18, as pertinently discerned by Judge Kūris in his concurring opinion in *Tchankotadze v Georgia*, reveals this very point. In *Tchankotadze*, issued in 2016, the Court found the applicant’s claim under Article 18 of the Convention in conjunction with Article 5 manifestly ill-founded and rejected it in accordance with Article 35(3)(a) and (4) of the Convention.⁶³ Going through the case law of the Court up until that point, Judge Kūris identified the following patterns with respect to Article 18 ECHR. When faced with a claim under Article 18, the Court would invariably do one of the following:

1. conclude that there had been no violation of Article 18 because no violation of the substantive provision had been established;
2. find that Article 18 was not violated even if that was the case for the substantial provision;
3. find that there was no need to examine the claim under Article 18;
4. consider the complaint incompatible *ratione materiae* with the Convention; or
5. reject the complaint as manifestly ill-founded.⁶⁴

It was, thus, still unclear what the true meaning of Article 18 was. Since *Gusinskiy*, thirteen more years passed before the Grand Chamber⁶⁵ of the Court clarified its case-law on misuse of power⁶⁶ in its *Merabishvili* judgment of 17 December 2017.

The factual background of the case was connected to the recent political history of Georgia.⁶⁷ The applicant, Ivane Merabishvili, was one of the protagonists of the Georgian ‘Rose Revolution’ that took place in 2003. Member of the United National Movement (‘UNM’), Ivane Merabishvili was appointed Minister of the Interior in 2005 and Prime Minister in 2012. In October 2012,

59. *Gusinskiy v Russia* ECHR 2004-IV 129, para 78.

60. Frédéric Sudre, ‘Droit de la Convention européenne des droits de l’Homme. Chronique d’actualité’ (2004) 161 La Semaine juridique: édition générale 1577, 1578.

61. Coussirat-Coustère (n 17) 526-527.

62. See in this regard the concurring opinion of Judge Kūris (n 57) paras 13-42.

63. *Tchankotadze v Georgia* (n 57) para 116.

64. Concurring opinion of Judge Kūris (n 57) paras 13-42.

65. It is not the first time that a complaint under Article 18 is brought before the Grand Chamber. See, *Akdivar and others v Turkey* ECHR 1996-IV, paras 98-99; *United Communist Party of Turkey and others v Turkey* ECHR 1998-I, para 62; *Socialist Party and others v Turkey* ECHR 1998-III, para 55; *Süreç and Özdemir v Turkey* App nos 23927/94 and 24277/94 (ECHR, 8 July 1999) paras 65-66; *Menteş and others v Turkey* ECHR 1998-IV, paras 93-96; *Çakıcı v Turkey* ECHR 1999-IV 583, paras 115-117; *Beyeler v Italy* ECHR 2000-I 57, paras 127-129; *Tahsin Acar v Turkey* ECHR 2004-III 1, paras 244-247 and *Sisojeva and others v Latvia* ECHR 2007-I 127, paras 127-129.

66. This clarification was highly anticipated: David Harris, Michael O’Boyle, Edward Bates and Carla Buckley, *Harris, O’Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, OUP 2014) 842; Joint concurring opinion of Judges Sajó, Tsotsoria et Pinto de Albuquerque in *Tchankotadze v Georgia* (n 57) para 10; Concurring opinion of Judge Kūris (n 57) para 51.

67. For the background of the case see, *Merabishvili v Georgia* (n 4) paras 9-13.

following the electoral defeat of the UNM, criminal proceedings were brought against the applicant for various offenses, including abuse of power. Ivane Merabishvili had recently been elected Secretary-General of the UNM, which became the main opposition party in the country. Relying on Article 5(1), (3) and (4) of the Convention, the applicant complained about the irregularities of his arrest and detention.⁶⁸ Furthermore, he alleged a violation of Article 18 combined with Article 5(1), claiming that the purpose of the criminal proceedings against him and of his pre-trial detention was to exclude him from the political scene and to obtain information from him on issues that had nothing to do with the criminal proceedings against him.⁶⁹ The applicant particularly referred to a night in December 2013, during which he was secretly removed from his cell to be questioned about the death of a former prime minister and the bank accounts of Mikheil Saakashvili, leader of the UNM.⁷⁰ In 2014, the applicant was found guilty of most of the charges against him and was serving a prison sentence when the Grand Chamber judgment was published on 28 November 2017.⁷¹

The Grand Chamber in Strasbourg concluded, unanimously, that there had been no violation of Article 5(1) with regard to the applicant's arrest and pre-trial detention⁷² and no violation of Article 5(3) as to the initial phase of his pre-trial detention.⁷³ However, the Court held unanimously, as to the violation of Article 5(3), that the continued detention was no longer based on sufficient grounds⁷⁴ and, by nine votes to eight, found in favour of a violation of Article 18 in conjunction with Article 5(1).⁷⁵ It is on this latter point that the particular importance of the *Merabishvili* judgment lies. According to the Grand Chamber, the restriction of the applicant's right to liberty primarily served a purpose other than the purpose stated, and one not provided for in the Convention.⁷⁶ While initially the purpose of his detention had been the investigation of offences based on a reasonable suspicion, it later on transformed into obtaining information about a former Prime Minister's death and about Mikheil Saakashvili's bank accounts.⁷⁷

In its judgment, the Grand Chamber clarified the principles applicable to cases in which Article 18 claims are made. The clarifications provided by the Court are broadly concerned with three main points. In the first place, the Grand Chamber delimited the relationship of Article 18 with the other clauses of the Convention, confirming that the former does not exist independently.⁷⁸ Indeed, Article 18 can only be applied in conjunction with an Article of the Convention or the Protocols thereto setting out a right or freedom that may be subject to restrictions permitted by the Convention.⁷⁹ Despite this, Article 18 has an autonomous scope insofar as it can be violated without there being a violation of the article with which it is combined.⁸⁰ Second, the Grand Chamber introduced the criterion of 'predominant purpose'. According to the Court, a situation could arise

68. *ibid* paras 171, 209 and 236-240.

69. *ibid* paras 241-243.

70. *ibid*.

71. *ibid* paras 8, 53-55.

72. *ibid* para 194.

73. *ibid* para 208.

74. *ibid* para 235.

75. *ibid* para 354.

76. *ibid* para 353.

77. *ibid*.

78. *ibid* paras 287-291.

79. *ibid* para 287.

80. *ibid* para 288.

where one would be faced with a plurality of purposes, meaning the restriction would serve numerous purposes at the same time. Whereas this could be compatible with the substantive Convention provision which authorised the restriction, because it pursued an aim permissible under that provision, it could nonetheless still infringe Article 18 since the restriction was chiefly meant for another purpose that was not prescribed by the Convention. In other words, there would be a violation of Article 18 if out of all the purposes, the one not prescribed by the Convention was the dominant one.⁸¹ Third, the Court clarified its jurisprudence on the question of proof regarding Article 18, holding that it must follow its usual approach, without applying special rules.⁸²

While the in-depth analysis of the Court's judgment in *Merabishvili* cannot be exhausted in the present article,⁸³ it is noteworthy that the introduction of the 'predominant purpose' test has triggered a considerable debate. The eight dissenting judges – who agreed with the principles set in the judgment but disagreed with the majority as to their application to the facts of the case – seemed to acknowledge and accept the fact that the 'very high threshold (...) manifested in the predominant-purpose test' implies that Article 18 can only apply in 'the most serious of cases'.⁸⁴ Sounds of critique were, however, expressed in the concurring opinions. In his concurring opinion, Judge Serghides critically reflected on the ambiguity of the new test⁸⁵ and in their joint concurring opinion, Judges Yudkivska, Tsotsoria and Vehabović suggested that when there is evident misuse of State machinery for improper political ends, 'the Court should treat it by default as the predominant purpose'.⁸⁶ The 'predominant purpose' test introduced in *Merabishvili* is not an invention of the Court of Strasbourg. Even though, it is not explicitly acknowledged by the Court, it seems to have been inherited from the French doctrine of *détournement de pouvoir* and the concerns pertaining to its application are also relevant to the French Administrative Law.⁸⁷ It is

81. *ibid* paras 292-308.

82. *ibid* paras 309-317.

83. For doctrinal comments on the case see, Joël Andriantsimbazovina, 'Précision des critères de mise en œuvre de l'article 18 de la Convention relatif au détournement de pouvoir' (2018) 9 *Gazette du Palais* 35; Laurence Burgorgue-Larsen, 'Actualité de la Convention européenne de droits de l'homme (août-décembre 2017)' (2018) 3 *Actualité juridique Droit administratif* 152-153; Başak Çalı, 'Merabishvili v. Georgia: Has the Mountain Given Birth to a Mouse?' (*VerfBlog*, 3 December 2017) <<https://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/>> accessed 10 September 2019; Gérard Gonzalez, 'Le détournement de pouvoir dans la Convention européenne des droits de l'homme' in Frédéric Sudre, Gérard Gonzalez, Hélène Sirel and Katarzyna Blay-Grabarczyk, *Chronique de jurisprudence de la Cour européenne des droits de l'homme (2017)* (2018) 3 *Revue du droit public* 895 *et seq.*; Corina Heri, 'Merabishvili, Mammadov and Targeted Criminal Proceedings: Recent Developments under Article 18 ECHR' (*Strasbourg Observers*, 15 December 2017) <<https://strasbourgobservers.com/2017/12/15/merabishvili-mammadov-and-targeted-criminal-proceedings-recent-developments-under-article-18-echr/>> accessed 10 September 2019; Stefan Kieber, 'The jurisprudence of the European Court of Human Rights in 2017' (2018) *European Yearbook on Human Rights* 258-259; Henri Labayle and Frédéric Sudre, 'Jurisprudence de la Cour européenne des droits de l'homme et droit administratif' (2018) 4 *Revue française de droit administratif* 704; Jean-Pierre Marguénaud, 'Une nouvelle approche européenne en demi-teinte du détournement de pouvoir' (2018) 1 *Revue de science criminelle et de droit pénal comparé* 183-190; Frédéric Sudre, 'Clair-obscur sur le détournement de pouvoir: CEDH, gr. ch., 28 nov. 2017, n° 72508/13, Merabishvili c. Géorgie' (2017) 51 *La Semaine juridique: édition générale* 2315.

84. Joint partly dissenting opinion of Judges Raimondi, Spano, Kjølbros, Grozev, Ravarani, Pastor Vilanova, Poláčeková and Hüseyinov in *Merabishvili v Georgia* (n 4) paras 1-3.

85. Concurring opinion of Judge Serghides in *Merabishvili v Georgia* (n 4) paras 14-21.

86. Joint concurring opinion of Judges Yudkivska, Tsotsoria and Vehabović in *Merabishvili v Georgia* (n 4) para 38.

87. Auby (n 38) 550-560.

left to be seen whether future applications of the test by the Court will indeed raise concern in this regard.⁸⁸

Ever since the *Merabishvili* judgment, the Court has delivered a string of judgments that contributed to the further development of the interpretation of Article 18. From 2004 until April 2019, the Court has found a violation of Article 18 in thirteen cases, all of them in conjunction with Article 5 of the Convention (right to liberty and security)⁸⁹ and, in two of them, also in conjunction with Article 8 (right to respect for private and family life)⁹⁰ and Article 11 (freedom of assembly and association).⁹¹ In all cases, prominent figures in the political and/or economic arena of the country were prosecuted and detained for purposes other than those officially stated by the authorities and prescribed by the Convention. In the context of what is perceived as ‘political justice’, the proceedings against the applicants served ulterior purposes, namely the implementation of the government’s agenda or the punishment of those who were opposing to it.

So far, the violations of Article 18 seem to have an Eastern European character. Russia, Moldova, Ukraine, Azerbaijan, Georgia and Turkey are the States against which violations of Article 18 were found. With respect to some of these States, a violation of Article 18 was found in more than one case; Russia,⁹² Ukraine⁹³ and certainly Azerbaijan⁹⁴ seem to qualify as ‘repeat offenders’. This observation might not come as a surprise given the reoccurrent challenges pertaining to the rule of law in these countries during the past years. In any case, though, we should always be reminded that no State can enjoy immunity from the threats of what Pierre-Henri Teitgen describes as the ‘eternal reason of State’.⁹⁵ ‘Behind the State, whatever its form, were it even democratic, there ever lurks as permanent temptation, this reason of State’.⁹⁶

Notwithstanding the evolution of the case law on Article 18, as described previously, the specific role of the ‘clause *anti-détournement*’ in the Strasbourg system is yet to be determined. Article 18 in conjunction with Articles 17 and 35(3)(a) ECHR form the basis of the Strasbourg theory of abuse of rights. This theory revolves around the regulation of the ‘proper use by

88. See, Thomas Besse, ‘Article 18 de la Convention et critère du “but prédominant”: la Cour de Strasbourg persiste et signe’ (2019) 1 *L’actualité juridique: Pénal* 42-43.

89. *Gusinskiy v Russia* (n 59) para 78; *Cebotari v Moldova* App no 35615/06 (ECHR, 13 November 2007) para 53; *Lutsenko v Ukraine* App no 6492/11 (ECHR, 3 July 2012) para 110; *Tymoshenko v Ukraine* App no 49872/11 (ECHR, 30 April 2013) para 301; *Ilgar Mammadov v Azerbaijan* App no 15172/13 (ECHR, 22 May 2014) para 144; *Rasul Jafarov v Azerbaijan* App no 69981/14 (ECHR, 17 March 2016) para 163; *Merabishvili v Georgia* (n 4) para 354; *Mammadli v Azerbaijan* App no 47145/14 (ECHR, 19 April 2018) para 105; *Rashad Hasanov and others v Azerbaijan* App nos 48653/13, 52464/13 and 65597/13 (ECHR, 7 June 2018) para 127; *Aliyev v Azerbaijan* App nos 68762/14 and 71200/14 (ECHR, 20 September 2018) para 216; *Navalnyy v Russia* App nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14 (ECHR, 15 November 2018) para 176; *Selahattin Demirtaş v Turkey (No. 2)* App no 14305/17 (ECHR, 20 November 2018) para 274; *Navalnyy v Russia (No. 2)* App no 43734/14 (ECHR, 9 April 2019) para 99.

90. *Aliyev v Azerbaijan* (n 89) para 216.

91. *Navalnyy v Russia* (n 89) para 176.

92. *Gusinskiy v Russia* (n 59) para 78; *Navalnyy v Russia* (n 89) para 176; *Navalnyy v Russia (No. 2)* (n 89) para 99.

93. *Lutsenko v Ukraine* (n 89) para 110; *Tymoshenko v Ukraine* (n 89) para 301.

94. *Ilgar Mammadov v Azerbaijan* (n 89) para 144; *Rasul Jafarov v Azerbaijan* (n 89) para 163; *Mammadli v Azerbaijan* (n 89) para 105; *Rashad Hasanov and others v Azerbaijan* (n 89) para 127; *Aliyev v Azerbaijan* (n 89) para 216.

95. Pierre-Henri Teitgen (France) during the First Session, Eight sitting of the Consultative Assembly (19 August 1949): *Collected edition of the ‘Travaux préparatoires’ of the European Convention on Human Rights* (n 1) 40.

96. *ibid.*

European human rights actors of rights and freedoms'⁹⁷ and puts forward the requirement of good faith.⁹⁸

Admittedly, the requirement of good faith permeates the entirety of the ECHR system, especially considering its intrinsic link with the fight against arbitrariness. As the Grand Chamber pointed out in *Saadi*, '[o]ne general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities'.⁹⁹ If bad faith, deception, or hidden agenda (s)¹⁰⁰ relate to the idea of arbitrariness, it would be legitimate to ask what the added value is of the application of the 'clause *anti-détournement*' in this regard.¹⁰¹ It is this question that the following section will address.

3. THE CONTRE-POUVOIRS APPROACH UNDER ARTICLE 18 ECHR

Considering the continued evolution of the case law on Article 18 of the Convention, especially since the *Merabishvili* judgment, it is now possible to define what is at stake in Article 18 cases. It goes without saying that the prohibition of the misuse of power pertains to the protection of the values of democracy and the rule of law. More precisely, however, it is the entire system of *contre-pouvoirs* within a State that is protected under Article 18. The following lines will analyse this *contre-pouvoirs* approach under Article 18 ECHR.

In the next two sections, two points will be demonstrated. First, that the case law on Article 18 of the Convention pertains to every *contre-pouvoir* within a State, being it institutional, political, social or economic. Second, it will be shown that, overall, the finding of a violation on the basis of Article 18 is founded on the fact that the whole system of *contre-pouvoirs* is suffering within that particular State.

3.1. IDENTIFYING THE CONTRE-POUVOIRS IN ARTICLE 18 CASES

In light of the case law on Article 18, the involvement of *contre-pouvoirs* in cases of abuse of power revolves around two axes. First, a misuse of power occurs when the political, social and economic *contre-pouvoirs* of the State are under threat. Second, a misuse of power occurs when the institutional *contre-pouvoirs* fail to fulfil their functions effectively.

3.1.1. The targeting of the political, social and economic contre-pouvoirs

According to the *travaux préparatoires* of the Convention, the *raison d'être* of Article 18 is the prohibition of limitations on rights on the basis of reason of State, namely the protection of the State according to the political tendency which it represents, against an opposition which it

97. Joël Andriantsimbazovina, 'L'abus de droit dans la jurisprudence de la Cour européenne des droits de l'homme' (2015) 32 *Recueil Dalloz* 1854, 1860. For Article 17 see in particular, Antoine Buyse, 'Prohibition of the Abuse of Rights (Article 17)' in van Dijk, van Hoof, van Rijn and Zwaak (n 55) 1085-1094.

98. Rainey, Wicks and Ovey (n 18) 127.

99. *Saadi v the United Kingdom* App no 13229/03 (ECtHR, 29 January 2008) para 69.

100. The term 'hidden agenda' belongs to the Court itself which employs it for the first time in *Khodorkovskiy v Russia* App no 5829/04 (ECHR, 31 May 2011) para 255.

101. Çalı (n 83).

considers dangerous.¹⁰² Considering the typology of the cases where the Court found a violation of Article 18 in conjunction with Articles 5, 8 or 11 of the Convention, it is indeed clear that Article 18 can be conceived ‘as a tool for addressing the suppression of dissent and the silencing of political opposition’.¹⁰³

In a large number of cases, eminent politicians belonging to the political opposition within the State¹⁰⁴ were targeted by the State. In the *Lutsenko v Ukraine* case, the applicant was the Former Minister of the Interior and the leader of a political opposition party.¹⁰⁵ Similarly, in the *Tymoshenko* and *Merabishvili* cases, the applicants were former Prime Ministers and leaders of the leading opposition parties in the country.¹⁰⁶ In the more recent *Navalnyy*¹⁰⁷ and *Selahattin Demirtaş (No. 2)* cases, the applicants were also leaders of the political opposition.¹⁰⁸

The eminent members of the political opposition constituted the first category of persons targeted by the executive branch. This is not, however, the only category of individuals whose rights are restricted for political reasons. Opposition to the ruling power within a State might as well derive from other entities acting as social *contre-pouvoirs* within a democratic society.

As clarified by the Court in *Rashad Hasanov and others*, the political motivation of the restrictions to rights is conceived in a broad sense. In this case against Azerbaijan, the Court did not accept the government’s assertion ‘that the accusations against the applicants could not be politically motivated because they had not been an opposition leader or a public official’.¹⁰⁹ According to the Court, ‘[i]t is undisputed that the applicants were civil society activists and board members of [the civic movement] NIDA, which was one of the most active youth movements in the country and had been behind a number of protests against the government’.¹¹⁰

Indeed, an important number of cases where the Court considered the accusations and prosecution of the applicants as politically motivated was brought before the Court by frontline activists connected to civil society organisations.¹¹¹ The Azerbaijani cases, in which the Court found a violation of Article 18 in conjunction with Article 5, are pertinent in this regard.

More precisely, the applicant in *Ilgar Mammadov* was involved in various political organisations as well as local and international non-governmental organisations for a number of years. In 2008, he co-founded the Republican Alternative Civic Movement (‘REAL’) and in 2012 he was elected its chairman. He also held the position of Director of the Baku School of Political Studies for several years, which is part of a network of schools of political studies affiliated with the

102. See above n 43-44.

103. Helfer (n 5) 14.

104. *Lutsenko v Ukraine* (n 89); *Tymoshenko v Ukraine* (n 89); *Merabishvili v Georgia* (n 4); *Ilgar Mammadov v Azerbaijan* (n 89); *Navalnyy v Russia* (n 88); *Selahattin Demirtaş v Turkey (No. 2)* (n 89); *Navalnyy v Russia (No. 2)* (n 89).

105. *Lutsenko v Ukraine* (n 89).

106. *Tymoshenko v Ukraine* (n 89); *Merabishvili v Georgia* (n 4).

107. *Navalnyy v Russia* (n 89) and *Navalnyy v Russia (No. 2)* (n 89). See, Floris Tan, ‘The European Court’s Role as Warden of Democracy and the Rule of Law: *Navalnyy v Russia*’ (*ECHR Blog*, 27 November 2018) <<http://echrblog.blogspot.com/2018/11/guest-blog-on-grand-chamber-judgment-in.html>> accessed 10 September 2019.

108. *Selahattin Demirtaş v Turkey (No. 2)* (n 89).

109. *Rashad Hasanov and others v Azerbaijan* (n 89) para 124.

110. *ibid.*

111. *Rasul Jafarov v Azerbaijan* (n 89); *Mammadli v Azerbaijan* (n 89); *Rashad Hasanov and others v Azerbaijan* (n 89); *Aliyev v Azerbaijan* (n 89).

Council of Europe.¹¹² In a similar vein, *Mammadli* was also a well-known civil society activist and human rights defender,¹¹³ just like *Rasul Jafarov*. The latter was chairman and one of the co-founders of Human Rights Club, a non-governmental organization ('NGO') specialising in the protection of human rights.¹¹⁴ High-ranking members of other NGOs have also been targeted by the State in Azerbaijan. In the case of *Rashad Hasanov and others* the applicants were board members of the civic movement NIDA, an NGO established by a group of young people in February 2011. According to its manifesto, NIDA wants liberty, justice, truth and change in Azerbaijan and it rejects violence and uses only non-violent methods of struggle.¹¹⁵ In the more recent *Aliyev* case, the applicant targeted for his political activity was the chairman of the Legal Education Society, an NGO specialising in legal education. Mr. Aliyev was a well-known human-rights lawyer and civil-society activist, who represented applicants before the ECtHR in a large number of pending cases.¹¹⁶

The aforementioned cases pertain to individuals who are adherent to social forces. The Court has also recognised the existence of political motivation to restrictions of the rights of individuals representing economic powers within a State. It is noteworthy that the first case in which the Court found a violation of Article 18 in conjunction with Article 5 of the Convention concerned Mr. Gusinskiy, a media tycoon in Russia and former Chairman of a private media holding company. The *Cebotari* case also falls within the same category of cases where the economic *contre-pouvoirs* within the State are targeted. Mr. Cebotari was the head of a Moldovan State-owned power distribution company, thus, an eminent representative of the economic *contre-pouvoirs* in Moldova.¹¹⁷

3.1.2. The failure of the institutional *contre-pouvoirs*

It goes without saying that not every restriction on the rights of individuals, who are active in entities that function as *contre-pouvoirs* to the State-power, qualifies as a restriction prohibited under Article 18. The same even goes for those restrictions that are found incompatible with the provisions of the Convention that allow for certain types of restrictions. It was explicitly stressed by the Court that a claim under Article 18 is a 'very serious' one.¹¹⁸ Such a claim entails a general rule,¹¹⁹ that 'the whole legal machinery of the respondent State (...) [is] *ab intio* [*sic*] misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention'.¹²⁰

The 'whole legal machinery' of a State comprises all the institutional powers of the State, namely the executive, the legislative and the judicial branch of government. The systemic failure implied by an Article 18 violation does not solely reflect the misuse of the executive power, as exercised by the governing center of the State, but also the ineffective exercise of the legislative and judiciary power. The latter are expected to function as institutional *contre-pouvoirs* to the

112. *Ilgar Mammadov v Azerbaijan* (n 89).

113. *Mammadli v Azerbaijan* (n 89).

114. *Rasul Jafarov v Azerbaijan* (n 89).

115. *Rashad Hasanov and others v Azerbaijan* (n 89).

116. *Aliyev v Azerbaijan* (n 89).

117. *Gusinskiy v Russia* (n 59); *Cebotari v Moldova* (n 89).

118. *Khodorkovskiy v Russia* (n 100) para 260.

119. cf *Selahattin Demirtas v Turkey* (No. 2) (n 89) para 271.

120. *Khodorkovskiy v Russia* (n 100) para 260.

ruling power within a democratic society, only that in the cases where the Court has found a violation of the Article 18, they have failed to do so.

In its most recent string of judgments, adding to the clarification of the general principles concerning the interpretation and application of Article 18 of the Convention that occurred in *Merabishvili*, the Court has explicitly acknowledged this failure.

Particular emphasis is placed on the failure of the judiciary to fulfil its role as the ultimate guarantor of rights within a democratic society governed by the rule of law.¹²¹ In the cases brought before the Court against Azerbaijan, the Court paid very close attention to how the judiciary exercised its function of control over the acts of the executive. The Court observed that with respect to the judicial review of the lawfulness of the applicant's detention, the domestic courts 'limited their role to one of mere automatic endorsement of the prosecution's requests'¹²² without conducting a 'genuine'¹²³ and independent¹²⁴ review of the 'lawfulness' of the detention. Thus, they did not verify the existence of reasonable suspicion underpinning the applicant's arrest and detention and the legitimacy of its purpose.¹²⁵

In the *Aliyev* judgment issued in September 2018, the Court was particularly vocal in this regard. When examining the case under Article 46 of the Convention and taking also into consideration the rest of the cases where Azerbaijan was found to have breached Article 18, the Court

consider[ed] important to stress, as a matter of concern, that the domestic courts, being the ultimate guardians of the rule of law, systematically failed to protect the applicants against arbitrary arrest and continued pre-trial detention in the cases which resulted in the judgments adopted by the Court.¹²⁶

The failure of the judiciary to protect the applicants against a hidden agenda does not necessarily have to fall within an orchestrated attempt by both the executive and the judiciary from the beginning. It is not necessary that both branches of government share and serve a common ulterior purpose from the outset.¹²⁷ For a violation of Article 18 to occur, the sole failure of the judiciary to act as a *contre-pouvoir* – ergo the failure to unveil the ulterior motive of the executive – suffices.

121. Aikaterini Tsampi, *Le principe de séparation des pouvoirs dans la jurisprudence de la Cour européenne des droits de l'homme* (Pedone 2019) 67.

122. *Ilgar Mammadov v Azerbaijan* (n 89) para 118; also, *Rasul Jafarov v Azerbaijan* (n 89) para 143.

123. *ibid.*

124. *Aliyev v Azerbaijan* (n 89) para 172.

125. *ibid.*

126. *ibid* para 224.

127. See in this regard the partly dissenting opinion of Judge Karakaş in *Selahattin Demirtaş v Turkey (No. 2)* (n 89) para 7: 'The same applies to the statements by the President of the Republic of Turkey concerning the criminal investigation carried out in respect of the applicant. In my view, such statements could only be seen as adequate proof of an ulterior purpose behind the judicial authorities' decisions, in line with the government authorities' own agenda, if the Court had found that the Turkish justice system was not sufficiently independent from the executive (compare *Merabishvili*, cited above, para 324). In the absence of such a conclusion (see paragraph 271 of the judgment), the majority should in my view have avoided engaging in speculation, as for example when they asserted that the applicant's continued detention had had a negative effect on the 'no' campaign relating to the proposed Bill to amend the Constitution with a view to introducing a presidential system, or that the political climate in recent years had created an environment capable of influencing certain decisions by the national courts'.

This is particularly corroborated by the findings of the Court in its judgment *Selahattin Demirtaş (No. 2)*. In that case, which is currently pending before the Grand Chamber,¹²⁸ the Court attributed the attitude of the judicial authorities to the influence of the political climate after the *coup d'état* in Turkey. The Court observed that

the tense political climate in Turkey during recent years has created an environment capable of influencing certain decisions by the national courts, especially during the state of emergency. In that context, concordant inferences drawn from this background support the argument that the judicial authorities reacted harshly to the applicant's conduct, bearing in mind his position as one of the leaders of the opposition, and to the conduct of other HDP members of parliament and elected mayors, as well as to dissenting voices more generally.¹²⁹

The judiciary may not be the only branch of government failing to act efficiently as a *contre-pouvoir* against the misuse of power by the governing power within a State. The finding of a violation under Article 18 implies a systemic malfunction of the State machinery, to the extent that the criminal justice system is perverted into an instrument of suppression.¹³⁰ This perversion might as well have its roots in the decisions taken by the legislator herself.

In many recent Article 18 cases where the Court was called to adjudicate upon, it particularly took note of the evolution of the relevant legislative framework. Assessing the general contextual evidence in the cases *Aliyev, Navalnyy* and *Selahattin Demirtaş (No. 2)*, the Court observed: the increasingly harsh and restrictive legislative regulation of NGO activity and funding in Azerbaijan;¹³¹ the important legislative changes which took place in Russia, increasing and expanding liability for a breach of the procedure for conducting public events;¹³² but also the fact that national laws were increasingly being used to silence dissenting voices in Turkey.¹³³

In light of the preceding observations, the finding of a violation of Article 18 is an indication of the malfunction of the whole system of power within a State. The governing power of the State, acting in bad faith, orchestrates the silencing of the political, social, economic *contre-pouvoirs*, with the institutional *contre-pouvoirs* being unable to counter-balance this misuse of power from the beginning to the end. Such an alarming situation, both for the democracy and the rule of law, entails the crossing of the 'significantly high threshold' required by the Court for the finding of a violation of the Article 18.¹³⁴

128. *Selahattin Demirtaş v Turkey (No. 2)* (n 89). The Grand Chamber held a hearing in the case on 18 September 2019.
129. *ibid* para 271.

130. Satzger, Zimmermann and Eibach (n 9) 112.

131. *Rasul Jafarov v Azerbaijan* (n 89) para 159; *Mammadli v Azerbaijan* (n 89) para 99; *Aliyev v Azerbaijan* (n 89) para 212.

132. *Navalnyy v Russia* (n 89) para 172.

133. *Selahattin Demirtaş v Turkey (No. 2)* (n 89) para 264.

134. *ibid* para 260: 'the mere fact that politicians have been prosecuted or placed in pre-trial detention, even during an election campaign or a referendum, does not automatically indicate that the aim pursued was to restrict political debate'.

3.2. IDENTIFYING THE EVOLUTION OF A SYSTEMIC ECtHR APPROACH

Just like Aristotle described it, *μία γὰρ χελιδὼν ἕαρ οὐ ποιεῖ, οὐδὲ μία ἡμέρα* [one swallow does not make spring, nor does [it make] one fine day].¹³⁵ One case of prosecution of an individual active in the sphere of a *contre-pouvoir* for general political reasons does not per se indicate that the *contre-pouvoirs* within the State are, as such, targeted. The assertion that a violation of Article 18 of the Convention reflects the orchestrated dysfunction of the *contre-pouvoirs* within a State, entails a systemic approach. Such a systemic approach pertains to the implications of an Article 18 violation regarding the whole democratic system.

This systemic approach was progressively developed by the Court.¹³⁶ Up until recently, the violation of Article 18 was based on the fact that the State prosecuted the applicants on the basis of the pursuit of specific ulterior purposes. These typically included their critical attitude towards the State authorities¹³⁷ and mostly against the government itself,¹³⁸ for the diffusion of information that the government wished to keep secret,¹³⁹ for controlling their affairs in the benefit of the government¹⁴⁰ or for collecting information of a political nature.¹⁴¹

It is undisputable that all the aforementioned ulterior purposes implied a persecution for political reasons closely related to the status of these individuals. However, the Court did not explicitly accept that such a situation systematically targeted the democratic functioning of the society in itself, via the neutralisation of certain entities of the political scene.

Even in the *Merabishvili* case, a revolutionary case for the interpretation of Article 18, the Grand Chamber did not base the finding of a violation of Article 18 on the allegation that the applicant's arrest and pre-trial detention were meant to remove him from the political scene.¹⁴² If, of course, such a conclusion is dependent on the assessment of the factual circumstances of the case, it is noteworthy that the judgments which followed, revealed what we believe to be the very essence of a violation of Article 18.

On 20 September 2018, the Court published its judgment on the case *Aliyev v Azerbaijan*, finding a violation of Article 18. With the *Aliyev* case included, there were five judgments in which the Court found a prohibited, under the Convention, misuse of power by Azerbaijan. Thus, in the framework of the examination of Article 46 of the Convention, the Strasbourg Court explicitly referred to the fact that these judgments 'reflect a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law'.¹⁴³

135. Aristotle, *Nicomachean Ethics* (Harris Rackham tr, Harvard University Press 1934) 1.7.

136. Confer with the partly concurring, partly dissenting opinion of Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay in *Navalnyy v Russia* (n 89) in particular paras 17-18. In their separate opinion, the aforementioned judges discuss the relation between Article 18 and Article 17 of the Convention, asserting that Article 17 is more suitable to address an abusive system which aims at the destruction of the rights and freedoms provided by the Convention. For the relation between Article 18 and Article 17 see, Paulien de Morree, *Rights and Wrongs under the ECHR. The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016) 69-70.

137. *Lutsenko v Ukraine* (n 89) paras 108-109; *Tymoshenko v Ukraine* (n 89) paras 299-300; *Rasul Jafarov v Azerbaijan* (n 89) para 162; *Rashad Hasanov and others v Azerbaijan* (n 89) para 125.

138. *Ilgar Mammadov v Azerbaijan* (n 89) para 143.

139. *Gusinskiy v Russia* (n 59) para 76; *Ilgar Mammadov v Azerbaijan* (n 89) para 143.

140. *Cebotari v Moldova* (n 89) para 53.

141. *Merabishvili v Georgia* (n 4) para 353.

142. *ibid* para 332.

143. *Aliyev v Azerbaijan* (n 89) para 223.

The explicit identification of a ‘troubling pattern’ rather than an ‘isolated incident’ is undoubtedly of great importance. The Court acknowledged that the applicant was not the only government critic detained and searched for ulterior purposes. However, a systemic approach is not solely related to the quantitative characteristics of a situation but also to the qualitative ones. Even as an isolated incident, the detention of the applicant, a human rights defender, and search of his home and office for the purpose of silencing and punishing him and impeding his work, would have specific implications on the functioning of the *contre-pouvoirs* within a State. As the Court itself stressed: it ‘cannot lose sight of the chilling effect of those measures on the civil society at large, whose members often act collectively within NGOs and who, for fear of prosecution, may be discouraged from continuing their work of promoting and defending human rights’.¹⁴⁴

The ‘chilling effect’ rationale as developed in the case-law of the ECtHR is in itself under-researched by scholars.¹⁴⁵ In a similar vein, its eventual value in the context of Article 18 cases also remained, until a certain point, underexplored by the Court.¹⁴⁶ In general, the Court has put particular emphasis on the chilling effect of measures adopted against a particular applicant on the exercise of criticism to government by the members of the judiciary¹⁴⁷ or the legislative.¹⁴⁸ It would thus have been expected that the Court would have done the same in the context of Article 18 cases. It is not an exaggeration to suggest that this ‘chilling effect’ on civil society, on the *contre-pouvoirs* and on the state of democracy¹⁴⁹ in general forms part of the ulterior purpose pursued by the State when misusing its power.¹⁵⁰

The Court progressively acknowledged this reality. Even though it does not *expressis verbis* refer to the ‘chilling effect rationale’,¹⁵¹ the Grand Chamber, for the first time in the *Navalnyy* case, unequivocally endorsed the systemic dimension of Article 18 violations. The Court observed that:

At the core of the applicant’s Article 18 complaint is his alleged persecution, not as a private individual, but as an opposition politician committed to playing an important public function through democratic discourse. As such, the restriction in question would have affected not merely the applicant alone, or his fellow opposition activists and supporters, but the very essence of democracy as a means of organising society, in which individual freedom may only be limited in the general interest, that is, in the name of a ‘higher freedom’ referred to in the *travaux préparatoires*.¹⁵²

144. *ibid* para 213.

145. See Rónán Ó Fathaigh, ‘Article 10 and the chilling effect principle’ (2013) 3 European Human Rights Law Review 304. More recently, Ronan Ó Fathaigh, ‘The Chilling Effect of Turkey’s Article 301 Insult Law’ (2019) 3 European Human Rights Law Review 298.

146. In his observations in the framework of different Article 18 cases, the Council of Europe Commissioner for Human Rights has particularly focused on the ‘chilling effect’ of the State’s attitude on civil society: *Rasul Jafarov v Azerbaijan* (n 89) para 102 and *Selahattin Demirtaş v Turkey (No. 2)* (n 89) para 109.

147. *Baka v Hungary* App no 20261/12 (ECHR, 23 June 2016) para 125.

148. *Karácsony and others v Hungary* App nos 42461/13 and 44357/13 (ECHR, 17 May 2016) para 116.

149. Joint concurring opinion of Judges Yudkivska, Tsotsoria and Vehabović in *Merabishvili v Georgia* (n 4) para 38.

150. Concurring opinion of Judge Kūris (n 57) para 26.

151. *Navalnyy v Russia* (n 89) para 152.

152. *ibid* para 174.

The same approach was adopted by the Court in the *Selahattin Demirtaş v Turkey (No. 2)* judgment issued on 20 November 2018.¹⁵³ In both cases the Court explicitly accepted that the ulterior purpose pursued by the State was the suppression of political pluralism and the limitation of the freedom of political debate, which forms part of ‘effective political democracy’ governed by ‘the rule of law’.¹⁵⁴ These affirmations of the Court mark another landmark evolution in the case law of Article 18 since the *Merabishvili* judgment.

It should be acknowledged though that, to a certain extent, it was *Merabishvili* which set the basis for such a systemic approach. In this 2017 judgment the Grand Chamber clarified, among other things, its stance on the questions of proof, making also clear that the Court does not restrict itself to direct proof in relation to complaints under Article 18 of the Convention¹⁵⁵ but also endorses the possibility of taking circumstantial evidence into consideration.¹⁵⁶ Thus, the Court can and does also take into account the contextual background of a case, reports or statements by international observers, non-governmental organisations or the media, or the decisions of other national or international courts, particularly with a view to shed light on the facts, or to corroborate findings made by the Court.¹⁵⁷ This is especially important for Article 18 cases, where the suffering of the democratic values is the result of systemic deficiencies, and the individual cases of the applicants are just the proverbial tip of the iceberg.

The moral considerations that are inherent to the ‘misuse of powers’ *à la strasbourgeoise* are closely connected to its structural dimension. As it was already demonstrated, a violation of Article 18 implies that the function of the whole machinery of the State is wanting.

The ongoing evolution of the case law under Article 18 reflects the shift of the Court towards systemic justice, where the Court evaluates the compatibility of a general context with fundamental principles. This trend is not new to the Court. The evolution of the conventional exigencies has gradually put the separation of powers within the State into the fray of the European case law. Even if it is true that the Court does not apply any specific theory of separation of powers, the protection of human rights as enshrined in the Convention cannot be guaranteed unless the activities of the executive are delineated by the legislative and the judiciary.¹⁵⁸ The ECtHR thus scrutinises the institutional designs within the State Parties to the ECHR, notwithstanding the fact that it does not qualify as a constitutional court. Even though the mandate of the ECtHR is to look at the working of the system from the perspective of its effects on individuals, there are still spill-over effects.¹⁵⁹ A change made to accommodate a requirement related to an

153. *Selahattin Demirtaş v Turkey (No. 2)* (n 89) para 272: ‘In this connection, the Court observes that the applicant does not see himself solely as an individual victim of a violation. His contention is that he has been kept in pre-trial detention chiefly on account of his position as one of the leaders of the political opposition. The Court considers that in such an eventuality, it is not only the applicant’s rights and freedoms as an individual that could be said to be under threat but the whole democratic system itself. In the Court’s opinion, an ulterior purpose of that kind would undoubtedly pose a serious problem for democracy’.

154. *Selahattin Demirtaş v Turkey (No. 2)* (n 89) paras 175 and 273.

155. *Merabishvili v Georgia* (n 4) para 316.

156. *ibid* para 317. See, for example, the contextual evidence considered by the Court in *Navalnyy v Russia (No. 2)* (n 89) para 96.

157. *Merabishvili v Georgia* (n 4) para 317.

158. Tsampi (n 121) general conclusion in 327-335.

159. David Kosař, ‘Policing Separation of Powers: A New Role for the European Court of Human Rights?’ (2012) 8 European Constitutional Law Review 33, 62.

individual can have effects on separation of powers within a member State of the Council of Europe.¹⁶⁰

This systemic justice trend is dominant in the case law relating to Article 18. The Court has explicitly acknowledged in *Selahattin Demirtaş v Turkey (No. 2)* that ‘it is not only the applicant’s rights and freedoms as an individual that could be said to be under threat but the whole democratic system itself’.¹⁶¹ Article 18 could therefore function as an early warning system for European States that are at risk of becoming an illiberal democracy or even of reverting to totalitarianism and the destruction of the rule of law.¹⁶²

In this context, it comes as no surprise that in the *Navalnyy* case, one year after *Merabishvili*, the Grand Chamber put emphasis on the ‘the structural inadequacy of the regulatory framework, which failed to provide effective legal safeguards against abuse’¹⁶³ and clarified under Article 46 of the Convention that ‘this situation in principle calls for the adoption of general measures by the respondent State’.¹⁶⁴ Even though the application of Article 46 remains scarce in the case law,¹⁶⁵ the systemic character of Article 18 cases justifies the recommendation of specific general measures¹⁶⁶ by the Court itself.

4. CONCLUSION

The aspiration of the present study was to clarify what is precisely at stake in the cases where the ECtHR has found violations of Article 18. The analysis of the relevant case law conducted in this article suggests that the finding of a violation of Article 18 of the ECHR manifests the *male fide* efforts of the executive branch of government to erode the social, political and economic *contre-pouvoirs* within a State due to the – *in toto*, orchestrated or not – dysfunction of the institutional *contre-pouvoirs*. Such an approach points out the inherent moral and structural characteristics of the *anti-détournement* clause of the Convention.

Any violation found on the basis of the clauses of the Convention can demonstrate dysfunctions related to the democracy and rule of law within a State. But a violation of Article 18 is not just *any* violation, just like the case law on Article 18 is not just *any* case law. It has been demonstrated that a violation of Article 18 surpasses the framework of a specific individual case and reflects the intentional and structural dysfunction of the whole State machinery.

160. *ibid.*

161. *Selahattin Demirtaş v Turkey (No. 2)* (n 89) para 272.

162. Floris Tan, ‘The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?’ (2018) 9 *Goettingen Journal of International Law* 109, 110.

163. *Navalnyy v Russia* (n 89) para 185.

164. *ibid* para 186.

165. For a pertinent overview, see Linos-Alexandre Sicilianos, ‘The Involvement of the European Court of Human Rights in the Implementation of its Judgments: Recent Developments under Article 46 ECHR’ (2014) 32(3) *Netherlands Quarterly of Human Rights* 235. See also the recent Lize R Glas, ‘The European Court of Human Rights supervising the execution of its judgments’ (2019) 37(3) *Netherlands Quarterly of Human Rights* 228.

166. For individual measures see, *Selahattin Demirtaş v Turkey (No. 2)* (n 89) para 283. See also, the first ever ECtHR judgment on infringement proceedings: *Proceedings under Article 46 § 4 of the Convention in the case of Ilgar Mammadov v. Azerbaijan* App no 15172/13 (ECHR, 29 May 2019). Its discussion falls outside the scope of the current article. For a brief overview of the author’s opinion, see Aikaterini Tsampi, ‘Happy 60th Anniversary, European Court of Human Rights: Celebrating (with) Protocol 16 Advisory Opinion and Infringement Proceedings’ (*GroJIL-blog*, 9 August 2019) <<https://grojil.org/2019/08/09/happy-60th-anniversary-european-court-of-human-rights-celebrating-with-protocol-16-advisory-opinion-and-infringement-proceedings/>> accessed 10 September 2019.

Such an approach also confirms the scholarly opinion that the case law of the Court under Article 18 of the Convention marks the development of a ‘coping strateg[y]’¹⁶⁷ for the Court to handle the fragmentation of the attitudes of its audiences ‘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’.¹⁶⁸

The case law on Article 18 is conceived as a tool against the holistic backsliding of democracy and rule of law within a State. The effectiveness of this tool is certainly an open question that does not fall within the scope of our analysis.¹⁶⁹ The evolution of the case law of Article 18, however, is on its own a sign that the ECtHR is up to the task to rise and meet the challenges of its role as the conscience of Europe, a continent tormented by institutional challenges to democracy and the rule of law.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

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167. Başak Çali, ‘Coping with Crisis: Whither the Variable Geometry in The Jurisprudence of the European Court of Human Rights’ (2018) 35(2) *Wisconsin International Law Journal* 237, 242.

168. *ibid* 237.

169. Kanstantsin Dzehtsiarou, ‘Is the European Court of Human Rights capable of changing legal systems? Judgment in *Aliyev v Azerbaijan*’ (*Strasbourg Observers*, 15 October 2018) <<https://strasbourgobservers.com/2018/10/25/is-the-european-court-of-human-rights-capable-of-changing-legal-systems-judgment-in-aliyev-v-azerbaijan/>> accessed 10 September 2019.