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Judicial Activism and Judge-Made Law at the ECtHR

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ABSTRACT

This paper contributes to an ongoing debate concerning the perceived judicial activism of the European Court of Human Rights (ECtHR). It argues that the output of the Court should be better viewed as the phenomenon of judicial law-making, not unlike in domestic jurisdictions. However, unlike many domestic legal systems, the European Convention on Human Rights framework promotes large quantities of judge-made law. This outcome results from a combination of objective factors that, taken together, enhance the process of judicial law-making by the ECtHR. Those factors include the applied mode of interpretation of the Convention, the approach to its construction, the weak textual basis, the existence of positive obligations, the lack of the doctrine of precedent, the extremely high case law and judicial turnovers, the concurrent legislative inactivity, the existence of the inter-state jurisdiction and the doctrine of autonomous meaning. At the same time, the judicial law-making is only hindered by the doctrine of subsidiarity, the principle of margin of appreciation and the Fourth Instance doctrine. As a consequence of this overwhelming dominance of the factors enhancing the process of judicial law-making over those that hinder it, the ECtHR produces large quantities of judge-made law.

KEYWORDS: European Court of Human Rights, judicial activism, judicial law-making, subsidiarity, legal interpretation, precedent

1. INTRODUCTION

The European Court of Human Rights ('ECtHR'/'the Court') has grown to become one of the most prominent judicial institutions worldwide. The scale of its success could be measured, *inter alia*, in reference to the number of cases the Court hears each year. In 2022 alone, 44,500 applications were allocated to a judicial formation and judgments were delivered in respect of 4168 applications.[1] Those numbers clearly illustrate the confidence the ECtHR and the whole European Convention on Human Rights ('ECHR'/'the Convention') enjoy in the eyes of an average person. However, over the course of its development, the ECtHR has also been criticised, sometimes heavily, for its supposedly activist nature. The paper will suggest that such criticism is inaccurate and misplaced. The ECtHR is not an inherently activist court; nor are its judges inherently activist. Instead, what appears to be judicial activism at first is merely the phenomenon of judicial law-making present in all legal jurisdictions. Inasmuch as the ECtHR produces large quantities of judge-made law, this is not prompted by any special activist nature

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1 ECtHR, Analysis of statistics 2022, January 2023, https://www.echr.coe.int/Documents/Stats_analysis_2022_ENG.pdf [last retrieved 4 April 2023].

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of the Court, but rather is a function of a number of objective factors, most of which exist in all legal systems. Depending how they actually play out in each jurisdiction, such factors result in large or small quantities of judge-made law. This is because some of them inherently drive the accumulation of judge-made law whereas others hinder this process. When it comes to the ECtHR, the overwhelming majority of the relevant factors happen to drive the accumulation of judge-made law. The interplay of those factors pushes the Court towards generating more case law which, in turn, translates into more and more issues falling within its jurisdiction, which, ultimately, amounts to more and more judge-made law.

2. JUDICIAL ACTIVISM OR LAW-MAKING?

In legal scholarship, the concept of judicial activism is commonly associated within the USA. In very general terms, it indicates the prioritization of the needs derived from present-day circumstances over the doctrine of precedent and deference to legislators.[2] In the recent decades, it has migrated across the Atlantic to Europe and has been raised in relation to many courts, including the ECtHR. Over the course of its operation, the ECtHR has been criticised, sometimes heavily, for its supposedly activist nature. This criticism has been levied by legal scholars,[3] domestic judges[4] as well as governments[5] and others.[6] On the other hand, interestingly, some scholars ascribe the apparent success of the ECHR system to judicial activism of the ECtHR.[7] In any event, the supposedly activist nature of the ECtHR has been acknowledged by former ECtHR Registrar and Judge, Paul Mahoney,[8] who argued that judicial activism and restrain were both inherent in the process of judicial review as 'two sides of the same coin' as well as certain Judges of the Court, such as former Serbian Judge Popović,[9] who openly acknowledged the activist nature of the ECtHR.[10] At the same time, various justifications have been put forward to defend the Court's practice, including those by former President of the Court, Judge Spano.[11]

However, it appears that the notion of judicial activism is not particularly well suited for an international court, having evolved in a domestic jurisdiction, and in the particular context of the legal and political reality of the USA.[12] Furthermore, the term itself is highly politicised and is often thrown at courts whenever they fail to side with one particular side of a legal debate.[13] As such, if nothing else, the concept of judicial activism is unhelpful. Instead, when it comes to the ECtHR, it is submitted that this issue is better explained in terms of judicial law-making,[14]

2 Urbaitė, 'Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State' (2011) 11(1) *Baltic Yearbook of International Law Online* 211 at 225.

3 See Bossuyt, 'Judicial Activism in Strasbourg' in Wellens (ed). *International Law in Silver Perspective: Challenges Ahead* (2015).

4 See Sumption, *Trials of the State—Law and the Decline of Politics* (2019).

5 UK Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (UK), Human Rights Act Reform: A Modern Bill of Rights - GOV.UK (www.gov.uk) [last retrieved 16 January 2023]

6 See Spano, 'Over-Reaching or Under-Achieving? The Trajectory of the Case Law in the European Court of Human Rights' (2022) *UC Louvain Faculty of Law* [https://echr.coe.int/Documents/Speech_20220312_Spano_Leuven_University_ENG.pdf]

7 Urbaitė (n 2) at 211.

8 Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57.

9 Popovic, 'Prevailing of Judicial Activism Over Self-Restraint in the Jurisprudence of the European Court of Human Rights' (2008) 42 *Creighton Law Review* 361.

10 Urbaitė (n 2) at 226–27.

11 See Spano (n 6).

12 See Tulkens, 'Judicial Activism v Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights' Vol. 3. No. 3 *European Convention on Human Rights Law Review*.

13 See Balkin, 'Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time' (2019) 98 *Texas Law Review* 215; Meese, 'A Return to Constitutional Interpretation from Judicial Law-Making' (1995) 40 *NYLS Law Review* 925.

14 See Wojtyczek, 'The European Court of Human Rights and Judicial Law-Making' (2020) *Judicial Law-Making in European Constitutional Courts* 221–241.

which generates judge-made law. In this context, judge-made law could be understood as a judicial overlay on the text of the law itself. It is a natural consequence of the role judges play—interpretation and application of laws. Laws are generally passed by legislatures *in abstracto*, without taking into consideration all possible scenarios in which they apply. It is then on the courts to interpret those laws in specific real-life contexts.[15] This process allows for a judicial input into the shape of the law.

The phenomenon of judicial law-making is well documented and applies to both common law and civil law jurisdictions.[16] Contrary to the traditional views on the passive role of judges in civil law systems, historically described by Montesquieu as being 'merely the mouth that pronounces the words of the law, inanimate beings who can moderate neither their force nor their severity',[17] judicial law-making is not foreign to the continental Europe. In fact, as early as 1899, French legal scholars[18] realised that French judges had 'created' whole new areas of law, such as unfair competition, unjust enrichment or automotive liability, based on nothing else but very generic clauses of the Napoleon's Code Civil that was completely silent on those matters.[19] This phenomenon was not limited to France only. For instance, the Swiss Civil Code of 1907,[20] still in force today, openly allows for the judicial law-making process by prescribing that 'in the absence of a [relevant applicable] provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.'[21] Finally, the 20th century also saw the German judiciary developing legal concepts and filling legal gaps in a process akin to judicial law-making.[22]

When it comes to common law, the English orthodox declaratory theory of law, represented by Blackstone, has traditionally maintained that judges are 'not delegated to pronounce a new law, but to maintain and expound the old one',[23] and, therefore, they merely declare what the law has always been.[24] This has translated into British courts[25] historically declaring that 'there is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.'[26] However, this approach has been heavily criticised by both scholars[27] and judges,[28] for almost as long as it has existed, including being described as a 'childish fiction',[29] among other things.[30] It seems that, nowadays, the prevailing view is that, as Lord Denning[31] has once put it, 'judges do every day make law, though it is almost heresy to say so.'[32] This is, perhaps, best illustrated by the fact that, for centuries, English and British courts had the power to recognise new criminal offences at common law without any statutory

15 Ibid.
16 See Brenncke, *Judicial law-making in English and German courts: Techniques and Limits of Statutory Interpretation* (2018), Chapter 3.6.
17 Montesquieu, *The Spirit of Law* (1748, Trans. Philip Stewart, 2018), Book XI, Chapter 6 https://montesquieu.ens-lyon.fr/spip.php?article2730 [last retrieved 16 January 2023].
18 Gény, *Méthode d'interprétation et sources en droit privé positif* (1899).
19 Friedmann, 'Legal Philosophy and Judicial Lawmaking' (1961) 61(5) *Columbia Law Review* 821–845 at 826.
20 Swiss Civil Code of 1907, Article 1.
21 Friedmann (n 19) at 826.
22 See Rose-Ackerman, Egidy, Fowkes, *Due Process of Lawmaking* (2015), Chapter 4.
23 Blackstone, *Commentaries on the Laws of England* (1766), Vol 1 at 69.
24 Beever, 'The Declaratory Theory of Law' (2013) 33.3 *Oxford Journal of Legal Studies* 421 at 421.
25 *Willis v Baddeley* [1892] 2 QB 324 (CA) at 326.
26 Beever (n 24) at 422.
27 E.g. Atiyah, 'Judges and Policy' (1980) 15 *Israel Law Review* 346; Cane, *Responsibility in Law and Morality* (2002) at 7, n 21.
28 Holmes J in *Southern Pacific Co v Jensen*, 244 US 205 (1917) at 222; Lord Reid, 'The Judge as Lawmaker', (1972–73) 12, *The Journal of the Society of Public Teachers of Law*, 22 at 22.
29 Austin, *Lectures on Jurisprudence, or, The Philosophy of Law* (1895) at 321.
30 Beever (n 24) at 422.
31 Denning, *Reform of Equity* in Hamson et al. (eds), *Law Reform and Law Making: A Reprint of a Series of Broadcast Talks* (1953) at 31.
32 Beever (n 24) at 422.

basis.[33] Although the British courts[34] gave up that power in the 1970s,[35] they continue to shape the scope of existing criminal offences without any legislative input, including by extending it to completely new circumstances,[36] a practice that the ECtHR has accepted as compatible with Article 7 of the Convention.[37]

Accordingly, the distinction between the common law and civil law legal cultures, traditionally raised to emphasise the differences in the approach to judicial law-making,[38] appears largely obsolete these days.[39] Instead, it could be said that judicial law-making exists in all jurisdictions, including those of international courts and tribunals.

3. ACCELERATION

Judicial law-making is a highly complicated process that is influenced by a wide variety of considerations.[40] In fact, it appears that there are a number of objective factors that either accelerate or hinder this process. Accordingly, the quantities of judge-made law are a function of how those factors play out within the bounds of a particular jurisdiction.

A. Modes of Interpretation

The first, and arguably the most important, factor which affects the accumulation of judge-made law is the prevailing mode of interpretation which a court employs towards the text of the law. The ECHR, as an international treaty, is subject to the rules of interpretation prescribed by the Vienna Convention on the Law of Treaties 1969;[41] however, that instrument itself leaves ample room for various modes of interpretation. Out of those, two major modes stand out. First, courts could remain faithful to the original intention of the drafters of the law, *i.e.* apply originalism. Second, they can depart from that original meaning and rather keep in line with the present-day conditions, *i.e.* apply living instrument. *Tempora mutantur, nos et mutamur in illis*.[42] The former mode of interpretation severely hinders the accumulation of judge-made law as the court remains closely bound by the text of the law itself. As a result, the space for any judicial overlay is very limited. On the other hand, the latter mode of interpretation drives the accumulation of judge-made law as it allows for an ever-changing interpretation which is not limited to the original meaning of the text. A changing environment prompts changes in the jurisprudence. Relatively early in its jurisprudence, in *Tyrer v UK*,[43] the ECtHR adopted the living instrument doctrine. Soon after, in *Young, James and Webster v UK*,[44] it also decidedly rejected originalism. This has set the Court on the course towards ever-expanding quantities of judge-made law. This has also led the ECtHR to expand the scope of application of the ECHR towards areas that are not obviously affected such as environmental cases[45] as well as to uphold rights which could

33 Smith, 'Judicial Law Making in The Criminal Law' (1984) 100 *The Law Quarterly Review* 46–76 at 54–55.
34 *R v Knuller* [1973] AC 435; *Director of Public Prosecution v Withers* [1975] AC 842.
35 Smith (n 33) at 54–55.
36 E.g. *R v R* [1991] UKHL 12.
37 E.g. *CR v UK* (20190/92) 1995; *SW v UK* (20190/92) 1995.
38 See Yu, 'The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries' (1999) 2.2 *International Area Review*, 35.
39 See Fon, Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2006) 26.4 *International Review of Law and Economics* 519–535; Schneider, 'Judicial Lawmaking in a Civil Law System: Evidence From German Labor Courts of Appeal' (2002) *IAAEG Discussion Paper Series*.
40 See Tulkens (n 12).
41 Vienna Convention on the Law of Treaties 1969, Articles 31–32.
42 Eng: 'Times are changed; we, too, are changed within them.'
43 *Tyrer v UK* (5856/72) 1978.
44 *Young, James and Webster v UK* (7601/76 & 7806/77) 1981.
45 E.g. *Hatton v UK* (36022/97) 2003.

not have been contemplated by the drafters of the Convention (such as those related to the Internet)[46] or, indeed, rejected by them altogether.[47]

This phenomenon is perhaps most apparent under Article 8 of the Convention, which has undergone nothing short of a real transformation. In his dissent in the famous 1979 case of *Marckx v Belgium*,[48] concerning the compatibility of the distinction between legitimate and illegitimate children with Article 8 of the Convention, Judge Gerald Fitzmaurice observed:

> 'It is abundantly clear (at least it is to me)—and the nature of the whole background against which the idea of the European Convention on Human Rights was conceived bears out this view—that the main, if not indeed the sole object and intended sphere of application of Article 8 (art. 8), was that of what I will call the "domiciliary protection" of the individual. He and his family were no longer to be subjected to the four o'clock in the morning rat-a-tat on the door; to domestic intrusions, searches and questionings; to examinations, delaying and confiscation of correspondence; to the planting of listening devices (bugging); to restrictions on the use of radio and television; to telephone-tapping or disconnection; to measures of coercion such as cutting off the electricity or water supply; to such abominations as children being required to report upon the activities of their parents, and even sometimes the same for one spouse against another,—in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8 (art. 8), and it was for the avoidance of these horrors, tyrannies and vexations that "private and family life . . . home and . . . correspondence" were to be respected, and the individual endowed with a right to enjoy that respect—not for the regulation of the civil status of babies.'

Today, the ECtHR's expansive interpretation of the scope of Article 8 means that there are substantial areas of an individual's life that can be litigated under it.

However, it cannot be said that the ECtHR is the only court of law applying the living instrument doctrine. In contrast, most modern national courts tend to adopt the living instrument mode of interpretation, at least to some extent. The notable exception is, of course, the US Supreme Court under its current conservative majority, formerly championed by Justice Scalia. However, even there, the minority would depart from originalism and apply the living instrument doctrine. In fact, this division lies at the bottom of the debate over the constitutional right to abortion in the USA. In the recent case of *Dobbs v Jackson Women's Health Organization*,[49] the originalist majority on the US Supreme Court interpreted the Bill of Rights in line with its meaning at the time of the ratification to the effect that legal protection was no longer extended to cover the decision to terminate pregnancy. This, of course, erased the precedent set in *Roe v Wade*,[50] arguably the most famous piece of American jurisprudence to date. The opposite conclusions of Dobbs and Roe were prompted precisely by the different modes of interpretation applied—with the former being an originalist decision and the latter being based on the living instrument doctrine.

[46] E.g. *Cengiz and Others v Turkey* (48226/10 & 14027/11) 2016.
[47] E.g. *Young, James and Webster v UK* (7601/76 & 7806/77) 1981.
[48] *Marckx v Belgium* (6833/74) 1979, Dissenting Opinion of Judge Gerald Fitzmaurice at [7].
[49] *Dobbs v Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022).
[50] *Roe v Wade*, 410 U.S. 113 (1973).

B. Approach to Construction

The second factor affecting the accumulation of judge-made law is the approach towards the construction of different types of laws. Not all laws are created equal when it comes to their construction. Laws that regulate the powers of governments tend to attract a relatively narrow construction. On the other hand, laws recognising individual rights tend to attract a wide construction. The former necessarily limits the accumulation of judge-made law; the latter tends to drive it as the scope of relevant provisions is enlarged so as to provide a legal protection to all individuals. In the Privy Council case of Minister of *Home Affairs v Fisher*,[51] dealing with the Bermudian Constitution, Lord Wilberforce explained that a constitution is a document 'sui generis, calling for principles of interpretation of its own, suitable to its character'; at the same time, a charter of individual rights forming part of such a constitution should be given '. . . a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give individuals the full measure of the fundamental rights and freedoms referred to.'[52] This approach to construction of individual rights has been subsequently adopted by courts[53] and supported by academics[54] worldwide.[55] In fact, not long after that decision, the Canadian Supreme Court[56] similarly explained that, when it came to the Charter of Rights and Freedoms, 'the interpretation should be [. . .] a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.'[57] Naturally, the ECHR is exactly that—a charter of individual rights. As such, by its very own character, it must be construed generously, leading to an enhanced accumulation of judge-made law compared with courts that deal with laws regulating matters other than individual rights.

C. Textual Basis

The third factor affecting the accumulation of judge-made law is the shape of the text of the law itself. The more comprehensive the text, the less room there is for judge-made law. This is because a detailed text is easier to apply on average than vague and generic phrases, without any need for elaborate legal argumentation. In case of the ECHR, the text of its provisions is relatively short and generic.[58] More than that, it also contains plentiful of vague phrases such as 'torture' and 'inhuman or degrading treatment or punishment' under Article 3 of the Convention; 'fair hearing' under Article 6 of the Convention or 'private and family life' under Article 8 of the Convention, to name a few. What actually constitute 'torture', 'inhuman or degrading treatment or punishment', 'fair hearing' or 'private and family life'? The answers to these questions are not to be found in the text of the Convention. Instead, they must be developed by the Court itself. That necessarily drives the accumulation of judge-made law. In fact, courts around the globe tend to struggle with vague and generic language of laws they interpret. For instance, it took the US Supreme Court approximately 300 rulings between 1957 and 2021 to explain the meaning

[51] *Minister of Home Affairs v Fisher* [1980] A.C. 319 at 328.

[52] Marcus, 'Interpreting the Chapter on Fundamental Rights' (1994) 10.1 *South African Journal on Human Rights* 92–102 at 93–94.

[53] E.g. *Reyes v The Queen,* [2002] UKPC 11; *Marshall and Others v Deputy Governor of Bermuda and Others,* [2010] UKPC 9 at [15]; *S v Makwanyane*, 1995 (3) SA 391 at [10]; *Attorney General v Smith*, [2018] NZCA at [18]; *Madhewoo v Mauritius,* [2017] NZHC 463 at [13].

[54] See Ramy, 'Native Title in Malaysia: A "Complementary" Sui Generis Right Protected by the Federal Constitution' [2007] 11(1) *Australian Indigenous Law Review* 54 at footnote 170; Butler, 'Limiting Rights' [2002] 33(3 and 4) *Victoria University of Wellington Law Review* 113 at footnote 8.

[55] Matthews, Amoah, *Securing Equality for All in the Administration of Justice* (2019) at 122.

[56] *R v Big M Drug Mart Ltd.* [1985] 1 SCR 295 at 359–60.

[57] Marcus (n 52) at 94.

[58] See Wojtyczek (n 14) at [2.3].

of the phrase 'unreasonable searches and seizures' under the fourth Amendment.[59] And that, of course, does not mean that the matter is settled.

D. Positive Obligations

The fourth factor affecting the accumulation of judge-made law is the concept of positive obligations. The existence of positive obligations opens a gate to a flood of judge-made law. It allows for the finding of individual rights where none existed before and of state liability where none was possible before. As such, positive obligations necessarily drive the accumulation of judge-made law. The existence of positive obligations under the ECHR has been recognized for decades now.[60] It has allowed the Court to extend the protection offered by the Convention to horizontal relations between individuals themselves[61] as well as to harm resulting from natural occurrences.[62] This phenomenon has considerably accelerated the accumulation of judge-made law as the ECtHR has expanded its jurisdiction to circumstances that had been, hitherto, considered outside the Court's jurisdiction. However, the ECtHR is by no means an outlier in this area. In fact, most modern national courts tend to recognize positive obligations.[63] The notable exception is, of course, the US Supreme Court, which famously rejected the concept of positive obligations in *DeShaney v Winnebago County*[64] explaining that the US Bill of Rights 'generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual'.[65]

E. Precedent

The fifth factor affecting the accumulation of judge-made law is the doctrine of precedent. A formal rule requiring a court to follow previously decided cases necessarily hinders the accumulation of judge-made law because it leaves no room for any new interpretation where one already exists. Naturally, the original case (*i.e.* the precedent which subsequent judgements refer to) itself constitutes judge-made law, as soon as it comes into existence, it restricts ensuing judicial law making. This factor has traditionally had the most effect in common law countries where courts are indeed expected to follow previous decisions. However, even in civil law jurisdictions, the idea of precedent has some persuasive value.[66]

This is exactly the approach taken by the ECtHR. Although the Court is not bound by its previous decisions, it generally follows them in most circumstances. This, naturally, allows at least some room for new and creative interpretation of the Convention, which, in turn, contributes to the accumulation of judge-made law. For example, a flexible approach to the doctrine of *stare decisis* led the Court in the 2002 cases of *Christine Goodwin v UK*[67] to require states to legally recognize the newly assigned sex of transgender individuals despite the 1986 *Rees v UK*[68] ruling in contrast. In *Christine Goodwin v UK*, the Court explained that

[59] Oyez, Search and seizure, https://www.oyez.org/issues/227 [last retrieved 16 January 2023].
[60] See *Airey v Ireland* (6289/73) 1979.
[61] *Osman v UK* (23452/94) 1998.
[62] E.g. *Oneryildiz v Turkey* (48939/99) 2004.
[63] See Grimm, 'The Role of Fundamental Rights After Sixty-Five Years of Constitutional Jurisprudence in Germany' (2015) 13.1 *International Journal of Constitutional Law* 9.
[64] *DeShaney v Winnebago County*, 489 U.S. 189 (1989) at 195–97.
[65] Kannan, 'But Who Will Protect Poor Joshua DeShaney, a Four-year-old Child with No Positive Due Process Rights' (2008) 39 *University of Memphis Law Review* 543 at 554.
[66] See Fon (n 39).
[67] *Christine Goodwin v UK* (28957/95) 2002.
[68] *Rees v UK* (9532/81) 1986.

> 'While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory . . . '[69]

The fact that the ECtHR decided to depart from its previous precedent and recognize a right which had previously been denied automatically created a new layer of judge-made law.

However, the ECtHR is by no means an outlier when it comes to the lack of any strict doctrine of *stare decisis*. In fact, even supreme courts of common law jurisdictions have abandoned the doctrine of precedent when it comes to being bound by their own previous decisions. The UK House of Lords, the predecessor of the current UK Supreme Court, did so in the famous Practice Statement[70] of 1966.[71] At the same time, one of the most famous and ground-breaking cases ever decided by the US Supreme Court were actually departures of previous precedents, among these were *Brown v Board of Education*[72] abolishing racial segregation (overruling *Plessy v Ferguson*[73]), *Obergefell v Hodges*[74] establishing a constitutional right to same-sex marriage (overruling *Baker v Nelson*[75]) and, very recently, *Dobbs v Jackson Women's Health Organization*[76] overruling *Roe v Wade*,[77] among others.[78]

F. Caselaw Turnover

The sixth factor affecting the accumulation of judge-made law is the caselaw turnover, *i.e.* the number of cases a court deals with. Each case is an individual scenario which engages various aspects of the law. The more such scenarios are presented to the court, the more aspects of the law are engaged. This, in turn, translates into more judge-made law being generated. When it comes to the ECtHR, the caselaw turnover is extremely high. As noted, in 2022, 44,500 applications were allocated to a judicial formation and judgments were delivered in respect of 4168 applications.[79] These numbers are simply unparalleled in any legal system. This is, of course, directly linked to the size of the population living within the Council of Europe, all of whom can, at least in theory, seek redress from the ECtHR. Currently, that number stands at approximately 675 million.[80] At the same time, in the past decade, the ECtHR has been expanding the concept of jurisdiction to persons living outside the territory of the Council of Europe, yet affected by actions of States parties to the Convention. This was particularly important in cases of armed conflicts taking place outside of Europe where members of the Council of Europe have been held responsible for various forms of interference with the Convention rights occurring in

69 *Christine Goodwin v UK* (n 67) at [74].
70 *The Practice Statement* [1966] 3 All ER 77.
71 Lee, 'Fides et Ratio: Precedent in the Early Jurisprudence of the United Kingdom Supreme Court' (2015) 21 *European Journal of Current Legal* at 8.
72 *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).
73 *Plessy v Ferguson*, 163 U.S. 537 (1896).
74 *Obergefell v Hodges*, 576 U.S. 644 (2015).
75 *Baker v Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971).
76 *Dobbs v Jackson Women's Health Organization*, 597 U.S. (2022).
77 *Roe v Wade*, 410 U.S. 113 (1973).
78 Congress, Constitution Annotated, Table of Supreme Court Decisions Overruled by Subsequent Decisions, https://constitution.congress.gov/resources/decisions-overruled/ [last retrieved 16 January 2023].
79 ECtHR, Analysis of statistics 2023, (n 1).
80 Our Member States, Council of Europe, https://www.coe.int/en/web/about-us/our-member-states [last retrieved 16 January 2023].

regions under their effective overall control.[81] Alternatively, the Court's jurisdiction could also be triggered in relation to individuals under a complete control of member states' governmental agents, regardless of the geographical location,[82] including on the high seas.[83] Naturally, this expansion of jurisdiction contributes to the increase in the number of cases the ECtHR hears each year.

Nevertheless, the size of the population itself, or the rules for trigging the jurisdiction, do not, on their own, explain the caseload of the ECtHR. For comparison, the EU population currently stands at approximately 447 million yet, in 2021, only 1720 cases were brought before the two courts comprising the Court of Justice of the EU with a total of 1723 cases disposed of.[84] Furthermore, the overall population of all member states to the Rome Statute of the International Criminal Court currently stands at over 3 billion, with more countries being able to accept the Court's jurisdiction on an *ad hoc* basis or through a UN Security Council referral,[85] yet there are only 31 cases pending before it, with a large portion remaining inactive.[86]

Another factor, besides the size of the population, affecting the caseload of a court is the nature of its jurisdiction. The ECtHR happens to have a compulsory jurisdiction. In other words, the Court is not in the position to pick and choose its own caseload. Instead, all cases which fulfil the formal criteria are considered admissible and, therefore, must be allocated to a judicial formation for a decision. Under Article 35 of the Convention, applications for review by the ECtHR must be submitted within 4 months from the exhaustion of domestic remedies as well as must not be anonymous or 'substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.' Protocol 15 has recently introduced a new requirement allowing the Court to refuse to hear a case if 'the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits.' However, so far, this additional criterion has not had any substantial impact on the number of cases the Court hears.

On the other hand, for comparison, in the 2021–22 term, the UK Supreme Court issued only 56 judgments,[87] whereas the US Supreme Court hears between 100 and 150 of cases each year.[88] Neither of those courts has a compulsory jurisdiction; generally, a permission to appeal is given only if a case raises a point of general public importance.[89] The caseload of neither of those courts comes even close to that of the ECtHR.

G. Judicial Turnover

The seventh factor affecting the accumulation of judge-made law is a judicial turnover, *i.e.* the number of judges passing through a court. The more individuals pass through an institution,

[81] E.g. *Al-Skeini v UK* (55721/07) 2011.
[82] E.g. *Hassan v. UK* (29750/09) 2014.
[83] E.g. *Hirsi Jamaa v Italy* (27765/09) 2012.
[84] CJEU, 'Judicial statistics 2021: despite the pandemic, the judicial institution of the European Union has been able to ensure the continuity of its activities in full', Press Release No 40/22, Luxembourg, 2 March 2022 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjl7rGKyez7AhXFxQIHHczhDnIQFnoECBwQAQ&url=https%3A%2F%2Fcuria.europa.eu%2Fjcms%2Fjcms%2Fp1_3662853%2Ffr%2F&usg=AOvVaw1Bgv3vOYpvi1YF5oFR9zst [last retrieved 16 January 2023].
[85] Rome Statute, Article 13.
[86] ICC, Cases, https://www.icc-cpi.int/cases [last retrieved 16 January 2023]. Of course, important factors are the limited nature of the ICC's jurisdiction over crimes and the nature of its relationships with national courts.
[87] UK Supreme Court, The Supreme Court and Judicial Committee of the Privy Council Annual Report and Accounts 2021–2022 https://www.supremecourt.uk/docs/annual-report-2021-2022.pdf [last retrieved 16 January 2023].
[88] US Supreme Court, About the Supreme Court, Cases, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=The%20Supreme%20Court%20agrees%20to,asked%20to%20review%20each%20year [last retrieved 16 January 2023].
[89] See Rules of The Supreme Court of the United States (2022), Rule 10.

the more diverse the impact will be. In case of courts, a high number of judges passing through a court is likely to lead to a high number of divergent, perhaps even contradictory, decisions. This, naturally, drives the accumulation of judge-made law. On the other hand, a small judicial bench tends to be more consistent in its opinions, which, in turn, limits the room for the growth of judge-made law. The ECtHR is composed of 46 judges, one from each member state of the Council of Europe.[90] They are elected for non-renewable terms of nine years.[91] As of now, there are over 160 former judges of the Court since 1959.[92] This, inevitably, leads to a very high judicial turnover. This is especially so compared with domestic supreme courts. For example, the US Supreme Court has only 9 Justices appointed for life,[93] amounting to only 18 former Justices and Chief Justices since 1959.[94] The UK Supreme Court is composed of 12 Justices appointed until a mandatory retirement age.[95] Beyond that, also other international courts tend to have a much more limited judicial turnover. For example, the European Court of Justice is composed of 27 judges elected for renewable terms of six years amounting to approximately 80 former judges between 1959 and 2021.[96] Finally, the International Criminal Court is composed of 18 judges elected for generally non-renewable terms[97] of 9 years amounting to approximately 30 former judges since 2003.[98] None of those courts comes even close to the ECtHR when it comes to the judicial turnover.

H. Legislative (In)activity

The eighth factor affecting the accumulation of judge-made law is the extent of legislative activity in parallel to the operation of a court. The separation of powers tasks the judiciary with the interpretation of laws passed by the legislature. However, generally, anytime the legislature deems a given interpretation to be undesirable, it is in the position to pass a new law which would fix the perceived problem. A legislative activity concurrent to the operation of the judiciary necessarily limits the accumulation of judge-made law because it erases its effects, whenever deemed undesirable, through the passage of new legislation. In some jurisdictions, this phenomenon has a more robust effect than in others. For example, in the UK, it could be taken to extremes, which is famously illustrated by the passage of the War Damage Act 1965 wherein Parliament, by a simple majority vote, retrospectively reversed the effects of the judgment of the House of Lords in the Burmah Oil case[99] issued earlier that year.[100] On the other hand, in the US, the interpretation of the Bill of Rights rendered by the US Supreme Court is generally final and could not be changed through ordinary legislation. However, even there, it could be erased

[90] ECHR, Article 20. It was 47 before the expulsion of the Russian Federation.

[91] Ibid. Article 23(1).

[92] ECtHR, Judges of The Court Since 1959/Les Juges De La Cour Depuis 1959 www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjUuOHMlur7AhX757sIHeOIBjkQFnoECBwQAQ&url=https%3A%2F%2Fwww.echr.coe.int%2FDocuments%2FList_judges_since_1959_BIL.pdf&usg=AOvVaw3oU7Z0PUEBhs4bjsnRGbns [last retrieved 16 January 2023].

[93] Subject to the 'good behaviour' qualification (US Constitution, Article III, Section 1).

[94] Supreme Court of the United States, Justices 1789 to Present https://www.supremecourt.gov/about/members_text.aspx [last retrieved 16 January 2023].

[95] UK Supreme Court, Who's who, https://www.supremecourt.uk/about/whos-who.html [last retrieved 16 January 2023]. In March 2022, the mandatory retirement age for judicial office holders was increased from 70 to 75.

[96] List of members of the European Court of Justice, https://en.wikipedia.org/wiki/List_of_members_of_the_European_Court_of_Justice [last retrieved 16 January 2023].

[97] Unless a judge has been elected to fill a vacancy created by a predecessor less than three years prior to the scheduled expiration of their term in which case he or she is eligible for re-election for another full term (ICC—frequently asked questions: Election of judges at [7], ICC - Frequently asked questions: Election of judges | International Criminal Court (icc-cpi.int) [last retrieved 16 January 2023]).

[98] Judges of the International Criminal Court, https://en.wikipedia.org/wiki/Judges_of_the_International_Criminal_Court [last retrieved 16 January 2023].

[99] *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75.

[100] Paul Scott, 'Property and the Prerogative at the End of Empire: Burmah Oil in Retrospect' (2022) *SSRN* 4157391 at [5].

by a constitutional amendment passed by two-thirds of the Congress and ratified by three-fourths of the States.[101] This is exactly what happened when the effects of the judgment of the Supreme Court in *Pollock v Farmers' Loan & Trust Company*,[102] declaring personal income tax incompatible with the US Constitution, were erased by the passage of the 16th Amendment.[103]

On the other hand, a lack of legislative activity inevitably leads to courts stepping up and filling that void with judicial law-making. This phenomenon is clearly visible in common law jurisdictions where large areas of law are still governed by legal principles derived from courts' jurisprudence instead of formal legislation.[104] However, the phenomenon also exists in civil law countries.[105] For instance, parts of labour law in Germany that pertain to industrial action have been governed largely by 'unofficial judge-made law'[106] in the absence of any applicable formal legislation.[107]

However, within the ECHR system, the activity of the legislature is virtually non-existent. There is no mechanism for the limitation of the effects of any judgment of the ECtHR other than a treaty amendment. At the same time, amending the ECHR, an international treaty, involves a much more complex and demanding process compared to passing domestic legislation. This situation has led to the general legislative inactivity, which, in turn, has left ample room for an uninterrupted accumulation of judge-made law within the Convention system. The ECHR has been amended through a number of Protocols. Some have added new rights. Others have made institutional and procedural changes. Although Protocol 15 attempts to influence the process of judicial law-making through the reinforcement of the principle of subsidiarity,[108] there has never been any attempt to erase, rectify or modify the effects of any particular judgment of the ECtHR.

I. Inter-State Jurisdiction

The ninth factor affecting the accumulation of judge-made law is the inter-state jurisdiction of the ECtHR. Although the vast majority of cases brought before the Court are brought by individuals, the ECtHR also has jurisdiction to adjudicate alleged violations of the Convention rights through a system of inter-state adjudication.[109] Historically, this path has never been popular, but at the end of 2022 there were 16 inter-state cases pending before the Court.[110] Although the adjudication of inter-state cases before the ECtHR involves at least two states as the parties to the proceedings, it still requires individual victims of human rights violations. The inter-state path allows states to vindicate the rights of their citizens; however, it does not render a state a victim as such. Nevertheless, the inter-state adjudication has usually focused on inter-state armed conflicts whereby the invaded country brings a case against the alleged invader (on behalf of individual victims of the invasion). Out of 16 inter-state cases pending before the Court at the end of 2022, only one did not relate to an ongoing armed conflict.[111] The rest all pertained to the armed conflicts between Russia and Georgia,[112] Russia and Ukraine[113] as well as Azerbaijan and

[101] US Constitution, Article 5.
[102] *Pollock v Farmers' Loan & Trust Company*, 157 U.S. 429 (1895), affirmed on rehearing, 158 U.S. 601 (1895).
[103] Lau, '100th Anniversary of the 16th Amendment' (2013) 3.1 *Contemporary Tax Journal* 3 at 8–9.
[104] See White, *Law in American History* (2019), Volume III: 1930–2000, Chapter 4.
[105] See Friedmann, 'Legal Philosophy and Judicial Lawmaking' (1961) 61(5) *Columbia Law Review* 821.
[106] Bydlinski, 'Hauptpositionen zum Richterrecht' (1985) 40 *Juristenzeitung* 149–155 at 149.
[107] Schneider (n 39) at 3.
[108] See the discussion in Part 4 below.
[109] ECHR, Article 33.
[110] ECtHR, Inter-State applications, https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c [last retrieved 16 January 2023].
[111] *Liechtenstein v Czech Republic* (35738/20).
[112] *Georgia v Russia (II)* (38263/08); *Georgia v Russia (IV)* (39611/18).
[113] *Ukraine v Russia (re Crimea)* (20958/14); *Ukraine and the Netherlands v Russia* (8019/16, 43800/14 and 28525/20); *Ukraine v Russia (VIII)* (55855/18); *Ukraine v Russia (IX)* (10691/21); *Russia v Ukraine* (36958/21); *Ukraine v Russia (X)* (11055/22).

Armenia.[114] This trend has also been true historically.[115] The vast majority of completed inter-state cases also pertained to some forms of conflicts including between Russia and Georgia,[116] Turkey and Cyprus[117] as well as the UK and Ireland.[118]

This jurisdiction encompassing inter-state cases has involved the ECtHR in armed conflict adjudication which further expands the array of circumstances in which the Court applies the Convention. Inasmuch as the proceedings before the ECtHR do not pertain to public international law use of force, which remains under the jurisdiction of the ICJ,[119] the ECtHR must necessarily adjudicate claims based on, *inter alia*, certain elements of international humanitarian law. This is especially so in circumstances where a country derogates from the ECHR under Article 15 of the Convention, which determines that derogations from the right to life[120] are forbidden 'except in respect of deaths resulting from lawful acts of war'.[121] Naturally, this means that the ECtHR must, for itself, engage in interpretation of the so-called Hague law in this respect. At the same time, armed conflicts also give rise to cases concerning the so called Geneva law, *i.e.* the treatment of prisoners of war under international humanitarian law, which, in certain circumstances, could also be adjudicated before the ECtHR.[122] In addition, the ECtHR must also engage in interpretation of international criminal law in cases where applicants complaint that their convictions for war crimes fell short of the requirements of Article 7 of the Convention.[123]

Naturally, armed conflicts present a huge challenge to human rights from various angles. The need to engage with those challenges, therefore, accelerates the accumulation of judge-made law. On the other hand, domestic courts generally do not adjudicate inter-state disputes, especially in the context of armed conflicts.

J. Autonomous Meaning

The tenth and last factor positively affecting the accumulation of judge-made law is the concept of autonomous meaning. The ECtHR, unlike domestic courts, must deal with a variety of different legal systems. They all employ different definitions, which, in turn, affects the scope of application of legal rules. In order to accommodate that situation, the Court developed in the famous case of *Engel and Others v Netherlands*[124] the principle of autonomous meaning whereby different concepts mentioned in the Convention are given the same meaning across all legal systems, regardless how they are defined domestically in each jurisdiction. Those concepts include, *inter alia*, terms such as 'home',[125] 'family life',[126] 'criminal charge'[127] or 'witness'.[128]

[114] *Armenia v Azerbaijan* (42521/20); *Armenia v Türkiye* (43517/20); *Azerbaijan v Armenia* (47319/20); *Armenia v Azerbaijan (II)* (33412/21); *Armenia v Azerbaijan (III)* (42445/21); *Armenia v Azerbaijan (IV)* (15389/22); *Azerbaijan v Armenia (II)* (39912/22).

[115] ECtHR, Inter-State applications, https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c [last retrieved 16 January 2023].

[116] *Georgia v Russia (III)* (61186/09) 2010; *Georgia v Russia (I)* (13255/07) 2014.

[117] *Cyprus v Turkey (IV)* (25781/94) 2001; *Cyprus v Turkey (III)* (8007/77) 1983; *Cyprus v Turkey (I) and (II)* (6780/74 and 6950/75) 1976.

[118] *Ireland v UK (II)* (5451/72) 1972; *Ireland v UK (I)* (5310/71) 1978.

[119] See Sloan and Tams, 'The Development of International Law by the International Court of Justice' (2013) 26 *Hague Yearbook of International Law* 216.

[120] ECHR, Article 2.

[121] Ibid. Article 15(2).

[122] E.g. *Hassan v UK* (29750/09) 2014.

[123] E.g. *Milanković v Croatia* (33351/20) 2022.

[124] *Engel and Others v Netherlands* (5100/71; 5101/71; 5102/71; 5354/72; 5370/72) 1976.

[125] E.g. *Chiragov and Others v Armenia* (13216/05) 2015.

[126] E.g. *Marckx v Belgium* (n 48).

[127] E.g. *Engel and Others v Netherlands* (n 124).

[128] E.g. *S.N. v Sweden* (34209/96) 2002.

The principle of autonomous meaning is a practical tool developed precisely due to the international character of the Convention and, as such, could not exist in domestic legal orders. However, inadvertently, the principle of autonomous meaning contributes to the accumulation of judge-made law at the ECtHR as the Court develops its own jurisprudence concerning the relevant concepts rather than simply relies on definitions supplied by domestic law of member states. Each such concept adds another layer of judge-made law wherein the Court explains different criteria that a domestic legal concept must fulfil in order to be recognized under the Convention.

4. BRAKES ON JUDICIAL LAW-MAKING

It is apparent that there are a number of factors that happen to drive the process of judicial law-making and, thereby, the accumulation of judge-made law at the ECtHR regardless of any (perceived) judicial activism. Nevertheless, this is not to say that all factors work in favour of large quantities of judge-made law in Strasbourg. The biggest brake on the accumulation of judge-made law at the ECtHR is the principle of subsidiarity. It generally does not exist in domestic legal system. At the most basic level, the principle of subsidiarity means that decisions should be made at the lowest level possible.[129] Within the ECHR context, it means that the protection of rights contained in the Convention is first and foremost effectuated by domestic authorities. This principle has multiple manifestations. Procedurally, it means that under Article 35 of the Convention, complaints before the ECtHR cannot be brought unless all domestic remedies have been exhausted. Furthermore, under the Fourth Instance doctrine, the ECtHR generally does not question findings of fact or interpretation of domestic law given by national courts unless it is manifestly unreasonable.[130] Substantially, the principle of subsidiarity means that states enjoy a certain margin of appreciation in deciding the scope of protection of the Convention rights, a concept established as early as the 1976 case of *Handyside v UK*.[131] All those radically limit the ability of the ECtHR to generate judge-made law.

Nevertheless, it should be noted that margin of appreciation is only triggered in the absence of any European consensus on the issue. The phenomenon of European consensus, *i.e.* a common ground among members of the Council of Europe as to the acceptability (or not) of a certain solution, regulates the width of margin of appreciation.[132] Wherever European consensus is weak or entirely lacking, states enjoy a wide margin of appreciation which puts limitations on the ECtHR's law-making abilities. In those circumstances, the Court defers to the local authorities which are believed to be in a better position to ascertain the needs of the local population.[133] On the other hand, wherever a particular solution is generally recognized across Europe, this tends to reinforce the ECtHR's law-making powers, pushing the Court to enforce that solution in few places where it is still resisted.[134]

In any event, the principle of subsidiarity has recently been undergoing a rapid expansion, at least since the conferences in Interlaken in 2010 and Brighton in 2012. In fact, the term 'subsidiarity' is now to be added to the text of the Convention itself through Protocol 15. This new push for subsidiarity is now transforming the review performed by the Court from substantive towards procedural.[135] To that effect, the ECtHR is now reluctant to interfere with

[129] See Mowbray, 'Subsidiarity and the European Convention on Human Rights' (2015) 15 *Human Rights Law Review* 313.
[130] E.g. *Perlala v. Greece* (17721/04) 2007.
[131] *Handyside v UK* (5493/72) 1976.
[132] See Dzehtsiarou, 'European consensus and the evolutive interpretation of the European Convention on Human Rights' (2011) 12.10 *German Law Journal* 1730.
[133] E.g. *Pretty v UK* (2346/02) 2002.
[134] E.g. *Hirst v UK* (No. 2) (74025/01) 2005.
[135] See Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and The Rule Of Law' (2018) 18 *Human Rights Law Review* 473.

the outcome of the balancing of competing interests performed by domestic courts so long as it was conducted in light of the Court's jurisprudence, a phenomenon best illustrated by the famous case of *Von Hannover v Germany* (no. 3).[136] What is more, a further deference is also given to national legislatures where they give a proper consideration to the balancing of competing interests when passing legislation, a practice best illustrated by the famous case of *Animal Defenders International v UK*.[137] This modern subsidiarity severely restricts the ability of the ECtHR to generate judge-made law as the Court no longer sets substantive legal standards, but rather performs reviews of judicial processes conducted by domestic courts.

5. CONCLUSIONS

The consequences of the particular interplay of all those factors mentioned is to have accelerated the process of judicial law-making and, thereby, the generation of substantial amounts of judge-made law at the ECtHR. Between 1959 and 2021, the Court decided on the examination of almost one million applications through a judgment or decision, or by being struck out of the list. This translates into 24,511 judgments delivered in that period.[138] Those numbers alone inevitably lead to extremely large quantities of judge-made law. In addition, the outwards expansion of the scope of application of the Convention rights, through the various interpretive instruments and jurisdictional links, have radically expanded the scope of matters which the Court deals with. Issues which not long ago were not considered justiciable, are now subject to a full review by the Court. This, in combination with the extraordinary number of cases submitted for consideration, could lead in the future to a snowball effect whereby more and more matters fall within the jurisdiction of the Court, which, in turn, prompts more and more cases to be brought for consideration.

At the same time, however, there are also reasons to believe that, perhaps, the ECtHR's jurisprudential output has already peaked. First such reason is the cessation of membership of the Russian Federation to the Council of Europe. The Russian Federation was responsible for approximately 13 per cent of all judgments issued by the Court, one of the highest numbers among all member states; this translated into over 3100 judgments between 1996 (when Russia joined the Council of Europe) and 2021.[139] Inasmuch as Russian cases pending before the Court remain active following the expulsion, new applications are being accepted only insofar as they concern alleged acts or omissions occurring until 16 September 2022,[140] which will inevitably lead to a substantial decrease of the overall number of judgments issued by the Court in the next decade and, thereby, the amount of new judge-made law at the ECtHR will decrease accordingly.

The second big reason to believe that the ECtHR's output has already peaked is the newly reinforced principle of subsidiarity. Following the Interlaken and Brighton conferences in 2010 and 2012, respectively, as well as Protocol 15, the Court is now transitioning from substantive-based review towards process-based review.[141] It is the former that has always driven the accumulation of judge-made law at the ECtHR as the setting of substantive legal standards

[136] *Von Hannover v Germany (no. 3)* (8772/10) 2013.

[137] *Animal Defenders International v UK* (48876/08) 2013.

[138] ECtHR, Overview 1959–2021 ECHR, https://www.echr.coe.int/Documents/Overview_19592021_ENG.pdf [last retrieved 16 January 2023].

[139] ECtHR, Overview 1959–2021 ECHR, https://www.echr.coe.int/Documents/Overview_19592021_ENG.pdf [last retrieved 16 January 2023].

[140] Council of Europe, Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjLn-DawuL8AhVqR_EDHcrrA_4QFnoECBAQAQ&url=https%3A%2F%2Fechr.coe.int%2FDocuments%2FResolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf&usg=AOvVaw2mlzlnvcbNz8WsDa47kaTK [last retrieved 16 January 2023].

[141] See Spano (n 135).

often requires elaborated explanations concerning their different aspects. This process is now slowly coming to an end and being replaced by the setting of standards concerning the review process that is to be conducted by domestic courts. This requires much less jurisprudence as the burden of judge-made law related to the Convention is shifting from Strasbourg towards domestic courts.

Finally, there is also a question over the Court's administrative capacity to continue to process such high numbers of cases. This problem is not a new one; it led in the 1990s to a reform which transformed the Court from a part-time to full-time institution precisely in order to accommodate a sharp rise of cases following the acceptance of the central and eastern European countries into the Council of Europe. As things stand now, it is not unusual for a case to take up to a decade before a final judgment is given by the Court. If, indeed, the number of cases was to rise, a capacity limit would inevitably soon be hit.

Consequently, the accumulation of judge-made law at the ECtHR, often ascribed to judicial activism, is better explained in terms of the process of judicial law-making that is governed by at least 10 objective factors. It so happens that the interplay of those factors overwhelmingly favours the judicial law-making process in the ECHR jurisdiction.