Guest Editorials

Autocratic Strategies and the European Court of Human Rights

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Comparative politics scholarship tells us that Europe and, in turn, the Council of Europe, is currently composed of a spectrum of political regime types ranging from democracies to hybrid regimes to autocracies.¹ The degree of regime autocratisation and the ideological sources for it no doubt vary from one place, time and context to another. Autocratising or autocratic powers, however, share common strategies and practices with a view to establishing and consolidating their long-term rule. The use of constitutional and ordinary law to curb pluralism, dissent, democratic institutions and the independence of the judiciary, also understood as ‘autocratic legalism’;² the use of domestic courts and judicial review in the service of democratic erosion, coined as ‘abusive judicial review’³ and the use of administration of justice mechanisms as a tool of social and political control over dissident voices, known as ‘administrative and judicial

1 A Lührmann and SI Lindberg, ‘A Third Wave of Autocratization is Here: What is New About It?’ (2019) 26(7) *Democratization* 1095.

2 KL Schepelle, ‘Autocratic Legalism’ (2018) 85 *The University of Chicago Law Review* 545. For the seminal work that coins this term in the context of Venezuela, see, also, J Corrales, ‘The Authoritarian Resurgence: Autocratic Legalism in Venezuela’ (2018) 26(2) *Journal of Democracy* 37.

3 D Landau and R Dixon, ‘Abusive Judicial Review: Courts Against Democracy’ (2020) 53 *University of California, Davis* 1313.

harassment'⁴ are three such common strategies. Autocratic legalism, abusive judicial review and judicial harassment work hand in hand. Autocratic legalism enables the creation of autocracy – regarding legal frameworks and politically dependent judicial institutions and judges. These in turn employ legalism to enable autocrats, who are holding on to power by way of exerting control over anti-autocratic institutions and forces, to validate these laws through judicial review, and thus contribute to the making and longevity of an authoritarian regime. Legalist autocratic regimes do not routinely resort to brute force (although that is not completely out of the question), but predominantly leverage the power of law and legal institutions to pursue their agendas. In this vein, political opponents, journalists or human rights defenders are not extra-judicially executed, but are prosecuted and detained under existing criminal laws. Non-governmental organisations (NGOs), political parties, bar associations, media outlets and judicial institutions are not outright shut down, but their sphere of activities is curtailed through legal means, such as financial regulations, bans on their activities, or redesigning their legal frameworks.⁵

What is more, autocratic or autocratising regimes in Europe appropriate key concepts of European human rights law while advancing autocratic legalist strategies. When cases against these countries come before the European Court of Human Rights (ECtHR or the Court) they actively engage and defend themselves by employing the interpretive principles of the ECtHR. They explain that they have legitimate aims as provided for by the European Convention on Human Rights (ECHR or the Convention) when amending constitutions or introducing new laws. These aims range from national security, to the protection of rights of others, to the protection of public morals and to the prevention of crime. Autocratic legalists hold that their actions are 'proscribed by law' and are 'necessary in a democratic society'. Furthermore, they demand that their legalist strategies are respected as a matter of constitutional pluralism in Europe. They ask that the Council of Europe organs and the ECtHR make allowances for their national circumstances in the spirit of subsidiarity, that is, a presumptive deference in favour of domestic judicial processes and laws in Europe.

Thanks to the compulsory jurisdiction that the ECtHR enjoys in all of the Council of Europe member states, the case docket of this court is filled with

4 European Commissioner for Human Rights, 'Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions', *CommDH*(2019)10, 29 March 2019: <<https://rm.coe.int/hr-defenders-in-the-coe-area-current-challenges-and-possible-solutions/168093aabb>>.

5 The range of these subtle tactics have also been coined as 'stealth authoritarianism'. See, OO Varol, 'Stealth Authoritarianism' (2015) 100 *Iowa Law Review* 1673.

cases that concern autocratic strategies ranging from administrative and judicial harassment cases to cases concerning tinkering with legal frameworks regulating NGOs or judicial governance. For many of the applicants, the ECtHR may be the only judicial institution to detect, pronounce and remedy the abusive use of laws and judicial institutions against fundamental rights.

Against this background, how has the ECtHR responded to the practices of its autocratic or autocratising member states who defend their actions by attempting to appropriate the Convention?

1 Authoritarian Strategies and Tools at the Court's Disposal

At first sight, it may be argued that the ECtHR is the best placed institution in Europe to expose and address the strategies of authoritarian regimes. The ECHR in its very inception was regarded as a safeguard against not only overt, but also subtle forms of anti-democratic totalitarian regimes in Europe.⁶ The requirements that all restrictions must be proscribed by law and must be 'necessary in a democratic society' and pursue a legitimate aim, alongside prohibitions on the abuse of rights and bad faith restrictions of rights in Articles 17 and 18 of the Convention, all point to this reading: the Convention was designed as the ultimate safeguard against democratic and rule of law decay.⁷

On closer inspection of the Court's current case management policies and case law, however, it is not (yet) clear whether the ECtHR is responding consistently and holistically to the mounting and pervasive threats of 'abusive human-rightism' in its member states.⁸ Instead, it may be argued that the efforts of the Court to pronounce on autocratic legalism, judicial harassment and abusive judicial review have been piecemeal, fragmented and contested. When it has responded, it has, for the most part, done so through its substantive case law, but remained deferential to autocratic strategies as a matter of its admissibility and remedial case law. Its responses, when they have arrived, have often come too late for those individuals affected by authoritarian strategies. What is more, the Judges on the bench of the Court seem to have important

6 M Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press 2017).

7 On the drafting history of Articles 17 and 18, see C Heri, 'Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with *Mala Fide* Limitations of Rights' (2020) 1(1) *European Convention on Human Rights Law Review* 25.

8 This term is inspired by Landau (n 3).

and public disagreements as to how to address autocratic legalism and judicial harassment cases, as reflected in their majority and dissenting opinions.⁹

In what follows, I offer a brief overview of the piecemeal tools through which the Court is able to address authoritarian strategies and ask what the Court can do more or do differently when using these tools, and what impediments there are against doing so.

1.1 Case Prioritisation

Since 2009, the Court has employed a priority policy in order to speed up processing of the most important, serious and urgent cases.¹⁰ The top priority cases are those ‘urgent’ applications that concern life, health and the deprivation of liberty. Urgent applications are capable of addressing the strategies of authoritarian regimes, in particular, that of administrative and judicial harassment, when opposition figures, journalists or human rights defenders are charged, detained and tried under legalist pretexts and may be subject to inhuman or degrading detention conditions.

Yet, whilst urgent cases are assigned the top priority, it is not clear what this means for the applicants, who are victims of authoritarian strategies in terms of the length of time it takes to receive a judgment either before a Chamber or the Grand Chamber. For example, the case of the arrested Russian politician Navalnyy took 58 months before a Chamber,¹¹ the arrest of human rights activists in *Yunusova* took 69 months.¹² The case of *Demirtas v Turkey*, which involves the stripping of parliamentary immunity and detention of the former leader of the second-largest opposition party in Turkey, a top priority detention case, has taken 21 months before the Chamber and another 21 months before the Grand Chamber.¹³

In the second tier of priority are cases that may have an impact on the effectiveness of the Convention system. It may be assumed that this category includes significant interventions in the independence of democratic and rule of law institutions by way of authoritarian strategies such as interventions in

9 See, for example 9 to 8 split in the Grand Chamber with respect to finding of a violation of Article 18 in *Merabishvili. Merabishvili v Georgia* [GC] 72508/13 (ECtHR, 28 November 2017). See also the dissenting opinion of Judge Küris protesting that the majority did not find an Article 18 violation in the case of *Sabuncu and Others v Turkey* 23199/17 (ECtHR, 10 November 2020) and *Şık v Turkey (No 2)* 36493/17 (ECtHR, 24 November 2020).

10 ECtHR, ‘The Court’s Priority Policy’: <https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf>.

11 *Navalnyy v Russia (No 2)* 43734/14 (ECtHR, 9 April 2019), application date: 6 July 2014.

12 *Yunusova and Yunusov v Azerbaijan (No 2)* 68817/14 (ECtHR, 16 July 2020), application date: 17 October 2014.

13 *Selahattin Demirtaş v Turkey* [GC] 14305/17 (ECtHR, 22 December 2020).

the operation of political parties, NGOs, universities and trade unions, as well as interventions in the design of the independence of the judiciary. The banning of NGOs receiving foreign funding in the Russian Federation in 2012, for example, led to a series of communications from Russian NGOs to the Court in 2013 and pending since then.¹⁴ In contrast, the rising list of Polish cases concerning the independence of the judiciary since 2018 have received priority status in February 2021 as urgent priority cases.¹⁵ The progress of these cases, which undoubtedly raise serious systemic challenges, so far does not reflect a comprehensive priority strategy.

There is, therefore, ample scope to adapt the priority policy to be more responsive to authoritarian strategies. There is also a great need for this policy to be made more transparent. The information concerning which cases have been assigned priority, for example, and for what reasons, is not publicly available on the Court's website, so one would need to look at communications concerning each individual case to assess whether it has been assigned priority. The process of assigning priority to cases, and who ultimately makes these decisions is also not clear. Without further public information, it is not possible to assess whether the Court pursues a holistic policy of prioritisation of cases that engage judicial harassment and autocratic legalism across the board, precisely because the cases concern systemic challenges to the Convention, and whether it seeks to conclude these cases in a speedy way to maximise their impact.

1.2 *Admissibility*

Whether the Court could or should address authoritarian strategies by relaxing its exhaustion of effective domestic remedies rule is a thorny and double-edged issue for the overburdened Court. It is also one that, so far, the Court has been most resistant to consider.

It is well known that exhaustion of effective and available domestic remedies is a necessary condition for cases to reach the merits stage before the ECtHR. The Court's assessment of effective and available domestic remedies is largely based on asking whether the domestic legal system would treat a particular remedy as effective, and whether such remedies are accessible, capable of providing redress in respect of the complaint at stake and offer reasonable

¹⁴ *Ecodefence and Others v Russia and 48 other applications* 9988/13 (pending application).

¹⁵ *Grzęda v Poland* 43572/18, *Xero Flor w Polsce Sp. z o.o. v Poland* 4907/18, *Broda and Bojara v Poland* 26691/18 and 27367/18, *Żurek v Poland* 39650/18, *Sobczyńska and Others v Poland* 62765/14, 62769/14, 62772/14 and 11708/18, *Reczkowicz and Others v Poland* 43447/19, 49868/19 and 57511/19 (pending applications). Also see, Press Release issued by the Registrar of the Court, ECHR 066 (2021)(ECtHR, 18 February 2021)<

prospects of success. That is, the focus is primarily on whether the availability of any such remedy is sufficiently certain in domestic law and in practice.

These considerations, however, are unable to address the widespread strategies of autocratic legalism of which use of courts against opponents forms part. Oftentimes, autocratic legalists do not operate by making domestic remedies uncertain in law or in practice. On the contrary, a maze of remedies, appeal procedures and lengthy constitutional review processes remain in place. What is more, autocratic legalists actively employ the exhaustion rule to ask Strasbourg to reject applications of their opponents. For example, the Turkish authorities recently argued that, if a person is detained, and then released and re-detained based on the same facts but under a different charge, they cannot enjoy victim status under the Convention with respect to their initial detention.¹⁶

The Court has doctrinal resources, in which it has held that the general legal and political context in which domestic remedies operate must be taken into account when interpreting the exhaustion rule.¹⁷ In particular, the Court has developed the notion of an 'administrative practice' consisting of a repetition of acts incompatible with the Convention and official tolerance by the state authorities to such an administrative practice¹⁸ in its earlier case law. This doctrine, however, was developed in the context of the Court's gross human rights violations case law. The Court, so far, has not been able to adopt these doctrinal resources in order to assess authoritarian strategies when analysing the exhaustion of the domestic remedies rule. This is, therefore, an area where the Court is well resourced to develop doctrinally, but so far has not done so.

2 Merits Reasoning

Whilst the Court have let authoritarian strategies run their lengthy exhaustion of domestic remedies course, finding violations under Article 18 of the ECHR in conjunction with other rights has become the main tool for the Court to address authoritarian strategies in its substantive case law in the past decade.¹⁹

¹⁶ *Selahattin Demirtaş v Turkey* (n 13) para 215.

¹⁷ *Akdivar and Others v Turkey* [GC] 21893/93 (ECtHR, 16 September 1996) paras 68–69; *Khashiyev and Akayeva v Russia*, 57942/00 and 57945/00 (ECtHR, 24 February 2005) paras 116–17; *Chiragov and Others v Armenia* [GC] 13216/05 (ECtHR, 16 June 2015) para 119.

¹⁸ *Aksoy v Turkey* 21987/93 (ECtHR, 18 December 1996) para 52; *Georgia v Russia (I)* [GC] 13255/07 (ECtHR, 3 July 2014) paras 125–159.

¹⁹ Also, see A Nussberger, 'The European Convention on Human Rights at Sixty – Challenges and Perspectives' (2020) 1(1) *European Convention on Human Rights Law Review* 11.

As is now well known, the Court uses Article 18 when it finds that a Convention violation has come about because illegitimate ulterior purposes on the part of the authorities are at work.

However, the bench of the ECtHR seems vehemently divided on how to establish the existence of illegitimate ulterior motives. Judges of the Court do not agree about whether Article 18 is primarily a tool for detecting authoritarian strategies as a matter of general context or whether it is more concerned with finding violations specific to the unique experiences of the applicants before it. These divisions are apparent in the ways that different sections of the Court handle Article 18 cases. For example, the section that delivers Article 18 Azerbaijani cases in particular, starting from *Jafarov v Azerbaijan*,²⁰ seems to follow the first approach. It also refers to its findings of Article 18 in its earlier cases as a persuasive authority in identifying the general context of abusive uses of domestic law.²¹ On the other hand, the section that handles the Turkish cases, for example, treats Article 18 questions as a one-off matter surrounding the immediate facts of an individual case; so, practices of autocratic legalism give rise to Article 18 violations in some cases, but do not in others, despite the similarity of the general context.²²

The Grand Chamber case law is also not immune from disagreements as to whether Article 18 is a tool to call out authoritarian strategies or whether it is a more of an administrative law like legality review that can be applied both in authoritarian contexts and in rule of law democracies. The majority of the Court in *Merabishvili*, for example, embraced the latter view, by accepting that any public authority, regardless of its regime type, may have mixed purposes, some legitimate and some illegitimate, and the real question is which one of these is dominant at a given point in time. This interpretation has attracted strong dissent, amongst others, on the grounds that it normalises the practices of authoritarian regimes.²³ What emerges from this discussion is the continuing need for the ECtHR to clarify its Article 18 case law and to seek to address the apparent divisions in how authoritarian strategies are approached by its different sections under Article 18. The Court's haphazard treatment of authoritarian strategies in different countries and in different cases in the

²⁰ *Jafarov v Azerbaijan* 69981/14 (ECtHR, 17 March 2016).

²¹ See *Aliyev v Azerbaijan* 68762/14 and 71200/14 (ECtHR, 20 September 2018) para 214.

²² See the dissenting opinions of Judge Küris (n 9).

²³ Joint concurring opinion of Judges Yudkivska, Tsotsoria and Vehabović, in *Merabishvili v Georgia* (n 9). Also see, B Çalı, 'Merabishvili v. Georgia: Has the Mountain Given Birth to a Mouse?' (Verfassungsblog, 3 December 2017): <<https://verfassungsblog.de/merabishvili-v-georgia-has-the-mountain-given-birth-to-a-mouse/>>.

same country risks the portrayal of the Court as indifferent to authoritarian strategies at best and tolerant of these strategies at worst.

And yet, to focus solely on Article 18 as the Court's meaningful substantive output with respect to authoritarian strategies is misleading and incomplete, in particular, because the authoritarian regimes fully defend the legality and legitimacy of all of their authoritarian legalist moves. So long as this trend in some member states continues, it will be necessary for the Court to holistically review its generally 'light touch' approach to assessing whether a restriction really falls under one of the legitimate aims, whether domestic and constitutional laws enacted meet the quality of law requirements under the Convention, and whether domestic apex constitutional courts offer relevant and sufficient reasons when they review the application of these laws. These are areas in which the Court has had on and off engagement so far. In *Bayev v Russia*, for example, it has rejected legitimate aims provided by the government and provided reasons for doing so.²⁴ In *Demirtaş v Turkey (No 2)*, the Grand Chamber has undertaken a review of the lifting of immunities by members of Parliament by way of a constitutional amendment, by asking whether this met the quality of law requirements under the Convention as a matter of foreseeability and requirements that laws cannot target specific individuals.²⁵ As these cases show, the Court has resources to address authoritarian strategies by defending the autonomous application of the Convention. A key challenge for the Court in developing its substantive case law will be to fend off 'double standard' charges, as a key argument of authoritarian actors is that they do not benefit from the 'subsidiarity doctrine,' which they argue should apply equally to all states.

2.1 Remedies

The Court has so far employed a 'business as usual' approach²⁶ to delivering remedies to cases that come before it concerning authoritarian strategies, only occasionally indicating specific individual remedies. Of the 18 Article 18 violations that have become final since 2004, it has indicated clear individual remedies only in 3 recent cases, the request to restore professional activities of a human rights lawyer in the case of *Aliyev v Azerbaijan*²⁷ and the request of

24 *Bayev and Others v Russia* 67667/09, 44092/12 and 56717/12 (ECtHR, 20 June 2017) para 83.

25 *Selahattin Demirtaş v Turkey* (n 13) para 146.

26 For a comparative assessment of the Court's remedial approach see, B Çali, 'Explaining Variation in the Intrusiveness of Regional Human Rights Remedies in Domestic Orders' (2018) 16(1) *International Journal of Constitutional Law* 214.

27 *Aliyev v Azerbaijan* (n 21).

immediate release from pre-trial detention, in the cases of *Kavala v Turkey*²⁸ and *Demirtaş v Turkey*.²⁹ As seen by the monitoring of the execution in the case of *Mammadov v Azerbaijan*, and the Committee of Ministers' referral of the remedial aspects of this case back to the ECtHR for clarification, the lack of indication of clear individual remedies can lead to lengthy delays in securing full restoration of civil rights in such cases. Given that the Court is using Article 18 to signal that individuals have been subjected to restrictions that took place outside of the boundaries of rule of law, the Court may be seen as well placed to taking a more principled and consistent approach to specifying *restitutio in integrum* remedies in Article 18 judgments.

3 Lack of a Grand ECtHR Strategy against Authoritarian Strategies

What the preceding discussion has shown is that, whilst the ECtHR has addressed authoritarian strategies through its procedures, policies and case law, there is still much room for improvement to ensure that the ECtHR is adequately, efficiently and holistically responsive. The ECtHR has doctrinal resources to address authoritarian strategies in its admissibility, substantive and remedy case law. It can and must offer more holistic judicial responses to practices and laws that undermine the very object and purpose of the Convention. These doctrinal sources, however, have to be adapted to this new context. The piecemeal and fragmented ways in which the ECtHR has so far addressed authoritarian strategies shows that the Court has not yet developed a grand strategy to ensure that it takes on autocratic strategies, regardless of where they occur, and does not become an apologetic victim of it.

²⁸ *Kavala v Turkey* 28749/18 (ECtHR, 10 December 2019).

²⁹ *Selahattin Demirtaş v Turkey* (n 13).