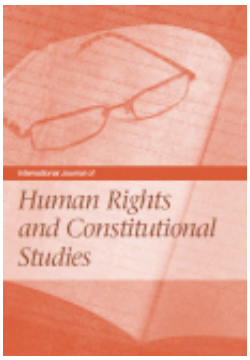

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Erosion of democracy and adequacy of the Strasbourg court's response

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Abstract: In this article, the author examines the metamorphoses of political regimes of Council of Europe states, as well as the erosion of democracy in some of them. Political regimes are classified into liberal democracy, militant democracy, patronal democracy and patronal autocracy. The last three types of political regimes are considered in the context of Article 17 of the first part, Article 18 and Article 17 of the second part of ECHR. The response of Strasbourg court to the challenges of militant democracy and partronal democracy are adequate. In regards of challenges of patronal autocracy, the Strasbourg court's response is not relevant. The author comes to a conclusion that the court has not fully uncovered the potential of the second part of Article 17. Instead, the court uses Article 18 of the convention, which is an effective response to the challenges of patronal democracy, but not patronal autocracy.

Keywords: metamorphosis of political regimes; liberal democracy; militant democracy; patronal democracy; flew democracy; patronal autocracy.

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1 Introduction

The Council of Europe (CoE) was an international organisation that gathered several Western European states under a common system of values in respect of democracy.[1] After the Cold War, the CoE encompasses Eastern and Central European countries, as well as Russia.[2] With this expansion, the CoE stood up as a figure supporting newly established democracies in Europe.[3] Under the new circumstances, the CoE reformed its institutional system in order to implement effectively its new role to help the transitional societies to establish liberal democratic regimes. The establishment of the European Commission for Democracy through Law occurred in 1990.[4] The European Court of

Human Rights became a full-time court in 1998.[5] The institution of the CoE Commissioner for Human Rights came into existence in 1999.[6]

This is a partial list of institutional reforms designed to adapt the CoE to the new conditions. All these reforms were accompanied by great optimism and hope for the creation of a new Europe from Lisbon to Vladivostok on the culture of liberal democracy.

Today, the optimism that prevailed in the 1990s regarding the prospect of democracy, the capacity of the CoE and its entities to ensure the respect of human rights, the rule of law and support of liberal democracy within its member nations is often questioned, and these concerns are justified.[7]

The drift of illiberal countries towards a no longer hidden but already obvious challenge to democracy appeared in the decisions of the Strasbourg court on the application of Article 18. The absolute majority of these judgments are against Russia, Türkiye, and Azerbaijan. By the end of 2020, the Court has issued eighteen judgments that identified violations of Article 18: there are nine cases against Azerbaijan, three cases against Russia,[9] one case against Moldova,[10] two cases against Ukraine,[11] one case against Georgia,[12] and two cases against Türkiye.[13] The open challenge to democracy is already the third stage in the dynamics of illiberalism. The dynamics of the Strasbourg court decisions showed that we are talking about countries where there are systemic and structural institutional problems that are incompatible with the conventional system. The latest events regarding the exclusion of the Russian Federation from the CoE reflect this dynamic.

Of course, the erosion of democracy, and the neutralisation of constitutionalism by populism is visible in many member states of CoE, but in post-totalitarian ones especially it is demonstrated more sharply. At the same time, the features of all post-communist countries that distinguish them from the former metropolis began to fade more and more. Some have overcome the post-totalitarian syndrome and are firmly building a democratic society: the Baltic States, Croatia, Slovenia, the Czech Republic. Some are at a crossroads - Romania, Bulgaria, some are drifting towards Russia and Türkiye. A number of countries are firm in their choice of democracy, but their development is slowed down by the outward expansion (in different ways) of new autocracies. In this regard, Ukraine, Georgia, Armenia, and Moldova were less fortunate than the Baltics, which from the very beginning were under the protection of NATO.

Russia and Türkiye are major violators of the ECHR. In this context, we agree with the authors according to whom: neither Türkiye nor Russia gained admission on the basis of their democratic status. Turkey became a member in 1949, and it was associated with Cold War requirements.[14] In 1996, Russia's admission occurred due to a political assessment grounded in the potential advantages of inclusion and the avoidance of potential negative consequences associated with its exclusion. Unfortunately, their acceptance of the ECHR could not change their deep rooted authoritarian tendencies.[15]

The old diseases of imperialism are clearly appearing in the region. In this regard, international law, and the European public order of human rights becomes an obstacle in their path and a ' headache'. In this perspective, the pressure on the ECtHR arises not solely from the incomplete process of democratisation in certain member states but also from emerging obstacles resulting from the increase of neo-nationalist assertion, populism, and authoritarianism (along with their combinations).[16]

2 The current metamorphoses of political regimes of the member states of CoE

During the last decade the CoE has observed a deterioration of democracy within many of its member states. This trend has been reflected in many analyses and researches. For instance, Hungary, Poland, Romania, Serbia, Türkiye, and Ukraine are perceived as experiencing 'democratic backsliding'.[17] Certain countries, such as Russia, are classified as 'hybrid regimes' or 'non-democracies' (Azerbaijan).[18] In another analysis, Azerbaijan, Russia and Turkey were classified as 'not free', while Armenia, Georgia and Ukraine were categorised as 'partly free' in 2020.[19]

The Global State of Democracy had shown different levels of democracy in Europe, in some cases backsliding, in some cases advancing.

Armenia was the only state transitioning from a 'hybrid regime' to democracy. Some improvements had been noticed in Georgia. In contrast, there are two 'non-democracies' – Azerbaijan and Belarus. In the case of Russia, it is classified as 'hybrid regime'. Turkey, Poland and Hungary had shown backslide, so-called 'democratic erosion'. For example

> " ...Turkey is suffering severe democratic backsliding. The backsliding in Turkey began in 2010 and continues to date. Turkey is the country in the world that has suffered the most democratic declines in the past five years, declining on 11 of its democratic subattributes.".[20]

Certainly, regime classifications may vary across studies,[21] but the global picture reveals a discernible trend: the erosion of democracy in many CoE member states.[22]

Based on the World Justice Project's Rule of Law Index, for example, eight member states of the CoE are included in the list's top ten.[23] Meanwhile, there are other member states, including Türkiye and Russia, that are towards the end of the list.[24] The countries include Denmark (1st), Norway (2nd), Finland (3rd), Sweden (4th), Netherlands (5th), Germany (6th), Austria (8th), and Estonia (10th). The following is the ranking of the ECHR member states that have been examined in greater detail in this analysis: The UK (13th), France (20th), Hungary (60th), Ukraine (72nd), Russia (94th), and Türkiye (107th).[25]

In contemporary global circumstances, a notable aspect of illiberal democracies is that, quite frequently, when the political majority loses the support of the societal majority, it endeavours to preserve its authority by utilising the state apparatus, the mechanisms to exercise power, as well as populism and manipulative technologies.[26] This results in a scenario where the previously existing political majority transforms into a ruling minority without the support of society and no longer representing general interests. This is frequently accompanied by the suppression of opposition and a complete disregard for human dignity.[27]

The anti-liberalism of ruling groups is an opportunistic way to distract people from corruption and abuse of power. There are several examples when local parties try to distract and silence their citizens by pointing out the constitutionalism of 'the West' as a conspiracy directed against their countries, e.g., *Fidesz* (*the Hungarian Civic Alliance*) and *PiS* (*the Polish Law and Justice Party*).[28]

In post-communist Russia, particularly during the 1990s, the electoral accountability of politicians towards citizens was stage-managed and presented as deceptive. If the Yeltsin administration had been responsible, it would not have shelled the Supreme

Soviet in 1993, manipulated the 1996 election, deliberately avoided submitting the Gaidar economic reform program to a popular vote, or permitted Russia's national wealth to be looted by a narrow group of future oligarchs with the full endorsement of Boris Yeltsin and his group of 'reformers'.[29] The Cold War was succeeded by a state of cold peace in the relationship between the RF and the USA.[30]

Simulating democracy was a just way for the Kremlin to reduce pressure from Western democracies. Populism was a way to distract people from real problems.

Within the anti-democratic narrative, foreign actors – both international and national NGOs, political parties, and individuals can only be opposed to the interests of the people if they express disagreement with the populist or the manner of exercise of power. In this scenario, the reliance on popular sovereignty evolves into the reliance on national sovereignty, whereby the populist represents the people, their interest, and consequently, by definition, the national interest that goes unnoticed by the populist's critics. This encapsulates the core of Putin's narrative of 'sovereign democracy'[31], and Orban's reliance on the interest of 'national sovereignty' within the framework of his many discussions with the EU.[32]

We consider it a simplistic scheme to divide the regimes of CoE member states into democratic and non-democratic. Democracies, in their turn, can be divided into stable (mature) ones, where the system is strong enough, and the probability of moving away from democracy is minimal, and unsettled liberal democracies that need to protect themselves from totalitarian encroachments – these are militant democracies. There are also transitional democracies – 'patronal democracies'; and the last one – autocracies (patronal autocracies)[33], that have clearly departed from the democratic system. We also call the latter post-totalitarian autocracies.

2.1 Liberal democracy (liberal sustainable- mature democracy)

In a liberal democracy, the core principle is the respect for human dignity, which implies that individuals must be treated as free individuals with the power to influence the direction of their own lives. They should also enjoy a substantial degree of autonomy. With this fundamental concept as a starting point, the constitutional state is obliged to:

- respect the human dignity of everyone,
- protect and promote the rights and freedoms of every person,
- ensure pluralism, separation of branches of power, a system of checks and balances.

There is no any dominant ideology and all different interests are considered as legitimate alternatives to each other.

2.2 Militant democracy (liberal unsustainable democracies)

As we already underlined, liberal democracies can be divided into two groups: 'stable' (mature) and 'unstable', where the bearers of authoritarian ideologists are strong enough to take power and direct the country towards autocracy. That is, there is a real danger of transforming from liberal to patronal democracy. Such democracies have to defend themselves. These are militant democracies.

It was only after the Second World War that militant democracy became a subject of constitutional thinking. Nowadays, practically all European democracies can be

considered to some extent militant. We understand that there are non-democratic groups in the liberal sustainable democracies as well, and that our division into sustainable and unsustainable is relative. Nevertheless, the 'immune system of self-defence' of Western democracies is somewhat stronger, because the political and legal culture and traditions are developed and matured compared to the new liberal democracies, which need time to establish such culture and tradition. It is important to remark that political and legal traditions and culture are an organic part of the system of checks and balances. Hence their absence makes new liberal-democratic countries more vulnerable.. Therefore, the implementation of the concept of militant democracy is highly context-dependent and always accommodates the distinctive characteristics of a particular democratic legal order.

A militant democracy can be described as a democratic system that has adopted and applies pre-emptive, prima facie undemocratic legal instruments to define itself against anti-democratic groups using democratic procedures to abolish it. The concept of militant democracy means that only democratic states can use undemocratic measures to protect themselves.[34]

2.3 Patronal democracy (illiberal, flaw, cheating, majoritarian democracies)

In countries with a very strong patronal legacy, the post-communist era brought patronal networks. Newly created multi-patronal networks started competing. On the facade there was a party competition, covering patronal networks. In patronal democracies, unlike liberal democracies, party leadership rarely resigns after an electoral loss. In fact, these are clubs run by one person, who through corruption at the expense of the state created a financial 'empire'.[35]

In a patronal democracy, each patron's party seeks to establish their supremacy and eliminate their competitors and consequently transforming the system into a patronal autocracy. The fundamental aspect of this regime lies in the dynamic balance of competing for patronal networks.[36]

It is necessary to distinguish between two concepts – dynamism and equilibrium. Their organic unity creates a complete regime which is called patronal democracy. Because if in the dynamics of the fight one of these networks, get domination, the system will move from patronal democracy to autocracy.

Of course, there can be the second scenario in the case of victory over the power. If the democratic party came to power through the colour revolution (Ukraine, Armenia, Georgia...).

Then the logic of the fight changes, and the system is more suited to militant democracy.

Because of dynamic equilibrium the patronal democracy can have some democratic features:

- there is still a separation of branches of power, and a system of checks and balances
- There is still public deliberation, pluralism
- Civil society still has some autonomy.

2.4 Patronal autocracy (post-totalitarian autocracies, electoral autocracies)

The patronal autocracy establishes an unlimited system for power of the leading group replacing constitutionalism with populism.

Populists act by presenting themselves as representatives of the people and the general will,[37] or when being elected, they portray themselves as the state and being guided by 'the national interest'.[38] As a result of this, in the populist narrative, anyone who opposes the populist figure is likewise seen as opposing both the people and the nation, thus not just morally despicable, but indeed considered as lacking legitimacy.[39]

Consequently, individuals who have been identified as the most distinctive factor within democratic societies[40], are losing their rights and freedoms, their personal authority. Citizens become subjects of the system, which 'generously' grants them right and in response requires obligations. Of course, all this was presented in suitable packaging, that the regime only thinks of ordinary people. Such regimes are dangerous because they often use nationalism to find an external enemy and permanently distract the people from the situation in the country. The lack of social justice is filled with a surrogate of nationalism.

Laws do not work in autocracies. first, because they serve the private interests of the highest elite. Secondly, the government gives an example of injustice and frees citizens from moral responsibility before the law. That is why citizens in such states always break the law if it is possible to do it with impunity. As a consequence of this, in autocracy chaos is formed when the coercion weakens. And it is happening sooner or later. Therefore, dictators use populistic, nationalist rhetoric, they create a system of power that serves the interests of a narrow circle of their close associates, but in fact, they doom their countries to chaos. It's just a matter of time.

In brief, patronal-autocracy can be described as unrestricted and monopolistic control exercised by the chief patron, subordinated to the principles of elite interest. Exclusive possession of political authority and accumulation of personal wealth at cost of public assets, are undertaken as the state transforms into an autocratic system.[41]

In view of the foregoing, the following types and subtypes of regimes existing in the member states of CoE can be distinguished: liberal sustainable (mature) democracies, liberal unsustainable militant democracies, patronal democracies (this form is also called illiberal democracies, flaw democracies, cheating democracies, but the essence is the same), patronal autocracies (and here the forms can be different: 'electoral autocracies', 'tsarism', 'sultanism', but the essence is the same).

Let's see what the arsenal of mechanisms Strasbourg Court has in order to face these challenges, which part of them are already in action, and which ones haven't yet been used.

3 The coping mechanisms at the disposal of the ECtHR against current challenges of democracies.

3.1 Militant democracies in the context of article 17 ECHR

Inspite of the term militant democracy[42] has never been openly used by the Strasbourg Court, but, it is clear that the prohibition of abuse of rights in Article 17 ECHR is in fact a

militant instrument. The inclusion of Article 17 ECHR had an aim to prevent political rights and freedoms from exploitation by anti-democratic actors.

The prohibition of abuse of rights in the context of human rights law echoes some of the basic assumptions of the concept of abuse of rights in general. In accordance with Josserand's interpretation of rights based on their social function, abuse clauses in a way top are corrective mechanisms that aim to correct any undesirable outcomes of the exercise of rights that disproportionally affect the interests of the community at large.[43]

It is noteworthy that the convention system interacts with liberal democracies in a non-conflict normal way: there is no disagreement here related to the covert or open denial of democracy. But even here of course, there can be anti-democratic groups, abusing their rights, which inevitably provokes a response to the application of Article 17 of the convention. In this sense, the coping mechanism of the Strasbourg court in relation to such situations is quite in line with the logic of militant democracies.

During the first decades of the Convention, its militant role was primarily used in the context of the fight against a totalitarian regime.[44]

> "Article 17 provides a line of defence where different groups or individuals try to use rights and freedoms in order to establish extremist parties agitating nazism[45], communism[46], or other ideologies, that are extremist and coexistence with ECHR system is impossible"[47].

In this regard, I am sharing the position of Tan that democratic European States are not required to remain passive where such groups rise to prominence. If they opt to prohibit and criminally prosecute these parties and their adherents, they can effectively refer to Article 17 to deflect claims of breaching the freedom of expression or association. Article 17 in this context is thus a component of the militant democracy's toolbox.[48]

The Strasbourg Court's case law confirms that the doctrine of militant democracy is explicitly featured in the convention.[49] The Strasbourg court has subsequently reaffirmed the convention's commitment to democracy by holding that it '*appears to be the only political model contemplated by the conventional and, accordingly, the only one compatible with it*'.[50] The court acknowledged that anti-democratic actors might do away with democracy, after prospering under the democratic regime, as illustrated by instances from modern European history.[51] In a number of cases the commission and the court accordingly referred to the notion of democratic self-defence as a legitimate ground for the restriction of the fundamental rights of anti-democratic actors. The dissolution and banning of political parties are the most common measures that the Strasbourg organs considered justified from the perspective of militant democracy.[52] Other instances of militant measures allowed by the COURT involve barring individuals adhering to a certain ideology from standing for public office[53] or occupying a range of positions within the public sector[54], limitations on political speech[55], racist speech[56], as well as prohibiting the use of certain symbols[57]. The case Refah Partisi v. Türkiye shows that the court agrees with states defending their democratic values against abolishment, thereby concluding that ''militant secularism'[58] 'is an acceptable form of militant democracy''.[59] As a result of this decision, the principle of militant democracy has become an obvious characteristic of European law.[60]

But at the same time, we note that the court did not develop this position. The court simply affirmed that secularism is in harmony with democracy, but did not endorse the idea that secularism is an inherent component of democracy.[61]

I agree that secularism should be subject to assessment within the framework of the margin of appreciation and proportionality test, because it represents a manifestation of negative republicanism.[62]

But it should be noted that the ECtHR does not always support negative republican justification, as it was in the case of Vajnai vs Hungry[63], where the court did not approve the applicant's arrest. Moreover, it must be noted that in the case of Refah Partisi, at that moment, he was taken under protection by a constitutional identity of Turkiye. The last tendencies show, that constitutional identity and national identity are matching not always. Suppose national identity for a number of reasons, develops in another direction. In that case, it follows that measures of militant democracy are non-relevant, even more using of that measures can bring to opposite reaction, considering the militant illiberalism. This question requires separate research. Here we should note that democracy must be able to protect itself first through other institutions, such as education and culture, to consolidate the society around the idea of rights and freedoms. The militant democracy measures, must be the last instrument to protect democracy.

From the 1990s the Court received several claims from Central and Eastern European states arguing for the need for such militant measures to protect their young and fragile democracies.[64]

Even though the Court in general seemed willing to endorse such claims in the context of the process of democratisation, it started to stress that such measures can only be justified for a limited period of time.[65]

For example in the case Zdanoka v. Latvia court underlines, that '*(e) very time interference with individual rights must carefully evaluate the scope and consequences of the measures under consideration*'.[66]

According to the new approach of court, militant measures must be applied with great cautiousness.

The balancing exercise between the right of the applicant and the legitimate grounds for its restriction is crucial concerning the use of militant measures. The court should consider the proportionality of a militant measure taken by the state party every time in order to clarify whether the risk that democracy is indeed harmed by the activities of the applicant is significant. The court should also take into account that militant measures may be less easily justified in mature and stable democracies, where there are fewer opportunities to harm democracy in such a significant way, that to put under question the existence of the latter.

Nowadays the militant measures have been incorporated in many European constitutional orders. However, there is a certain degree of suspicion.

Several studies question the effectiveness of the concept of militant democracy. Frequently, one can hear phrases such as: […] '*The intuition behind militant democracy is […]no liberty for the enemies of liberty*'.[67] The concept of the democratic paradox refers to the potential for a democracy to undermine itself while striving to protect itself.[68] Overall I agree with them, but sometimes, in young democracies, there is no other choice. That is why I am sharing the position of the court that militant democracy measures are acceptable.

However, my position is based on constitutional limits of militant democracy in conjunction with international human rights law. In this context, non-stable militant democracies are a more suitable combination of negative and legal constitutionalism.

We would identify two problems here; the first issue is that '*militant measures in the name of protecting democracy limit the free political competition*', and thesecond, the

concept has faced criticism for its vagueness, lack of precision, and narrow focus on legal instruments.[69]

States should, therefore, be wary of too quickly identifying certain movements as enemies of democracy. Militant democracy presupposes a suspicion towards the notion that the label anti-democratic is frequently employed as a pretext for prohibiting individuals whose political activism merely poses a challenge to the dominant national ideology.[70] Militant measures must be controlled in some way on the national level.[71] In this regard, we agree with Muller (2012), who attributes importance to the removal of the decisions on the militant state of actions from the executives everyday decision-making process. In this context, he cites the example of the German system, where the German Federal Constitutional Court holds the exclusive authority to prohibit political parties, an institution that is detached from political influences, as the most reasonable option. In what concerns illiberal democracies?. Any attempt by them to use the instrumentation of militant democracies as we shall see later, is easily detected by the Strasbourg court within the framework of the application of Article 18.

3.2 Patronal democracies in the context of Article 18 ECHR and misuse of power (Détournement De Pouvoir)

In the last decade, the ECtHR has addressed a wide range of cases involving 'systemic threats', encompassing situations such as interventions dangering the independence of the judiciary,[73] opposition politicians,[74] journalists,[75] activists,[76] and political parties.[77] In certain cases, the ECtHR has also invoked Article 18 of the ECHR, determining that the influence of political and economic ulterior motives played a crucial role in leading to human rights violations.[78]

Article 18 of the ECHR has widely been regarded as one of the most crucial legal instruments against the fall of the rule of law within the member states of the CoE.[79] This is due to the fact that when the ECtHR identifies a breach of Article 18 (in conjunction with a substantive right in the convention), it signifies that state authorities limited the convention rights for illegitimate ulterior purposes. To put it differently, Article 18 violations are identified by the court when domestic authorities clearly step outside of the rule of law regime based on the convention.[80] It shows that human rights restrictions may have ulterior hidden purposes and reasons behind the façade of maintaining democratic values.[81]

The purpose of Article 18 is to protect against the abuse of power or détournement de pouvoir. It should function in a way that no room is left for any 'hidden purposes' in the restricted rights.[82]

Some States have employed their criminal justice systems and detention powers to take out political adversaries, detaining them under false pretexts.[83]

Within this context, I am in full agreement that imposing restrictions on rights under the guise of legitimate intentions contradicts the assumption of good faith that underlies the convention. Article 18 could thus serve as an alert mechanism for European States that face the potential of evolving into illiberal democracy or even of reverting to totalitarianism, leading to the erosion of the rule of law.[84]

The concept of contre-pouvoirs encompasses a broader significance than 'checks and balances', commonly perceived as its source of inspiration. The status of contre-pouvoirs varies on the basis of the nature of their source of power tools. This category comprises of 'institutional' contre-pouvoirs which that 'the famous theory of separation of powers

intends to institute', namely the judicial and the legislative branch of government, but also 'political'- in the form of political parties- and social contre-pouvoirs, varying from economic and social forces (example, associations) to military (example, such a role may be attributed to the army, however it may be a tool in the hands of the political forces as well), as well as spiritual forces (example, Church). Thus, the prevailing attribute of these contre-pouvoirs is their function to counterbalance the abuse of political power.

This theory of misuse of power stems from French Administrative Law.[85]

Article 18 stipulates that the limitations allowed by this CONVENTION to the mentioned rights shall not be employed for any purpose other than those for which they have been established. Article 18 has no 'additional normative content' and '*seems merely to reiterate the idea that the legitimate limits on each right must be used for the equally legitimate purposes contemplated together with the right*'[87].

Article 18 has traditionally been granted a very high burden of proof by the ECtHR. In the most extreme instances applicants were required to present undeniable and direct evidence of an Article 18 violation. They needed to demonstrate that the entire legal apparatus of the respondent state had been ab initio misused, indicating that throughout, the authorities were acting with bad faith and displaying a clear disregard for the convention.[88]

Until recently, the capacity of Article 18 to serve as an alert mechanism for threats to the rule of law remained rather passive.

If the violation of Article 18 takes place, it means, that the state has driven away from the main, principles of human rights protection, that are common for all ECHR system states. Delivered judgement based on this article clearly shows that the State party intentionally and systematically abuses its power.

In cases, where the state intentionally ignores basic norms of modern pluralistic society, they systematically violate human rights to achieve their goals. This type of state policy poses a threat to the whole European system of minimum human rights protection. It follows that there is a danger that the treaty is not functioning.[89]

For a long time Article 18 of ECHR remained a dormant provision in the case law of the Court. It was first triggered in 2004, within the framework of the Gusinskiy v. Russia case.[90] Nevertheless, Gusinskiy judgment did not change the prudent approach of ECHR to Article 18 in its case law.

3.3 The turning point (Merabishvili judgment). Evolution of the coping strategy of the Strasbourg Court against patronal democracies

The primary applicants in Article 18 judgments are individuals claiming that their governments have exceeded their authority.

These judgments primarily concern states where the weak state of the rule of law and frequent breaches of human rights safeguards are consistently recorded by civil society members, the Commissioner for Human Rights, and the Venice Commission.[91]

In several cases, politicians who were part of the political opposition were targeted by the state. For instance, in the cases of Tymoshenko and Merabishvili, the applicants were former Prime Ministers and leaders of the leading opposition parties within their countries.[92] In the cases of Navalnyy[93] and Selahattin Demirtaş No. 2.[94], the applicants also held positions as leaders of the political opposition.

In this context, A. Tsampi states that the first group of individuals targeted by the executive comprised prominent members of the political opposition. However, this is not

the sole group of individuals whose rights are curtailed due to political motives. Resistance to the governing authority within a country can also originate from other entities serving as social contre-pouvoirs in a democratic society.[95]

A significant number of instances where the Court assessed the applicants' accusations and prosecution as politically motivated were presented before the Court by frontline activists associated with civil society organisations.[96] The cases of Azerbaijan, in which the Court identified a breach of Article 18 in conjunction with Article 5, characteristical in regards of this Ilgar Mammadov v. Azerbaijan (GC)[97]; Rashad Hasanov[98], Rasul Jafarov v Azerbaijan[99]; Aliyev v. Azerbaijan[100]; Mammadli v. Azerbaijan[101] – the incidents investigated in all of these cases exposed a concerning pattern of unjustifiable arrests and detentions of government critics, civil society activists, and human rights defenders through retaliatory prosecutions and abuse of criminal law, disregarding the principles of the rule of law.[102]

In the 2017 Merabishvili v. Georgia judgment, the Court set out a framework for handling situations where legitimate and illegitimate objectives coexist, along with guidelines for demonstrating the presence of an illegitimate aim. In this case, the Court altered its approach to tolerate measures having a mixed purpose.

The case Merabishvili v. Georgia concerned the arrest and pre-trial detention of opposition politician Merabishvili. He complained that there had been ulterior purposes behind his arrest and pre-trial detention. Merabishvili alleged that the actions of Georgian authorities aimed to remove him from the political scene. The Court found a violation of Article 18 in conjunction with Article 5(1). However, the legal value of judgment is beyond this single case of violation. The Court used this opportunity to clarify its position on the use of Article 18, in particular, to advance the test of ulterior purpose/plurality of purposes and create a totally new standard of proof. The Grand Chamber established that the concept of 'plurality of purposes' means that the Court must determine which was the predominant purpose among several possible purposes of government actions by evaluating all of the circumstances and if it is determined that the illegitimate purpose dominates, then Article 18 is violated.[103]

Regarding the standard of proof, the Court found no reason to employ a special standard of proof for Article 18.[104] Moreover, it elaborated that the modalities of proof must encompass circumstantial evidence, which means information related to core facts, contextual elements, or sequences of events that can establish the basis for inferences concerning the primary facts.[105]

Through Merabishvili judgment the Court re-evaluates the standard of proof under Article 18. It was the response to the strengthening of antidemocratic tendencies. The major policy shift lies in how 'purpose' in Article 18 should be perceived. In this judgment, the Court relaxed its stance from demanding a proof of exclusively 'a prohibited purpose' to a proof of 'beyond reasonable doubt'. This means that the cases mixed purposes may as well violate Article 18 if it is established that the nefarious purpose predominates.[106]

Starting from Merabashvili judgment, applicants didn't have to prove bad faith on the part of authorities and to demonstrate that measures used by authorities were exclusively pursuing unproper prohibited purposes.[107]

Article 18 gives to the Court possibility to use effectively its function, to forbid States from misusing their power (détournement de pouvoir) to restrict rights.

Article 18 as a coping mechanism is very well placed for patronal democracies. If democratic tendencies are stronger, citizens are actively pushing the patronal networks

toward democracy and via colour revolutions are supporting real democratic parties, out of patronal networks, then the regimes drift towards liberal unsustainable democracy, where the whole system is democratic, but there are strong challengers. While in patronal democracy, the significant part of the system is based on the equilibrium of non-democratic patronal networks, if authoritarian tendencies are stronger, and one of the patronal networks or coalition manages to get a dominating position and neutralising competitors, then the drift goes towards autocracy. On their way such networks are oppressing their opponents, civil society activists, and judiciary, prosecuting these actions in order to maintain democracy and as if there is the lawful basis for it. Article 18 as an early warning mechanism, served an ulterior purpose or mixed purposes where non-proper purpose dominates and shows misuse of power (détournement de pouvoir). In fact, via Article 18 the court indicates the movement of patronal democracies towards autocracy.

3.4 The failure of the institutional contre-pouvoirs. Article 17 ECHR as a dormant coping mechanism against patronal autocracies

Article 17 of the ECHR pertains not only to individuals and groups but also extends its scope to encompass states. The historical background of the drafting of Articles 17 and 18 distinctly indicates that the Convention's drafters explicitly considered the scenario in which a state might carry out actions with the intention of undermining any of the rights and freedoms outlined in the Convention.[108]

Right from the beginning, Article 17 was designed not only to empower states to respond to threats posed by groups or individuals to democratic societies, but also (and perhaps even greater extent) to prevent states from a totalitarian drift.[109]

Article 17 and 18 have different aims, otherwise why there would be two articles with the same aim. My colleagues underline that , these articles are for different situations: Article 18 is about misuse of power and Article 17 is about abuse of rights of power.[110]

It must be noted that only the state has a monopoly right to use coercive apparatus. When this right is being used not on a purpose in separate isolated cases, then rights and freedoms are being restricted with an ulterior purpose, and then we deal with the misuse of power. It is not about systematic intervention of authorities in the rights. But when it is about systematic abuse, where there is no hidden aim, then it is about systematic change of all institutional systems, then we are dealing with the systemic abuse of power and right on forced power , aiming to destroy rights and culture of liberty. The second part of Article 17 is about such situations: failure of the institutional contre-pouvoirs. The relevance of Article 17 and 18 depends on the particular situation.

Overall, Article 18 is better placed for misuse of power in isolated cases where there is no systemic challenge to the right to liberty, which is more typical for patronal democracies. While article 17 is better placed for a hypothesis where the misuse of power occurs when the institutional contre-pouvoir fails in a systemic way , which is more typical for patronal autocracies. This is a situation, when a political regime of the given member state is already not compatible with the Convention. Such tendency is about the change in quality, not in quantity, and moving from article 18 to 17 vis-à-vis state indicates that the state we are dealing with has already crossed the red lines, thus, it withdrew from the values protected by the CoE. Hence, if, regarding the misuse of power by the state, the Article 18 is to be regarded as an 'early warning mechanism', indicating

the first symptoms of the institutional degradation of the state, Article 17 should be the 'last call', signifying the transition of the state into an autocracy with all the possible consequences.

I am sharing the standpoint of my colleagues that while the misuse of power is undeniably its abuse, the converse is not always true. There could be cases of power abuse where authorities, in making an individual decision, do not actually have a hidden motive. Applying the model of set theory, Article 18 is considered a subset of Article 17. The scope of the concept of abuse of rights extends beyond that of misuse of power, meaning that specific actions will be considered abusive, not due to an illegal intent, but because of the way in which the power was used.[111]

The question is whether Article 18 is more appropriate dealing with the regimes transitioned from patronal democracies to patronal autocracies, where the whole contre-pouvoirs system failed. The entirety of a State's legal apparatus, which encompasses the collective institutional authorities of the State, particularly the executive, legislative, and judicial branches of government[112], is degraded.

In the recent years, the Court ruled on a number of cases concerning the arbitrary arrest, pre-trial detention of government critics, civil society organisations, human rights activists and defenders, journalists and state powers in breach of Article 18 of the Convention. In some cases, it was obvious that the court is facing a pattern of systemic anti-democratic approach of the authorities. It was reflected in the language used by the Court. Let's analyse it.

Navalnyy v Russia

In this case, a prominent Russian opposition leader had been arrested at peaceful public gatherings and was charged with administrative offences.[113] The Court thus found that some of the arrests had actually aimed at suppressing political pluralism in a democratic order and for this reason the freedom of assembly of Navalnyy had become 'a particular object for targeted suppression'.[114]

The Court's argument in this context drew from Merabishvili's approach, which concentrated not on bad faith but on the purpose's nature of reprehensibility to ascertain whether an illegitimate purpose fell within the scope of Article 18, as opposed to merely being a matter of the 'normal' rights limitations regime and the criteria for legitimate objectives.[115] The Court concluded:

> "156. (...) he had been harassed precisely because of his active engagement in political life and the influence that he had on the political views of the Russian people.
>
> 173. (...) Russian authorities' attempts at the material time to bring the opposition's political activity under control. (...)
>
> 174. As such, the restriction in question would have affected not merely the applicant alone, (…), but the very essence of democracy as a means of organising society.
>
> 175. (…) the Court finds it established beyond reasonable doubt that the restrictions imposed on the applicant (…) pursued an ulterior purpose (…) namely to suppress that political pluralism which forms part of "effective political democracy" governed by "the rule of law"".[116] As we see, the court

unambiguously pointed that authorities were targeting the institution, namely political pluralism.

Navalnyy v. Russia (No. 2)

On 9 April 2019, the Court issued Navalnyy v. Russia (No. 2) judgment, where it reaffirmed its conclusions in Navalnyy v. Russia case of 2018.[117] The court again concluded that Navalnyy was targeted as a political activist. Specifically, the court observed that the actions taken against the applicant had gradually become more implausible, and that he had been directly targeted due to his established status as an activist.[118] Relying on the Merabishvili test, the Court held that the house arrest served of Navalnyy pursued an aim other than that stipulated by the domestic courts. The wider context of the Russian authorities' efforts was to control the political actions of the opposition. Therefore, the Court determined that the limitations aimed to suppress political pluralism, which was an ulterior purpose and had a considerable and serious impact.[119] The ultimate purpose of the actions of Russian authorities was the suppression of political pluralism.

In November 2019, February and July 2020, The Court handed down four more judgments against Azerbaijan in the cases of Natig Jafarov v. Azerbaijan[120], Ibrahimov and Mammadov v. Azerbaijan[121], Khadija Ismayilova (no. 2) v. Azerbaijan[122] and Yunusova and Yunusov v. Azerbaijan (No. 2)[123]. In addition, in December 2019 the Court held that Türkiye once again had violated Article 18 ECHR in the widely discussed case of Kavala v. Türkiye[124]. If we analyse these cases, as well as the 'Russian' cases, it is easy to see that the court was already dealing with an institutional challenge to democracy and article 17 should already have been applied as a measure the of last call instead of article 18.

Natig Jafarov v. Azerbaijan[125]

The Court reaffirmed its conclusions concerning the pattern of measures against opposition members and civil society activists like the applicant, with the goal of suppressing their actions.

Ibrahimov and Mammadov v. Azerbaijan[126]

The Court employed previous conclusions about a systemic breakdown by the courts to safeguard against unjustified arrest and detention. In this instance, considering various factors, it was evident that failing the investigation, the timing of police arrival and their actions, the real aim of the arrest, detention and prosecution were related to the act of creating graffiti with political slogans.

Khadija Ismayilova (No. 2) v. Azerbaijan[127]

The Court concluded that this case is a component of the pattern recognised in the Aliyev case. The conclusion drawn was the actions taken by the authorities against Ismayilova, a journalist who wrote articles about members of the Azerbaijani government and their families for alleged accusations of corruption or illicit business activities. Her arrest was primarily motivated by the intention to silence and punish her for professional activities.

Yunusova and Yunusov v. Azerbaijan (No. 2)[128]

The Court demonstrated the same approach as in Mammadli v. Azerbaijan and included this case in the series of 5 cases mentioned in Aliyev v. Azerbaijan.

Therefore, this case had become a component of that pattern since the combination of the relevant case – particular details in the applicants' case had been similar to that in preceding cases, where evidence of an ulterior motive had stemmed from juxtaposing the absence of suspicion with contextual factors. In this framework, the Court took into account the applicants' status, the gravity of the criminal offences, public officials' statements concerning the applicant's arrest and the context of restrictive legislative regulation of NGO activity and funding in Azerbaijan. Moreover, the Court took into consideration the context of similar arrests of civil society activists and human rights defenders.

Kavala v. Türkiye[129]

At the core of this complaint was the idea that, over and above the applicant or other persons as individuals, the alleged persecution was intended to exert human-rights defenders and NGOs, and destroyed the nature of democracy. The court determined that the hidden motive would attain significant gravity, given the distinctive role of human rights defenders and NGOs within a pluralist democracy.

The court identified a parallel between, on the one hand, the explicit accusations publicly directed at the applicant by the President of the Republic towards the end of 2018 and, on the other, the language used in the charges within the bill of indictment, submitted approximately three months subsequent to those speeches. Moreover, the court is aware of the considerations raised by the Commissioner for Human Rights and the third-party interveners, who asserted that the applicant's detention was a component of a broader campaign to suppress human rights defenders in Turkey.[130]

In its GC judgment the court has concluded that Türkiye '*did not act in 'good faith', in a manner compatible with the 'conclusions and spirit' of the Kavala judgment, or in a way that would make practical and effective the protection of the convention rights which the Court found to have been violated in that judgment*'[131].

These developments should be interpreted within the framework of the process under Article 46, which was employed for the first time in 2017, leading to the court's judgment rendered against Azerbaijan in 2019.[132] This position was affirmed in Kavala v Türkiye.[133]

This is the second time that the Committee of Ministers has referred a question to the Court concerning the implementation of member state its obligations according to Article 46 § 1. Through this GC judgment, the court affirmed the fundamental principles concerning the infringement proceedings (see the first judgment, Ilgar Mammadov vs Azerbaijan), as well as clarified specific aspects pertaining to the roles and the institutional equilibrium between the court and the country member: the nature of the member state's right to initiate such proceedings; the role of the explicit indication in the initial judgment of individual measures under Article 46; the need for the applicant to submit a new application regarding the state's failure to implement the court's initial judgment; as well as the potential for a simultaneous examination by both the court and the member state of the domestic proceedings initiated by that judgment.

Applying the Predominant Purpose Test (Selahattin Demirtaş v. Türkiye (No. 2)

One of the last episodes of Article 18 cases was delivered by the Court on 22 December 2020 – Selahattin Demirtaş v. Türkiye (No. 2).[134] It concerned the chairman of a pro-Kurdish left-wing political party and member of the parliament of Turkey until 2018. Following a constitutional amendment concerning parliamentary immunity rules in 2016, he was arrested together with party members on suspicion of leading an illicit organisation and having connections with terrorism.

In paragraph 436 the court emphasised that the actions of Turkish authorities followed an ulterior political purpose of pressing free political debate and therefore undermining the democratic order in Türkiye. The conclusions drawn from this case substantiate the assertion that the judicial authorities have responded severely to the actions of the applicant as one of the opposition leaders, as well as to the behaviour exhibited by the Peoples' Democratic Party members of parliament. The ongoing pretrial detention of the applicant deprived numerous voters from being represented within the National Assembly, as well as considerably limited the scope of the free democratic discussions in the country. Taking these factors into account, the Court concluded that the purposes that the state authorities put forward concerning the pre-trial detention of the applicant were covered for an ulterior political purpose which undermines the democratic order in Türkiye.[135]

Court has explicitly acknowledged in Selahattin Demirtaş v Türkiye (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'.[136] Again court underlined like in Navalny vs Russia, that the authorities of Türkiye were targeting the institution, namely: democratic order, the whole democratic system.

In addition, the findings of the Venice Commission on the independence of the judicial system in Türkiye, and more specifically those concerning the Supreme Council of Judges and Prosecutors ('the Supreme Council'), are also relevant to the Court's examination under Article 18 of the Convention.

> "(...)the Venice Commission took the view that the composition of the Supreme Council would seriously endanger the independence of the judiciary, because it was the main self-governing body of the judiciary, overseeing appointments, promotions, transfers, disciplinary measures and the dismissal of judges and public prosecutors. It added that "[g]etting control over [the Supreme Council] thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice".[137]

The Court found that the predominant purpose of the set of measures undertaken by the Turkish Republic has been to remove the applicant from the political scene in Türkiye and to silence him as one of the main opposition figures in the country.[138]

Several authors emphasise that a judgment based on the infringement of Article 18 ECHR then is a clear warning signal which is meant to stigmatise deliberate and consistent power abuses by one Member State.[139] Does not this mean that we are already talking about patronal autocracy? As we mentioned, Article 17 would be more appropriate in this case and the other cases mentioned above, where the issue was the failure of the entirety of the contre pouvoirs system.

All these cases are about deliberate and structural dysfunction of the entire state apparatus, of its systemic perversion.[140] It is time to realise the pertinence of Article 17(2) in comparison to Article 18 for such systemic backsliding issues.

4 Conclusive remarks

Modern challenges to liberal democracy do not take the form of ideological confrontation. Post-totalitarian autocracies have understood the weakness of anti-liberal ideologies that deny human rights and freedoms, political pluralism, the system of checks and balances, the independence of the judiciary, and so on. So, they mutated to a dangerous extent. They do not offer anything, but simply manipulate and speculate on the objective difficulties of building democracy in their countries using the methods of national populism. That is, they criticise without offering anything in return. At the same time, those aspects of liberal democracy that have proven their indispensability in ensuring and protecting the autonomy of the individual and respect for his dignity are not criticised. We should note that the societies of these countries do not know what true democracy is. They are unhappy with the pseudo-democratic parody of democracy that the authorities have created. This is the culmination of anti-democratic challenges faced by the conventional system in general and the ECtHR in particular. Some member states of the CoE are standing very close to the line beyond which the mere existence of these regimes would be incompatible with the convention.[141] After the recent aggression in Ukraine Russia crossed that line.

Of course, there are also states remaining in the intermediate phase, such as patronal democracies, which, depending on the circumstances, can overcome autocrat tendencies and move initially into the phase of non-sustainable democracies. But they can also transform into Patronal autocracies (post totalitarian autocracies). As we have noticed, the forms of challenges are different, but the essence does not change, and Europe has already learned this 'lesson' in history. Therefore, 'travaux préparatoires' have laid down mechanisms in the convention that provide the ECtHR with a wide range of tools to overcome these challenges. The first part of Art. 17 is well placed to deal with anti-democratic groups seeking to destroy democracy using democratic procedures. Art. 18 is effective as an early warning instrument, reacting to misuse of power (détournement de pouvoir). This article points out dangerous tendencies in the system of contre-pouvoirs. While the second part of Art. 17 is the last call instrument to remedy and address the structural and systemic degradation of the contre-pouvoirs mechanisms, when it comes to the pattern of actions of the authorities in the direction of oppression of pluralism, political opponents, judiciary and civil society and democratic order, coping mechanisms of the Strasbourg court are numerous. They, like an open nerve, not only directly react to these problems, but through the use of the respective tool they indirectly identify what kind of challenge to human rights and democracy we are dealing with.

It remains to ensure that these instruments are used to their full potential. This is especially true for those situations where we are dealing with orchestrated disfunction of the contre-pouvoirs within a state. The explicit identification of a 'troubling pattern' rather than an 'isolated incident' undoubtedly needs to be reacted in a more relevant way. As for the militant potential of the first part of Article 17 and Article 18 as an early warning instrument, here the court already has accumulated experience, and these articles as coping mechanisms work and evolve.

Today's imperative is to discover the potential of the second part of Article 17, as the 'last call' coping instrument of the Strasbourg court against organised dysfunction of the whole contre-pouvoirs system.

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2 Czech Republic (1992) Bulgaria (1992), Slovak Republic (1992), Hungary (1992), Poland (1993), Romania (1994), Slovenia (1994), Lithuania (1995), Estonia (1996), Albania (1996), Andorra (1996), Latvia (1997), Moldova (1997), from (1997), Ukraine (1997), Croatia (1997), Russian Federation (1998), Georgia (1999), Armenia (2002), Azerbaijan (2002), Bosnia and Herzegovina (2002), Serbia (2004), and Montenegro (2004). See, *Council of Europe*, Chart of *Signatures and Ratifications of Treaty 005*' [online] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=vFZ7AeW4 (accessed 20 June 2022).

3 Jordan, P.A. (1997) 'Does membership have its privileges? Entrance into the Council of Europe and compliance with human rights norms', *Human Rights Quarterly*, Vol. 25, No. 2003, pp.660–661. But also see, Janis, M. (1997) 'Russia and the 'legality' of Strasbourg Law', *European Journal of International Law*, Vol. 8, No. 1, p.93.

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