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This article belongs to the debate » Coping Strategies: Domestic and International Courts in Times of Backlash

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What doesn't kill me makes me stronger. Nietzsche's popular aphorism encapsulates one possible reading of the consequences of backlash against domestic and international courts: the, perhaps naïve, hope that the existential pressure upon courts while severely threatening could be useful, good, and perhaps even beneficial for those bodies. The hope is that, at least in the long term, backlash might trigger necessary improvements or even institutional reform. Judicial recourse to process-based strategies, as Erik Voeten points out, is thus just one possible dimension of the coping strategies employed by human rights courts.

This contribution starts from the premise that human rights courts can rarely avoid confrontation with backlashing states. This is particularly true for the two oldest and most prominent regional human rights courts, the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). Yet, by close observation, we can witness that for both courts, backlash has triggered important institutional developments which will guide the work of human rights bodies in an increasingly polarized 21st century.

First, I will analyze the shift in the current discourse on international courts, from backlash to resilience, before applying a comparative regional approach to the developments in the European and Inter-American human rights regimes over the last decade. Importantly, I claim that the current dominant understanding of resilience confounds its original aim which is not the avoidance of backlash but institutional adaptation. This also implies to analyze the sources of resilience of the respective courts, i.e., their institutional ecosystem which consists of political and parliamentary bodies as well as communities of practice and civil society.

From Backlash to Resilience

Courts won't save us. The backlash against constitutional and international courts, in particular those designed to protect and promote liberal values such as democracy, rule of law, human rights, trade, or criminal justice, has been widely reported in recent years. There are several, overlapping explanations for this unprecedented level of backlash, most prominently the breakdown of the idea of the liberal world order as well as rising populism and authoritarianism. It also became apparent that domestic and international courts have

only limited capacity to stop or overturn those developments. In some instances, even attempting to do so threatened the very existence of those courts. This raises a particular dilemma for human rights courts designed to counteract those tendencies in the first place. When courts cannot effectively protect us, or at least the most vulnerable among us, from systematic human rights abuses, democratic retreats, and the dismantling of the rule of law, can they save themselves?

In this context, an emergent strand of literature has investigated possible resilience techniques of international courts (see here, here, here). Resilience, a concept with a long pedigree in psychology and environmental studies, has become a catch-all term for explaining, understanding, and prescribing how institutions might overcome a situation of crisis. Scholars have identified a variety of both judicial as well as extrajudicial resilience techniques such as a restrictive interpretation, judicial diplomacy, and outreach activities which can be employed on a short- and long-term basis. However, most of those resilience techniques and coping strategies focus on how courts can avoid resistance, and if not possible, mediate the downfall and possible negative externalities to their authority. Whether this actually corresponds to the interests and expectations of the people concerned is, as Erik Voeten pointed out in his contribution, empirically doubtful.

I claim that those strategies divert from what resilience in environmental studies actually investigated: the buffer capacity of a particular system. This means, the level of disturbance that can be absorbed before the state of the system changes. In other words, resilience does not equal stability or how to prevent the oil spill, but how to absorb the shock by means of self-organization, learning, and adaption. The result of resilience will not be the return to the status quo ante but a significantly changed system: a renewal.

Resilience is thus a process dependent on an institution's capacity to change. Its main aim is not to avoid backlash, but to use those situations in a productive way. In contrast to most environmental studies, the particular threat to the system is not per se exogenous. For international courts, the danger to their authority is endogenous; it comes from member states or the respective non-state actors which are, or have been, part of the system. Yet, this understanding of resilience implies a systematic perspective on international courts as they do not change in isolation from their broader institutional framework. In particular, human rights courts are embedded in long standing institutional environments which provide sources of resilience beyond judicial or extrajudicial techniques.

As such, insights by institutionalist theories and organizational sociology offer tools to analyze those adaptation capacities. In the following sections and borrowing from my PhD research, I will use Albert O. Hirschman's classic tryptic of "Exit, Voice, and Loyalty" to sketch three different, and not exclusive ways how the institutional structures surrounding the ECtHR and the IACtHR have learned and adapted to backlash in the last decades.

Exit

The discussion on state exit has dominated the debates on backlash in both the European and the Inter-American human rights regimes in the last decades. Next to Russia as the most prominent current example, the Dominican Republic, UK, Nicaragua, Peru, Russia, Trinidad and Tobago, Turkey, and Venezuela have openly threatened to withdraw from the jurisdiction of the Courts or have effectively withdrawn either partially from core human rights instruments or completely, as in the case of Venezuela which has even left the overall framework of the OAS. Additionally, those threats of exit by member states have been accompanied by severe instances of non-compliance and financial blackmail. For instance,in the European human rights system, Russia's refusal to contribute financially resulted in an unprecedented budgetary crisis of the institution.

State exit is particularly difficult for human rights regimes. Exit symbolizes a regression in the protection of human rights by depriving those most vulnerable from recourse to human rights bodies, and in particular, to human rights courts. It also entails reputational damages for international institutions whose authority is called into question by state exit. Yet, Hirschman argues that the availability of exit is an essential feature of any institution. Without the possibility of exit and voice, institutional adaptation and reform would not be possible.

State exits, or threats thereof, have led to two important legal developments in the European and Inter-American human rights regimes. In the European system, in response to the Russian blackmail to reinstate its PACE voting rights, a new complementary joint procedure was adopted in 2020 to facilitate the close monitoring and eventual expulsion of a state party that has seriously violated its statutory obligations. However, while this procedure diversifies the options to initiate this procedure, it provides no role for the ECtHR or its jurisprudence. In contrast, in the Inter-American system, the Venezuelan withdrawal from the jurisdiction of the Court in 2012 and the OAS in general in 2017 resulted in Advisory Opinion OC 26/20. In this opinion requested by Colombia, the IACtHR determined not only the obligations and additional procedural requirements of a withdrawing state but also developed the idea of a collective guarantee of human rights. The latter includes significant legal, political, and diplomatic tools that the OAS institutions and the remaining state parties must employ in case of a withdrawal, or threat thereof. In particular, the IACtHR lays out six specific situations in which denunciations should be scrutinized on their good faith requirement, for instance in a context of serious human rights violation, the progressive erosion of democratic institutions or a coup d'état. Consequently, in such a situation, state parties and OAS institutions must express their observation in a timely manner, ensure that the denouncing state does not consider itself disengaged from the OAS until it has fully complied with all orders, cooperate to combat impunity, provide international protection for victims, and engage in bilateral and multilateral diplomatic efforts so states might rejoin the regional system. Instead of accommodating critical voices, the IACtHR has used the opportunity of the advisory opinion not to retract but push forward his transformative agenda to safeguard essential guarantees of human rights even in cases of state exit.

Voice

In most cases, state parties will first attempt to voice their critique in the hope to contribute to institutional reform than resort to withdrawal as the so-called nuclear option. During the last decade in both the European and the Inter-American human rights regime, states that have later threatened to withdraw, have been heavily involved in significant reform processes. In the European human rights system, the Interlaken Process initiated in 2010 focused on the reform of the ECtHR, while the Strengthening Process in the Inter-American human rights systems from 2011 to 2013 centred on the Inter-American Commission on Human Rights. In contrast to earlier institutional reforms, both reform processes were characterized by a significant bottom-up dynamic. They spanned over several years and were driven by the active engagement of a variety of critical state parties, also including states that have pushed back but not engaged in full-blown backlash such as Denmark.

In both regimes, the reforms did not result in an institutional revolution as in earlier historical episodes which created, for instance, a permanent court. Instead, they triggered implicit, but not less powerful procedural developments which continue to influence the regimes even long after the reform processes were officially completed. The Interlaken process, which was concluded in 2020, cemented the importance of deference in the European system, which not only greatly promoted the doctrine of margin of appreciation in ECtHR jurisprudence but also resulted in the selection of more deferential judges. While some argue that this has effectively resulted in a regression of human rights jurisprudence and narrowed the authority of the Court, others demonstrate that the reform has failed to destroy the ECtHR's authority and prevented state exit.

The debate on the margin also spilled over across the Atlantic and emboldened supporters of more subsidiarity in the Inter-American system, ultimately peaking in the so-called "Five Presidents Letter" in April 2019. In this public declaration, the Presidents of Argentina, Brazil, Chile, Colombia, and Paraguay appealed to the Inter-American Court of Human Rights to award states more deference in upholding their human rights commitments and implementing judgments. Interestingly, while the "Five Presidents Letter" was clearly designed as a threat, it did not impact the jurisprudence of the Court but led to a rallying cry of civil society actors, thus ultimately emboldening the transformative approach.

Loyalty

Both the ECtHR and the IACtHR have attempted to increase loyalty among state parties, epistemic communities, and the general public. In particular, instances of state backlash such as the Russian blackmail or the Venezuelan slander have triggered the need for a proactive approach to communication by the respective institutions.

During the last decade, both courts have heavily invested in the professionalization of communication policies. They have not only established and staffed press departments, revamped their press releases, and public statements, but also joined new communication outlets such as an increasing presence on social media. While the ECtHR has so far been more conservative in its approach to communication, the IACtHR has particularly embraced new communication formats such as visualization and story-telling, for instance via a series of videos and cartoons on procedural and substantive questions before the Court. While it must still be seen whether this new proactive communication might help to effectively, prevent backlash, the availability of accessible information in a variety of languages and strategic engagement to core stakeholders have the potential to increase the legitimacy of the Courts and counteract possible populist attacks. The public engagement by academics, civil society, and practitioners following certain episodes such as the Draft Copenhagen Declaration or the "Five Presidents Letter" is testament to the influence of loyal communities of practice in defense of the Court and the values they stand for.

Comparative Results

In 2022, both the ECtHR and the IACtHR are not the same institutions as they were ten years earlier. The IACtHR has continued with its transformative agenda even in the face of resistance not only by backlashing states but also from states which had been very supportive such as Costa Rica. While the European human rights regime has generally embraced a more deferential approach in its jurisprudence, it also developed a new sanctioning instrument and acted coordinated and decisively in the face of the Russian aggression in Ukraine. With the expulsion of Russia, effective from September 2022, the ECtHR will face an unprecedented situation as cases against Russia will continue to arrive at Strasbourg in the next years. This not only stretches the organizational and financial capacity of the CoE but also requires innovative responses by the Court. It is highly unlikely that Russia will cooperate and implement any judgments rendered against it. Instead, the ECtHR might look to its Inter-American counterpart to gain inspiration on how judgments can still play an essential function for civil society and victims of human rights abuse.

In the end, the last decade has shown that for both courts to cope with an increasingly hostile environment, a strong institutional ecosystem is crucial. Courts can only confront the individual situation which comes before them. They cannot implement long-term strategies to combat the retreat of human rights. The Inter-American Commission on Human Rights has not only taken the brunt of the backlash and thus shielded the Court, but also reacts in real-time to pressing human rights issues. Similarly, in the Council of Europe, the Committee of Ministers and in particular the Department for the Execution of Judgments of the ECHR have taken a more proactive role in confronting backlash, for instance in triggering the first infringement proceedings against Azerbaijan and Turkey.

This does not mean that every instance of exit is to be welcomed, or every exercise of voice is necessarily in the best interest of the institution. The situation of the African Court on Human and Peoples' Rights is a warning sign that there exists a watershed moment in which criticism can fundamentally threaten the authority and continuous existence of a Court. However, a focus on resilience as buffer capacity demonstrates that in both the European and Inter-American human rights regimes, backlash served as an important and necessary trigger for institutional adaption. It remains to be seen whether the changes implemented are sufficient to secure the institutional authority of both courts in the future, but, as there are no prospects of changing political winds, avoiding confrontation rarely seems fruitful.

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