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**“Détournement de pouvoir” à la française and “Misuse of Power” under Article 18 ECHR : high time for a comparison**

**ABSTRACT**

Under the current challenges to liberal democracy and rule of law in many European States, the European Court of Human Rights (hereinafter, “ECtHR”) recently reinvigorated its case-law on Article 18 of the European Convention on Human Rights (hereinafter, “Convention”) (limitations on use of restrictions on rights). Through this reaction, the ECtHR offers what could be called a doctrinal response to the “Misuse of Power” and the cunning progression of the evil of authoritarianism today. Since the Grand Chamber judgment in *Merabishvili v. Georgia* (28.11.2017), and in less than a year, the interpretation and implementation of Article 18 has evolved in a dramatic fashion. This is particularly evidenced in the *Aliyev v. Ajerbaidjan* judgment (20.9.2018) and also in the Grand Chamber judgment in *Navalnyy v. Russia* (15.11.2018).

The inclusion of Article 18 into the Convention is directly linked to the French influence of the time, as evidenced by the Convention’s *travaux préparatoires*. The drafting of Article 18 was a compromise between the French and British approaches on the restrictions of rights. Whereas the British approach, hostile to the inclusion of a general restriction clause, was finally adopted, this did not mean that the French approach was completely rejected. On the contrary, the partisans of the French approach secured an important victory since it was their draft provision on the power of interference that found its way to the adopted Convention text. Thus, Article 18 of the Convention provides that “*The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed*.” But much more than that, the French influence can be felt at the very core the clause. As also acknowledged by the Grand Chamber itself (*Merabishvili v. Georgia*, above), Article 18 was described by the Conference of Senior Officials on Human Rights as an application of the “détournement de pouvoir” theory, hence its current name of “clause anti-détournement”.

Considering however the jurisprudential evolution of Article 18, it is pertinent to ask ourselves how close is the “Misuse of Power” of said Article, as interpreted by the ECtHR, to the “détournement de pouvoir” theory under French Administrative Law. The current paper aims to compare these two concepts. It is true that the theory of “Misuse of Power” is traditionally linked to the French Administrative Law. The “Misuse of Power” under the Convention, just like the “détournement de pouvoir” à la française, implies a reproach for the “particularly scandalous” attitudes of the administration, namely a moral condemnation of the most serious excesses of public authority because the error of law is accomplished in bad faith. Nonetheless, it is also to be noted that the “Misuse of Power” within the case-law of the ECtHR has acquired an autonomous meaning that seems to go beyond the traditional “détournement de pouvoir”. The “Misuse of Power” under Article 18 of the Convention precisely implies the prohibition of any restriction on a guaranteed freedom that is based on motives other than the common good or general interest, namely motives that are based on reasons of State, particularly the oppression of the political opposition by the governing power.

*Key-words:* Misuse of Power; political opposition; limitations on use of restrictions on rights; ECHR.

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