

Rights In The Populist Era, A Comment On *Bayev v. Russia* (ECtHR): More Didactic Than Persuasive?

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I. INTRODUCTION

In June 2017, the European Court of Human Rights (“ECtHR” or “the Court”) was called upon to decide whether Russia’s so-called “gay propaganda” laws were in accordance with human rights. Through these laws, the Russian Government had restricted the dissemination to minors of information and “propaganda” about “non-traditional sexual relationships.”¹ The ECtHR found that the Russian laws violated both Article 10 (freedom of expression) and 14 (non-discrimination) of the European Convention on Human Rights (“ECHR”).² This appears to be the first case in which the Court has found a joint violation of these two articles.

Bayev and Others v Russia (“*Bayev*”) was the result of a legal challenge brought by three Russian gay activists. Each had been charged with offences under the Code of Administrative Offences of the Russian Federation, which imposes fines on those promoting “non-traditional sexual relationships” among children, including portraying such relationships in a positive light, creating a distorted image of the equivalence of such relationships with traditional sexual relationships, and providing information which would create in children a non-traditional sexual orientation. The three individuals who brought the case were fined for demonstrating in public areas with banners containing slogans such as “Homosexuality is normal” and “Homosexuality is not a perversion.”³ After their cases were dismissed by the Russian Constitutional Court, the activists challenged the laws in question on the basis of Articles 10 and 14 ECHR, alleging that

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1. See generally *Case of Bayev and Others v. Russia*, Apps. Nos. 67667/09 and 2 others 2017-VI Eur. Ct. H.R [hereinafter *Bayev*].

2. See *id.*, ¶¶ 84 & 92. See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, arts. 10 and 14, Nov. 4, 1950, E.T.S. No.5 [hereinafter ECHR].

3. See *id.*, ¶¶ 8-18.

they constituted an unjustifiable and discriminatory restriction on free speech.

The timing of the judgment in *Bayev* is of particular significance. The Court found that Russia's "gay propaganda" law violates human rights at a time of steady deterioration in the position of LGBT people in Russia, a prominent example being the Government tolerance of, and possible collusion in, the persecution of gay men in Chechnya.⁴ Russia is not the only European country to have passed laws of this type, with Lithuania, and Latvia having comparable restrictions.⁵

The rise in measures targeting the LGBT community coincides with the increasing influence of the populist political movement and the associated marginalization of minority rights. In this respect, one might note the announcement by the U.S. President Donald Trump that transgender individuals will not be permitted to serve in the U.S. armed forces. This change of policy is an example of the increasing challenge to existing arrangements on the protection of LGBT in liberal democracies where populism has gained ground.⁶

Discussion now begins to turn to the question of how to respond to the populist influence and restrictions on minority rights. Scholars have warned that populism has changed the world we used to know and requires innovative strategies in the struggle to advance human rights.⁷ Philip Alston argues that, with the rise of populism, human rights advocates must dedicate more time to being persuasive and convincing and avoid being unduly didactic and resistant to critique.⁸ Persuasiveness does not necessarily require compromise on the substantive protection of human rights, but it does require that human rights advocates consider the reasons why the other side is not doing what we consider to be the "right thing." By seeking to understand and engage with the concerns of those with whom we disagree, we can identify constructive ways forward in the hope of bolstering human rights protection in the long run.

Judicial institutions also have a role to play in this engagement and dialogue.⁹ Courts have not been left untouched by the populist movement, as can be seen from the attacks on judicial independence in Poland, Turkey,

4. See Lizzie Dearden, *Chechnya gay purge: Footage Taken Inside Prison Shows Where Men Were 'Detained and Tortured'*, THE INDEPENDENT, Jun. 21, 2017, <https://perma.cc/PRT6-MT5M>.

5. See *Lithuanian Law on the 'Protection' of Minors Enters the Statute Book*, INTERGROUP ON LGBT RIGHTS (Jun. 21, 2017), www.lgbt-ep.eu/press-releases/lithuanian-law-enters-the-statute-book/; *President Bērziņš Approves 'Constitutional Morality' Law*, LATVIAN PUBLIC BROADCASTING (Jun. 27, 2015), <http://eng.lsm.lv/article/society/society/president-berzins-approves-constitutional-morality-law.a135470/>.

6. See PRESS OPERATIONS, U.S. DEP'T OF STATE, RELEASE NO: NR-246-16 SECRETARY OF DEFENSE ASH CARTER ANNOUNCES POLICY FOR TRANSGENDER SERVICE MEMBERS, (Jun. 30, 2016), <https://perma.cc/U6T5-RW2Y>.

7. See Philip Alston, *The Populist Challenge to Human Rights*, J. HUM. RIGHTS. PRACT. 2 (2017).

8. See *id.*, 1, 4, 11.

9. See generally *Constitutional Courts and Populism*, VERFASSUNGSBLOG (May, 2017), <https://perma.cc/7BRN-V9KT>.

and Hungary.¹⁰ The Secretary General of the Council of Europe has acknowledged that the ECtHR and the ECHR are under the attack in a growing number of European populist countries, and that this may push the ECtHR towards more self-restraint.¹¹ Head-on collisions between courts and populist governments are argued to not be in the interest of courts' authority,¹² and as such the need to be persuasive is of great importance. In line with this, the present contribution analyses the reasoning of the ECtHR in the *Bayev* case through this lens of persuasiveness versus didacticism. By looking at the Court's mode of engagement with Government's arguments, the authors will offer an opinion on whether the Court is rising to the challenge of persuasiveness and engagement in the new populist era.

II. PARTIES' SUBMISSIONS

The Government argued that the ban on “gay propaganda” aimed to protect the private lives of minors and the rights of parents to decide on the appropriate forms of education of their children.¹³ It considered that the dissemination of information on homosexuality among minors had the effect of inducing children to a homosexual lifestyle and promoted the denial of traditional family values.¹⁴ It also contented that same-sex relations were associated with greater health risks and that they impeded population growth.¹⁵ As regards the application of the measures in question in the present case, the Government submitted that, by holding banners such as “homosexuality is normal,” the applicants had abused the right to freedom of expression as they intentionally “placed psychological pressure on children [and] influenced their self-identification.”¹⁶

The applicants contested the Government's presumption that the laws in question served the legitimate aim of protecting minors from age-inappropriate information about homosexuality. They submitted that the “information about sexual orientation as such should not be subject to the same

10. See Michaela Hailbronner & David Landau, Introduction: Constitutional Courts and Populism, *INT'L J. CONST. L. BLOG* (Apr. 22, 2017), <https://perma.cc/D5BF-ULLC> [hereinafter Hailbronner & Landau].

11. Thorbjorn Jagland, *Don't Caricature Europe's Court*, *N.Y. TIMES* (Dec. 12, 2016), <https://perma.cc/8CFB-G5ZH>.

12. Hailbronner & Landau, *supra* note 10. On the Court's authority see generally Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 *L. CONT. PROB.* 7 (2016) (arguing that the de facto authority of an international court is measured by two key components: (1) recognizing an obligation to comply with court rulings, and (2) engaging in meaningful action pushing toward giving full effect to those rulings, the latter component being particularly essential.)

13. Bayev, *supra* note 1, at ¶¶ 47 & 50.

14. See *id.*, ¶¶ 46 & 48. As regards the definition of propaganda by Constitutional Court of the Russian Federation see ¶ 36.

15. See *id.*, ¶ 48.

16. *Id.* ¶¶ 46-47.

restrictions as information on sexual relations,”¹⁷ arguing that the former embraces a whole spectrum of human relationships between two individuals that includes not only sexual relations but also emotional or loving affection, family ties, etc.¹⁸ The ban on the dissemination of information on sexual orientation was argued to constitute “a denial of an individual’s right to express his or her identity.”¹⁹ The laws in questions were said to be “inherently discriminatory, in that. . .[they] specifically concerned minors’ exposure to information about sexual minorities, which reinforced stigma and prejudice against the latter groups.”²⁰

As regards to the parents’ right to choose educational policies for their children, the applicants argued that the right to disseminate information about homosexuality cannot be conditional on parents’ authorization.²¹ Finally, the applicants opposed the Government’s allegations that learning about homosexuality could offend children’s intimate convictions or induce them into a homosexual lifestyle.²²

III. THE COURT’S ASSESSMENT

Article 10(1) ECHR establishes the right to freedom of expression, with Article 10(2) ECHR setting out the circumstances under which this right can be limited.²³ From this framing, mirrored in Articles 8-11 ECHR (private life, religion, expression, and assembly), the Court through its case law has distilled a number of elements with which a limitation must comply: it must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society.²⁴ The Court began its assessment in *Bayev* by stipulating that it “will focus on the necessity of the impugned laws as general measures.”²⁵ This focus on necessity seemed to indicate that the Court would base the assessment of the limitation on this element. However, this clear demarcation is not maintained in the Court’s reasoning, which also

17. *Id.* ¶ 53.

18. *See id.*, ¶¶ 53–54.

19. *Id.* ¶ 53.

20. *Id.* ¶ 54.

21. *See id.*, ¶ 57.

22. *See id.*, ¶¶ 53 & 56.

23. Article 10 ECHR reads: 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. *See ECHR, supra* note 2.

24. *See David Harris et. al. Law of the European Convention on Human Rights* (2014), pp 503-522.

25. *Bayev, supra* note 1, ¶ 64.

contained arguments more generally associated with the elements of prescribed by law and legitimate aim.

The Court briefly discussed the notion of margin of appreciation, and outlined two reasons why Russia enjoyed a narrow margin of appreciation in the present case.²⁶ First, the case concerned the recognition of individuals' right to openly identify themselves as LGBT and to promote their own rights, in favour of which there exists a clear European consensus. Second, the case concerned facets of individuals' existence and identity, a qualification the Court has repeatedly used to narrow the margin of appreciation.²⁷ Having set out these points, the Court went on to consider whether the interference with Article 10 ECHR was justified on three grounds: protection of morals, protection of health, and protection of the rights of others.

A. *Protection of Morals*

With regards to the Government's assertion that the law reflects the moral position of the Russian people and the widespread disapproval of homosexuality in the country, the Court affirmed that popular sentiment may only be invoked in order to extend the scope of Convention rights, not to restrict them. To allow otherwise would make the exercise of Convention rights by a minority group conditional on acceptance by the majority, rendering those rights merely theoretical.²⁸

The Court also rejected the Government's contention that the law was necessary to uphold the moral imperative of the protection of traditional family values as the foundation of society. The Court saw no reason to consider social acceptance of homosexuality as incompatible with family values, and cited the growing tendency to include relationships between same-sex couples within the concept of "family life".²⁹ To the contrary, the Court noted the desire of members of the LGBT community to have access to institutions such as marriage and adoption as evidence of their allegiance to, rather than intention to undermine, "family values".³⁰

The Russian legislation was determined to embody a "predisposed bias" on the part of the heterosexual majority against sexual minorities in Russia.³¹ In support of this finding the Court cited the language of the legislation itself, in particular the reference therein to the "distorted image of the social equivalence of traditional and non-traditional relationships."³² In

26. *See id.* ¶ 66.

27. *See, e.g.* Case of Oliari and Others v. Italy, Apps. Nos. 18766/11 and 36030/11 2015-VII Eur. Ct. H.R., ¶ 177.

28. *See* Bayev, *supra* note 1, ¶ 70.

29. *See id.* ¶ 67.

30. *See id.*

31. *Id.* ¶ 69.

32. *See id.*

particular, the Court was critical of the parallels drawn by the Government between homosexuality and paedophilia.³³

B. *Protection of Health*

Arguments justifying the restrictive measures on grounds of public health and the “demographic situation” were also rejected by the Court. In terms of public health, the messages written and displayed by the applicants on their banners were not said to advocate reckless behaviour or unhealthy personal choices. The Court determined that, rather than it being necessary to ban the dissemination of information about sex and gender identity, the objective communication of information concerning the relevant risks is instead an “indispensable part” of a public health campaign.³⁴

In terms of the need to promote population growth and achieve demographic targets, the Court noted that these issues are dependent on a range of factors, including economic prosperity and social-security. No evidence was adduced by the Government as to why the suppression of information about same-sex relationships would reverse a negative demographic trend. Furthermore, the Court noted the inconsistency that “social approval of heterosexual couples is not conditional on their intention or ability to have children.”³⁵

C. *Protection of the Rights of Others*

The Government’s final argument invoked the need to protect the rights of others to justify the restriction on freedom of speech. The Government contended that the slogans of the demonstrators could have the effect of converting minors to a “homosexual lifestyle,” and as such, the freedom of expression of the LGBT activists touched upon the personal autonomy of minors and encroached upon the educational choices of their parents.³⁶

The Court addressed these allegations on three grounds. First, with respect to the alleged forceful or underhand recruiting of minors by the LGBT community, there was held to be no evidentiary basis to suggest that “a minor could be enticed into “[a] homosexual lifestyle,” let alone science-based evidence that one’s sexual orientation or identity is susceptible to change under external influence.”³⁷ Second, the allegations that minors were more vulnerable to abuse in the context of homosexual relationships than in heterosexual ones were deemed a manifestation of predisposed bias. The Court noted that the Russian law on criminal liability for lecherous actions against minors and the dissemination of pornography to minors are applicable irrespective of the sexual orientation of those involved. No evi-

33. *See id.*

34. *Id.* ¶ 72.

35. *Id.* ¶ 73.

36. *Id.* ¶ 74.

37. *Id.* ¶ 78.

dence was adduced as to why stricter protections against abuse would be needed in the context of homosexual relationships.³⁸ Third, the Court found the allegations that the LGBT demonstrations intruded in the field of educational policies and parental choices on sex education to be unsubstantiated, as the applicants “did not seek to interact with minors, nor intrude into their private space. . . .or advocate any sexual behaviour.”³⁹ The Court went on to clarify that the obligation to respect parents’ religious or philosophical views does not extend to protecting children in all cases from being confronted with opinions that are opposed to one’s own convictions.⁴⁰

FINDING OF THE COURT

After dismissing the arguments of the Government under the headings above, the finding of the Court was that Russia, in adopting the laws in question and implementing them against the applicants, had overstepped its margin of appreciation and so had violated Article 10 ECHR. The Court went on to examine whether there was a violation of Article 14’s prohibition on discrimination in conjunction with Article 10. It found that there was no justification for the difference in treatment between the heterosexual majority and homosexual minority, and that the legislation embodied unjustified bias. As such, Article 14 had also been violated.⁴¹

THE DISSENTING OPINION

The position adopted by Judge Dedov in his dissenting opinion aligns much more closely to the arguments of the Russian Government than to the reasoning of his fellow bench members. The connections that Judge Dedov draws between homosexuality on the one hand, and violence towards and abuse of children on the other, are concerning.⁴² The dissent criticises the majority for approaching the issue as a non-discrimination one, rather than as a conflict between the freedom of expression of the applicants and the right to private life of children (as well as the rights of parents to educate their children as they wish). Judge Dedov argues that these rights must be balanced, although his statement that “the private life of children is more important than the freedom of expression of homosexuals,”⁴³ suggests that this balance may be predetermined. It is notable that, despite the emphasis placed by Judge Dedov on the need to consider the rights of children under Article 8, he fails to articulate precisely how the actions of the appli-

38. *See id.* ¶ 79.

39. *Id.* ¶¶ 80 & 82.

40. *See id.* ¶ 81.

41. *See id.* ¶¶ 85–92.

42. *See id.*, Dissenting Opinion of Judge Dedov, 39.

43. *Id.*, 44.

cants could be understood as interfering with these rights. His argument seems ultimately based on the idea that by intruding into the *perception* held by children of the homosexual lifestyle, the activists were intruding into their private lives.⁴⁴

IV. ANALYSIS OF THE COURT'S ASSESSMENT

The *Bayev* judgment clarified that, under the ECHR, measures which restrict the freedom to express ideas on the sole ground that those ideas pertain to sexual orientation cannot be justified and are discriminatory. Furthermore, the Court rejected assertions that popular sentiment could be used as a justification to limit the rights of LGBT persons to freedom of expression, however strong that sentiment might be. In this way, the scope of protection for LGBT rights in relation to so-called “gay propaganda” laws has been firmly established, and is already being used as a precedent in the European context. Commenting on the effects of the *Bayev* judgment, the Vice-President of the EU Parliament Intergroup on LGBT Rights called on the Lithuanian authorities to abolish its anti-propaganda law.⁴⁵ The judgment may also be used to challenge other, more subtle, legislative acts employed to restrict the freedom to express and receive information relating to LGBT. One such legislative act is a 2015 amendment to the Latvian education law that requires that schools provide education in “constitutional morality,” and educate children in line with the constitutional definition of marriage as a union between a man and a woman.⁴⁶ According to Latvian LGBT activists, the authorities used this 2015 law to censor discussion about LGBT people in at least two schools in 2016.⁴⁷

As a backdrop to the legal statements made by the ECtHR in *Bayev*, the judgment identified and highlighted broader trends in relation to same-sex couples: the “growing general tendency to include relationships between same-sex couples within the concept of ‘family life;’” an acknowledgment that same-sex relationships need legal protection and recognition; and the wish of same-sex couples to have access to the institutions of marriage, parenthood, and adoption.⁴⁸ The Court’s findings on the law, as well as these more general remarks on the broader trends, signal that the direction of protection under the ECHR continues to move forward despite Europe’s changing political climate, namely the rise of populism and deepening divides on the scope of LGBT rights.

44. *See id.*, 45.

45. *Strasbourg Court: Russian ‘anti-propaganda’ law is discriminatory and violates human rights*, INTERGROUP ON LGBT RIGHTS (Jun. 21, 2017), <http://www.lgbt-ep.eu/press-releases/strasbourg-court-russian-anti-propaganda-law-is-discriminatory-and-violates-human-rights/>.

46. *Supra* note 5.

47. *See* Human Rights Watch, *World Report*, 275 (2017), https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

48. *Bayev*, *supra* note 1, ¶ 67.

That being said, the manner in which the *Bayev* judgment is framed is worthy of note. It is an instance where one can appreciate the relevance of Philip Alston's plea for the human rights movement to be more persuasive and engaging, rather than employing uncompromising didacticism when faced with the populist challenge. This analysis will critically reflect on the judgment and highlight some of the ways in which the ECtHR fell short in this regard.

In addressing the Russian Government's submissions regarding the protection of health, in particular the perceived threat that the promotion of same sex relationships would constitute to public health, the Court considered

it improbable that a restriction on potential freedom of expression concerning LGBT issues would be conducive to a reduction in health risks. Quite the contrary, disseminating knowledge on sex and gender identity issues and raising awareness of any associated risks and of methods of protecting oneself against those risks. . . would be an indispensable part of a disease-prevention campaign.⁴⁹

The framing of the Court's reasoning here can be described as unduly didactic in the way it instructs the Government as to what information is "*indispensable*" to a public health campaign. It would perhaps have been sufficient to note that the Government, as the party with the burden of establishing whether a measure was necessary to achieve a given aim, had not adduced sufficient evidence to discharge this burden. By employing categorical language on what constitutes a correct standard on this aspect of public health campaigns, the Court might have overstepped its competence. The Court's approach is also striking in that, while criticizing the Government for not producing evidence for how the measures taken would contribute to protecting public health, it fails itself to refer to scientific or other evidence to support its own statements on what information is "*indispensable*" to public health campaigns.

The Court's approach to the Government's arguments on morality also demonstrate a clear leaning towards didacticism, in a more pronounced way than can be discerned with respect to public health. When considering whether the limitation to free speech can be justified on grounds of morals, the Court acknowledged "that the majority of Russians disapprove of homosexuality" and took note of the Government's argument that maintaining family values is incompatible with social acceptance of homosexuality.⁵⁰ The Court's response was dismissive, simply stating that it "sees no reason to consider these elements as incompatible," and thereby appearing to re-

49. *Id.* ¶ 72.

50. *Id.* ¶ 70.

ject outright the moral beliefs of the Russian population.⁵¹ The statement reads as if the Court is passing judgment on the content of the moral values themselves, rather than confining itself to assessing whether, from a legal perspective, this moral standpoint, whatever its merits, can justify a limitation of human rights.

This approach contrasts somewhat strikingly with the Court's tactic in other cases that deal with sensitive moral and ethical issues. For example, in cases concerning abortion, the Court's analysis has extended only to confirming the existence of deeply ingrained and profound moral values on abortion in a given country.⁵² Where it finds this to be the case, then the Government is deemed to be pursuing a legitimate aim and the discussion moves on to questions of necessity and proportionality.⁵³ In principle, the Court does not venture to question the "correctness" or "appropriateness" of the moral views themselves, instead confining itself to deciding whether the moral values could constitute a legal basis for the limitation of a right.

The Court's didactic remarks on public health and morals are concrete illustrations of the general tone of the judgment, which is characterised by language such as "the authorities have no choice" and "could only be."⁵⁴ Expressions of this type were not necessary to reach the findings on the law, nor, it is submitted, an adequate form of judicial dialogue in the populist era. This approach by the Court may have implications for the persuasiveness of the judgment, as some of the States party to the ECHR may perceive the *Bayev* judgment as not only answering a legal question on human rights standards, but also as an unwelcome instruction on "correct" moral standards and beliefs. These considerations may ultimately overshadow the arguments on the law, and thereby the Court runs the risk of undermining the protections it has sought to move forward.

Apart from the substantive approach to legal questions, the methodology of assessment is one of the elements that lends persuasiveness to judicial decisions, and here too the ECtHR falls short. Employing a consistent approach to deciding on legal questions allows the Court's audience to assess how in line a particular case is with previous cases and with the way that similar issues have been interpreted in the past. As noted above, the Court has distilled through its case law a number of elements to be considered when assessing the permissibility of a limitation of a right.⁵⁵ At times, the Court looks at all of these elements when examining a limitation,⁵⁶ and at

51. *Id.* ¶ 67.

52. *See, e.g.*, Case of A, B and C v. Ireland, App. No. 25579/05 2010-XII Eur. Ct. H.R., ¶ 222-228.

53. *Id.* ¶ 229-251.

54. *Bayev*, *supra* note 1, ¶ 82.

55. *See Harris et al.*, *supra* note 24.

56. *See e.g.* Case of S.A.S. v. France, App. No. 43835/11 2014-VII Eur. Ct. H.R., ¶¶ 106-123.

other times it focuses on just one of the elements.⁵⁷ What stands out about the methodology adopted in *Bayev* is that it does neither of these things, but instead collapses these different elements into one single assessment.

One example of this collapse relates to the treatment of the “prescribed by law” element. When determining whether the limitation on free speech was justified on grounds of protecting the rights of others, the Court took into account a number of factors, one of which was the vagueness of the terminology of the laws and their lack of foreseeable application. Such considerations are not associated with necessity but with a quality of law assessment. Another example relates to the structure of the judgment more generally. The Court’s initial indication that it would consider the Government’s arguments through the lens of *necessity* created the impression that the Court would look at the hallmarks of *necessity* and *democratic society*, including pluralism, tolerance, and broadmindedness.⁵⁸ Instead of looking at the latter, it assessed the *necessity* through the facets of legitimate aim, namely the protection of morals, health and the rights of others. From a persuasiveness standpoint, this collapsing of different elements and the resulting lack of consistency with the methodology of approach adopted in previous case law is unhelpful.

V. CONCLUSIONS

A plea for more persuasion and less didacticism is not a call for a pushback on human rights activism. A human rights mindset and human rights activism are particularly necessary in challenging times, in which we see the hard fought victories on LGBT rights being contested through direct and indirect measures such as “gay propaganda” laws and “constitutional morality education.”

However, the rise of populism and its negative effects on human rights do require self-reflection and creative strategies to overcome resistance to the maintenance and advancement of human rights standards. The central question is how to address sensitive issues without undermining the protection of human rights. This may be somewhat of a tightrope, but it is a tightrope that can be walked and managed. This can be done by adopting an approach that engages with the arguments of the “other side” in a meaningful manner, which takes into account competing concerns, and which acknowledges the importance of these concerns, rather than dismissing them. In the case of judicial institutions, time should be taken to explain

57. See *Case of Bayatyan v. Armenia*, App. No. 23459/03 2011-VII Eur. Ct. H.R., ¶¶ 116-117 (deciding that the measure was not necessary in a democratic society, the Court ‘preferred to leave open’ the question of whether the interference with the right to freedom of religion in relation to conscientious objection of military service was prescribed by law and fulfilled a legitimate aim).

58. See William A. Schabas, *The European Convention on Human Rights* (2015), pp 406, 438, 474.

this engagement in the judicial reasoning using the language of comity rather than of confrontation. The *Bayev* judgment falls short in this respect.

This analysis does not suggest that more persuasive and less didactic reasoning would *per se* guarantee a smooth implementation of the *Bayev* judgment or make the Russian Government more sympathetic to LGBT concerns. The failure of the Russian Government to implement the *Alekseyev* judgment,⁵⁹ also pertaining to the LGBT rights, suggests that an otherwise unresponsive member of the ECHR may not be immediately swayed by persuasive judicial reasoning, particularly in LGBT cases.

However, the *Bayev* judgment cannot be seen solely in the context of Russia. As an international judgment it sets a standard that is to be followed by other States party to the ECHR. Hence, the *Bayev* judgment is also relevant in the context of other European States, such as the Baltic States, which, in some respects, have also taken steps to roll back LGBT protections, but which are more responsive to the Court's jurisprudence. Furthermore, the ECtHR jurisprudence influences other international and domestic courts. In light of the wider reach and effects of the Court's jurisprudence, judicial reasoning based on a rigorous and persuasive analysis, rather than on unduly didactic statements and confrontation, could be a more constructive form of engagement in overcoming populist arguments. This is particularly so where a move for equal rights for minority groups is oftentimes misrepresented as a reduction in the rights of the majority and as an attack on the majority's moral, religious, and political beliefs.

59. See Case of *Alekseyev v. Russia*, Apps. Nos. 4916/07, 25924/08 and 14599/09 2010-X Eur. Ct. H.R. On the failure of the Russian Government to implement the *Alekseyev* judgment see Pierre-Yves Le Borgn, *The 9th Report on the Implementation of judgments of the European Court of Human Rights*, Council of Europe AS/Jur (May 18, 2017) ¶ 10, <http://website-pace.net/documents/19838/3115031/AS-JUR-2017-15-EN.pdf/18891586-7d6c-4297-b5f7-4077636db28e>.