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Rethinking Enmeshment and the Rule of Law in Authoritarian Contexts

Dilek Kurban*

Scholars frequently cite Turkey under Recep Tayyip Erdoğan's rule among the leading examples of populism and authoritarianism in contemporary politics. Long an authoritarian regime, Turkey has in indeed evolved into a full-blown autocratic regime engaged in serious human rights violations and systemic rule of law violations. What makes this case particularly striking, however, is that this backsliding has occurred under the watch of European institutions. Claiming that the Turkish case speaks to broader issues concerning the ways in which transnational human rights and rule of law organizations interact with authoritarian regimes, this article puts forth theoretical insights for the rule of law scholarship. Going beyond conventional analyses which characterize interactions between international institutions and nation states as one-way relationships where norms flow (or not) from the top-down, it looks into the "enmeshment" of domestic and international law in authoritarian settings described in the introductory article of this special issue. Doing so, however, the article does not solely ask whether and how human rights norms are applied in authoritarian contexts, but also looks into how international organizations tasked with upholding the rule of law can not only permit illiberal states to violate those norms, but also themselves undermine these principles.

Conceptually, the article illustrates that the rule of law-rule by law spectrum fails to account for authoritarian contexts, where states go beyond rule by law to engage in legal repression and resort to lawlessness towards certain (racialized) segments of the population. Thus, it argues, if the rule of law is at one end of the analytical spectrum on the arbitrary exercise of power, what lies at the other end is lawless rule, not rule by law, and the dual state lies somewhere in between. Empirically, the article analyzes Turkey's decades-long relationship with the European Union and in particular the European Court of Human Rights (ECtHR). It zooms in on the latter's case law concerning Erdoğan's resort to the law to consolidate his power (rule by law) and utter disregard of legal rules, including domestic ones, in repressing democratic dissent and engaging in state violence (lawlessness). Methodologically, to display and contest conventional

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scholarship's depiction of the ECtHR as a supranational court exercising strict scrutiny of authoritarian regimes, the article goes beyond judgments, which constitute a mere 9 percent of jurisprudence, and takes a close look at inadmissibility decisions and strike-out rulings concerning Turkey's resort to rule by law and lawlessness.

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INTRODUCTION

In the early-mid 2000s, the "new" Turkey under the leadership of the Justice and Development Party (*Adalet ve Kalkınma Partisi*-AKP) was seen by the international community as a beacon of light in the Middle East. Turkey's Prime Minister Recep Tayyip Erdoğan was acclaimed as a visionary politician leading his nation in the pursuit of European Union membership.¹ Within a decade, Turkey has turned from a country in democratic transition whose reforms earned it European Union (EU) accession status and major victories at the European Court of Human Rights (ECtHR) to one engaged in systematic rule of law violations and violence against the Kurdish minority,² coupled with sporadic legal repression

1. Dexter Filkins, *Once Banned, a Turkish Leader Is Elected and Revives U.S. Hopes for Access*, N.Y. TIMES (Mar. 10, 2003), <https://www.nytimes.com/2003/03/10/world/threats-responses-turkey-once-banned-turkish-leader-elected-revives-us-hopes-for.html>.

2. DILEK KURBAN, LIMITS OF SUPRANATIONAL JUSTICE: THE EUROPEAN COURT OF HUMAN RIGHTS AND TURKEY'S KURDISH CONFLICT (2020); U.N. Off. of the High Comm'r for Hum.

against high-profile civil unrests.³ One more decade later, Turkey is an autocratic country under the one-man rule of Erdoğan, who has eroded the few remnants of rule of law and democracy since the failed coup attempt on July 15, 2016.⁴ Yet, the country has not been sanctioned by any of the human rights and rule of law transnational legal orders (TLO) it is a part of.⁵

From one perspective, this is nothing new. Turkey has never been a democracy, even after its transition from single-party rule to polyarchy in 1950 and despite its decades-long engagement with European human rights and rule of law transnational legal orders. The military's interventions, from staging coup d'états to forcing elected governments to step down or carry out ultimatums have all taken place after Turkey has joined the Council of Europe (CoE) and ratified the European Convention on Human Rights (ECHR). As far as the EU is concerned, with the exception of the first coup d'état, all of these interventions took place after the signing of the 1963 Association Agreement. Throughout, European institutions repeatedly upheld their security interests over human rights by failing to sanction Turkey.⁶

At the same time, there seems to be something truly puzzling in the current situation. The worst instances of state violence in its history have occurred after Turkey recognized the ECtHR's individual petition mechanism in 1987 and compulsory jurisdiction in 1990. By the mid-1990s, when violations in the Kurdish region had reached the level of atrocities, the ECtHR had long evolved into the powerful regional court it is.⁷ One decade later, it was widely accepted as the world's "most effective court"⁸ operating under the world's "most effective human rights

Rights (OHCHR), *Report on the Human Rights Situation in South-East Turkey, July 2015 to December 2016* (Feb. 2017); Comm'r for Hum. Rights of the Council of Eur., *Memorandum on the Human Rights Implications of Anti-Terrorism Operations in South-Eastern Turkey*, CommDH(2016)39 (Dec. 2, 2016); Venice Commission, *Turkey: Opinion on the Legal Framework Governing Curfews*, CDL-AD(2016)010, ¶ 86 (June 13, 2016) [hereinafter *Opinion on Legal Framework*].

3. Özge Zihnioglu, *The Legacy of the Gezi Protests in Turkey*, in *AFTER PROTEST: PATHWAYS BEYOND MASS MOBILIZATION* (Richard Youngs ed., 2019).

4. Venice Commission, *Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017*, CDL-AD(2017)005 (Mar. 13, 2017) [hereinafter *Opinion on Amendments*]; Venice Commission, *Turkey: Emergency Decree Laws no. 667-676 adopted Following the Failed Coup of 15 July 2016*, CDL-AD(2016)037, ¶ 186 (Dec. 12, 2016) [hereinafter *Opinion on Emergency Decree Laws*]; Venice Commission, *Turkey: Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability)*, CDL-AD(2016)027 (Oct. 14, 2016) [hereinafter *Opinion on Suspension*]; *Turkey: Crackdown on Kurdish Opposition: MPs Jailed, Elected Mayors Removed Ahead of Referendum*, HUMAN RIGHTS WATCH (Mar. 20, 2017), <https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition>.

5. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer eds., 2015).

6. JON C. PEVEHOUSE, *DEMOCRACY FROM ABOVE: REGIONAL ORGANISATIONS AND DEMOCRATIZATION* (2005).

7. Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 *LAW & SOC. INQUIRY* 137 (2007).

8. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 *EUR. J. INT'L L.* 125, 126 (2008).

regime.”⁹ Yet, despite hundreds of ECtHR judgments which effectively demonstrated a state policy of violence against Kurdish civilians, Turkey did not change course. Under Erdoğan, the country evolved into a full blown autocratic regime despite its EU accession status, ordinarily reserved for adherents to the rule of law. In light of all of this, European institutions’ failure to sanction Turkey is perplexing. As Turkey’s systemic rule of law violations intensified, the ECtHR has become increasingly inaccessible for their victims. Contrary to Tom Ginsburg’s assessment of the CoE as a regional organizations where liberal member states stand up for “the defense of democracy,”¹⁰ none of them brought an inter-state case against Turkey nor sought its suspension from membership for its serious human rights violations and rule of law backsliding. Similarly, the EU and its liberal members continue to let Turkey reap the political, financial and reputational benefits of its accession country status. Even more, they have taken steps to deepen relations with Turkey in some areas, most notably through the 2015 refugee agreement brokered in the leadership of former German Chancellor Angela Merkel.¹¹

Is the Turkish case a singular story of democratic transition gone wrong or does it speak to broader issues concerning the ways in which human rights and rule of law TLOs interact with authoritarian regimes? Claiming the latter, this article puts forth theoretical insights on the rule of law in authoritarian contexts based on an empirical analysis of Turkey’s relationship with European institutions. Going beyond conventional analyses which characterize interactions between international institutions and nation states as one-way relationships where norms flow (or not) from the top-down, it looks into what Gregory Shaffer and Wayne Sandholtz name as the “enmeshment of national and international trends.”¹² Doing so, however, it does not solely ask whether and how human rights norms are applied in authoritarian contexts, but also how international organizations tasked with upholding the rule of law not only permit illiberal states to violate those norms but also themselves undermine such norms. While this article also analyzes the EU and its institutions in this regard, it principally focuses on the ECtHR for several reasons. First, Turkey is not (yet?) an EU member state and therefore the toolbox of the latter is limited to suspending or ending the accession negotiations and cutting down or freezing pre-accession funds. While these are important tools that need to be made use of, quasi-judicial (e.g., infringement proceedings by the European Commission) and judicial (e.g., European Court of Justice judgments in response to such proceedings or preliminary referrals from national courts) EU sanctioning

9. Alec Stone Sweet & Helen Keller, *Introduction: The Reception of the ECHR in National Legal Orders*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 3, 3 (Helen Keller & Alec Stone Sweet eds., 2008).

10. TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 288 (2021).

11. Josef Janning, *Germany’s Gambit: Turkey and the Refugee Crisis*, EUR. COUNCIL ON FOR. REL. (Jan. 28, 2016), https://ecfr.eu/article/commentary_germanys_gambit_turkey_and_the_refugee_crisis5080/.

12. GREGORY SHAFFER & WAYNE SANDHOLTZ, THE RULE OF LAW UNDER CHALLENGE: THE ENMESHMENT OF NATIONAL AND INTERNATIONAL TRENDS, (on file).

mechanisms are not available against Turkey. In contrast, as a member of the CoE, Turkey is under legal obligation to uphold the rule of law, democracy and human rights in its policies and abide by the ECtHR's violation judgments. Second, contrary to the EU, which has received a fair amount of criticism for its lack of or inadequate action vis-à-vis democratic backsliding in Hungary and Poland, the CoE system has not been sufficiently held accountable for its failure in Russia, Turkey, Azerbaijan and beyond. To the extent that mistakes have been pointed out, they have been attributed to member states, such as Russia's premature accession to the CoE, and to the Committee of Ministers, for its reluctance to push for systemic rule of law reforms for the implementation of ECtHR judgments. The ECtHR has been, by and large, insulated from criticism; its ineffectiveness has been mainly attributed to compliance failure on the part of recalcitrant states. In reality, as the Turkish case illustrates, the Strasbourg Court has never done its best in making full use of its adjudicatory tools and resources to expose systemic rule of law and human rights violations in authoritarian regimes.

I. CONCEPTUALIZING THE RULE OF LAW

As Martin Krygier has so aptly put it, the rule of law “has become an unavoidable cliché of international organizations of every kind.”¹³ Virtually all international and regional institutions engaged in political, economic, legal and security cooperation require actual and prospective member states to adhere to the rule of law without specifying what that actually means.¹⁴ Scholarship has not provided much clarity either.¹⁵ Despite formidable efforts, the rule of law remains an “essentially contested”¹⁶ and “elusive”¹⁷ concept. For some, it refers to a mode of governance where rules abide by certain procedural criteria such as generality, foreseeability, applicability, certainty and non-discrimination.¹⁸ Accordingly, the rule of law should not be conflated with democracy, human rights and justice, which are separate concepts of their own standing and may or may not co-exist with the rule of law. For Brian Tamanaha, insistence on inserting democracy and human rights as elements of the rule of law excludes much of the legally pluralistic world governed in “communitarian-oriented” ways where people enjoy basic rights to security,

13. Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. SOC. SCI. 199, 200 (2016).

14. For an overview, see Anne Peters, *International Organisations as Catalysts of the Rule of Law: From Neoliberalism to Postcolonialism*, 8 U.C. IRVINE J. INT'L, TRANSNAT'L & COMPAR. L. (forthcoming May 2023).

15. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); Shaffer & Sandholtz, *supra* note 12.

16. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002).

17. Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD. 232, 232 (2012).

18. RON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979). For a functionalist version which defines the rule of law as a system where “government officials and citizens are bound by and abide by the law,” see Tamanaha, *supra* note 17, at 233.

prosperity, property and formal equality.¹⁹ In contrast to this thin or formal version, proponents of a thick or substantive formulation argue that there can be no rule of law without individual rights, democracy and justice.²⁰ What distinguishes the substantive the rule of law from the formal rule by law is that it is designed by democratically accountable officials and institutions with the goal of advancing and upholding fundamental rights and individual justice. In other words, the rule of law cannot exist in the absence of a liberal democratic order.

Another way in which legal theorists and philosophers approach conceptualizing the rule of law is, instead of listing its institutional elements “as though they were ingredients in a recipe,”²¹ to ask what it is good for and what it seeks to achieve. In Tamanaha’s functionalist approach, the rule of law exists when law provides security and trust, social order, individual liberty and economic development; restrains government officials; gives prominence to legal professionals including judges; and, most controversially, reflect and maintain power structures in society.²² For Terry Nardin, the rule of law is first and foremost “a moral idea” which brings moral limits on the exercise of power²³—in contrast to rule by law where powerholders “make and enforce legal norms to regulate and control the population.”²⁴ Similarly, in Krygier’s end-oriented approach, while “never the only thing we want,”²⁵ what is distinctive about the rule of law is that it aims at the “institutionalized tempering”²⁶ of power. In light of the power’s potential to be abused, our utmost worry should be arbitrary power and our ultimate goal its non-arbitrary exercise. According to Krygier, power is arbitrary when it is uncontrolled (rules don’t apply to power holders), unpredictable (rules are not foreseeable for those they bound), unrespectful (those affected by power are denied fora to be heard) and ungrounded (no justifiable reason is given for the way power is exercised).²⁷ Where a reason is provided, the way it is pursued must be proportionate to that goal. A goal-oriented approach cautions against the authoritarian capture of the rule of law rhetoric where law functions “as an instrument of power” rather than “a constraint on the exercise of power.”²⁸

But, what is the rule of law’s relationship to democracy and human rights? As distinct as these concepts are, can they exist in isolation or are they *sine qua non* elements of each other? If the goal is to ensure the non-arbitrary exercise of power, can that be achieved without democratic accountability and representation? How

19. Tamanaha, *supra* note 17, at 235; *see also* TAMANAHA, *supra* note 15.

20. RONALD DWORKIN, A MATTER OF PRINCIPLE (1986).

21. Krygier, *supra* note 13, at 212.

22. Brian Z. Tamanaha, *Functions of the Rule of Law*, in THE CAMBRIDGE COMPANION TO THE RULE OF LAW 221 (Jens Meierhenrich & Martin Loughlin eds., 2021).

23. Terry Nardin, *Theorising the International Rule of Law*, 34 REV. INT’L STUD. 385, 385 (2008).

24. Shaffer & Sandholtz, *supra* note 12.

25. Krygier, *supra* note 13, at 205.

26. *Id.* at 199.

27. Martin Krygier, *Tempering Power: How to Think, and Not to Think, About the Rule of Law* (unpublished manuscript) (paper presented at symposium titled Rule of Law in Transnational Context, UCI Law, Sep. 16-17, 2022).

28. Nardin, *supra* note 23, at 385.

can power be tamed in the absence of the free exercise of civil and political rights? Going beyond the thin versus thick accounts of the rule of law, Gregory Shaffer and Wayne Sandholtz rightfully point out that when those governed by the law have no input in its substance, “adherence to rules is less a matter of choice and more a reflection of power relations.”²⁹ Thus, democratic participation in lawmaking processes is a *sine qua non* of the rule of law, even by its thin conceptualization. Similarly, the non-arbitrary exercise of power can only be possible in contexts where rulers adhere to fundamental human rights norms, such as the right to due process. So, the thin-thick distinction is indeed not conceptually sound nor practically attainable.³⁰

Socio-legal research into distinct political and social contexts has demonstrated that the rule of law and rule by law do not represent a binary, but rather, as Jens Meierhenrich has put it, “a continuum of legality”; there are variations of both ends of the spectrum and countries may fall in different points along the continuum in different times.³¹ We know, as confirmed by Meierhenrich’s discovery of Fraenkel’s work on the Nazi legal regime, that the rule of law (a normative state) and rule by law (a prerogative state) may even co-exist in “hybrid authoritarian regimes,”³² a truth verified in contexts ranging from the military dictatorship in Chile to the single-party rule in China.³³ Whereas the dual states in Nazi Germany and apartheid South Africa operated along racial lines, extending protection for the property and contractual rights of the dominant Aryan and white citizens and denying the entirety of citizenship rights to Jews and blacks respectively, much of empirical scholarship concerns hybrid cases where the rule of law bit applies to the economic sphere and is driven by attracting foreign investment whereas the political sphere is ruled by law to suppress the opposition.³⁴ In reality, authoritarian regimes often go beyond that and blend rule by law with lawlessness by simultaneously operating inside and outside the law. China under Xi Jinping both turns to law “as a tool of governance” in the economic sphere,³⁵ and to lawlessness in order to

29. Shaffer & Sandholtz, *supra* note 12.

30. Krygier, *supra* note 13; Shaffer & Sandholtz, *supra* note 12.

31. Jens Meierhenrich, *Is the Authoritarian Rule of Law an Oxymoron?* (unpublished manuscript) (paper presented at symposium titled Rule of Law in Transnational Context, UCI Law, Sep. 16-17, 2022); *see also* Shaffer & Sandholtz, *supra* note 12; Michael McCann & Filiz Kahraman, *On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes. . . The Case of the United States*, 17 ANN. REV. L. SOC. SCI. 483 (2021).

32. JENS MEIERHENRICH, *THE REMNANTS OF THE RECHTSTAAT: AN ETHNOGRAPHY OF NAZI LAW* (2018).

33. JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE, AND LEGITIMACY IN SINGAPORE* (2012); TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007); LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (2007); JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA, 1652-2000* (2008); Kanishka Jayasuriya, *The Exception Becomes the Norm: Law and Regimes of Exception in East Asia*, 2 ASIAN-PAC. L. POL. J. 108 (2001).

34. RAJAH, *supra* note 33; Jayasuriya, *supra* note 33.

35. GINSBURG, *supra* note 10, at 257.

engage in what has been argued to constitute genocide³⁶ or crimes against humanity³⁷ against the Uyghur minority. Neither is the dual state limited to anti-democratic contexts. As Michael McCann and Filiz Kahraman show, the binary of liberal democracies of the global north and authoritarian regimes of the global south as regime types respectively representing the rule of law and rule by law does not match reality. Legal hybridity is much more common and the (racialized) dual state also exists in countries where certain parts of the population have systematically been denied their core civil liberties, albeit in varying degrees over time.³⁸

Where we stand, much remains unresolved. One concerns the use of violence. Much of socio-legal research on rule by law is limited to legal repression rather than the use of outright force. While human rights scholars have produced ample empirical research on state violence, rule of law scholarship has not sufficiently conceptualized the use of brute force as a form of governance. What to do with instances where the state goes beyond legal repression in its rule by law and turns to violence towards certain (racialized) segments of the population in utter lawlessness? Examples are plenty—dictatorships in the Southern Cone of Latin America, Russia in Northern Caucasus, Turkey in the Kurdish region, China in Xinjiang. . . This goes far beyond the arbitrary exercise of power, which McCann and Kahraman label as authoritarianism, and speaks to a mode of governance which is illiberal³⁹ or antiliberal⁴⁰ in the sense that it denies core, basic civil liberties to specific groups within the populace. Thus, if we are to agree that the rule of law stands on one end of the spectrum, the far end seems to be lawlessness, not rule by law, and the dual state or “authoritarian legalism”⁴¹ stands somewhere in between. As in Meierhenrich’s reformulation of Fraenkel, the dual state’s prerogative half need not only refer to the sovereign’s violation of its own laws but also extends to institutionalized lawlessness and violence.⁴²

Another outstanding question concerns the object of our inquiry. Scholarship is predominantly focused on the nation state and to the extent that it turns its lens on international institutions, the analysis is often limited to their domestic impact, or lack thereof. The relationship is defined in unidimensional terms where norms flow (or not) from the supranational to the domestic level. Certainly, this dualist perspective has faced formidable challenge in recent scholarship. In their study of the TLOs, Halliday and Shaffer adopt an empirically based theoretical approach

36. *The Uyghur Genocide: An Examination of China’s Breaches of the 1948 Genocide Convention*, NEWLINES INST. FOR STRATEGY & POL’Y (Mar. 8, 2021), <https://newlinesinstitute.org/uyghurs/the-uyghur-genocide-an-examination-of-chinas-breaches-of-the-1948-genocide-convention/>.

37. *“Like We Were Enemies in a War”: China’s Mass Internment, Torture and Persecution of Muslims in Xinjiang*, AMNESTY INT’L (June 10, 2021), <https://www.amnesty.org/en/documents/asa17/4137/2021/en/>.

38. McCann & Kahraman, *supra* note 31.

39. *Id.*

40. Martin Krygier, Comments at UCI Law Symposium: Rule of Law in Transnational Context (Sept. 16-17, 2022).

41. MEIERHENRICH, *supra* note 32, at 245.

42. *Id.* at 237–38.

which integrates top-down and bottom-up analyses to understand the complex and variable ways in which legal norms and practices are “developed, conveyed, and settled” transnationally through a “dynamic tension” between local, national, international and transnational levels.⁴³ Similarly, Shaffer and Sandholtz argue that the interaction between national and international laws and practices is recursive, in that the erosion in the former implicates the latter, and cyclical, in that it alternates between positive and negative cycles, and variable, in that it changes within and across regions.⁴⁴ In his recent book, Tom Ginsburg provides a global, empirical overview of the rising authoritarian threat to the international legal order, documenting the ways in which illiberal norms and practices are competing with their liberal counterparts—an international rule by law, so to speak.⁴⁵ Kim Scheppele has diligently documented how “autocratic legalists” not only defy the EU’s founding norms and rules but also seek to undermine its capability to respond to the illiberal challenge.⁴⁶ She makes a powerful case of the European Commission’s failure to uphold the rule of law in the face of democratic backsliding in Poland and Hungary.⁴⁷

Yet, we lack comparable empirical work on the performance of other international institutions facing authoritarian backlash to their rules and norms. Nowhere is the gap between scholarly assessments and empirical reality as wide as in the practice of the ECtHR—arguably the most central institution for analyses on international law and authoritarian legalism. A growing body of scholarship places the ECtHR court on the receiving end of authoritarian backlash without sufficiently inquiring into its own role in facilitating and accommodating the rule of law crisis in Europe.⁴⁸ While the European Commission and to some extent the European Court of Justice received considerable critical attention by scholars of rule of law backsliding within the EU,⁴⁹ the ECtHR enjoys scholarly praise as the bastion of

43. HALLIDAY & SHAFFER, *supra* note 5, at 1.

44. Shaffer & Sandholtz, *supra* note 12.

45. GINSBURG, *supra* note 10.

46. Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIV. CHI. L. REV. 545, 548 (2018).

47. Kim Lane Scheppele, *The Treaties Without a Guardian: The European Commission and the Rule of Law* (unpublished manuscript).

48. Basak Cali, *Coping with Crisis: Whither the Variable Geometry in the Jurisprudence of the European Court of Human Rights*, 35 WIS. INT’L L. J. 237 (2017); Øyvind Stiansen & Erik Voeten, *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights*, 64 INT’L STUD. Q. 770 (2020); Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?*, 9 J. INT’L DISP. SETTLEMENT 199 (2018); Laurence R. Helfer & Erik Voeten, *Walking Back Rights in Europe?*, 31 EUR. J. INT’L L. 797 (2020).

49. R. Daniel Kelemen & Tommaso Pavone, *Where Have all the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union* 3 (Feb. 24, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918; R. Daniel Kelemen & Kim Lane Scheppele, *How to Stop Funding Autocracy in the EU*, VERFASSUNGSBLOG (Sept. 10, 2018), <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>; Laurent Pech, Patryk Wachowiec, & Dariusz Mazur, *Poland’s Rule of Law Breakdown: A Five-Year Assessment of the EU’s (In)Action*, 13 HAGUE J. RULE L. 1 (2021).

liberal democratic order in Europe.⁵⁰

What lies beneath this skewed depiction of the ECtHR is a methodological bias. With the exception of a few,⁵¹ scholars base their empirical analyses and conclusions solely on judgments—where the ECtHR addresses the merits of the case.⁵² Yet, such rulings constitute a tiny fraction of the Court’s jurisprudence. An astounding eighty-four percent of the cases reaching Strasbourg are rejected as inadmissible or struck out of the list and never reported. Six percent are struck out on grounds of friendly settlements and one percent on grounds of unilateral declarations. Thus, in only nine percent of the cases does the ECtHR reach a conclusion as to whether there has been a violation.⁵³ While lacking the public visibility of withdrawal threats⁵⁴ or declarations of non/selective compliance by authoritarian regimes,⁵⁵ it is this giant bottom of the iceberg where most of the “enmeshment” of ECtHR norms, national rules, and practices occur. What this publicly invisible interaction reveals is not a “trustee court” holding states accountable for their human rights violations, as Alec Stone Sweet and Clare Ryan claim the ECtHR to stand for,⁵⁶ but an international institution enabling the consolidation of authoritarian legalism.

To address the above-mentioned gaps in rule of law scholarship, this Article zooms in on the ECtHR and its interaction with Turkey to inquire how international

50. See e.g., Scheppele, *supra* note 47; Cali, *supra* note 48. But see Mikael Rask Madsen, *The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court*, 2 EUR. CONVENTION HUM. RTS. L. REV. 180 (2021) (showing that the United Kingdom-led efforts to undermine the ECtHR during reform conferences of 2010 has prompted the court to issue routine inadmissibility decisions in favor of authoritarian regimes without assessing the actual effectiveness of their legal systems). Yet, the ECtHR’s exercise of restraint at the pre-merit stage is not new; it has since the turn of the century exponentially resorted to friendly settlements and unilateral declarations as a “case management tool” in its oversight of authoritarian regimes. HELEN KELLER, MAGDALENA FOROWICZ & LORENZ ENGI, FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE 10 (2010). Moreover, in the case of Turkey, as I demonstrate below, the Court has been issuing inadmissibility decisions concerning large groups of cases since the mid-2000s.

51. Keller, Forowicz & Engi, *supra* note 50; Veronika Fikfak, *Against Settlement Before the European Court of Human Rights*, 20 INT’L J. CONST. L. 942 (2022).

52. Stiansen & Voeten, *supra* note 48; Helfer & Voeten, *supra* note 48.

53. These statistics are based on the year 2021. European Court of Human Rights, *Analysis of Statistics 2021* (2022), at 11, https://www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf.

54. United Kingdom governments have made repeated threats to withdraw from the Convention system. For the latest example, see Toby Mann, *UK Migrant Flight to Rwanda Grounded as European Court Steps In*, ABC NEWS (June 15, 2022), <https://www.abc.net.au/news/2022-06-15/uk-migrant-flight-to-rwanda-grounded-as-european-court-steps-in/101153166>.

55. In July 2015, Russia’s highest court announced it would not implement ECtHR rulings violating the Constitution—a competence retrospectively conferred on it by the Duma. Marina Aksenova & Iryna Marchuk, *Reinventing or Rediscovering International Law? The Russian Constitutional Court’s Uneasy Dialogue with the European Court of Human Rights*, 16 INT’L J. CONST. L. 1322 (2018); Anton Burkov, *The Use of European Human Rights Law in Russian Courts*, in RUSSIA AND THE EUROPEAN COURT OF HUMAN RIGHTS: THE STRASBOURG EFFECT 59, 66–7 (Lauri Mälksoo & Wolfgang Benedek eds., 2017).

56. ALEC STONE SWEET & CLARE RYAN, *A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2018).

institutions, specifically human rights courts, do and should react to authoritarian challenge to the rule of law. Doing so, conceptually, it analyzes the Court's case law concerning both the Turkish government's resort to the law to consolidate its power (rule by law) and utter disregard of legal rules, including its own, in repressing civil society and engaging in state violence (lawlessness). Methodologically it goes beyond judgments, which constitute a mere nine percent of the Court's jurisprudence, and takes a close look at inadmissibility decisions and strike-out rulings in cases concerning legal repression and gross violations.

II. TURKEY AND EUROPEAN INSTITUTIONS: A BRIEF HISTORY

Turkey's 1950 transition from single-party rule to polyarchy has never translated into real democracy. This is due to not only frequent military interventions but also the lack of basic elements of substantive democracy in Turkey's politico-legal regime—first and foremost the protection of minorities and the guarantee of fundamental rights. Factors such as the institutional legacy of the single party rule, an authoritarian political culture which equates democracy with majoritarianism and transforms opposition groups to autocrats once in power, and the submissive nature of society prevented the emergence of democracy.⁵⁷ Turkey has a long tradition of a strong state immune to the *sine qua non* internal checks of a liberal democratic order: an ideologically neutral judiciary, an independent media,⁵⁸ a legislative with effective oversight powers over the executive, and a free and strong civil society.

In light of these limited socio-political dynamics, any progress towards the rule of law has principally resulted from external pressure. The main source of such pressure has been European intergovernmental institutions. After World War II, in a Europe divided by the Cold War, Turkey saw its integration with the West to be in its security interest. It joined intergovernmental institutions as a founding member (UN and the Organisation for Economic Co-Operation and Development) or soon after their establishment (CoE and NATO). To complement these political and military alliances with an economic one, it applied for membership to the European Economic Community (EEC) in 1959.

There has been a fundamental paradox in what proved to be an uneasy relationship. Turkey joined the European institutions at an early stage of their development. To the surprise of their founders, the EU and the CoE, particularly their respective courts the European Court of Justice and the ECtHR, evolved into

57. İlkey Sunar & Sabri Sayarı, *Democracy in Turkey: Problems and Prospects*, in TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE 165 (Guillermo O'Donnell, Philippe C. Schmitter, & Laurence Whitehead eds., 1986).

58. Dilek Kurban & Esra Elmas, *Turkish Media Policy in National Context*, in UNDERSTANDING MEDIA POLICIES: A EUROPEAN PERSPECTIVE 214 (Evangelia Psychogiopoulou ed., 2012); Dilek Kurban & Ceren Sözeri, *Caught in the Wheels of Power: The Political, Legal and Economic Constraints on Independent Media and Freedom of the Press in Turkey*, TESEV (Aug. 13, 2012), <https://www.tesev.org.tr/en/research/caught-in-the-wheels-of-power-the-political-legal-and-economic-constraints-on-independent-media-and-freedom/>.

powerful institutions with strong human rights mandates.⁵⁹ And Turkey was *there* from the outset—a rather ill-suited partner (EU) or member (CoE) which was too costly to leave out and, for the EU, to fully integrate. During the Cold War, the disconnect between the authoritarian Turkey and democratic Europe was tolerated due to mutual security interests. This enabled Turkey to keep its engagement with the ECtHR at a minimum, by not recognizing the right of individual petition and the Court's compulsory jurisdiction as long as it could. With the end of the Cold War, everything has changed. The European re-unification project entailed the intertwined eastward enlargements of the CoE and the EU. Accession to the former, including the ECHR, became a prerequisite for that to the latter. The rapidly changing political climate in Europe caught Turkey unprepared at a time when the war with the Kurdish insurgency had just started. At the same time, Turkey's geostrategic and economic interests still lay in further integration with the EU, rendering it a reluctant recipient of ECtHR oversight.

A. Turkey's Engagement with European Rule of Law Regimes

Turkey's engagement with transnational human rights was the product of an instrumentalist foreign policy.⁶⁰ Although it was among the fifty nations which signed the UN Charter in 1945, Turkey signed and ratified the UN's 1966 twin conventions as late as 2000 and 2003 and did so under EU pressure. In contrast, it signed the ECHR in 1950 and ratified it in 1954. The decision was partially related to the ECHR system's weakness at its inception.⁶¹ It was also, and more so, Turkey's aspirations to join the transnational economic legal order that led to its early integration with the European human rights regime. After all, the CoE had emerged from the post-World War II efforts to build a federal Europe. The ECHR was envisioned to be an initial step towards that end and was expected to be followed by other treaties to deepen European political and economic integration.

The low costs and potential high gains associated with engagement offset for Turkey, at least initially, the risks involved in subjugating its policies to international oversight. At the same time, the risk was there. Therefore, Turkey for a long time kept its engagement at a minimum. In ratifying the ECHR in 1954, it entered a reservation to the right to education. It did not ratify the ECHR's additional protocols or did so with significant delay.⁶² Most importantly, it did not recognize

59. Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (discussing the ECJ's transformation); Mikael Rask Madsen, *From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics*, 32 L. & SOC. INQUIRY 137 (2007) (discussing the ECtHR's).

60. Füsün Türkmen, *Turkey's Participation in Global and Regional Human Rights Regimes*, in HUMAN RIGHTS IN TURKEY 249 (Z. F. Kabasakal Arat ed., 2007).

61. ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* (2010).

62. It took Turkey twenty years to sign and ratify the 1983 Protocol no. 6 concerning the abolition of the death penalty, and it is yet to ratify Protocol no. 4 prohibiting the expulsion of nationals and the collective expulsion of aliens, which it signed in 1992. Turkey signed in 1985 the 1984 Protocol

the right of individual petition and the ECtHR's compulsory jurisdiction until as late as it could.⁶³ At the same time, the ECtHR was evolving from a negligible institution into a strong court, and it was becoming increasingly clear that Turkey would not for long be allowed to remain a pseudo-CoE member. Turkey's prospects for EU membership were also becoming ever more linked to the deepening of its institutional links to the ECtHR. The European Parliament had already made this link clear in 1985, setting Turkey's recognition of the ECtHR's individual petition mechanism as a condition for the normalization of relations.⁶⁴

In 1987, the Turkish government took three critical decisions. In January, it recognized the right of individual petition to the ECtHR to enhance its prospects of EU accession. In April, it applied for EC membership. In July, it declared a state of emergency in the Kurdish region. These decisions created a paradoxical situation in which the government gave carte blanche to security forces in their counter-terrorism efforts a few months after subjecting its policies to European oversight. The incompatibility of these policies became evident in 1989 when the EC, based on the European Commission's negative opinion,⁶⁵ rejected Turkey's application on the basis, among others, of its human rights record. Despite this rejection, Turkey recognized the ECtHR's jurisdiction in 1990 in response to mounting international pressure. These tactical decisions had a "boomerang effect" on Turkey, enabling domestic human rights lawyers to win landmark ECtHR judgments, which the EU treated as benchmarks in assessing Turkey's progress towards accession.⁶⁶

B. European Political Oversight of Rule of Law in Turkey

During the Cold War, given the unavailability of ECtHR oversight, European political institutions were the only source of meaningful pressure over Turkey.⁶⁷ The EEC reacted to the 1960 coup by freezing its relations with Turkey. Although

no. 7 expanding the rights protected under the ECHR and Protocols no. 1, 4 and 6, but ratified it as late as 2016, whereas it is yet to ratify Protocol no. 12 on anti-discrimination, which it signed in 2001.

63. According to Rıza Türmen, a former ECtHR judge in respect of Turkey and Turkey's ambassador to the CoE before then, the considerable time lag was due to the fear of potentially high number of cases to originate from Cyprus and the Kurdish region. Interview, in Istanbul, Turkey (December 3, 2015).

64. Resolution on the Human Rights Situation in Turkey, EUR. PARL. DOC. A2-117/85 (Oct. 23, 1985).

65. Commission of the European Communities, *Commission Opinion on Turkey's Request for Accession to the Community*, SEC (1989) 2290 final (Dec. 20, 1989).

66. MARGARET E. KECK & KATHRYN A. SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

67. NATO, which is not the focus of this research, was arguably the best-positioned international institution to exert pressure on Turkey during the Cold War. However, the organization which "was focused more on maintaining allied unity in the face of the Soviet threat than on democratizing its members" did not "eject or even sanction" Turkey in reaction to any of the military interventions including the 1960 *coup d'état* which resulted in the execution of the prime minister and two ministers. Dan Reiter, *Why NATO Enlargement Does Not Spread Democracy*, 25 INT'L SEC. 41, 56–57 (2001). At the same time, this stance was not limited to Turkey. NATO's response to the 1967 *coup* in Greece was "muted at best." While expressing regrets over the incident, the organisation continued to provide military support to the new regime. PEVEHOUSE, *supra* note 6, at 177.

relations resumed with the Association Agreement of 1963,⁶⁸ continued military intervention into politics and Turkey's occupation of northern Cyprus in 1974 led the EEC to continue to defer the Customs Union envisioned in the Agreement. When the military staged another *coup d'état* in 1980, the EEC suspended its aid to Turkey. Although the military stepped down three years later, the European Parliament still refused to approve a new customs union agreement due to Turkey's gross violations in the Kurdish region and the imprisonment of eight Kurdish parliamentarians on charges of terrorism. Suspending the EU-Turkey Joint Parliamentary Committee,⁶⁹ the European Parliament asked the European Council to suspend the Customs Union negotiations with Turkey. When that failed, using its enhanced powers under the Maastricht Treaty, it refused to give consent to the Customs Union unless Turkey improved its treatment of the Kurds. Turkey made several changes in its constitution and counter-terrorism law, resulting in the release of two Kurdish deputies, and assured that the cases of remaining parliamentarians would be heard by the ECtHR.⁷⁰ Although there were strong doubts about Turkey's commitment to human rights, the Parliament eventually gave in to the "intensive lobbying by the Council and the Commission" and approved the Customs Union in 1995.⁷¹ Thus, ultimately, "countervailing economic and political factors" such as Turkey's geostrategic role and the unity of the NATO alliance prevailed over normative principles.⁷²

While this decision brought about a degree of discursive change and "tactical concessions"⁷³ on the part of Turkish official circles, widespread abuses prevailed, in the Kurdish region and beyond. The EU's rejection of Turkey's candidacy in 1997 was both the consequence and the cause of this phenomenon. When Turkey unilaterally suspended the dialogue as a protest of what it perceived to be discriminatory treatment, the European Commission was tasked with continuing relations at a technical level. In 1998, the Commission released its first progress report on Turkey. Based on the positive assessments in the next report, the European Council declared Turkey as a candidate for membership during its Helsinki summit in December 1999.

Following the 1980 *coup d'état*, the CoE was similarly conflicted between its legal obligation to uphold human rights and political unwillingness to alienate Turkey. While the Parliamentary Assembly of the Council of Europe (PACE)

68. Agreement Establishing an Association Between the European Economic Community and Turkey, 1963 O.J. (L 361) 29.

69. Christopher Piening, *The European Parliament: Influencing the EU's External Relations* (May 30, 1997) (unpublished manuscript) (paper presented at the 5th Biennial ECSA Conference, Seattle).

70. *Id.* at 4.

71. Flavia Zanon, *The European Parliament: An Autonomous Foreign Policy Identity?*, in *THE ROLE OF PARLIAMENTS IN EUROPEAN FOREIGN POLICY: DEBATING ON ACCOUNTABILITY AND LEGITIMACY* 5 (Esther Barbe & Anna Herranz eds., 2005).

72. Gordon Crawford, *Foreign Aid and Political Conditionality: Issues of Effectiveness and Consistency*, 4 *DEMOCRATIZATION* 69, 92 (1997).

73. Ümit Cizre, *The Truth and Fiction About (Turkey's) Human Rights Politics*, 3 *HUM. RTS. REV.* 55, 68–69 (2001).

advocated⁷⁴ Turkey's suspension,⁷⁵ the Committee of Ministers (CoM), the CoE's executive organ made up of government representatives, refrained from implementing this post-ante conditionality due to the junta's assurances for democratic transition.⁷⁶ As a result, the sole sanction that the junta faced was PACE's suspension of the term of office of Turkey's parliamentary delegation, pending "an elected and properly constituted" one.⁷⁷ While PACE also carried out several fact-finding visits to Turkey and adopted resolutions calling for human rights reforms,⁷⁸ the only tangible impact of its engagement was the inter-state complaint filed by several CoE member states⁷⁹ (see below).

The 1990s led Turkey and Europe in different directions. The genocide in Former Yugoslavia led to the "resurgence" of minority rights in Europe.⁸⁰ The Conference on Security and Co-operation in Europe (CSCE) re-emerged as a regional mechanism with a broadened mandate and adopted the Copenhagen Principles requiring states to take affirmative actions to ensure full equality between minorities and the majority.⁸¹ Soon after, the European Council adopted these Principles as the EU's accession criteria, which includes the rule of law, democracy, human rights and minority protection.⁸² By the mid-1990s, the European order presented a completely different picture than that of the 1950s when Turkey had initiated its engagement with the EU. Turkey was on a very different trajectory. The intensification of the war with the Kurdistan Workers' Party (*Partiya Karkerên Kurdistan*-PKK) strengthened the military's influence in politics, emboldening it to commit gross violations in the Kurdish region.

Nonetheless, at the end of the decade, the paths of Turkey and the EU re-converged. Following Turkey's declaration as a candidate for EU membership in 1999, ECtHR rulings against the government gained prominence. The EU's treatment of the execution of ECtHR judgments as an accession criterion triggered

74. Eur. Consult. Ass., *Recommendation 904*, 18th Sess. (1980).

75. Pursuant to Article 8 member states which have seriously violated Article 3 may lose their representation rights and asked to withdraw from membership. In case of non-compliance with that request, the CoM may decide to suspend their membership.

76. Interview with Rıza Türmen, in Istanbul, Turkey (December 3, 2015).

77. Eur. Consult. Ass., *Order 398*, 6th Sess. (1981).

78. Eur. Consult. Ass., *Resolution 765*, 26th Sess. (1982); Eur. Consult. Ass., *Resolution 786*, 19th Sess. (1982); Eur. Consult. Ass., *Resolution 794*, 27th Sess. (1983); Eur. Consult. Ass., *Resolution 803*, 16th Sess. (1983); Eur. Consult. Ass., *Resolution 822*, 7th Sess. (1984); Eur. Consult. Ass., *Resolution 840*, 7th Sess. (1985); Eur. Consult. Ass., *Resolution 860*, 7th Sess. (1986).

79. Eur. Consult. Ass., *Resolution 765*, 26th Sess., ¶ 17 (1982) (drawing the attention of member states to Article 24 of the Convention regarding inter-state complaints).

80. James Hughes & Gwendolyn Sasse, *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*, 1 J. ETHNO. MIN. ISSUES EUR. 1, 4 (2003).

81. Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (June 29, 1990).

82. Presidency Conclusions, Copenhagen European Council, at 13 (June 23, 1993), <https://www.consilium.europa.eu/media/21225/72921.pdf>. These criteria were subsequently codified into the EU's primary law through the Treaty of Lisbon which came into force on 1 December 2009. Article 49 of the revised EU Treaty sets respect for values laid out in Article 2, including the rule of law, democracy and human rights, as a formal condition for membership.

a reform process, accelerated by the AKP after it came to power in late 2002.

III. TURKEY UNDER ERDOĞAN: OSCILLATING BETWEEN RULE BY LAW AND LAWLESSNESS

An in-depth analysis of authoritarianism embedded in Turkey's politico-judicial regime, which I have done elsewhere,⁸³ is beyond the scope of this article. Turkey's three-quarters century experience with polyarchy has been overshadowed by military interventions, each of which left its mark on the country's politico-judicial regime. At the same time, the problem has never been limited to military tutelage. Rather than aiming for the rule of law, civilian governments took advantage of constitutions and laws left behind by military rulers to suppress their political opponents and civil dissent. Exceptional legal regimes, special criminal tribunals, and anti-terror laws have been constant features of Turkey's legal regime during military *and* civilian rule. Emergency rule, in particular, has been the norm rather than the exception. Turkey was formally governed by a state of exception for forty-one of the seventy-nine years between the establishment of the Republic and the end of emergency rule in the Kurdish region in 2002.⁸⁴ Non-violent political opposition has always been criminalized as terrorism or separatism, particularly when expressed by the Kurds and leftists.

At the same time, the current period cannot be explained by domestic historical continuities alone. The particularity of the AKP rule stems from the quick succession, and at times overlap, of unprecedented EU-induced rule of law reforms with rule by law and, more recently, plain lawlessness. The timing, duration, and intensity of these phases were closely related to the fluctuations of Turkey's relations with European institutions. What renders the AKP rule all the more striking is Erdoğan's ability to pull this off at a time when Turkey was enjoying the deepest integration with human rights and rule of law TLOs in its history. Thus, Erdoğan's ability to consolidate his autocratic rule cannot be characterized as the product of Turkey's authoritarian political culture alone; he was enabled by interest-driven European institutions.

A. Continuity: Rule by Law with Strategic Rule of Law Reforms

Any assessment of the rule of/by law under Erdoğan needs to start from the elections that brought him to power in 2002. After a period of political instability characterized by successive short-lived coalition governments, Erdoğan's ability to form a single party government was shocking for observers—inside and outside. His claim for democratic legitimacy rested not only on the strong mandate he argued to have received from the electorate, but also on his triumph over military tutelage.

83. For that, see KURBAN, *supra* note 2.

84. I reached this number by updating the figures provided by Gemalmaz for the period until 29 October 1991. See Mehmet Semih Gemalmaz, *Historical Roots of Martial Law Within the Turkish Legal System: Perspectives and Texts*, 13 TURKISH Y.B. HUM. RTS. 73, 74 (1991). On the prevalence of states of exception in Turkey's political life, see also Bülent Tanör, *States of Exception in Turkey*, in STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 309 (International Commission of Jurists ed., 1983).

Certainly, the ability of political Islam to come to and remain in power against the military was an important step towards democratization.⁸⁵ Yet, the AKP's democratic legitimacy claim rested on a fallacy. Of the eighteen parties which took part in the elections, only two could enter the Parliament with a total of fifty-five percent of the votes. The AKP was one of them; it acquired sixty-five percent of the parliamentary seats with a mere thirty-four percent of the votes. What made this possible was the ten percent electoral threshold the military regime had introduced several months before stepping down from power with the goal of keeping Kurdish political parties out of the Parliament after transition to civilian politics.⁸⁶ To illustrate, in Diyarbakir, the largest city of the Kurdish region, the pro-Kurdish Democratic People's Party (*Demokratik Halk Partisi-DEHAP*) received fifty-six percent of the votes in the 2002 parliamentary elections, whereas the AKP a mere sixteen percent. Had the threshold been five percent as in Germany, DEHAP would have gained eight of the ten seats allocated to Diyarbakir in the Parliament—and AKP would have acquired none. Instead, six seats were allocated to the AKP and four to independent candidates. In other words, what enabled and has since sustained Erdoğan's majoritarian rule was the very military tutelage he claimed to overcome. Thus, even pursuant to a thin notion of these terms, AKP's rise to power has never been grounded in the rule of law or democracy.

Once in power, Erdoğan faced a conundrum. He needed the EU's support to consolidate his rule against the military and yet the accession status he desperately sought hinged on rule of law reforms, including lowering the electoral threshold which made possible his ascent to power. Initially, in response to the carrot extended by the EU,⁸⁷ he continued the constitutional reforms initiated by the preceding coalition government⁸⁸ and adopted significant reforms with unprecedented speed. Among others, new press, association and penal laws were adopted, several UN conventions were ratified and new ones were signed, the constitutional supremacy of international human rights treaties over domestic law was established and minorities were granted limited language rights. At the same time, many of the changes were problematic from the start, such as the criminalization of the denigration of "Turkishness" with up to three years of imprisonment.⁸⁹ Also noteworthy is what was not changed. The ten percent

85. The Turkish military engaged in overt and covert attempts to bring down the AKP ranging from issuing a notorious 'e-coup' in 2007 to attempting to stage a coup d'état in July 2016.

86. MİLLETVEKİLİ SEÇİM KANUNU [LAW ON THE ELECTION OF MEMBERS OF THE PARLIAMENT] no. 2839 (1983), *translated in* OFFICIAL GAZETTE, no. 18076, art. 33 (June 13, 1983) [hereinafter 'Law no. 2839'].

87. The European Council had declared that it would open accession negotiations "without delay" if it would decide in its December 2004 summit that Turkey fulfills its political conditionality for accession. Presidency Conclusions, Copenhagen European Council (Jan. 29, 2003), <https://www.consilium.europa.eu/media/20906/73842.pdf>.

88. In 2001, the Parliament adopted thirty-four constitutional amendments, many in the area of human rights, introducing the principle of proportionality and replacing categorical limitations on fundamental rights with right-specific ones. In 2002, the state of emergency was brought to a complete end and the death penalty in peacetime was abolished.

89. TÜRK CEZA KANUNU [TURKISK PENAL CODE] art. 301 (2005).

threshold, which the European Commission had said made it difficult for minorities to be represented in the Parliament, was kept in place.⁹⁰ Nonetheless, in relative terms, the reforms were so remarkable that, in the words of an EU official, they were “a breakthrough, a revolution in the overall mentality in Turkey.”⁹¹ Caught between the need to acknowledge this progress and the resistance in some member states to Turkey’s accession,⁹² the European Commission produced a middle solution, inventing “a brand new language in the report methodology.”⁹³ Embracing this language, the European Council concluded in December 2004 that “Turkey *sufficiently* fulfils the Copenhagen political criteria” and decided to commence the accession process the following year.⁹⁴ Never before had the EU made such an exception to its political accession conditionality—neither it has ever since.

Almost immediately after they started, accession negotiations halted due to two mutually reinforcing developments: the EU’s growing lack of commitment to Turkey’s membership and Turkey’s obstinacy concerning the Cyprus question. The institutional overload brought by the EU’s 2004 enlargement had triggered a heated internal debate over further enlargement versus deeper integration, causing the EU to consider Turkey’s accession in a new light and introduce “absorption capacity” as a formal criterion in 2005.⁹⁵ Domestic debates in several member states⁹⁶ linked together discussions over the EU’s future and Turkey’s accession, leading to the European Council’s announcement that negotiations would be “an open-ended process.”⁹⁷ Meanwhile, Cyprus’ EU accession and acquisition of veto power over further enlargement turned the Cyprus conflict into a stumbling block for Turkey’s membership. Despite its original commitment, Turkey refused to open its ports and airports to the vessels and flights of the Republic of Cyprus, as required by the Association Agreement and its Additional Protocol of 1970. In response, the EU froze negotiations of eight chapters in 2006. The next year, following the election of Nicolas Sarkozy, France decided to block five chapters on “the shaky grounds that they were too evidently related to full membership.”⁹⁸ While such a unilateral

90. 2004 Regular Report on Turkey’s Progress Towards Accession, at 50, COM (2004) 656 final (Oct. 6, 2004), https://www.ab.gov.tr/siteimages/birimler/kpb/tr_rep_20061998/2004_tr_rap.pdf.

91. Interview with anonymous EU official, in Brussels, Belgium (Nov. 11, 2013).

92. The resistance was particularly strong in France, causing President Jacques Chirac to approve the opening of accession negotiations with Turkey on the condition of them being open-ended.

93. Interview with anonymous EU official, in Brussels, Belgium (Nov. 11, 2013).

94. Presidency Conclusions, Copenhagen European Council (Feb. 1, 2005), https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf (emphasis added).

95. Senem Aydın-Düzgüt & E. Fuat Keyman, *EU-Turkey Relations and the Stagnation of Turkish Democracy*, ISTITUTO AFFARI INTERNAZIONALI 3 (Dec. 12, 2012), <https://www.iai.it/en/pubblicazioni/eu-turkey-relations-and-stagnation-turkish-democracy>.

96. In 2005, the EU’s Constitutional Treaty was rejected in popular referenda held in France and the Netherlands, and Angela Merkel, who strongly opposed Turkey’s accession, came to power in Germany.

97. European Council, Enlargement: Accession Negotiations with Turkey: General EU Position, Annex II: Negotiating Framework, 12823/1/05 REV 1 (Oct. 12, 2005).

98. Nathalie Tocci, *The Baffling Short-Sightedness in the EU-Turkey-Cyprus Triangle*, ISTITUTO AFFARI INTERNAZIONALI 2 (Oct. 19, 2010), <https://www.iai.it/en/pubblicazioni/baffling-short-sightedness-eu-turkey-cyprus-triangle>.

decision was unprecedented, it set a precedent for Cyprus, which followed suit two years later and announced that it would block the opening of six chapters. Only four years after the accession process had started, negotiations over more than half of the EU acquis chapters were blocked. As a result, merely fourteen of the thirty-five chapters have been opened, only one of which has been provisionally closed. Between 2010 and 2013, no new chapter was opened. According to Joost Lagendijk, a former Member of the European Parliament, this made “it easy for the Turkish Government to say ‘whatever we will do will not satisfy the EU’ and to cherry pick from the long list of reforms that the EU has demanded those that fitted their political agenda.”⁹⁹

The diminishing EU pressure expanded the AKP’s room for manoeuvre in domestic politics, enabling it to accelerate rule by law to attract the nationalist votes it needed for a second term. Before the 2007 general elections, the government rolled back many of the EU-induced reforms it had adopted in earlier years. It introduced an intent-based definition of terrorism and a long list of terrorist offences,¹⁰⁰ and proposed severe sanctions on media organizations and prison sentences for journalists.¹⁰¹ It granted the police expansive powers to search people and seize property without a court order. It also granted the police a right to use excessive force in public demonstrations¹⁰² and lethal force against suspects failing to obey an order to surrender. These rules prompted the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions to conclude that it “open[s] the way for unlawful killing.”¹⁰³

As Turkey’s prospects for EU membership diminished, so did the EU’s leverage, enabling the AKP to pursue its own ‘reform’ agenda, which sought two goals. The first was to diminish ECtHR judgments against Turkey by creating new domestic remedies which, if found effective by the Court, would lead to inadmissibility decisions in pending cases and lower the number of new applications. The most consequential measure was the introduction of the individual right to constitutional complaint.¹⁰⁴ The right was granted with an eye on Strasbourg, evident in the legislative intent: the measure would “result in a

99. Interview with Joost Lagendijk, in Istanbul, Turkey (Oct. 5, 2013).

100. TERÖRLE MÜCADELE KANUNUNDA DEĞİŞİKLİK YAPILMASINA DAİR KANUN [LAW ON THE AMENDMENT OF THE ANTI-TERROR LAW] no. 5532 (2006), *translated in* OFFICIAL GAZETTE, no. 26232 (July 18, 2006), arts. 1(1), 2, 3, 5 and 6 [hereinafter Law no. 5532].

101. *Id.* at arts. 5, 6.

102. On the law enforcement’s expansive use of these powers, *see* Kurban et al., *supra* note 2.

103. Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, at 5, U.N. Doc. A/HRC/23/47/Add.2 (Mar. 18, 2013) <https://www.refworld.org/pdfid/53981a550.pdf>.

104. Introduced as part of constitutional amendments approved by a national referendum in 2010. TÜRKİYE CUMHURİYETİ ANAYASASININ BAZI MADDELERİNDE DEĞİŞİKLİK YAPILMASI HAKKINDA KANUN, [LAW ON THE AMENDMENT OF CERTAIN PROVISIONS OF THE CONSTITUTION OF THE REPUBLIC OF TURKEY] no. 5982 (2010), *translated in* OFFICIAL GAZETTE, no. 27580 (May 13, 2010). The constitutional complaint mechanism entered into force in 2012.

considerable decrease in the number of files against Turkey.”¹⁰⁵ It was also evident in the scope of the complaint, which was restricted to rights and liberties guaranteed under the ECHR and its additional protocols, without extending to other human rights treaties that Turkey is a party to.¹⁰⁶ It was further evident in the intense backdoor diplomacy carried out by CoE’s Secretary General Thorbjørn Jagland, who would later refer to this mechanism as a “system [that Turkey and CoE] have built together” and “a source of immense pride.”¹⁰⁷

The second, and predominant, goal was to consolidate Erdoğan’s power by incrementally expanding his control over the military and the judiciary in response to their coordinated efforts to preclude the election of the AKP’s candidate, Abdullah Gül, as president¹⁰⁸ and government’s efforts to legalize headscarf at universities.¹⁰⁹ The crisis was exacerbated by a dissolution case filed against the AKP.¹¹⁰ Erdoğan’s immediate response was to ‘go to the people.’ He submitted to a national referendum a constitutional reform package seeking to increase his influence over the composition of the Constitutional Court (*Anayasa Mahkemesi-AYM*) and the High Council of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu-HSYK*).¹¹¹ The amendments stirred a heated debate; critics accused the government of court-packing while strategically including liberal reforms to win political allies¹¹² and excluding the Kurds’ demands for a lower electoral threshold,¹¹³ whereas proponents depicted the changes as the end of judicial

105. Venice Commission, *Opinion on the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey*, CDL-AD(2011)040, 3 (Oct. 18, 2011), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)040-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)040-e).

106. *Id.* at 3–4.

107. Esra Demir-Gürsel, *The Former Secretary-General of the Council of Europe Confronting Russia’s Annexation of the Crimea and Turkey’s State of Emergency*, 2 EUR. CONVENTION HUM. RTS L. REV. 303, 329–30 (2021).

108. Asli Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11 INT’L J. CONST. L. 666 (2013).

109. The Constitutional Court (*Anayasa Mahkemesi-AYM*) annulled a constitutional amendment abolishing the ban on headscarf at universities. AYM, E. 2008/16, K. 2008/116 (June 5, 2008).

110. While the AKP escaped dissolution by one vote, ten out of eleven judges of the Constitutional Court decided that it was “a focal point for anti-secular activities,” resulting in a judgment depriving the party of half of the Treasury funds it was entitled to receive. AYM, E. 2008/1, K. 2008/2, (July 30, 2008).

111. The amendments increased the number of Constitutional Court judges from eleven to seventeen and the number of HSYK members from seven to twenty-two with the stated goal of making these institutions more representative of the legal profession. Ozan Erözden, Ümit Kardaş, Ergun Özbudun, & Serap Yazıcı, *A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform on Turkey*, TESEV (May 6, 2010), <https://www.tesev.org.tr/en/research/a-judicial-conundrum-opinions-and-recommendations-on-constitutional-reform-in-turkey/>.

112. Among human rights reforms included in the package were the establishment of an Ombudsman’s Office, the introduction of the right to privacy and information, and the right to constitutional complaint.

113. Haldun Güllalp, *The Battle for Turkey’s Constitution*, THE GUARDIAN, (Sept. 4, 2010, 7:00 AM) <https://www.theguardian.com/commentisfree/2010/sep/04/turkey-constitution-undemocratic> #comments; Andrew Arato, *The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition*, 17 CONSTELLATIONS 345 (2010); Andrew Arato, *Ten Theses on Constitutional Change in Turkey*, PUB. SEMINAR (Oct. 4, 2013), www.publicseminar.org/2013/10/10-theses-on-constitutional-change-in-turkey/#.WMKdGPnyuM8.

tutelage over democracy.¹¹⁴

These amendments would have tremendous implications for Turkey's political future, which became evident to most observers only retrospectively. The first indication was the HSYK elections held in 2010, resulting in the victory of candidates endorsed by the AKP.¹¹⁵ At the time, dissenting voices within the judiciary contended that the government supported candidates affiliated with the Fethullah Gülen movement,¹¹⁶ enabling it to dominate the HCJP. The most outspoken critic was a judge who revealed behind-the-scenes negotiations between the AKP and the Gülenists in putting together a joint list.¹¹⁷ In 2011, the AKP and the Gülenists had a public fallout culminating in a 2013 corruption case implicating the family members of Erdoğan and his ministers.¹¹⁸ Accusing the Gülenists of seeking to form a 'parallel state' to seize power, President Erdoğan declared war against his former ally, the battleground of which would be the judiciary. Starting from 2014, the AKP government "has asserted an unprecedented degree of control over the judiciary" by re-establishing its control over the HSYK and purging alleged Gülenist judges and prosecutors.¹¹⁹ In December 2015, it classified the Gülen movement as a terrorist organization. The dramatic events of summer 2016, when Erdoğan survived a coup attempt, would show that the war was far from over.

B. Rupture: From Rule by Law to Lawlessness

Since his election to presidency in 2014, Erdoğan had incrementally usurped the constitutional powers belonging to the Parliament and the Prime Minister. As he had openly declared in August 2015, Turkey's system of government had

114. Bâli, *supra* note 108; Ergun Özbudun, *Turkey's Search for a New Constitution*, 14 INSIGHT TURKEY 39 (2012). For a middle position urging a 'wait and see' approach, see Hootan Shambayati & Güliz Sütçü, *The Turkish Constitutional Court and the Justice and Development Party (2002-09)*, 48 MID. EAST. STUD. 107, 119 (2012).

115. Venice Commission, *Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey*, CDL-AD(2010)042, ¶ 37 (Dec. 20, 2010) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)042-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)042-e). Erdoğan publicly acknowledged the government's meddling into the HSYK elections. *Turkey: Judicial System in Peril – A Briefing Paper*, INT'L COMM'N OF JURISTS, 3 (June 2, 2016), <https://www.icj.org/turkey-icj-raises-concerns-at-threats-to-the-independence-of-judges-prosecutors-and-lawyers/>.

116. An Islamic preacher, Fethullah Gülen is the leader of a transnational religious movement, the non-transparent structure, operation and goals of which have been a subject of speculation and controversy. Members of the movement gained increasing power and influence in the areas of education, judiciary, business, police and state bureaucracy since the early 1980s and particularly after 2002 thanks to its political alliance with the AKP.

117. Ahmet İnel, Ali Bayramoğlu, İbrahim Okur, Koray Özdil, Leyla Köksal Tarhan, Mithat Sancar, Uğur Yiğit, Yücel Sayman, ed., *The High Council of Judges and Prosecutors in Turkey: Roundtable Discussion on its New Structure and Operations*, (Ferda Balancar & Belgin Çınar eds., Fethi Keleş trans, TESEV, Jan. 10, 2013), <https://www.tesev.org.tr/en/research/the-high-council-of-judges-and-prosecutors-in-turkeyroundtable-discussion-on-its-new-structure-and-operations>.

118. Günter Seufert, *Is the Fethullah Gülen Movement Overstretching Itself? A Turkish Religious Community as a National and International Player*, STIFTUNG WISSENSCHAFT UND POLITIK (SWP) (Jan. 13, 2014), <https://www.swp-berlin.org/en/publication/turkey-the-fethullah-guelen-movement/>.

119. INT'L COMM'N OF JURISTS, *supra* note 115, at 10.

effectively changed and what needed to be done now was “to give a legal framework to this de-facto state with a new constitution.”¹²⁰ The principal hurdle was the presence in the Parliament of the pro-Kurdish Peoples’ Democratic Party (*Halkların Demokratik Partisi*-HDP). The Kurdish political movement had for decades circumvented the electoral system by entering in pre-election coalitions with mainstream social democratic parties or running with independent candidates, for whom the threshold does not apply. In June 2015, the Kurds dared, for the first time, to participate in the elections under the rubric of their own party. Running on an election platform to bar Erdoğan from introducing a presidential regime, the HDP won 13.1 percent of the votes—corresponding to eighty seats in the Parliament. This was the first time in Turkey’s history that a Kurdish party entered the Turkish Parliament. HDP’s victory also brought a hung parliament, depriving the AKP not only of the two-thirds majority it needed to change the constitution or at least the three-fifths majority to call a referendum to establish a presidential system, but even the simple majority to continue its single-party government.¹²¹

Having faced the first electoral defeat of his career, Erdoğan took a decisive turn to rule by lawlessness by disregarding the election results. He blocked the coalition negotiations between parties represented at the Parliament and then used the hung Parliament’s “inability” to produce a government as a pretext to hold repeat elections in November. He resumed war with the PKK to attract the nationalist votes he needed to regain parliamentary majority.¹²² In July, the military went into densely populated towns with combat-ready troops, tanks and heavy artillery allegedly to remove the barricades and trenches the PKK had built in residential areas. The army razed entire towns, without any regard to the presence of civilians. From August onwards, local authorities declared round-the-clock, open-ended curfews in over thirty towns and neighborhoods, some of which lasted several years and affected 1.6 million people.¹²³ Civilians were trapped in curfew zones, without access to food, water, power and health services during long winter months. No one, including children, the sick, the wounded, the elderly, and the disabled, was allowed to leave without authorization, while parliamentarians, humanitarian aid workers, and human rights observers were denied access. Journalists who tried to enter were threatened, arrested, and, in at least one case, shot. In two reported cases, dead bodies of two presumed terrorists were dragged

120. Agence France Presse, *Defiant Erdogan Vows to Press for New Turkey Constitution*, THE GUARDIAN (Aug. 14, 2015), <https://guardian.ng/news/defiant-erdogan-vows-to-press-for-new-turkey-constitution>.

121. For a commentary on the HDP’s “spectacular” win and its implications for the AKP, see Alberto Nardelli, *Turkey Election Results: What You Need to Know*, THE GUARDIAN (June 8, 2015), <https://www.theguardian.com/news/datablog/2015/jun/08/turkey-election-results-what-you-need-to-know>.

122. Ümit Cizre, *Introduction: The Politics of Redressing Grievances – The AK Party and its Leader*, in THE TURKISH AK PARTY AND ITS LEADER: CRITICISM, OPPOSITION AND DISSENT 1 (Ümit Cizre ed., 2016).

123. EUR. PARL. ASS., *The Functioning of Democratic Institutions in Turkey*, 24th Sess., para. 10 (June 22, 2016). As of September 2019, the curfew remains in force in six neighborhoods of Diyarbakir’s Sur district.

behind an armored vehicle and, in the case involving a woman, she was stripped naked before being dragged behind the vehicle.¹²⁴ The United Nations Human Rights Office of the High Commissioner reported that witnesses “painted an apocalyptic picture of the wholesale destruction of neighbourhoods”.¹²⁵ By December 2016, some 2,000 people, including 1,200 civilians, were killed. Many died for lack of access to emergency health services. Around 350,000 were displaced, numerous disappeared and tortured. Satellite imagery showed entire neighborhoods razed to the ground in the immediate aftermath of security operations.¹²⁶

As noted by the CoE Commissioner for Human Rights¹²⁷ and the Venice Commission,¹²⁸ the operation was unequivocally against the Turkish law, which authorizes executive curfews only under a state of emergency, which the government had not declared. Lawlessness was also evident in the absence of any proportionality between the curfews and the counter-terrorism operations accompanying them and the national security goals they allegedly pursued. As the Commissioner for Human Rights pointed out, there was a “big contrast” between the number of affected (1.6 million) and displaced (355,000) civilians and the official number of terrorists killed, injured, or captured (873, 196, and 718, respectively) and the “tremendous” destruction of neighborhoods through the use of lethal force in residential areas.¹²⁹

Erdoğan’s strategy of running on a law and order platform worked; the AKP won back some of the nationalist votes it had lost in June 2015. Though still short of the two-thirds majority to call for a referendum on its own, the snap elections in November brought the AKP its fourth single-party rule. While the HDP still passed the threshold, its vote was down to 10.7 percent. Yet, it was still the third largest party at the Parliament. Erdogan now needed the support of the HDP’s nemesis, the Nationalist Movement Party (*Milliyetçi Hareket Partisi*-MHP). MHP, for a “Turkish-style” presidential system. In return for helping Erdoğan hold a referendum, the MHP demanded support to oust the HDP deputies. On April 2, 2016, the AKP presented to the Parliament a draft law introducing a one-time exception to the constitutional immunity regime by allowing a blanket vote on all dossiers awaiting legislative authorization as of May 20, when the law would be put to vote.¹³⁰ The draft bypassed the constitutionally required regular procedure whereby the Plenary reviews the dossiers before the vote and grants affected

124. U.N. Off. Of the High Comm’r for Hum. Rights (OHCHR), *supra* note 2; Comm’r for Hum. Rights of the Council of Eur., *supra* note 2.

125. U.N. Off. Of the High Comm’r for Hum. Rights (OHCHR), *supra* note 2, at 7–8.

126. U.N. Off. Of the High Comm’r for Hum. Rights (OHCHR), *supra* note 2, at 10.

127. Comm’r for Hum. Rights of the Council of Eur., *supra* note 2.

128. Venice Commission, *Opinion on Legal Framework*, *supra* note 2.

129. Comm’r for Hum. Rights of the Council of Eur., *supra* note 2, ¶¶ 28–29.

130. TÜRKİYE CUMHURİYETİ ANAYASASINDA DEĞİŞİKLİK YAPILMASINA DAİR KANUN [LAW ON THE AMENDMENT OF THE CONSTITUTION OF THE REPUBLIC OF TURKEY], no. 6718 (2016), translated in OFFICIAL GAZETTE, no. 29736 (June 8, 2016).

deputies the right to defend themselves.¹³¹ Any dossier to reach the Parliament after May 20 would be subject to the regular immunity regime.

While the amendments seemingly affected all similarly situated parliamentarians, the real target were the HDP deputies, as evident from Erdoğan's concerted campaign immediately after the June 2015 elections. On July 28, he had called on Parliament to strip HDP deputies of their immunity to make them "pay the price one by one" for supporting terrorism.¹³² On January 2, 2016, he claimed that HDP co-chairs Selahattin Demirtaş and Figen Yüksekdağ engaged in "constitutional crimes" by calling for democratic autonomy and appealed to Parliament to lift their immunities "in the name of counter-terrorism".¹³³ In May, hours before the vote in Parliament, Erdoğan noted that the highest number of dossiers concerned deputies from "the party supported by the separatist terrorist organization" (i.e., the HDP) and expressed his hope for a favorable outcome to enable their immediate prosecution.¹³⁴ Prosecutors hastily prepared new dossiers to ensure the prosecution of the highest number of HDP deputies in the greatest number of cases. Of the 468 new immunity dossiers sent to Parliament between Erdoğan's call on January 2 and the law's entry into force on June 8, 368 were against the HDP deputies, 154 of which were prepared between April 21 and May 20 alone.¹³⁵ The fact that the real target was the HDP deputies is also evident in the law's disproportionate impact. While only twenty-nine of the 317 AKP deputies lost their immunities, fifty-five out of the fifty-nine HDP parliamentarians lost their immunities. The nature of charges against the de-immunized parliamentarians were also strikingly different. While virtually all AKP deputies were charged with misusing their immunities to make personal material gains or to escape criminal liability for common crimes, virtually all HDP deputies were charged for their constitutionally protected statements and activities in and outside Parliament.¹³⁶

Turkey continued its transition into a rule by lawlessness when the AYM denied constitutional review. The AYM unanimously rejected a request for annulment made by HDP deputies,¹³⁷ who argued that the law introducing a one-time exception to the constitutional immunity regime was a parliamentary decision

131. Venice Commission, *Opinion on Suspension*, *supra* note 4.

132. *Turkey's Erdoğan Demands Lifting of HDP Deputies' Immunity*, HÜRRIYET DAILY NEWS (July 29, 2015), <https://www.hurriyetdailynews.com/turkeys-erdogan-demands-lifting-of-hdp-deputies-immunity-86038>.

133. *President Erdoğan Makes an 'Immunity Call' Regarding the HDP Deputies* [Cumhurbaşkanı Erdoğan'dan HDP'liler için 'Dokunulmazlık' Çağrısı], AJANS HABER (Jan. 2, 2016), <https://bedirhaber.com/erdogandan-hdplilere-dokunulmazlik-mesaji-bedelini-odemeliler/>.

134. *According to Erdoğan, the HDP Deputies Will be Prosecuted Anyway: There is No Way Out* [Erdoğan'a göre HDP'liler Zaten Yargılanacak: Bu İşten Kaçış Yok], DIKEN (May 20, 2016), <https://www.diken.com.tr/cumhurbaskani-dokunulmazliklari-kaldirdi-bile-bu-isten-kacis-yok/>.

135. PEOPLES' DEMOCRATIC PARTY (HDP), *THE LIFTING OF LEGISLATIVE IMMUNITIES AT THE PARLIAMENT OF TURKEY: AN ASSESSMENT REPORT* 5 (2016).

136. *Id.* at 7–14.

137. AYM, E. 2016/54, K. 2016/117 (June 3, 2016) (Turk.). Lacking the minimum threshold for requesting abstract review, a total of seventy HDP and CHP deputies collectively filed a constitutional complaint.

subject to AYM's oversight rather than a constitutional amendment whose substance the AYM is not authorized to review. HDP further argued that the law violated the non-violability and non-liability of parliamentarians by enabling their prosecution for acts and statements protected under the Constitution; deprived the deputies of their constitutional right to defend themselves; and stripped the immunities on a collective instead of the constitutionally prescribed individual basis. The law, HDP argued, also violated the principle of equality by not affecting all deputies equally. Deputies who had committed "the crimes" before the amendment and had not yet faced investigation would not be affected by the amendment. The same would be true for deputies who would commit the acts in the future. In other words, the only deputies affected by the amendment would be those who had already been charged and convicted. The AYM responded that while it is authorized to review parliamentary decisions concerning immunities, what was at issue here was a "special process" that had all the formal elements of a constitutional amendment and gave rise to "special legal consequences".¹³⁸ Thus, by inventing a new rule, the AYM refrained from fulfilling its constitutional duties, legitimizing what the Venice Commission considered to be a "misuse of the constitutional amendment procedure."¹³⁹

Then came the coup attempt of July 15, 2016. Almost immediately following the attempt, Erdoğan declared a cleric named Fethullah Gülen as the culprit behind the coup, leading to the arrest, purge, and blacklisting of anyone remotely linked to his transnational religious movement. On July 16 alone, roughly 3,000 judges and prosecutors, including two AYM judges, were arrested.¹⁴⁰ Taking advantage of the crisis, Erdoğan declared emergency rule. Of the thirty-seven executive decrees adopted under emergency rule, only five were approved by the Parliament, despite the constitutional requirement of prompt *ex post facto* legislative approval. Although several of these decrees introduced permanent measures, citing *ultra vires*, the AYM declined to annul them.¹⁴¹ This clearly contradicted a 1991 ruling where the AYM had granted itself the power to review whether emergency decrees are temporally, geographically, and substantively limited to the respective boundaries of emergency rule. The decrees bestowed the government with unlimited powers for collective dismissal of civil servants, closure of civil society organizations, and arrest of individuals without a shred of due process. By December 2018, 57,000 individuals were held in pre-trial detention, amounting to 20 percent of the total

138. *Id.* ¶ 11.

139. Venice Commission, *Opinion on Suspension*, *supra* note 4, ¶ 3. The Venice Commission also found the temporary, ad hoc and ad homines nature of the constitutional amendment to contradict the principles of proportionality and equality. *Id.* ¶¶ 68-76.

140. *Alparslan Altan v. Turkey*, App. No. 12778/17, ¶ 14 (Apr. 16, 2019), <https://hudoc.echr.coe.int/fre?i=001-192804>. A further 1,393 were dismissed in the following months. *Turan and Others v. Turkey*, App. Nos. 75805/16 and 426 others, ¶ 18 (Nov. 23, 2021), <https://hudoc.echr.coe.int/fre?i=001-213369>.

141. AYM, E. 2016/166, K. 2016/159 (Oct. 12, 2016) (Turk.).

prison population in Turkey.¹⁴² By the end of 2021, over 125,000 civil servants were dismissed and their pensions, properties, life savings, and passports were confiscated; and 2,761 associations, foundations, trade unions, media organizations, companies, hospitals, schools and dormitories were closed.¹⁴³ Many of these measures remain in force, even though the emergency rule was lifted two years after its proclamation.¹⁴⁴

Erdogan did not hide that he regarded the coup attempt as “a gift from God.”¹⁴⁵ He made use of the failed putsch to complete his unfinished business with Kurdish politicians. First, without a trace of evidence, he accused the HDP cadres of having collaborated with the Gülenists. On November 4, 2016, thirteen de-immunized HDP deputies, including the co-chairs Demirtaş and Yüksekdağ, were placed in pre-trial detention. The list [of detainees] has since grown, enabled by the AYM’s reluctance to exercise review.¹⁴⁶ Erdogan’s next target was the HDP mayors. An executive decree adopted in September [of 2016] authorized the government to dismiss, arrest, or ban from public office mayors and municipal officials accused of terrorism and to replace them with bureaucrats (“trustees”).¹⁴⁷ Thereby, the AKP grasped by executive force the governance of a significant part of the Kurdish region it had been unable to win in local elections, where an electoral threshold is not applicable. This policy, too, remains in effect more than six years after the failed coup. By April 2022, the number of municipalities the HDP had won in the 2019 local elections had gone down from sixty-five to six. Just like HDP deputies, the number of HDP mayors and deputy mayors held in pre-trial detention, recorded as ninety-three in September 2019,¹⁴⁸ remains in constant flux, with their frequent arrest, release, re-arrest, detention, and conviction. In all likelihood, the HDP will be closed before the general elections in November 2023. At the time of this writing,

142. *Turkey: Amnesty International’s Brief on the Human Rights Situation*, Amnesty International, 2 (Feb. 1, 2019), Index No: EUR 44/9747/2019, <https://www.amnesty.org/en/documents/eur44/9747/2019/en/>.

143. TURKEY, STATE OF EMERGENCY INQUIRY COMMISSION, ACTIVITIES REPORT 2021, at 27, https://ohalkomisyonu.tccb.gov.tr/docs/OHAL_FaaliyetRaporu_2021.pdf [hereinafter *Activities Report 2021*].

144. In July 2018, the AKP-dominated Turkish Parliament passed a law transposing into ordinary law many of the extraordinary powers granted to the executive through emergency decrees. *Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılmasına Dair Kanun* [Law on the Amendment of Certain Laws and Legislative Decrees], No. 7145, July 25 2018, *translated in* OFFICIAL GAZETTE, July 31, 2018.

145. Marc Champion, *Coup was ‘Gift from God’ for Erdogan Planning a New Turkey*, BLOOMBERG (July 17, 2016, 11:00 PM), <https://www.bloomberg.com/news/articles/2016-07-17/coup-was-a-gift-from-god-says-erdogan-who-plans-a-new-turkey#sj4y7vzkg>.

146. After waiting for one year, the AYM rejected the applications of HDP deputies. AYM, *Gülser Yıldırım*, App. No. 2016/40170 (Nov. 16, 2017); AYM, *Selahattin Demirtaş*, App. No. 2016/25189 (Dec. 21, 2017), <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/25189?Dil=en>.

147. OLAĞANÜSTÜ HAL KAPSAMINDA BAZI DÜZENLEMELER YAPILMASI HAKKINDA KANUN HÜKMÜNDE KARARNAME [DECREE WITH THE FORCE OF LAW CONCERNING CERTAIN REGULATIONS IN THE CONTEXT OF STATE OF EMERGENCY], No. 674, *translated in* OFFICIAL GAZETTE, No. 29818 (Sep. 1, 2016), arts. 38 and 39 (Turk.).

148. In October, as I was finalizing the update of this chapter, three more HDP mayors were stripped of their offices and four more were placed in pre-trial detention.

a closure case against the party is pending before the AYM.

Once he had Demirtaş and his colleagues removed from the Parliament, Erdoğan turned to his other unfinished project: consolidating his one-man rule by changing the nature of the regime. Lacking the qualified parliamentary majority to call for a referendum on his own, he turned to MHP to change the constitution. On December 10, 2016, only several weeks after the arrest of HDP deputies, the two parties jointly submitted constitutional amendments to Parliament, introducing a “Turkish-style” presidency. The changes were adopted by Parliament on January 21, 2017, signed by Erdoğan on February 10, and approved in a referendum on April 16. Throughout this period, the country was governed by emergency rule, demonstrations were restricted, and the imprisoned HDP deputies were not allowed to participate in the parliamentary process. The changes gave Erdoğan exclusive powers to appoint and dismiss ministers and high state officials, dissolve Parliament on any ground, issue decrees exempt from constitutional review, and declare a state of emergency—changes interpreted by the Venice Commission as a decisive move “towards an authoritarian and personal regime.”¹⁴⁹

However, Turkey had long been authoritarian. The new regime served to consolidate and deepen authoritarianism and expedite the ongoing transition towards an autocratic regime. The personal nature of the new regime became abundantly clear in March 2021. Without obtaining the constitutionally required parliamentary approval, Erdoğan singlehandedly withdrew Turkey from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, known as the Istanbul Convention.¹⁵⁰ Thus, one man deprived the female population of an entire country from the human rights vested on them through a unanimous vote of the Turkish Parliament in 2011.¹⁵¹ While Erdoğan’s disregard of separation of powers was not new, as in his earlier-mentioned instance of not seeking legislative approval for thirty-two of the thirty-seven emergency decrees adopted after the failed coup, his extreme exercise of arbitrary power in withdrawing from an international treaty without giving a reason was striking. In this sense, this was an arbitrary exercise of power par excellence, as defined by Shaffer, Sandholtz, and Krygier.¹⁵²

IV. EUROPEAN INSTITUTIONS’ DUAL ROLE IN AUTHORITARIAN RULE

European institutions are conventionally understood to uphold the rule of law norms in their dealings with governments¹⁵³ and to empower domestic movements

149. Venice Commission, *Opinion on Amendments*, *supra* note 4, ¶ 133.

150. I thank Anne Peters for reminding me of this particular instance of lawlessness.

151. Ayşegül Kula, *An Unconstitutional Setback: Turkey’s Withdrawal from the Istanbul Convention*, VERFASSUNGSBLOG (Mar. 22, 2021), <https://verfassungsblog.de/erdogan-istanbul-convention/>.

152. Shaffer and Sandholtz, *supra* note 12; Krygier, *supra* note 27.

153. For a portrayal of the EU as a promoter of democracy and human rights, see Svea Koch, *A Typology of Political Conditionality beyond Aid: Conceptual Horizons based on Lessons from the European Union*, 75 WORLD DEV. 97 (2015), <https://doi.org/10.1016/j.worlddev.2015.01.006>.

and individuals through norm diffusion,¹⁵⁴ rights provision, and judicial forum granting.¹⁵⁵ While foreign aid conditionality has been questioned,¹⁵⁶ and the EU's accession conditionality has been criticized for the double standards it has created between member and candidate countries,¹⁵⁷ the ECtHR has enjoyed scholarly praise as an effective court, and its inability to induce real change has been attributed to governments' non-compliance.

Certainly, political conditionalities attached to aid, trade, and membership enable domestic human rights groups to make rights claims and press for political reforms which would not have been likely without external pressure. The carrot of EU accession has brought remarkable legal reforms and empowered domestic civil societies. The ECtHR has served an indispensable function in enabling human rights victims in their pursuit of justice and empowering domestic civil societies in their struggle for the rule of law. The positive impact of these two regional institutions on the rule of law across Europe, including in Turkey, has been widely documented in scholarship, including my own. And yet, the case study at hand demonstrates that European institutions have had a dual impact on human rights, democracy, and the rule of law in Turkey—an impact that has increasingly tilted on the negative side. It is the dark side of this dual role on which I focus in the rest of this paper.

A. Political Oversight

During their over-half-a-century engagement with Turkey, European inter-governmental institutions displayed discrepancy between their normative values and the economic and security interests of their member states. For the latter, a nominally democratic and politically stable Turkey was sufficient. Where values promoted by European institutions collided with their individual interests, European states did not hesitate to follow the latter. This was evident, for example, in their responses to the 1980 coup d'état and ensuing atrocities. Except for holding financial aid under European Parliament's pressure, the EU and its members did not terminate their multilateral and bilateral relations with Turkey. Similarly, despite heated internal debates, Council of Europe (CoE) member states did not suspend Turkey's membership. The furthest that European governments went in

154. Sally Engle Merry, *Transnational Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006).

155. Lisa Conant, *Individuals, Courts, and the Development of European Social Rights*, 39 COM. POL. STUD. 76 (2006) (on the empowering impact of the ECJ's standing and admissibility rules for rights claim-making by social movements); Dia Anagnostou, *Law and Rights' Claiming on behalf of Minorities in the Multi-level European System*, in RIGHTS AND COURTS IN PURSUIT OF SOCIAL CHANGE: LEGAL MOBILISATION IN THE MULTI-LEVEL EUROPEAN SYSTEM 1, 9–11 (Dia Anagnostou ed., 2014) (on the ECtHR's incremental expansion of the scope of anti-discrimination protection as a contingent factor opening up opportunities for legal mobilization by minorities).

156. Crawford, *supra* note 72.

157. Bruno de Witte, *Politics versus Law in the EU's Approach to Ethnic Minorities*, in EUROPE UNBOUND: ENLARGING AND RESHAPING THE BOUNDARIES OF THE EUROPEAN UNION 137 (Jan Zielonka, ed., 2002).

sanctioning Turkey was an inter-state complaint at the ECtHR. France, Norway, Denmark, Sweden, and the Netherlands alleged, inter alia, “widespread and systematic torture,” long incommunicado detentions, the dissolution of political parties and the arrest of their leaders, and the dissolution of trade unions and the prosecution of their activists. By the time the complaint was found admissible,¹⁵⁸ the junta had stepped down. Nonetheless, the European Commission for Human Rights (EComHR) pursued the case. It held a hearing with victims of torture and sent a delegation to visit detention centers in Turkey.¹⁵⁹ It came as a surprise, then, when it announced in December of 1985 that it approved a friendly settlement between the applicants and the new Turkish government, which had come to power in December 1983. The Turkish government gave assurances that it would ensure the strict observance of Turkey’s obligations under the ECHR and further the preparations for an amnesty or pardon to political prisoners. The settlement took note of the changes Turkey had made in its laws, the progressive reduction of the territorial scope of martial law, and a declaration by the Prime Minister that he “hope[d . . . to] be able to lift martial law from the remaining provinces within 18 months.”¹⁶⁰ Settling their complaint on the basis of these vague promises, European liberal democracies let Turkey off the hook regarding serious allegations of torture.¹⁶¹

With the exception of PACE,¹⁶² none of the European institutions have called on Turkey to lower the 10 percent electoral threshold. It took the European Commission eighteen years after its first progress report to invite the government to “address” the threshold “as a priority”.¹⁶³ Only from 2018 onwards did it implicitly called on Turkey to lower the threshold in reference to OSCE and Venice recommendations for aligning the domestic legal framework on elections with European standards.¹⁶⁴ By then, the EU had lost its leverage on Turkey and Erdoğan had consolidated his authoritarian rule. Despite the increasing executive

158. *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, Apps Nos. 9940–9944/82 (joined) Eur. Comm’n H.R. Dec. (Admissibility) (1983), <https://hudoc.echr.coe.int/eng?i=001-74161>. [hereinafter *France and Others v. Turkey*]

159. Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?*, 2 NET. QUAR. HUM. RTS. 153, 158 (1994).

160. *France and Others v. Turkey*, Apps Nos. 9940–9944/82 (joined) Eur. Comm’n H.R. Dec & Rep. 9 (1985).

161. For a critical account of the case, see Leo Zwaak, *A Friendly Settlement in the European Inter-State Complaints against Turkey*, 13 SIM NEWSL. 44, 47 (1986). The United States also played a role in this outcome by exerting strong pressure for the settlement of the case in regard of Turkey’s strategic importance in the Cold War. Kamminga, *supra* note 159, at 158.

162. EUR. CONSULT. ASS. DEB. XX Sess. XX (Apr. 23, 2013), *Post-Monitoring Dialogue with Turkey*, Resolution 1925 (2013).

163. Eur. Comm’n, Turkey 2015 Progress Report, SWD(2015) 216, 4 (Nov. 10, 2015). Until then, the Commission limited itself to noting that the threshold is “among the highest among CoE member states”.

164. See Eur. Comm’n, Turkey 2022 Report, SWD(2022) 333 (Oct. 12, 2022); Eur. Comm’n, Turkey 2021 Report, SWD(2021) 290 (Oct. 19, 2021); Eur. Comm’n, Turkey 2020 Report, SWD(2020) 355 (Oct. 6, 2020); Eur. Comm’n, Turkey 2019 Report, SWD(2019) 220 (May 29, 2019); Eur. Comm’n, Turkey 2018 Report, SWD(2018) 153 (Apr. 17, 2018).

capture of the judiciary since the 2010 constitutional referendum, Turkey's transition to an autocratic presidential system, the re-emergence of state violence in the Kurdish region, and the total collapse of the rule of law after the coup attempt, Turkey still reaps the political, military, and financial benefits of its EU accession status and CoE membership. None of the European liberal democracies have brought an inter-state case in Strasbourg to challenge the rule of law breakdown in Turkey. It was only in February 2022 and with respect to only one unimplemented ECtHR judgment¹⁶⁵ that the CoM triggered the infringement mechanism against Turkey. As of October 2022, with the exception of a Grand Chamber judgment reiterating the obvious (that Turkey indeed did not fulfill a December 2019 ECtHR judgment¹⁶⁶ ordering the immediate release of civil society activist Osman Kavala, who had been held in arbitrary and prolonged pre-trial detention since October 2017),¹⁶⁷ no further step has been taken in this case despite Turkey's frequent public defiance of the ruling as well as the infringement proceedings.¹⁶⁸ Moreover, despite a similar December 2020 Grand Chamber judgment ordering the immediate release of a Kurdish former parliamentarian held in arbitrary and prolonged pre-trial detention since November 2016 (see below sub-section titled "on the disenfranchisement of a minority"), the Committee of Ministers has not launched an infringement proceeding for Turkey's blatant violation of this ruling.

As far as the EU–Turkey relations are concerned, one might argue that there is a reverse conditionality at work since the 2015 refugee crisis. To appease Erdoğan, the EU and its members violated established European norms by, *inter alia*, former German Chancellor Angela Merkel's official visit to Turkey two weeks before the general elections in 2015 and the European Commission's unprecedented decision to postpone the release of its unflattering progress report until after these elections.¹⁶⁹ The 2016 deal whereby Turkey would contain the refugees within its borders in exchange for the EU's financial support, waiver of visa requirement for Turkish citizens and re-opening of accession talks also contained an unspoken condition: the EU's silence vis-à-vis state violence in the Kurdish region and crackdown on the Kurdish opposition.

B. Judicial Oversight: The ECtHR

Despite its universal acclaim as the world's most effective human rights

165. *Kavala v. Turkey*, App. No. 28749/18, Judgment, (Dec. 10, 2019), <https://hudoc.echr.coe.int/fre?i=001-199515>.

166. *Id.*

167. Committee of Ministers, Interim Resolution on the Execution of the judgment of the European Court of Human Rights Kavala against Turkey, CM/ResDH(2022)21 (Feb. 2, 2022).

168. Hamdi Firat Buyuk, *Erdogan Dismisses Council of Europe's Call to Release Activist*, BALKANINSIGHT (Feb. 3, 2022), <https://balkaninsight.com/2022/02/03/erdogan-dismisses-council-of-europes-call-to-release-activist/>.

169. Paul Taylor, *Withheld EU Report Raps Turkey on Rights, Media, Justice*, REUTERS (Oct. 28, 2015), <https://www.reuters.com/article/us-turkey-election-eu/withheld-eu-report-raps-turkey-on-rights-media-justice-idUSKCN0SM2CT20151028>.

regime,¹⁷⁰ the ECHR system has never made full use of its tools and resources in its oversight of Turkey. Take the above-mentioned inter-state case. The EComHR was not bound to approve the settlement reached between the parties. It could have urged Turkey to make firm and comprehensive reform commitments, like it had done in the inter-state case filed against Greece.¹⁷¹ Instead, it approved the settlement,¹⁷² giving a “stamp of approval” to Turkey and enabling the continuation of systematic torture.¹⁷³ While martial law was indeed abolished across Turkey in 1987, it was replaced by a state of emergency in the Kurdish region, which remained in force until 2002. There was something even more fundamentally problematic. While the applicants reached an agreement with the new Turkish government, the constitution, laws, and decrees enacted by the military remained intact, certain to give rise to new violations. Thus, the ECHR system extended political recognition and legal legitimacy to an anti-democratic legal regime and set a problematic precedent for the ECtHR’s future review of individual petitions against Turkey.

C. “Excessive” but Suitable for Turkey: Europe’s Highest Electoral Threshold

The ECtHR delivered one of its most important judgments on democracy in a case concerning Turkey’s electoral threshold.¹⁷⁴ The case was brought under Article 3 of Protocol no. 1, which protects the electorate’s free expression of its opinion in the choice of the legislature.¹⁷⁵ The applicants were two Kurdish politicians who had received 45.95 per cent of the votes in the Kurdish province of Şırnak, but could not enter the Parliament because their party, Democratic People’s Party (*Demokratik Halk Partisi-DEHAP*), received 6.2 per cent of the votes in the 2002 elections and could not pass the national threshold. Two of the three parliamentary seats allocated to Şırnak were given to the AKP (though it polled only 14 per cent) and the third to an independent candidate who polled 9.69 per cent.¹⁷⁶ The Grand Chamber was not persuaded in this particular case.¹⁷⁷

What was “the specific political context” and “correctives and other guarantees” the Court was referring to? Member states have a wide margin of

170. Helfer, *supra* note 8; Stone Sweet & Keller, *supra* note 9.

171. Zwaak, *supra* note 161, at 48.

172. Eur. Comm’n H.R. 9, *France and Others v. Turkey*, *supra* note 160.

173. Kamminga, *supra* note 160, at 159.

174. *Yumak and Sadak v. Turkey*, App. No. 10226/03, 439 (July 8, 2008), Grand Chamber Judgment, Eur. Ct. H.R. Jud. & Dec. Cum. Index 1999-2015, 439, (July 8, 2008), <https://hudoc.echr.coe.int/eng?i=001-87363>.

175. Article 3 of Protocol no. 1 guarantees regular elections “under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” On the ECtHR’s limited yet slowly evolving case law, see Hans-Martien ten Napel, *The European Court of Human Rights and Political Rights: The Need for more Guidance*, 5 EUR. CONST. L. REV. 464 (2009).

176. For the democratic deficit nationwide, see *Yumak and Sadak v. Turkey*, App. No. 10226/03, ¶ 82 (July 8, 2008), <https://hudoc.echr.coe.int/eng?i=001-87363>.

177. *Id.* ¶ 147 (“when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants.”)

appreciation owing to the political nature of electoral rights and the lack of a common European standard. With respect to Turkey, the law was the “choice made by the legislature”¹⁷⁸ to avoid excessive political fragmentation and to strengthen political stability, the threshold was a general rule applicable to all parties without distinction, and the Turkish electoral system was based on the “context of a unitary State,”¹⁷⁹ which requires parliamentarians to represent the whole nation and not a particular region. The electoral system had “correctives . . . to counterbalance the threshold’s negative effects,”¹⁸⁰ namely the possibility to run as an independent candidate or to join the list of another party likely to pass the threshold. Although the system “compels political parties to make use of stratagems which do not contribute to the transparency of the electoral process,”¹⁸¹ there were past examples of both of these correctives. The candidates of pro-Kurdish parties had been elected to the Parliament from the lists of another party in 1991 and as independent candidates in 2007.¹⁸²

The Grand Chamber’s assessment, particularly its emphasis on correctives, is astonishing from the perspective of democracy. The Court unquestionably deferred to Turkey’s argument that the elections were held in a unique context of social and political instability which rendered the risk of fragmentation too costly. It overlooked the fact that the threshold was introduced in 1983 and applied to all elections before and after 2002, as the dissenting judges noted. The emphasis on the principle of unity not only suggests that the Court approves an electoral system which renders the representation of regional minority parties impossible, but also ignores how the same principle had led to the dissolution of Kurdish parties which the ECtHR itself had time and again found to be in violation of the Convention.¹⁸³

As the dissenting judges noted, the Grand Chamber’s endorsement of “stratagems” not only encourages candidates into “playing ‘hide and seek’ with the voters” and raises “an obvious problem of political morality,”¹⁸⁴ but also rests on a distorted reading of the context in Turkey. As the applicants noted, the competition between political parties and independent candidates is structurally unfair. First, independent candidates cannot receive votes from constituents abroad,¹⁸⁵ must

178. *Id.* ¶ 124.

179. *Id.*

180. *Id.* ¶ 133.

181. *Id.* ¶ 147.

182. *Id.* ¶ 97–99.

183. *Freedom and Democracy Party (ÖZDEP) v. Turkey*, App. No. 23885/94, Judgment, Eur. Ct. H.R. Jud. & Dec. Cum. Index 1999-2015, 316, (Dec. 8, 1999), <https://hudoc.echr.coe.int/eng?i=001-58372>; *Yazgar and Others v. Turkey*, App. No. 22723–22725/93, 22724/93 and 22725/93, Judgment, Eur. Ct. H.R. Jud. & Dec. Cum. Index 1999-2015, 317, (April 9, 2002), <https://hudoc.echr.coe.int/eng?i=001-60416>; *Dicle for the Democracy Party (DEP) of Turkey v Turkey*, App. No. 25141/94, (Dec. 10, 2002), <https://hudoc.echr.coe.int/eng?i=001-65370>.

184. *Yumak and Sadak v. Turkey*, *supra* note 174 at ¶ 4. (Tulkens, J., Vajic, J., Jaeger, J., & Sikuta, J., dissenting).

185. Sinan Alkin, *Underrepresentative Democracy: Why Turkey Should Abandon Europe’s Highest Electoral Threshold*, 10 WASH. UNI. GLOB. STUD. L. REV. 347, 356 (2011).

individually bear a very high financial cost to stand for elections,¹⁸⁶ are not allowed to make electoral broadcasts, although each party is allocated an airtime on public television and radio,¹⁸⁷ and need more votes than a party to gain the same parliamentary seat. Additionally, the Grand Chamber's legalistic argument does not take into account the specific political context Kurdish parties operate in. While Kurdish candidates had indeed entered the Parliament from the list of a social democratic party, this was hardly a happy marriage. Within months of their election, most of the Kurdish deputies were expelled from upon the nationalistic frenzy caused by their presence in the Parliament. In assuming that Kurdish politicians can easily form alliances with mainstream Turkish parties, the Grand Chamber was oblivious to this history.

Thus, treating the case as an electoral dispute rather than the contestation of a discriminatory law, the Grand Chamber effectively condoned the deprivation of the majority of the electorate in the Kurdish region from representation in Turkey's Parliament. It moreover disregarded the essential and unique role of political parties in democratic societies, which the ECtHR had emphasized time and again since *United Communist Party*.¹⁸⁸ When one considers that the ECtHR would one year later not hesitate from rejecting the terms of an international peace agreement which ended the violent conflict in Former Yugoslavia on the ground that it excluded minorities from the electoral process,¹⁸⁹ its failure to show any sensitivity to the political rights of Turkey's largest minority group is all the more striking.

D. On the Disenfranchisement of a Minority

HDP parliamentarians petitioned the ECtHR in January/February 2017 to contest their arrests and pre-trial detention. Although the cases qualified for priority treatment, it took the Court twenty-one months to issue a ruling. When the ECtHR finally spoke, it did so selectively – only with respect to HDP co-chair Demirtaş, leaving out the remaining eleven deputies for no apparent reason.¹⁹⁰ Demirtaş argued that his imprisonment sought to silence him. The crux of his Article 5 claim concerned the illegality of the detention, enabled by an unconstitutional parliamentary decision. He claimed that the government crackdown on his party intensified after the HDP's electoral gains in 2015 deprived the AKP of its qualified majority at the Parliament. The number of investigations against HDP deputies over a period of eight years almost tripled in the six months following Erdoğan's speech calling on the Parliament to lift their immunities. The prolonged nature of his

186. Independent candidates are required to deposit a sum equivalent to the gross monthly salary of a civil servant of the highest rank. Law No. 2839, *supra* note 86, at Art. 21(2).

187. Alkin, *supra* note 185, at 356.

188. *United Communist Party of Turkey and Others v Turkey*, App. No. 133/1996/752/951, (Jan. 30, 1998), <https://hudoc.echr.coe.int/eng?i=001-58128>.

189. *Sejdić and Finci v. Bosnia and Herzegovina*, App. Nos. 27996/06 and 34836/06, Grand Chamber Judgment, Eur. Ct. H.R. Jud. & Dec. Cum. Index 1999-2015, 29, (Dec. 22, 2009).

190. *Selahattin Demirtaş v. Turkey (no. 2)*, App. No. 14305/17, Judgment, (Nov. 20, 2018), <https://hudoc.echr.coe.int/eng?i=001-187961>.

detention, argued Demirtaş, sought to prevent his participation in the referendum concerning the transition to a presidential system and the presidential elections thereafter.

While noting the temporal link between Erdoğan's speeches and the acceleration of criminal investigations against Demirtaş, the ECtHR was reluctant to conclude that Turkish courts acted as government pawns in arresting political dissidents. Deferring to the AYM and disregarding the Venice Commission, the ECtHR concluded that the detention was lawful and lower courts had shown sufficient evidence to demonstrate a reasonable suspicion that Demirtaş had engaged in a criminal offence. The problem for the Chamber was in the continuation of the detention, which "pursued the predominant ulterior purpose of stifling pluralism and limiting political debate" in violation of Article 18 in conjunction with Article 5(3).¹⁹¹ Thus, bad faith was *not* in Demirtaş' detention, but in its prolonged nature.¹⁹²

The implications for the regime were clear; as long as Turkish courts showed *some* justification for arrests and kept pre-trial detention periods reasonably short, Kurdish deputies were fair game. Indeed, upon instructions from Erdoğan to "finish the job"¹⁹³ and only fourteen days after the ECtHR ruling, a lower court sentenced Demirtaş to four years and eight months of imprisonment relating to a speech he had made five years earlier. By September 2019, twenty-two HDP deputies were convicted to up to sixteen years and eight months of imprisonment.¹⁹⁴ The convictions of parliamentarians served two critical purposes for the regime: the change of their legal status from detainees to convicts to preclude ECtHR orders for their release, and the automatic revocation of their parliamentary seats. Certainly, the Grand Chamber rectified the Chamber's Article 5(1) judgment, finding that neither the initial nor the continued pre-trial detention was based on a reasonable suspicion that Demirtaş had committed a crime. By extension, it found an Article 18 violation in conjunction with not only the third, but also the first clause of Article 5.¹⁹⁵ But it was too late; Demirtaş was no longer a detainee, but a convicted felon.

Despite its significance, not least as the first Article 18 judgment against Turkey, *Selahattin Demirtaş* is symptomatic of the Court's de-contextualized and case-by-case approach. While Demirtaş is an important political symbol in Turkey, jurisprudentially speaking, there was no justifiable reason to exclude the remaining deputies. If the reason was Demirtaş' status as a leader of the opposition, then at

191. *Id.* ¶ 273.

192. The Chamber also found a violation of Article 3 of Protocol no. 1 due to Demirtaş' inability to take part in parliamentary activities, which infringed on his right to be elected and to sit at Parliament as well as the electorate's free expression of opinion. Exceptionally, pursuant to its powers under Article 46, the Court ordered Demirtaş' immediate release.

193. *Erdoğan: AIHM'nin Kararları bizî Bağlamaz*, [Erdoğan: We are not Bound by the ECtHR Rulings] DEUTSCHE WELLE (Nov. 20, 2018), <https://www.dw.com/tr/erdo%C4%9Fan-ai%CC%87hmnin-kararlar%C4%B1-bizi-ba%C4%9Flamaz/a-46374963>.

194. HDP, undated and untitled document (on file with the author).

195. *Selahattin Demirtaş v. Turkey (no. 2)*, App. No. 14305/17, Grand Chamber Judgment, (Dec. 22, 2020), <https://hudoc.echr.coe.int/fre?i=001-207173>.

the very least his co-chair Figen Yüksekdağ should have been included. If it was rather that Demirtaş had run in the presidential elections and the concern was his inability to run on equal terms with the other candidates, the Chamber should not have waited until five months after these elections. All twelve HDP deputies were stripped of their parliamentary immunities, arrested, and placed in pre-trial detention under the same circumstances and at around the same time as Demirtaş. So similar were the cases that the Court itself had joined them in June 2017. And yet, it treated Demirtaş' case in isolation – from those of the remaining deputies and from Turkey's history of suppressing Kurdish electoral representation.

E. Cases Not Heard

As McCann has long reminded, the “constitutive capacity of the law” is not limited to social movements; it also extends to governments.¹⁹⁶ By the early 2000s, it had become much more difficult for Kurdish lawyers to mobilize the ECtHR.¹⁹⁷ While the Kurds had become “repeat players” in Strasbourg,¹⁹⁸ so had their adversary. The Turkish government had understood the reputational, financial and political costs of denial and non-cooperation. The authoritarian outlook had become all the more costly when, in 1999, the EU granted Turkey candidacy for membership, but made accession contingent on its execution of ECtHR rulings. Turkey's democratic transition argument would enable the Court to send, with good conscience, bulk of pending cases back to Turkish courts. The timing was also ripe; post-Cold War enlargement had left the ECtHR palayzed with an unmanageable docket and desperate for the help of member states.

The change in Turkey's ECtHR policy happened incrementally. The initial government strategy was to minimize the number of adverse judgments in admitted cases by extending friendly settlement offers to applicants and, when refused, submitting to the Court unilateral declarations in the hope of winning strike out rulings. In these declarations, the Turkish government partially acknowledged that gross violations occurred, but did not accept responsibility for or promise to conduct investigations into them – flying in the face of established ECtHR jurisprudence. And yet, the strategy worked – at least initially. Invoking Article 37(1)(c) of the ECHR,¹⁹⁹ the Court struck out several right-to-life cases, effectively

196. Michael McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY, 715, 733 (1992).

197. Elsewhere, I have analyzed the motives, dynamics, and effectiveness of Kurdish legal mobilization before the ECtHR since the early 1990s. See KURBAN, LIMITS OF SUPRANAT'L JUST., *supra* note 2; Dilek Kurban, *Mobilizing Supranational Courts Against Authoritarian Regimes*, in RSCH. HANDBOOK ON LAW, MOVEMENTS, AND SOC. CHANGE (Steve Butcher, Corey Shdaimah & Michael Yarbrough eds., forthcoming).

198. Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

199. Article 37(1) of the ECHR authorizes the Court to “at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that (a) the applicant does not intend to pursue his application; or (b) the matter has been resolved; or (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.”

penalizing applicants for refusing to settle their claims with the government.²⁰⁰ While the Grand Chamber interrupted this process in 2003 on the ground that respect for human rights required the examination of cases where the parties have a substantial dispute over the facts and the government fails to acknowledge responsibility or to undertake an investigation,²⁰¹ in 2021, the Court resumed its practice of striking out cases based on Turkey's unilateral declarations.²⁰²

When the AKP came to power in 2002, it pursued a more proactive strategy. If found effective by the Court, new remedies would bring inadmissibility decisions in pending cases, save money in compensation, and bring Turkey down in the list of worst offenders. When the context became all the more ideal with the introduction of the pilot judgment mechanism,²⁰³ the government developed new domestic legal remedies tailored for three groups of thousands of cases pending in Strasbourg: cases concerning property rights in Turkish-occupied northern Cyprus,²⁰⁴ those concerning Kurdish civilians displaced by the military during the armed conflict in the 1990s,²⁰⁵ and cases concerning excessively lengthy proceedings.²⁰⁶

As it familiarized itself with the ECtHR's growing propensity to invoke subsidiarity to alleviate its docket, the AKP government perfected its counter-reform strategy. The goal now was to prevent the ECtHR from admitting new cases, or to at least further prolong the already excessively long path to Strasbourg. The most effective means to achieve this was to create a constitutional complaint mechanism, which would introduce a new layer of domestic remedy that needs to be exhausted by all potential ECtHR applicants, irrespective of the nature of their complaints. In the remainder of this sub-Section, I zoom in on this particular government measure and discuss its consequences for the ECtHR's jurisprudence

200. See, e.g., *Akman v. Turkey*, App. No. 37453/97, Eur. Ct. H.R. Jud. & Dec. Cum. Index 1999-2015, 69 (June 26, 2001), <https://hudoc.echr.coe.int/eng?i=001-59528>; *Haran v. Turkey*, App. No. 25754/94 (Mar. 26, 2002), <https://hudoc.echr.coe.int/eng?i=001-60330>; *T.A. v. Turkey*, App. No. 26307/95 (Apr. 9, 2002), <https://hudoc.echr.coe.int/eng?i=001-60418>; *Toğcu v. Turkey*, App. No. 27601/95 (Apr. 9, 2002), <https://hudoc.echr.coe.int/eng?i=001-60419>.

201. *Tahsin Acar v. Turkey*, App. No. 26307/95, Eur. Ct. H.R. Jud. & Dec. Cum. Index 1999-2015, 393 (May 6, 2003), <https://hudoc.echr.coe.int/eng?i=001-61076>.

202. *Melese Erdem and Mahmut Erdem v. Turkey*, App. No. 64727/11, (Mar. 30, 2021), <https://hudoc.echr.coe.int/eng?i=001-209892>.

203. Committee of Ministers, Resolution Res(2004)3 on Judgments Revealing an Underlying Systemic Problem; Recommendation Rec(2004)6 to Member States on the Improvement of Domestic Remedies. Both adopted on 12 May 2004.

204. Katselli Proukaki, *The Right of Displaced Persons to Property and to Return Home after Demopoulos*, 14 HUMAN RIGHTS L. REV. 701 (2014) (concerning the Immovable Property Commission established by the self-declared 'Turkish Republic of Northern Cyprus' to entertain property claims of Greek Cypriots against Turkey).

205. Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16 HUMAN RIGHTS L. REV. 731, 736-37 (2016) (concerning Damage Assessment Commissions established by Turkey to accept property claims of displaced Kurds).

206. Committee of Ministers, Communication from Turkey Concerning the Ormanci and Other Group of Cases against Turkey, at 30, COM (2014) 1468 final, ¶ 106 (Dec. 2, 2014).

and implications for human rights victims.²⁰⁷

F. Rule by Law

Without a doubt, the AKP's most successful and consequential counter-reform strategy was the constitutional complaint mechanism, which entered into force in 2012. Responding favorably and expeditiously (only seven months after commencement), the ECtHR rejected a case on the ground that the applicant had not applied to the AYM—without assessing whether the new remedy was effective.²⁰⁸

The ECtHR did not change its stance vis-à-vis applicants who contested the AKP's post-coup crackdown. One of them was Zeynep Mercan, a judge who was dismissed and arrested two days after the coup attempt. When a lower court upheld her detention, Mercan petitioned the ECtHR. In justifying skipping the constitutional complaint process, she cited special circumstances—the AYM's dismissal of its own two members.²⁰⁹ For the ECtHR, this fact did not “cast doubt” on the effectiveness of the mechanism and Mercan's “fears” of the AYM's impartiality did not relieve her of the obligation to exhaust it.²¹⁰ After all, the AYM had proven its effectiveness in finding the pre-trial detention of two journalists to be unconstitutional.²¹¹ The ECtHR was telling the applicant to seek justice at a constitutional court which had dismissed its own members without a hint of due process—based on similar accusations and on grounds of the same decree. Moreover, it was giving assurances on the AYM's impartiality based on a pre-coup judgment. In the post-coup phase, the AYM had made it very clear that it would not look for evidence linking its dismissed members with Gülenists, let alone in the coup attempt; the “conviction” of remaining judges was sufficient.²¹² As the Venice Commission noted, once the AYM confirmed the validity of an emergency decree dismissing thousands of judges, there would be “little chance of success” for challenging mass dismissals of judges and prosecutors before Turkish courts.²¹³ There was another sticking point: dismissals commanded by emergency decrees (as

207. Elsewhere, I analysed in detail each of the government strategies concerning cases arising from violations within Turkey's borders as well as the ECtHR's responses to them. See KURBAN, LIMITS OF SUPRANATIONAL JUSTICE, *supra* note 2; Kurban, *Mobilizing Supranational Courts*, *supra* note 197; Dilek Kurban, *The Authoritarian Slide, Large-Scale Violations and the Limits of the European Court of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS: CURRENT CHALLENGES IN HISTORICAL AND COMPARATIVE PERSPECTIVE, (Helmut Philipp Aust & Esra Demir-Gürsel eds., 2021).

208. *Uzun v. Turkey*, App. No. 10755/13, Eur. Ct. H.R. (Apr. 30, 2013), <https://hudoc.echr.coe.int/eng?i=001-119849>.

209. *Mercan v. Turkey*, App. No. 56511/16, ¶ 18 (Nov. 8, 2016), <https://hudoc.echr.coe.int/eng?i=001-170818>; see also, *Zihni v. Turkey*, App. No. 59061/16 (Nov. 29, 2016), <https://hudoc.echr.coe.int/eng?i=001-181294>.

210. *Id.* ¶ 26.

211. AYM, Erdem Gül and Can Dündar, App. No. 2015/18567 (Feb. 25, 2016) (Turk.), <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/18567?Dil=en>.

212. AYM, E. 2016/6, K. 2016/12, ¶ 84, (July 4, 2016) (Turk.), <https://siyasipartikarlar.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2016-12-spdi.pdf>.

213. Venice Commission, *Opinion on Emergency Decree Laws*, *supra* note 4, ¶ 186.

opposed to by administrative bodies) could not be contested before courts.²¹⁴

Desiring the resolution of post-coup cases at the national level, CoE institutions recommended the establishment of a domestic mechanism to review the dismissals.²¹⁵ In January 2017, Turkey passed a law establishing the State of Emergency Inquiry Commission.²¹⁶ The ECtHR lost little time in rejecting the application of a dismissed teacher for failure to exhaust this remedy.²¹⁷ It did not matter that the Commission had been established only one month earlier, was not yet operational, and the applicant had unsuccessfully petitioned the AYM before coming to Strasbourg. Thereafter, the ECtHR sent repeated warnings to Ankara that it would start reviewing the remaining dismissal cases unless the new mechanism became functional immediately. The Commission began accepting applications in July.²¹⁸ Two days later, the ECtHR rejected 12,600 petitions.²¹⁹ Turkey was off the hook. By the end of 2021, the consequences were dire; 126,783 applications were submitted, 120,703 were reviewed, and 100,000 were rejected.²²⁰ The Commission reinstated to their jobs only 3,733 of the 125,678 dismissed civil servants.²²¹

In March 2018, the ECtHR finally addressed the effectiveness of the constitutional complaint mechanism.²²² It did not see a reason to depart from its previous (pre-coup) finding that the AYM was an effective remedy for individuals deprived of their right to liberty. Although adding that it would continue to examine the effectiveness of this mechanism, the ECtHR has not changed its stance since. Even in cases where it found violations in the initial and prolonged pre-trial detentions of a former AYM judge,²²³ several journalists,²²⁴ and over 400 judges

214. *Id.* ¶¶ 200–01.

215. Demir-Gürsel, *supra* note 107.

216. OLAĞANÜSTÜ HAL İŞLEMLERİ İNCELEME KOMİSYONU KURULMASI HAKKINDA KANUN HÜKMÜNDE KARARNAME [DECREE ON THE ESTABLISHMENT OF THE STATE OF EMERGENCY PROCEDURES INVESTIGATION COMMISSION], No. 685, *translated in* OFFICIAL GAZETTE, no. 29957 (Jan. 23, 2017).

217. *Köksal v. Turkey*, App. No. 70478/16 (June 6, 2017), <https://hudoc.echr.coe.int/eng?i=001-174629>.

218. *Jagland Calls Turkey for Release of Hunger Strikers Gülmen and Özakca*, STOCKHOLM CENTER FOR FREEDOM (Jun. 26, 2017), <https://stockholmcf.org/jagland-calls-turkey-for-release-of-hunger-strikers-gulmen-and-ozakca/>.

219. Turkey, Ministry of Justice, *OHAL Komisyonu Kurulmasıyla AIHM Binlerce Dosyayı Düşürdü* [AIHM Dismissed Thousands of Cases with the Establishment of the State of Emergency Commission] (July 14, 2017), www.inhak.adalet.gov.tr/duyurular/faaliyet_uyurular/2017/Temmuz/basin-ilani.pdf.

220. Turkey, *Activities Report 2021*, *supra* note 143, at 25.

221. *Id.* at 7.

222. Mehmet Hasan Altan v. Turkey, App. No. 13237/17, para. 142 (Mar. 20, 2018), <https://hudoc.echr.coe.int/eng?i=001-181862>; Şahin Alpay, App. No. 16538/17, para. 121 (Mar. 20, 2018), <https://hudoc.echr.coe.int/eng?i=001-181866>.

223. *E.g.*, Alparslan Altan, *supra* note 140.

224. *Sabancı and Others v. Turkey*, App. No. 23199/17 (Nov. 10, 2020), <https://hudoc.echr.coe.int/fre?i=001-206212>; *Şık v. Turkey* (no. 2), App. No. 36493/17 (Nov. 24, 2020), <https://hudoc.echr.coe.int/fre?i=001-206411>; *Atilla Taş v. Turkey*, App. No. 72/17 (Jan. 19, 2021), <https://hudoc.echr.coe.int/eng?i=001-207367>; *Murat Aksoy v. Turkey*, App. No. 80/17 (Apr. 13, 2021),

and prosecutors,²²⁵ the ECtHR evaded the issue—glossing over the fact that, in these very cases, the AYM had either found no violation²²⁶ or dismissed the applications.²²⁷ Effectively, the ECtHR gave the AYM a blank check.

G. *Lawlessness*

The bankability of that check became evident two months later. On December 28, 2011, thirty-four Kurdish civilians, including seventeen minors, were killed by Turkish military jets. They were crossing the Iraqi border back into Turkey, smuggling goods with the knowledge and implicit consent of local authorities.²²⁸ A military court investigation found that the aerial bombardment was carried out by the military and approved by the General Staff, presumably with government consent; the victims were mistaken as PKK militants. The military prosecutor dismissed the case concluding the killings to be an unavoidable mistake. From the moment the families filed their complaint, the case was a ‘hot potato’ for the AYM. As the first serious human rights case it was asked to review, this was not a residue of the 1990s for which the current government bore no responsibility. To the contrary, in addition to authorizing the bombardment, the government covered up parliamentary and judicial investigations into it.

At the same time, the ECtHR’s recent judgment in a similar case left the AYM no room for the kind of ruling it ought to give. In *Benzler and Others*, the ECtHR had found the killing of Kurdish civilians in a 1994 aerial bombardment was a substantive violation of Article 2 and, exceptionally, ordered an effective investigation.²²⁹ The incompetence of the lead lawyer, who was two days late in submitting the requested additional information, came to the AYM’s rescue. The AYM rejected the case, finding the counsel’s medically certified illness not to be grave enough.²³⁰ Criticizing the majority with extreme formalism, a dissenting judge reminded the ECtHR of case law depicting very short time periods, unreasonable bureaucratic hurdles, and formalistic procedural requirements as disproportionate restrictions on access to justice.²³¹ Additionally, he noted: (1) that the AYM could have easily obtained the information itself, (2) that the majority should have considered the remoteness of the villages where the applicants lived and the security

<https://hudoc.echr.coe.int/eng?i=001-208899>; *Ahmet Hüseyin Altan v. Turkey*, App. No. 13252/17 (Apr. 13, 2021), <https://hudoc.echr.coe.int/eng?i=001-209444>; *Bulaç v. Turkey*, App. No. 25939/17 (June 8, 2021), <https://hudoc.echr.coe.int/fre?i=001-210489>; *Ilıcak v. Turkey*, App. No. 1210/17 (Dec. 14, 2021), <https://hudoc.echr.coe.int/eng?i=001-214483>; *Deniz Yücel v. Turkey*, App. No. 27684/17 (Jan. 25, 2022), <https://hudoc.echr.coe.int/fre?i=001-215184>.

225. *Turan and Others*, *supra* note 140.

226. *E.g.*, Ahmet Hüseyin Altan, *supra* note 224.

227. *E.g.*, Alparslan Altan, *supra* note 140.

228. *JETLER SIVİLLERİ VURDU* [THE JETS STRUCK CIVILIANS], CUMHURİYET, Dec. 30, 2011.

229. *Benzler and Others v. Turkey*, App. No. 23502/06, Eur. Ct. H.R. (Nov. 12, 2013), <https://hudoc.echr.coe.int/eng?i=001-128036>.

230. AYM, Mehmet Encü and Others, App. No. 2014/11864 (Feb. 24, 2016), <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/11864>.

231. *Id.* (dissenting opinion of Judge Osman Alifeyyaz Paksüt).

situation which might have reasonably delayed the completion of the process, and (3) that rules of procedure on constitutional complaints did not give guidance as to which illnesses constitute valid excuses for delays. When the case reached Strasbourg, the ECtHR dismissed the case on the same grounds as the AYM.²³² Displaying extreme procedural rigidity, the court went against its own jurisprudence and refused to pass judgment in arguably the most critical case filed against Turkey in decades.

V. THE AUTHORITARIAN THREAT TO THE RULE OF LAW

The Turkish case confirms the overall theme of this special issue. While authoritarians make increasing use of rule of law norms and practices, they do so to consolidate their power and not to pursue rule of law goals as defined by Shaffer and Sandholtz, and Krygier. At the same time, it illustrates the need for broadening our conceptualizations of the rule of law to account for the “enmeshment” of national and international law in authoritarian contexts.²³³ This is necessary in two aspects.

First, if the rule of law is at one end of the analytical spectrum on the arbitrary exercise of power, what lies at the other end is lawless rule, not rule by law. Certainly, lawlessness is not inevitable. Whether, and if so, when, countries end up in this dark end of the spectrum hinges on endogenous and exogenous factors. The longer and deeper a country has been ruled by authoritarian legalism, the higher chances it has in ending up in lawless rule. It is essential to see the gray areas along this continuum, where different conceptual categories can co-exist and vary across time and space. One would be hard-pressed to find examples where the entirety of a country is continuously governed by rule by law. Rather, as in Turkey, it can fall across different dimensions over time depending on the strength of internal and external liberal forces. There may be “rule of law pockets to rule by law”²³⁴ or, by extension, rule by law pockets to lawlessness. As far as authoritarian regimes are concerned, the longer and deeper they are subject to viable external pressure for democratic change, the better their chances are to move towards the rule of law end of the continuum. Regime survival is another factor; when autocrats feel secure in their seats, they may be more willing to adopt rule of law reforms to provide some space for the expression and representation of political dissent. Where they face a formidable domestic rival, in the form of a civil society movement on the streets (e.g., Gezi protests) or a political party in the ballots (e.g., the HDP), they would have self-interest in shifting the pendulum towards lawlessness. A further factor is the decline in the moral authority, institutional strength, or bargaining power of international institutions. Where they perceive weakness, hesitation, or confusion on the part of international and regional institutions in upholding their own norms

232. *Selahattin Encü v. Turkey and other 275 Applications*, App. No. 49976/16, (April 10, 2018), <https://hudoc.echr.coe.int/eng?i=001-186160>.

233. Shaffer & Sandholtz, *supra* note 12.

234. I am thankful to Greg Shaffer and Wayne Sandholtz for this nice formulation.

and practices, autocrats do not shy from abusing their bargaining positions to undermine the global security, legal, and economic order. Thus, where a country falls on the arbitrary exercise of power spectrum varies across time in accordance with internal and external push and pull factors.

TLO theory underscores the recursive interaction of domestic and international levels. In the case of Turkey, the country's swings along the pendulum were shaped by: (1) the ups and downs of its EU accession process, (2) its engagement with the ECtHR (which in turn was closely connected with the strength of its EU membership prospects), (3) actual (e.g., HDP and the Gülen movement) and perceived (e.g., Gezi protests) internal threats to the longevity of Erdoğan's authoritarian rule, and (4) broader geopolitical developments (e.g., the end of the Cold War, migration crisis in Europe, and Russia's invasion of Ukraine). Turkey came closest to its democratic transition moment between 2002 to the mid-2000s, when the EU accession carrot was most viable, Erdoğan's AKP desperately needed the support of the global legal and political order, and the ECtHR's docket was not yet experiencing the adverse impact of post-Cold War enlargement. This progress towards the rule of law was the direct outcome of the rule of law and human rights TLOs' conversation with, responsiveness to, and support for, domestic civil society groups, amplifying their voices and giving them an international platform to experience their grievances. Adversely, when the EU and the CoE were grappling with the institutional overload caused by their respective eastward enlargements, causing the former to effectively end Turkey's accession prospects and the latter to adopt radical reforms to ease the ECtHR's workload, on the one hand and Erdoğan was enjoying international endorsement as the reform-minded leader of new Turkey; on the other, the pendulum started to quickly shift towards rule by law. The diminished international support for human rights activists and victims, such as the ECtHR's inadmissibility decisions and strike out rulings and the EU's decreasing engagement with civil society in Turkey, helped Erdoğan consolidate his power. By the 2010s, the EU was distracted by internal (e.g. rule of law backsliding in new member states) and external (e.g., uncontrolled mass migration from conflict zones and poor countries) crises, the ECtHR was institutionally paralyzed with an unmanageable docket and an extreme dearth of financial resources, and Erdoğan's one-man rule was under increasing threat by external (e.g., the Arab Spring in the Middle East) and internal (e.g., the HDP's increasing appeal to non-Kurdish liberal and democratic votes and the AKP's fallout with the Gülen movement) political developments. For Erdoğan, the longevity of his power laid not in rule of law reforms, but in combining rule by law (e.g., replacing the ECtHR's oversight with captured domestic courts through creating new domestic legal remedies) with lawlessness (e.g., disregarding the outcome of free and fair elections, terrorizing Kurdish towns through unlawful curfews, locking up elected Kurdish politicians through an unconstitutional constitutional amendment, and taking over by executive fiat the local governance of Kurdish towns he had lost through elections). Taking advantage of the EU's desperation, Erdoğan brokered with Merkel the infamous migration deal; in exchange for him keeping Syrian refugees within

Turkey's borders, the EU would tone down and indeed mute its criticism of his domestic policies. The EU's and Merkel's appeasement was such that they resorted to unprecedented measures, such as postponing the release of a critical European Commission progress report and visiting a head of state several weeks before general elections, which would be unthinkable in their dealings with a truly "European" country. By the 2020s, internal (e.g., a failed coup against the AKP) and external (e.g., the rise of illiberal governments across the world and Russia's and China's growing threats to the longevity of the global legal order) dynamics had emboldened Erdoğan to rule by lawlessness. This time, his disregard of rules extended to foreign policy. Not only did he violate international and domestic rules governing treaty withdrawals, but he undermined global security by threatening to block NATO's decision to admit into membership Finland and Sweden in order to counter Russia's power in Europe. Erdoğan was mirroring Hungary's Orban (who has been obstructing EU efforts to sanction Russia) in abusing his veto powers within an international organization for his own political interests.

Second, the arbitrary exercise of power spectrum applies not only to governments interacting with transnational legal orders, but also to those orders themselves. As Shaffer and Sandholtz point out, the rule of law and democracy are interrelated and interdependent; we can only speak of the rule of law if the substance of rules is determined by democratic participation.²³⁵ As substantively anti-democratic as it is, Turkey's electoral threshold does not even meet the basic procedural requirements of democracy; it was introduced by a junta during a military regime. Yet, European institutions have not problematized this extreme democratic deficit, which has enabled the AKP's single-party rule since 2002. The embrace of a thin notion of democracy and the rule of law has also permeated in the ECtHR's case law on Turkey. In a striking factual mistake, the ECtHR treated it as the "choice of the legislature" and granted Turkey the wide margin of appreciation it affords member states in electoral issues.²³⁶ Just as the parliamentary election system which enabled and sustained Erdoğan's single party rule lacked minimal procedural democratic safeguards, so did the referendum which changed the regime type to presidential system. The amendments were hastily passed from the Parliament, introduced to a referendum under state of emergency and, most importantly, the detained HDP deputies were not allowed to participate in the parliamentary debates from prison. And yet, the referendum results were acknowledged by the international community, including the EU.

According to Shaffer and Sandholz, a central reason for adopting a goal-oriented definition of the rule of law is "the risk of creating formulaic checklists based on specified, formal characteristics."²³⁷ The performance of European institutions pursuant to this conceptualization does not hold either. Take the example of the constitutional complaint mechanism, treated by the EU and the CoE

235. Shaffer & Sandholtz, *supra* note 12.

236. Yumak and Sadak, *supra* note 174.

237. Shaffer & Sandholtz, *supra* note 12.

as an essential condition of the rule of law. The latter, as admitted by its secretary general himself, actively collaborated with the AKP government for the introduction of the right to individual complaint under Turkish law. Neither Brussels nor Strasbourg considered whether Turkey's constitutional court, which has long been complicit with authoritarian rule in Turkey, would be able and willing to conduct a rights-oriented review in accordance with European human norms.

Neither does the ECtHR's jurisprudence on Turkey in the past two decades withstand scrutiny based on the source of arbitrariness developed by Shaffer, Sandholtz and Krygier. In ways that were unpredictable for Kurdish human rights lawyers, the court has been striking out cases from its list where applicants did not accept Turkey's unilateral declarations and pressuring applicants to accept the government's settlement offers. These policies, resulting from a self-interest to get rid of as many cases as possible, went against the right of individual petition, which is at the core of the European human rights regime. Similarly, rejecting justiciable claims concerning gross human rights violations on grounds of the availability of a domestic remedy which has been proven to be ineffective denies victims the only forum to be heard against the government. Neither does the ECtHR meet the requirements for "reason giving." It either does not give any reason, since it is not required to do so in inadmissibility decisions, or does not give a justifiable reason. The pursuit of the subsidiarity principle is not proportionate to rejecting tens of thousands of applicants on grounds of their non-exhaustion of a domestic remedy which has time and again proven to be ineffective.

As Tom Ginsburg aptly noted, liberal democracy "can be promoted, defended or undermined by international legal institutions."²³⁸ Indeed, the CoE has not only failed to promote or defend, but actually undermined liberal democracy in Turkey at critical points in the country's political history. It's difficult to make a counterfactual argument as to whether Erdoğan would have complied with an ECtHR judgment finding Turkey's electoral threshold to be a violation of the right to elections. Coming at a time when Erdoğan still needed European support to consolidate his power against the military, such a ruling could have pushed for rule of law reform. At the very least, it would have drawn international attention to the anti-democratic nature of Turkey's electoral regime and undermined Erdoğan's claim to majoritarian democracy. Similarly, had the CoE started infringement proceedings earlier and moved expeditiously towards suspending Turkey thereafter, particularly considering that the geopolitical environment had for a while become less conducive for Turkey, it could have forced Erdoğan to change course by, for examples, releasing political prisoners held in captivity. Even if such an outcome did not materialize, the European human rights regime would, at the very least, demonstrated its commitment to its own principles and thus its effectiveness vis-à-vis authoritarian regimes that defy such norms. This, in itself, would have been a remarkable outcome, particularly in light of the proven failure of restraint and appeasement policies in taming anti-liberal governments.

238. GINSBURG, *supra* note 10, at 290.

