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Authoritarian Rule by Law

Erdoğan and the European Court of Human Rights

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In the early to mid 2000s, the 'new' Turkey under the leadership of the Justice and Development Party (Adalet ve Kalkınma Partisi, or AKP) was seen by the international community as a beacon of light in the Middle East. Within a decade, Turkey has turned from a country in democratic transition whose reforms earned it European Union (EU) accession status and victories at the European Court of Human Rights (ECtHR) to one engaged in systematic rule-of-law violations, state violence, and legal repression. A decade later, Turkey is an autocratic country under the one-man rule of Recep Tayyip Erdoğan, who has eroded any remnants of rule of law and democracy. Yet, none of the human rights and rule-of-law transnational legal orders (TLOs)[1] of which Turkey formally is a part has sanctioned this country.

From one perspective, this is nothing new. Turkey has never been a democracy, despite its decades-long engagement with European institutions. Its frequent military interventions have all taken place since Turkey joined the Council of Europe (CoE) and ratified the European Convention on Human Rights (ECHR) in 1954. As far as the EU is concerned, with the exception of the first, all of these interventions took place after the signing of the 1963 Association Agreement. Throughout, European institutions repeatedly upheld their security interests, in preference to human rights in support of the rule of law, by failing to sanction Turkey.[2]

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[1] Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015).

[2] JON C. PEVEHOUSE, DEMOCRACY FROM ABOVE: REGIONAL ORGANISATIONS AND DEMOCRATIZATION (2005).

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Nonetheless, there is something truly puzzling in the current situation. The worst instances of state violence have occurred since Turkey recognized the ECtHR's compulsory jurisdiction in 1990. By the mid-1990s, when violations in the Kurdish region had reached the level of atrocities, the ECtHR had evolved into a powerful regional court.[3] One decade later, it was the world's "most effective court,"[4] operating under the world's "most effective human rights regime."[5] Yet, despite hundreds of adverse ECtHR judgments, 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 became increasingly inaccessible for their victims. Contrary to Tom Ginsburg's assessment of the CoE as a regional organization where liberal member states stand up for "the defense of democracy,"[6] none of them brought an interstate case against Turkey nor sought its suspension from membership. 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.[7]

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 chapter puts forth theoretical insights based on an empirical analysis of Turkey's relationship with European institutions. Going beyond conventional analyses that 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

[3] 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).

[4] 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).

[5] 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).

[6] Tom Ginsburg, Democracies and International Law 288 (2021).

[7] Josef Janning, *Germany's Gambit: Turkey and the Refugee Crisis*, Eur. Council on Foreign Rels. (Jan. 28, 2016), https://ecfr.eu/article/commentary_germanys_gambit_turkey_and_the_refugee_crisis5080/.

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Gregory Shaffer and Wayne Sandholtz call the "enmeshment of national and international trends."[8] 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 I also analyze the EU in this regard elsewhere,[9] in this chapter I focus on the CoE, more specifically the ECtHR, for several reasons. First, since Turkey is not a member state, quasi-judicial and judicial EU sanctioning mechanisms are not available against this country; the EU's toolbox is limited to suspending/ending the accession negotiations and cutting down/freezing preaccession funds. In contrast, as a CoE member, Turkey is under obligation to uphold the rule of law, democracy, and human rights and to comply with ECtHR judgments. Second, contrary to the EU, which has received a fair amount of criticism for its inadequate action vis-à-vis democratic backsliding in Hungary and Poland, the ECtHR has not been sufficiently held accountable for its failure in Russia, Turkey, Azerbaijan, and beyond; its ineffectiveness has been mainly attributed to compliance failure. In reality, as the Turkish case illustrates, the ECtHR has never made full use of its powers to expose systemic rule-of-law and rights violations in authoritarian regimes.

I Conceptualizing the Rule of Law

As Martin Krygier has put it, the rule of law "has become an unavoidable cliché of international organizations of every kind."[10] Virtually all international and regional institutions require actual and prospective member states to adhere to the rule of law without specifying what that actually means.[11] Scholarship has not provided much clarity either;[12] the rule of law remains an "essentially contested"[13] and "elusive"[14]

[8] *See* Chapter 1.
[9] Dilek Kurban, *Rethinking Enmeshment and the Rule of Law in Authoritarian Contexts*, 8 U.C. Irvine J. Int'l Transnat'l & Comp. L. 107 (2023).
[10] Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 Ann. Rev. L. & Soc. Sci. 199, 200 (2016).
[11] *See* Chapter 4.
[12] Brian Z. Tamanaha, On The Rule Of Law: History, Politics, Theory (2004).
[13] Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & Phil. 137 (2002).
[14] Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, Sing. J. Legal Stud. 232, 232 (2012).

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concept. For some, it refers to a mode of governance where rules abide by procedural criteria such as generality, foreseeability, applicability, certainty, and nondiscrimination.[15] Proponents of a thick formulation argue that there can be no rule of law without individual rights, democracy, and justice.[16] Accordingly, what distinguishes the substantive conception of the rule of law is that it is designed by democratically accountable officials and institutions with the goal of advancing and upholding fundamental rights and individual justice.

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,"[17] to ask what it seeks to achieve. In Brian Tamanaha's functionalist approach, the rule of law exists when law provides security and trust, social order, individual liberty, and economic development; restrains officials; gives prominence to legal professionals; and, most controversially, reflects and maintains power structures in society.[18] For Terry Nardin, the rule of law is first and foremost "a moral idea," which limits the exercise of power[19] – in contrast to rule by law, where powerholders "make and enforce legal norms . . . to regulate and control the population."[20] In Krygier's end-oriented approach, while "never the only thing we want,"[21] what is distinctive about the rule of law is that it aims at the "institutionalized tempering"[22] of power. Power is arbitrary when it is uncontrolled, unpredictable, unrespectful, and ungrounded.[23] Where a reason is provided, its pursuit 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."[24]

[15] Ron L. Fuller, The Morality of Law (rev. ed. 1969); Joseph Raz, The Authority of Law: Essays on Law and Morality (1979).
[16] Ronald Dworkin, A Matter of Principle (1986).
[17] Krygier, *supra* note 10, at 212.
[18] 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).
[19] Terry Nardin, *Theorising the International Rule of Law*, 34 Rev. Int'l Stud. 385, 385 (2008).
[20] *See* Chapter 1.
[21] Krygier, *supra* note 10, at 205.
[22] *Id.* at 199.
[23] Martin Krygier, *Poder atemperado: Cómo pensar, y no pensar, sobre el Estado de Derecho* [Tempering power: How to think, and not to think, about the rule of law], 25 Eunomía: Revista en Cultura de la Legalidad 22, 34–36 (2023).
[24] Nardin, *supra* note 19, at 385.

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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 nonarbitrary exercise of power, can that be achieved without democratic accountability and representation? How can power be tamed in the absence of the free exercise of civil and political rights? Gregory Shaffer and Wayne Sandholtz 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."[25] Thus, democratic participation in lawmaking processes is a *sine qua non* of the rule of law, even by its thin conceptualization. Similarly, the nonarbitrary exercise of power can be possible only in contexts where rulers adhere to fundamental human rights norms, such as the right to due process. So, the thin/thick distinction is not conceptually sound nor practically attainable.[26]

Socio-legal research 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 at different times.[27] The rule of law (a normative state) and rule by law (a prerogative state) may even coexist in "hybrid authoritarian regimes"[28] – a truth verified in contexts ranging from the military dictatorship in Chile to the single-party rule in China.[29] Whereas the dual states in Nazi Germany and apartheid South Africa operated along racial lines, much of empirical scholarship concerns hybrid cases, where the rule-of-law bit applies to the economic sphere to attract foreign investment, whereas the political sphere is ruled by law to suppress the opposition. In reality,

[25] *See* Chapter 1.

[26] *See* Chapter 1; Krygier, *supra* note 10.

[27] Jens Meierhenrich, Is the Authoritarian Rule of Law an Oxymoron? Paper presented at the Rule of Law in Transnational Context symposium, U.C. Irvine Law Sch., Sept.16–17, 2022 (unpublished manuscript).

[28] Jens Meierhenrich, The Remnants of the Rechtstaat: An Ethnography of Nazi Law (2018).

[29] 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'y J. 108 (2001).

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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 turns both to law "as a tool of governance" in the economic sphere[30] and to lawlessness to engage in what has been argued to constitute genocide[31] or crimes against humanity[32] against the Uyghur minority. Nor is the dual state limited to antidemocratic 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 liberties, albeit in varying degrees over time.[33]

Where we stand, many things remain unresolved. One concerns the use of violence. Much of socio-legal research on rule by law is limited to repression as a form of governance. What to do with instances where the state turns to violence toward certain (racialized) segments of the population in utter lawlessness? Examples are plenty – dictatorships in the Southern Cone of Latin America, Russia in the Northern Caucasus, Turkey in the Kurdish region, China in Xinjiang, and so forth. 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 illiberal[34] or antiliberal[35] in the sense that it denies core 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"[36] stands somewhere in between. The dual state's

[30] GINSBURG, *supra* note 6, at 257.
[31] *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention,* NEWLINES INST. FOR STRATEGY & POL'Y (Mar. 8, 2021), https://tinyurl.com/38m3u34v.
[32] *"Like We Were Enemies in a War": China's Mass Internment, Torture and Persecution of Muslims in Xinjiang*, AMNESTY INT'L (June 10, 2021), www.amnesty.org/en/documents/asa17/4137/2021/en/.
[33] 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).
[34] *Id.*
[35] Martin Krygier, at the Rule of Law in Transnational Context symposium, U.C. Irvine Law Sch., Sept.16–17, 2022.
[36] MEIERHENRICH, *supra* note 28, at 245.

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prerogative half need not only refer to the sovereign's violation of its own laws but also extends to institutionalized lawlessness.[37]

Another outstanding question concerns the object of our inquiry. Scholarship predominantly focuses on the nation-state and to the extent that it turns its lens on international institutions, the analysis is limited to their 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 challenges recently. Halliday and Shaffer adopt an empirically based theoretical approach which integrates top-down and bottom-up analyses to understand the variable ways in which legal norms and practices are "developed, conveyed, and settled" transnationally through a "dynamic tension" between the local, national, international, and transnational levels.[38] 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, cyclical, in that it alternates between positive and negative cycles, and variable, in that it changes within and across regions.[39] Tom Ginsburg provides a global, empirical overview of the rising authoritarian threat to the international order, documenting the ways in which illiberal norms and practices are competing with their liberal counterparts – an international rule by law, so to speak.[40] Kim Scheppele documents 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.[41]

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. A growing body of scholarship places this court on the receiving end of backlash without sufficiently inquiring into its own role in the rule-of-law crisis in Europe.[42] While the European Commission and, to some extent, the

[37] *Id.* at 237–38.
[38] Halliday & Shaffer, *supra* note 1, at 1.
[39] *See* Chapter 1.
[40] Ginsburg, *supra* note 6.
[41] Kim Lane Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545, 548 (2018).
[42] 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*

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European Court of Justice received considerable critical attention by scholars of rule-of-law backsliding within the EU,[43] the ECtHR enjoys scholarly praise as the bastion of liberal democratic order in Europe.[44]

What lies beneath this skewed depiction of the ECtHR is a methodological bias. With the exception of a few,[45] scholars base their empirical analyses solely on judgments – where the ECtHR addresses the merits of the case.[46] Yet, such rulings constitute a tiny fraction of the ECtHR's jurisprudence – only 9 percent. Of the cases reaching Strasbourg, 84 percent are rejected as inadmissible, while 6 percent are struck out on grounds of friendly settlements and 1 percent on grounds of unilateral declarations.[47] 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 violations,[48] but an international institution enabling the consolidation of authoritarian legalism.

To address these gaps in rule-of-law scholarship, this chapter focuses on the ECtHR's interaction with Turkey to inquire how human rights courts do and should react to authoritarian challenge to the rule of law. Conceptually, it analyzes the Court's case law concerning both Turkey's resort to law to consolidate its power (rule by law) and disregard of rules,

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).

[43] 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. ON RULE L. 1 (2021).

[44] *See, e.g.*, Kim Lane Scheppele, *The Treaties Without a Guardian: The European Commission and the Rule of Law*, 29 COL. J. EUR. L. 93 (2023); Cali, *supra* note 42. *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).

[45] HELEN KELLER, MAGDALENA FOROWICZ & LORENZ ENGI, FRIENDLY SETTLEMENTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE 10 (2010); Veronika Fikfak, *Against Settlement Before the European Court of Human Rights*, 20 INT'L J. CONST. L. 942 (2022).

[46] Stiansen & Voeten, *supra* note 42; Helfer & Voeten, *supra* note 42.

[47] EUR. CT. OF HUM. RTS., ANALYSIS OF STATISTICS 2021, at 11 (2022), www.echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf.

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

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including its own, in engaging in repression and violence (lawlessness). Methodologically, it goes beyond judgments and takes a close look at inadmissibility decisions and strike-out rulings.

II Turkey under Erdoğan: Between Rule by Law and Lawlessness

An analysis of authoritarianism embedded in Turkey's politico-juridical regime, which I have done elsewhere,[49] is beyond the scope of this chapter. Suffice here to say that exceptional legal regimes, special criminal tribunals, and anti-terror laws have been constant during military *and* civilian rule in Turkey. 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, lawlessness – the timing, duration, and intensity of which were closely related to the fluctuations of Turkey's relations with European institutions. What renders the AKP rule 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.

1 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. Erdoğan claimed democratic legitimacy based on the strong mandate he claimed to have received from the electorate, which enabled him to form a single-party government. Yet, this legitimacy rested on a fallacy. Of the eighteen parties that took part in the elections, only two could enter the parliament, leaving 45 percent of the electorate without representation. One of these two parties was the AKP, which acquired 65 percent of the parliamentary seats with only 34 percent of the votes.

Such an antidemocratic outcome was possible thanks to the highest electoral threshold in Europe for parliamentary representation – 10 percent. What's more, the threshold was introduced by the military regime months before it stepped down in November 1983. Fearing that a future pro-Kurdish party would receive high support in the southeast where the Kurds are the majority, the junta introduced a *national* threshold to deny

[49] *See* Dilek Kurban, Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict (2020).

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them political representation.[50] The generals were right in their projections. In 2002, the pro-Kurdish Democratic People's Party (Demokratik Halk Partisi, or DEHAP) could not enter the parliament because its nationwide votes remained at 6.2 percent – although it received up to 56 percent of the votes in the Kurdish region. In Diyarbakır, the largest Kurdish city, DEHAP received 56 percent of the votes, whereas the AKP a mere 16 percent. Had the threshold been 5 percent as in Germany, DEHAP would have gained eight of the ten parlıamentary seats allocated to Diyarbakir – and AKP none. Instead, six seats were allocated to the AKP and four to independent candidates.

Once in power, Erdoğan 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. Initially, he continued the reforms initiated by the preceding government. Among others, his government adopted relatively progressive laws and established the constitutional supremacy of international human rights treaties over domestic law.[51] Caught between the need to acknowledge this progress and the resistance in some member states to Turkey's accession, 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.[52] Never before had the EU made such an exception to its accession conditionality – nor has it since.

Almost immediately after they started, accession negotiations halted due to two mutually reinforcing developments. Domestic debates in several member states linked discussions over the EU's future with Turkey's accession, leading to the European Council's announcement that negotiations would be "an open-ended process."[53] Meanwhile, Cyprus's EU accession and acquisition of veto power over further enlargement turned the Cyprus conflict into a stumbling block for Turkey's membership. When Turkey refused to open its ports and airports to the vessels and flights of Cyprus, the EU froze negotiations

[50] Milletvekili Seçim Kanunu [Law on the Election of Members of the Parliament], No. 2839, June 10, 1983, Official Gazette, No. 18076 (June 10, 1983) art. 33 [hereinafter Law No. 2839].

[51] *2004 Regular Report on Turkey's Progress Towards Accession*, at 50, COM (2004) 656 final (Oct. 6, 2004), www.ab.gov.tr/siteimages/birimler/kpb/tr_rep_20061998/2004_tr_rap.pdf.

[52] Presidency Conclusions, Brussels European Council (Feb. 1, 2005), www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf (emphasis added).

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

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of eight chapters in 2006, followed by similar unilateral decisions by France and Cyprus.

Turkey's diminishing prospects for EU membership enabled the AKP to pursue its own 'reform' agenda, which sought two goals. The first was to diminish the number of adverse ECtHR judgments by creating 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.[54] That the right was granted with an eye on Strasbourg was evident in legislative intent: achieving "a considerable decrease in the number of files against Turkey."[55] It was further evident in the intense backdoor diplomacy carried out by CoE secretary-general Thorbjørn Jagland, who later referred to this mechanism as a "system [that Turkey and the CoE] have built together" and "a source of immense pride."[56]

The second, and predominant, goal was to expand Erdoğan's control over the military and the judiciary, in response to their coordinated efforts to preclude the election of the AKP's candidate as president[57] and the legalization of headscarfs at universities,[58] and to dissolve the AKP.[59] 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, or AYM) and the High Council of Judges and Prosecutors (Hakimler ve Savcilar Yüksek Kurulu, or HSYK).[60]

These amendments would have tremendous implications for Turkey's political future, which became evident to most observers only retrospectively.

[54] Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun [Law on the Amendment of Certain Provisions of the Constitution of the Republic of Turkey], No. 5982, May 7, 2010, Official Gazette, No. 27580 (May 13, 2010).

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

[56] 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).

[57] Asli Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11 Int'l J. Const. L. 666 (2013).

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

[59] The AKP escaped dissolution by one vote. AYM, E. 2008/1, K. 2008/2, (July 30, 2008).

[60] Ozan Erözden et al., *A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform on Turkey*, TESEV (May 6, 2010), https://tinyurl.com/4tcnents.

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The first indication was the 2010 HSYK elections, resulting in the victory of candidates endorsed by the AKP.[61] At the time, dissenting voices within the judiciary contended that the government supported candidates affiliated with the Fethullah Gülen movement,[62] enabling it to dominate the HSYK.[63] Soon after, the AKP and the Gülenists had a public fallout, culminating in a 2013 corruption case implicating the family members of Erdoğan and his ministers.[64] Erdoğan declared war against his former ally, the battleground of which would be the judiciary. From 2014 onward, the AKP "has asserted an unprecedented degree of control over the judiciary" by reestablishing its control over the HSYK and purging alleged Gülenist judges and prosecutors.[65] 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 not over.

2 *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 declared in August 2015, Turkey's system of government had effectively changed and what needed to be done now was "to give a legal framework to this de-facto state with a new constitution."[66]

[61] Venice Comm'n, 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) www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)042-e. Erdoğan publicly acknowledged the government's meddling in the HSYK elections. Int'l Comm'n of Jurists, Turkey: Judicial System in Peril; A Briefing Paper 3 (June 2, 2016), https://tinyurl.com/5c9mw9xh.

[62] An Islamic preacher, Fethullah Gülen is the leader of a transnational religious movement whose members gained increasing power and influence in the education, judiciary, business, and police fields thanks to its political alliance with the AKP.

[63] Ahmet İnsel, Ali Bayramoğlu, İbrahim Okur, Koray Özdil, Leyla Köksal Tarhan, Mithat Sancar, Uğur Yiğit & Yücel Sayman, 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, Jan. 10, 2013), https://tinyurl.com/5ec8ntyt.

[64] 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), www.swp-berlin.org/en/publication/turkey-the-fethullah-guelen-movement/.

[65] Int'l Comm'n of Jurists, *supra* note 61, at 10.

[66] Agence France Presse, *Defiant Erdogan Vows to Press for New Turkey Constitution*, Guardian (Aug. 14, 2015), https://guardian.ng/news/defiant-erdogan-vows-to-press-for-new-turkey-constitution.

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The principal hurdle was the presence in the parliament of the pro-Kurdish Peoples' Democratic Party (Halkların Demokratik Partisi, or HDP). For decades, the Kurdish movement had circumvented the electoral system by entering in preelection coalitions with 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 a platform to bar Erdoğan from introducing a presidential regime, the HDP won 13.1 percent of the votes – corresponding to eighty parliamentary seats. The HDP's victory created 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.[67]

Having faced the first electoral defeat of his career, Erdogan took a decisive turn to rule by lawlessness. He 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 a parliamentary majority.[68] 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. From August onward, local authorities declared round-the-clock, open-ended curfews in over thirty towns.[69] 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, aid workers, and human rights observers were denied access. Journalists who tried to enter were threatened, arrested, and, in at least one case, shot.[70] Witnesses "painted an

[67] Alberto Nardelli, *Turkey Election Results: What You Need to Know,* GUARDIAN (June 8, 2015), www.theguardian.com/news/datablog/2015/jun/08/turkey-election-results-what-you-need-to-know.

[68] 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).

[69] Eur. Parl. Ass., The Functioning of Democratic Institutions in Turkey, 24th Sess., para. 10 (June 22, 2016).

[70] U.N. Off. of the High Comm'r for Hum. Rts. (OHCHR), Report on the Human Rights Situation in South-East Turkey, July 2015 to December 2016 (Feb. 2017); Comm'r for Hum. Rts. 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).

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apocalyptic picture of the wholesale destruction of neighbourhoods."[71] By December 2016, some 2,000 people, including 1,200 civilians, were killed.[72]

As noted by the CoE Commissioner for Human Rights[73] and the Venice Commission,[74] the operation was unequivocally against 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 security goals they allegedly pursued. 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 residential areas.[75]

Though still short of the two-thirds majority to call for a referendum on its own, the AKP gained its fourth single-party rule as a result of snap elections held in November 2015. Yet, the HDP still passed the threshold, though now with 10.7 percent, and was still the third-largest party in the parliament. Erdogan turned to the HDP's nemesis, the Nationalist Movement Party (Milliyetçi Hareket Partisi, or MHP), which demanded the Kurdish deputies' ousting from the parliament in return for helping Erdoğan hold a referendum. 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.[76] The draft bypassed the constitutionally required regular procedure whereby the plenary reviews the dossiers before the vote and grants affected deputies the right to defend themselves.[77] 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 was the HDP deputies, as evident from Erdoğan's concerted campaign after the June 2015 elections. He had

[71] U.N. Off. of the High Comm'r for Hum. Rts. (OHCHR), *supra* note 70, at 7–8.
[72] *Id.* at 10.
[73] Comm'r for Hum. Rights of the Council of Eur., *supra* note 70.
[74] Venice Comm'n, Turkey: Opinion on the Legal Framework Governing Curfews, CDL-AD(2016)010, ¶ 86 (June 13, 2016).
[75] Comm'r for Hum. Rights of the Council of Eur., *supra* note 70, ¶¶ 28–29.
[76] Türkiye Cumhuriyeti Anayasasinda Değişiklik Yapilmasina Dair Kanun [Law on the amendment of the Constitution of the Republic of Turkey], No. 6718, May 20, 2016, Official Gazette, No. 29736 (June 8, 2016).
[77] Venice Comm'n, *Turkey: Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability)*, CDL-AD(2016)027 (Oct. 14, 2016).

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called on the parliament to strip HDP deputies of their immunity to make them "pay the price one by one" for supporting terrorism.[78] He claimed that HDP cochairs Selahattin Demirtaş and Figen Yüksekdağ engaged in "constitutional crimes" by calling for democratic autonomy and appealed to the parliament to lift their immunities "in the name of counter-terrorism."[79] In May 2016, hours before the vote in the parliament, Erdoğan noted that the highest number of dossiers concerned deputies from "the party supported by the separatist terrorist organization" and expressed his hope for a favorable outcome to enable their immediate prosecution.[80] 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 the 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.[81] In the end, 55 out of the 59 HDP parliamentarians lost their immunities.[82]

The HDP deputies sought constitutional review, arguing that the law was a parliamentary decision subject to AYM's oversight rather than a constitutional amendment falling outside the AYM's review powers.[83] They further argued that the law violated the nonviolability and nonliability of parliamentarians by enabling their prosecution for constitutionally protected acts and statements; deprived the deputies of their constitutional right to defend themselves; and stripped the immunities on a collective instead of the constitutionally prescribed individual basis. Denying review in a unanimous ruling, the AYM reasoned 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

[78] *Turkey's Erdoğan Demands Lifting of HDP Deputies' Immunity*, Hürriyet Daily News (July 29, 2015), www.hurriyetdailynews.com/turkeys-erdogan-demands-lifting-of-hdp-deputies-immunity-86038.

[79] *Cumhurbaşkanı Erdoğan'dan HDPliler için "Dokunulmazlık" Çağrısı* [President Erdoğan makes an "immunity call" regarding the HDP deputies], Ajans Haber (Jan. 2, 2016), https://bedirhaber.com/erdogandan-hdplilere-dokunulmazlik-mesaji-bedelini-odemeliler/.

[80] *Erdoğan'a göre HDP'liler Zaten Yargılanacak: Bu İşten Kaçış Yok* [According to Erdoğan, the HDP deputies will be prosecuted anyhow: There is no way out], Diken (May 20, 2016), www.diken.com.tr/cumhurbaskani-dokunulmazliklari-kaldirdi-bile-bu-isten-kacis-yok/.

[81] Peoples' Democratic Party (HDP), The Lifting of Legislative Immunities at the Parliament of Turkey: An Assessment Report 5 (2016).

[82] *Id.* at 7–14.

[83] AYM, E. 2016/54, K. 2016/117 (June 3, 2016).

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amendment and gave rise to "special legal consequences."[84] Thus, by inventing a new rule, the AYM refrained from fulfilling its constitutional duties and endorsed Turkey's transition into rule by lawlessness.

Then came the coup attempt of July 15, 2016. Almost immediately, Erdoğan declared Fethullah Gülen as the culprit, leading to the arrest, purge, and blacklisting of anyone remotely linked to his movement. On July 16 alone, roughly 3,000 judges and prosecutors, including two AYM judges, were arrested.[85] Erdoğan declared emergency rule and adopted thirty-seven executive decrees, only five of which were approved by the parliament despite the constitutional requirement of prompt ex post facto approval. Although several of these decrees introduced permanent measures, the AYM declined to annul them on grounds of ultra vires[86] – despite a 1991 precedent where it 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 upon the government powers to dismiss civil servants collectively, close civil society organizations, and arrest individuals without a shred of due process. By December 2018, 57,000 individuals were held in pretrial detention, amounting to 20 percent of the total prison population in Turkey.[87] By the end of 2021, over 125,000 civil servants were dismissed and their pensions, properties, savings, and passports were confiscated; and 2,761 associations, foundations, trade unions, media organizations, companies, hospitals, schools, and dormitories were closed.[88] Many of these measures remain in force, even though the emergency rule was lifted two years after its proclamation.[89]

[84] *Id.* ¶ 11.

[85] 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 v. Turkey, App. No. 75805/16 and 426 others, ¶ 18 (Nov. 23, 2021), https://hudoc.echr.coe.int/fre?i=001-213369.

[86] AYM, E. 2016/166, K. 2016/159 (Oct. 12, 2016).

[87] Amnesty Int'l, Turkey: Amnesty International's Brief on the Human Rights Situation 2 (Feb. 1, 2019), Index No. EUR 44/9747/2019, www.amnesty.org/en/documents/eur44/9747/2019/en/.

[88] State of Emergency Inquiry Commission, Activities Report 2021, at 27, https://ohalkomisyonu.tccb.gov.tr/docs/OHAL_FaaliyetRaporu_2021.pdf [hereinafter Activities Report 2021].

[89] 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, Official Gazette, July 31, 2018.

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Erdoğan regarded the coup attempt as "a gift from God"[90] and used it to complete his unfinished business with Kurdish politicians. Without a trace of evidence, he accused the HDP cadres of having collaborated with the Gülenists. On November 4, 2016, thirteen deimmunized HDP deputies, including the cochairs Demirtaş and Yüksekdağ, were placed in pretrial detention. The list has since grown, enabled by the AYM's reluctance to exercise review.[91] Erdoğan's next target was the HDP mayors. An executive decree adopted in September 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").[92] The AKP thus grasped by executive force the governance of Kurdish towns it had been unable to win in local elections, where an electoral threshold is not applicable. This policy, too, remains in effect nearly eight years later. By April 2022, the number of municipalities the HDP had won in the 2019 local elections had gone down from sixty-five to six. At the time of this writing, a closure case against the HDP is pending before the AYM.

Erdoğan then turned to his other unfinished project: consolidating his one-man rule. Only several weeks after the arrest of HDP deputies, the AKP and the MHP jointly submitted to the parliament constitutional amendments introducing a "Turkish-style" presidency.[93] The changes were adopted by the parliament on January 21, 2017, signed by Erdoğan on February 10, and approved in a referendum on April 16. Throughout this period Turkey was governed under emergency, 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 the parliament on any ground, issue decrees exempt from constitutional review, and declare a state of emergency – changes interpreted by the

[90] Marc Champion, *Coup Was "Gift from God" for Erdogan Planning a New Turkey*, Bloomberg, (July 17, 2016, 11:00 PM), https://tinyurl.com/43d7m9ad.

[91] AYM, Gülser Yıldırım (2), App. No. 2016/40170 (Nov. 16, 2017), https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/40170; AYM, Selahattin Demirtaş, App. No. 2016/25189 (Dec. 21, 2017), https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/25189.

[92] 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, Official Gazette, No. 29818 (Sept. 1, 2016), arts. 38, 39.

[93] *See* Hilal Köylü, *5 Points on Turkish Constitutional Reform*, DW (Jan. 21, 2017), www.dw.com/en/turkish-constitutional-reform-5-important-points/a-37221685.

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Venice Commission as a decisive move "towards an authoritarian and personal regime."[94]

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.[95] One man, without giving any reason, deprived the female population of an entire country of the human rights vested on them through a unanimous vote of the Turkish parliament in 2011.[96] This was an arbitrary exercise of power par excellence, as defined by Shaffer, Sandholtz, and Krygier.[97]

III The ECtHR's Dual Role in Authoritarian Rule

Certainly, the ECtHR has enabled domestic groups to make rights claims and empowered victims in their pursuit of justice across Europe.[98] And yet, in the last two decades, the Strasbourg Court has 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. The rest of this chapter focuses on the dark side of this dual role.

1 "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.[99] 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. The applicants were two Kurdish politicians who had received 45.95 percent of the votes

[94] Venice Comm'n, *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), ¶ 133.

[95] I thank Anne Peters for reminding me of this particular instance of lawlessness.

[96] Ayşegül Kula, *An Unconstitutional Setback: Turkey's Withdrawal from the Istanbul Convention*, VERFASSUNGSBLOG (Mar. 22, 2021), https://verfassungsblog.de/erdogan-istanbul-convention/.

[97] *See* Chapter 1; Krygier, *supra* note 10.

[98] KURBAN, *supra* note 49.

[99] Yumak v. Turkey, App. No. 10226/03, at 439 (July 8, 2008), https://hudoc.echr.coe.int/?i=001-87363.

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in the Kurdish province of Şırnak, but could not enter the parliament because their party, the Democratic People's Party (Demokratik Halk Partisi, or DEHAP), received 6.2 percent 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, which polled only 14 percent, and the third to an independent candidate who polled 9.69 percent.[100]

While considering "in general" a 10 percent threshold to be "excessive," the ECtHR did not find a violation in this case "in the light of the specific political context of the elections in question."[101] The law sought to avoid excessive political fragmentation and strengthen stability, the threshold applied to all parties, and the electoral system was based on the "context of a unitary State,"[102] 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":[103] the possibility to run as an independent candidate or to join the list of another party likely to pass the threshold. 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.[104]

In unquestionably deferring to Turkey's argument regarding the unique context of social and political instability in which elections were held, which rendered the risk of fragmentation too costly, the Grand Chamber overlooked the fact that the threshold was introduced in 1983, and it applied to all elections before and after 2002. 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 successive Kurdish parties – which the ECtHR had found to be in violation of the Convention.[105]

[100] On the democratic deficit nationwide, see *id.* ¶ 82.
[101] *Id.* ¶ 147.
[102] *Id.* ¶ 124.
[103] *Id.* ¶ 133.
[104] *Id.* ¶ 97–99.
[105] Freedom and Democracy Party (ÖZDEP) v. Turkey, App. No. 23885/94 (Dec. 8, 1999), https://tinyurl.com/yj523a3t; Yazar v. Turkey, App. No. 22723/93, 22724/93 & 22725/93 (Apr. 9, 2002), https://hudoc.echr.coe.int/?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#;{%22itemid%22:[%22001-65370%22]}.

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As the dissent 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"[106] but also rests on a distorted reading of the domestic context, where the competition between political parties and independent candidates is structurally unfair. The latter cannot receive votes from constituents abroad,[107] must individually bear a very high financial cost to stand for elections,[108] cannot make electoral broadcasts,[109] and need more votes than a party to gain the same parliamentary seat. Moreover, in assuming that the Kurds could easily form alliances with mainstream Turkish parties, the Grand Chamber was oblivious to the fact that Kurdish deputies, who had indeed formed a preelection coalition with a social democratic party in 1991, were expelled within months of their election upon the nationalistic frenzy caused by their presence in the parliament.

Thus, the Grand Chamber effectively condoned depriving the majority of the electorate in the Kurdish region of representation in Turkey's parliament. It moreover disregarded the essential and unique role of political parties in democracies, which the ECtHR had emphasized since its 1998 decision in *United Communist Party*.[110]

2 *On the Disenfranchisement of a Minority*

Although the cases of HDP parliamentarians qualified for priority treatment, it took the ECtHR twenty-one months to issue a ruling. When it finally spoke, it did so selectively – only with respect to HDP cochair Demirtaş, leaving out the remaining eleven deputies for no apparent reason.[111] The crux of Demirtaş's Article 5 claim concerned the illegality of his detention. The government crackdown on his party intensified after the HDP's electoral gains in 2015. 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

[106] Yumak v. Turkey, App. No. 10226/03, at 439, ¶ 4 (July 8, 2008) (Tulkens, J., Vajic, J., Jaeger, J., & Sikuta, J., dissenting), https://hudoc.echr.coe.int/?i=001-87363.

[107] Sinan Alkin, *Underrepresentative Democracy: Why Turkey Should Abandon Europe's Highest Electoral Threshold*, 10 WASH. U. GLOB. STUD. L. REV. 347, 356 (2011).

[108] Law No. 2839, *supra* note 50, at Art. 21(2).

[109] Alkin, *supra* note 107, at 356.

[110] United Communist Party of Turkey v. Turkey, App. No. 133/1996/752/951 (Jan. 30, 1998), https://tinyurl.com/3sae5ut6.

[111] Selahattin Demirtaş v. Turkey (No. 2), App. No. 14305/17 (Nov. 20, 2018), https://tinyurl.com/2c4f7w42.

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immunities. The prolonged nature of his detention was intended 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. Deferring to the AYM, and disregarding the Venice Commission, the ECtHR concluded that lower courts had shown sufficient evidence to demonstrate a reasonable suspicion that Demirtaş had committed a criminal offence. The problem 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.[112] Thus, bad faith was *not* in Demirtaş's detention, but in its prolonged nature.[113]

The implications for the regime were clear; as long as Turkish courts showed *some* justification for arrests and kept pretrial detention periods reasonably short, Kurdish deputies were fair game. Upon instructions from Erdoğan to "finish the job"[114] and fourteen days after the ECtHR ruling calling for Demirtaş's immediate release, 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 had been convicted and sentenced to up to sixteen years and eight months of imprisonment.[115] Certainly, the Grand Chamber rectified the Chamber's Article 5(1) judgment, finding that neither the initial nor the continued pretrial 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.[116] 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 decontextualized and case-by-case approach. While Demirtaş is an important political symbol in Turkey, jurisprudentially speaking, there was no

[112] *Id.* ¶ 273.

[113] The Chamber also found a violation of Article 3 of Protocol No. 1 on account of Demirtaş's inability to take part in parliamentary activities.

[114] *Erdoğan: AIHM'nin Kararları bizi Bağlamaz* [Erdoğan: We are not bound by the ECtHR rulings], Deutsche Welle (Nov. 20, 2018), https://tinyurl.com/ms3fb38v.

[115] HDP, undated and untitled document (on file with the author).

[116] Selahattin Demirtaş v. Turkey (No. 2), App. No. 14305/17 (Dec. 22, 2020), https://hudoc.echr.coe.int/fre?i=001-207173.

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justifiable reason to exclude the remaining deputies. If the reason was Demirtaş's status as a leader of the opposition, then at the very least his cochair 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 immunities and placed in pretrial 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's case in isolation from cases of the remaining deputies and from Turkey's history of suppressing Kurdish electoral representation.

3 *Cases Not Heard*

The "constitutive capacity of the law" is not limited to social movements; it also extends to governments.[117] By the early 2000s it had become much more difficult for Kurdish lawyers to mobilize the ECtHR.[118] While the Kurds had become "repeat players" in Strasbourg,[119] so had their adversary. The government had understood the reputational, financial, and political costs of denial and noncooperation. 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 initial strategy was to minimize the number of ECtHR judgments in admitted cases by extending friendly settlement offers to applicants and, when refused, submitting to the Court unilateral declarations to win strike-out rulings. In these declarations, the government partially acknowledged that gross violations occurred but did not accept responsibility or promise to carry out investigations – flying in the face of established ECtHR jurisprudence. Yet, the strategy worked – at least initially. The ECtHR struck out several right-to-life cases, effectively penalizing applicants for refusing to settle their claims with the

[117] Michael McCann, *Reform Litigation on Trial*, 17 L. & Soc. Inquiry 715, 733 (1992).
[118] Kurban, *supra* note 49; Dilek Kurban, *Mobilizing Supranational Courts Against Authoritarian Regimes*, *in* Research Handbook on Law, Movements, and Social Change 197 (Steve Boutcher, Corey Shdaimah & Michael Yarbrough eds., 2023).
[119] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc. Rev. 95 (1974).

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government.[120] While the Grand Chamber interrupted this process in 2003 due to substantial factual disputes between the parties and the government's failure to acknowledge responsibility or to undertake an investigation,[121] the ECtHR resumed this practice in 2021.[122]

When the AKP came to power, it pursued a more proactive strategy by developing new domestic remedies which, if found effective by the Court, would trigger 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 useful for Turkey with the introduction of the ECtHR's pilot judgment mechanism,[123] the government adopted laws tailored for three groups of cases pending in Strasbourg concerning property rights in Turkish-occupied northern Cyprus,[124] forced displacement of Kurdish civilians during the 1990s,[125] and excessively lengthy proceedings.[126]

As it familiarized itself with the ECtHR's growing propensity to invoke subsidiarity to alleviate its docket, the AKP 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 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 ECtHR applicants. The remainder of this section addresses this particular measure.

a Rule by Law

The AKP's most successful and consequential counter-reform strategy was the constitutional complaint mechanism, which entered into force in 2012. Responding expeditiously (only seven months after commencement), the

[120] *See, e.g.*, Akman v. Turkey, App. No. 37453/97, at 69 (June 26, 2001), https://tinyurl.com/wad3ctuf

[121] Tahsin Acar v. Turkey, App. No. 26307/95 (May 6, 2003), https://tinyurl.com/5buzp3xv.

[122] Erdem v. Turkey, App. No. 64727/11 (Mar. 30, 2021), https://tinyurl.com/2usjjjbu.

[123] 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.

[124] Katselli Proukaki, *The Right of Displaced Persons to Property and to Return Home after Demopoulos*, 14 HUM. RTS. L. REV. 701 (2014).

[125] 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 HUM. RTS. L. REV. 731, 736–37 (2016).

[126] Committee of Ministers, Communication from Turkey Concerning the *Ormanci and Others* Group of Cases Against Turkey, at 30, COM (2014) 1468 final, ¶ 106 (Dec. 2, 2014).

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ECtHR rejected a case on the ground that the applicant had not applied to the AYM – without assessing whether the new remedy was effective.[127]

The ECtHR did not change its stance in response to the AKP's postcoup crackdown. Zeynep Mercan was a judge dismissed and arrested two days after the coup attempt. In justifying skipping the constitutional complaint process, Mercan cited special circumstances – the AYM's dismissal of its own two members.[128] 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.[129] After all, the AYM had proven its effectiveness in finding the pretrial detention of two journalists to be unconstitutional.[130] The ECtHR was telling the applicant to seek justice at a court that had dismissed its own members without a hint of due process – based on similar accusations and on the grounds of the same decree. Moreover, it was giving assurances based on the AYM's judgments *before* the coup attempt. In the postcoup phase, the AYM had made it very clear that it would not look for evidence linking its dismissed members with Gülenists, let alone with the coup attempt; the "conviction" of remaining judges was sufficient.[131] 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.[132] There was another sticking point that the ECtHR disregarded: dismissals via emergency decrees (as opposed to by administrative bodies) cannot be contested before Turkish courts.[133]

CoE institutions called for Turkey to establish a mechanism to resolve the postcoup dismissals at the national level.[134] In January 2017, Turkey passed a law establishing the State of Emergency Inquiry Commission.[135] The ECtHR lost little time in rejecting the application of a dismissed

[127] Uzun v. Turkey, App. No. 10755/13 (Apr. 30, 2013), https://tinyurl.com/54ybdmwb.
[128] Mercan v. Turkey, App. No. 56511/16, ¶ 18 (Nov. 8, 2016), https://tinyurl.com/33s7msha.
[129] *Id.* ¶ 26.
[130] AYM, Erdem Gül and Can Dündar, App. No. 2015/18567 (Feb. 25, 2016), https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/18567?Dil=en.
[131] AYM, E. 2016/6, K. 2016/12, ¶ 84, (July 4, 2016) https://siyasipartikararlar.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2016-12-spdi.pdf.
[132] Venice Comm'n, *Turkey: Emergency Decree Laws No. 667–676 Adopted Following the Failed Coup of 15 July 2016*, CDL-AD(2016)037, ¶ 186 (Dec. 12, 2016).
[133] *Id.* ¶¶ 200–01.
[134] Demir-Gürsel, *supra* note 56.
[135] Olağanüstü Hal İşlemleri İnceleme Komisyonu Kurulması Hakkında Kanun Hükmünde Kararname [Decree on the establishment of the State of Emergency Procedures Investigation Commission], No. 685, Official Gazette, No. 29957, January 23, 2017.

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teacher for failure to exhaust this remedy.[136] 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 taking the case 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. Two days after the Commission began accepting applications,[137] the ECtHR rejected 12,600 petitions.[138] The consequences were dire; by the end of 2021, the Commission had reviewed 120,703 of the 126,783 submitted applications, rejecting 100,000.[139] It reinstated to their jobs only 3,733 of the 125,678 dismissed civil servants.[140]

Finally addressing the effectiveness of the constitutional complaint mechanism in March 2018, the ECtHR did not see a reason to depart from its (precoup) finding that the AYM was an effective remedy for individuals deprived of their right to liberty.[141] It has not changed its stance since. Even in cases where it found violations in the pretrial detentions of a former AYM judge,[142] several journalists,[143] and over 400 judges and prosecutors,[144] the ECtHR evaded the issue – glossing over the fact that in these very cases the AYM had either found no violation[145] or dismissed the applications.[146] Effectively, the ECtHR gave the AYM a blank check, the bankability of which became evident two months later.

[136] Köksal v. Turkey, App. No. 70478/16 (June 6, 2017), https://tinyurl.com/bdfpm54w.
[137] *Jagland Calls Turkey for Release of Hunger Strikers Gülmen and Özakca*, Stockholm Ctr. for Freedom (June 26, 2017), https://stockholmcf.org/jagland-calls-turkey-for-release-of-hunger-strikers-gulmen-and-ozakca/.
[138] Turkish Ministry of Justice, *OHAL Komisyonu Kurulmasıyla AİHM 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_duyurular/2017/Temmuz/basin-ilani.pdf.
[139] Activities Report 2021, *supra* note 88, at 25.
[140] *Id.* at 7.
[141] Mehmet Hasan Altan, App. No. 13237/17, ¶ 142 (Mar. 20, 2018), https://tinyurl.com/mrpdau5y; Şahin Alpay, App. No. 16538/17, ¶ 121 (Mar. 20, 2018), https://tinyurl.com/y23xbb7a.
[142] *E.g.*, Alparslan Altan v. Turkey, App. No. 12778/17 (Apr. 16, 2019), https://hudoc.echr.coe.int/fre?i=001-192804.
[143] Sabuncu v. Turkey, App. No. 23199/17 (Nov. 10, 2020), https://tinyurl.com/4bndsvap.
[144] Turan v. Turkey, App. Nos. 75805/16 and 426 others, ¶ 18 (Nov. 23, 2021), https://hudoc.echr.coe.int/fre?i=001-213369.
[145] *E.g.*, Ahmet Hüsrev Altan v. Turkey, App. No. 13252/17 (Apr. 13, 2021), https://hudoc.echr.coe.int/fre?i=001-209444.
[146] *E.g.*, Alparslan Altan v. Turkey, App. No. 12778/17.

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b Lawlessness

On December 28, 2011, Turkish military jets killed thirty-four Kurdish civilians, including seventeen minors, who were crossing the Iraqi border back into Turkey, smuggling goods with the knowledge and implicit consent of local authorities.[147] A military court investigation found that the military had carried out the aerial bombardment upon the general staff's approval and presumably with the government's consent. Yet, the military prosecutor dismissed the case, concluding that the victims were mistaken as PKK militants.

From the moment the families filed their complaint, the case was a hot potato for the AYM. As the first serious human rights case that 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, that the killing of Kurdish civilians in a 1994 aerial bombardment was a substantive violation of Article 2 left the AYM no room for the kind of ruling it ought to give.[148]

What rescued the AYM from this dilemma was the lead lawyer's submission of the requested additional information with two days' delay. Finding the lawyer's medically certified illness not to be grave enough, the AYM rejected the case.[149] A dissenting judge reminded the majority of ECtHR case law establishing that very short time periods, unreasonable bureaucratic hurdles, and formalistic procedural requirements are disproportionate restrictions on access to justice. He noted that (1) the AYM could have easily obtained the information itself; (2) the remoteness of the villages where the applicants lived and the security situation might have reasonably delayed the completion of the process; and (3) rules of procedure on constitutional complaints did not give guidance as to which illnesses constitute valid excuses for delays.[150] The ECtHR dismissed the case on the same grounds as the AYM.[151] Displaying extreme procedural

[147] *Jetler Sivilleri Vurdu* [The jets struck civilians], CUMHURIYET, Dec. 30, 2011.
[148] Benzer v. Turkey, App. No. 23502/06 (Nov. 12, 2013), https://tinyurl.com/4nj7fyrf.
[149] AYM, Mehmet Encü, App. No. 2014/11864 (Feb. 24, 2016), https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/11864.
[150] AYM, Mehmet Encü, App. No. 2014/11864 (Feb. 24, 2016) (Osman Alifeyyaz Paksüt, J. dissenting), https://kararlarbilgibankasi.anayasa.gov.tr/BB/2014/11864.
[151] Selahattin Encü v. Turkey, App. No. 49976/16 (May 7, 2018), https://tinyurl.com/we2ubtmj.

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rigidity, it went against its own jurisprudence and refused to pass judgment in arguably the most critical case filed against Turkey in decades.

IV The Authoritarian Threat to the Rule of Law

The Turkish case confirms the overall theme of this volume: 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. 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.[152] This is necessary in two respects.

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 situation hinges on endogenous and exogenous factors. The longer and deeper a country has been ruled by authoritarian legalism, the more likely it will revert to lawlessness. It is essential to see the gray areas along this continuum, where different conceptual categories can coexist and vary across time and space. One would be hard-pressed to find examples where the entirety of a country is governed through the rule by law at all times. Rather, governance 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"[153] 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 toward 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 dissent. Where they face a formidable domestic rival, in the form of a civil society movement on the streets or a political party on the ballot, they would have self-interest in shifting the pendulum toward lawlessness. A further factor is the decline in the moral authority, institutional strength, or bargaining power of the international community. Where they perceive weakness,

[152] *See* Chapter 1.
[153] I am thankful to Greg Shaffer and Wayne Sandholtz for this nice formulation.

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hesitation, or confusion on the part of international institutions in upholding their own norms 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. Indeed, Turkey's swings along the pendulum were shaped by (1) the ups and downs of its EU accession process; (2) its engagement with the ECtHR; (3) actual (HDP and the Gülen movement) and perceived (Gezi protests[154]) internal threats to Erdoğan's authoritarian rule; and (4) broader geopolitical developments (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 and the middle of that decade, when the EU accession carrot was most viable, Erdoğan's AKP desperately needed the support of the international order, and the ECtHR's docket was not yet experiencing the adverse impact of post-Cold War enlargement. This progress toward the rule of law was the direct outcome of 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 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, and Erdoğan was enjoying international endorsement as the reform-minded leader of the new Turkey, the pendulum started to quickly shift toward rule by law. The diminished international support for human rights activists and victims, such as the ECtHR's inadmissibility decisions and strike-out rulings, helped Erdoğan consolidate his power. By the 2010s, the EU was distracted by internal (rule-of-law backsliding in new member states) and external (uncontrolled mass migration from conflict zones and poor countries) crises, the ECtHR was institutionally paralyzed with an unmanageable docket, and Erdoğan's one-man rule was under increasing threat by external (the Arab Spring) and internal (the HDP appealing to non-Kurdish liberal votes and the AKP falling out with Gülenists) developments. For Erdoğan, the longevity of his power lay not in rule-of-law-reforms, but in combining rule by law (replacing the ECtHR's

[154] Özge Zihnioğlu, *The Legacy of the Gezi Protests in Turkey, in* AFTER PROTEST: PATHWAYS BEYOND MASS MOBILIZATION 11 (Richard Youngs ed., 2019).

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oversight with that of captured domestic courts) with lawlessness (disregarding the outcome of elections, terrorizing Kurdish towns through unlawful curfews, locking up elected Kurdish politicians, and taking over the local governance of Kurdish towns with executive fiat). By the 2020s, internal (a failed coup against the AKP) and external (the global rise of illiberalism and Russia's and China's growing threats to the international order) dynamics had emboldened Erdoğan to rule by lawlessness. This time, his disregard of rules extended to foreign policy by blocking Sweden's (and initially Finland's) NATO accession and thus undermining European security amidst the growing Russian threat. 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 domestic political purposes.

Second, the arbitrary-exercise-of-power spectrum applies not only to governments interacting with TLOs but also to those orders themselves. As Shaffer and Sandholtz point out, the rule of law and democracy are interdependent; we can only speak of the rule of law if the substance of rules is determined by democratic participation.[155] As substantively antidemocratic as it is, Turkey's electoral threshold does not even meet the basic procedural requirements of democracy; it was introduced by a military regime. Yet, European institutions have not problematized this democratic deficit, which has enabled the AKP's single-party rule for a long time. The embrace of a thin notion of democracy and the rule of law has also permeated the ECtHR's jurisprudence on Turkey. In a striking factual mistake, the ECtHR treated the threshold as the "choice of the legislature" and granted Turkey the wide margin of appreciation it affords member states on electoral issues.[156] Just as the election system that enabled and sustained Erdogan's single-party rule lacked minimal procedural safeguards, so did the referendum that changed the regime type to a presidential system. The amendments were adopted by the parliament, where the detained HDP deputies were not allowed to participate, and submitted to a referendum conducted under emergency rule. Yet, the international community recognized the referendum results without question.

According to Shaffer and Sandholtz, a central reason for adopting a goal-oriented definition of the rule of law is "the risk of creating

[155] *See* Chapter 1.

[156] Yumak v. Turkey, App. No. 10226/03, at 439 (July 8, 2008), https://hudoc.echr.coe.int/?i=001-87363.

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formulaic checklists based on specified, formal characteristics."[157] The performance of European institutions pursuant to this conceptualization does not hold either. Take the constitutional complaint mechanism, treated by the EU and the CoE as a *sine qua non* for the rule of law. Neither Brussels nor Strasbourg considered whether the AYM, which has long been complicit with authoritarianism in Turkey, would be able and willing to conduct a rights-oriented review in accordance with European human norms.

Nor does the ECtHR withstand the arbitrariness scrutiny developed by Shaffer, Sandholtz, and Krygier. It 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 eliminate as many cases as possible, went against the right of individual petition – the core of the European human rights regime. Similarly, in rejecting justiciable claims concerning gross violations on grounds of an ineffective domestic remedy, the ECtHR has denied victims their only chance for a day in court. Nor has the ECtHR met the requirements for "reason-giving"; it has given either no reason, since it is not required to do so in inadmissibility decisions, or an unjustifiable one. The pursuit of subsidiarity is not proportionate to the rejection of tens of thousands of applicants due to their nonexhaustion of a domestic remedy that has proven to be ineffective.

As Ginsburg notes, liberal democracy "can be promoted, defended or undermined by international legal institutions."[158] The ECHR system has not only failed to defend, but has undermined, liberal democracy in Turkey at critical points. It is difficult to make a counter-factual argument as to whether Erdoğan would have complied with an ECtHR judgment against Turkey's electoral threshold. 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's Committee of Ministers started infringement proceedings for nonexecution of the ECtHR's *Demirtaş* judgment and moved expeditiously thereafter toward suspending Turkey for its noncompliance, it could have

[157] *See* Chapter 1.
[158] Ginsburg, *supra* note 6, at 290.

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forced Erdoğan to change course by, for example, releasing Kurdish parliamentarians held in captivity. At the very least, it would have drawn international attention to the antidemocratic nature of Turkey's electoral regime and undermined Erdoğan's claim to majoritarian democracy. Even if such an outcome did not materialize, the ECHR regime would have demonstrated commitment to its principles in relation to authoritarian regimes. This, in itself, would have been a remarkable outcome, particularly in light of the proven failure of restraint and appeasement policies in taming antiliberal governments.

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