Eliminating External Constraints: An Analysis of the Domestic Constitutional Courts' Modalities of Non-Compliance with the ECtHR Judgments in Hungary, Poland and Turkey

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ABSTRACT

This thesis investigates how constitutional courts in Hungary, Poland and Turkey use abusive judicial review in order to eliminate external constraints posed on the hybrid regimes in these countries by the European Court of Human Rights (ECtHR). By way of analyzing the case-law of constitutional courts on cases concerning the implementation of ECtHR standards, this thesis finds that there are three main non-compliance modalities employed by these courts: direct non-compliance, silent non-compliance and creative non-compliance. Although the effectivity of the Convention system mostly depends on the execution of the judgments, the ECtHR fulfils a number of important functions to uphold the protection of fundamental rights in hybrid regimes even without achieving full compliance. This thesis argues that Article 18 and infringement proceedings can prove to be vital tools in order to better adapt and respond to the unique challenges posed by hybrid regimes.

INTRODUCTION

As the final authority to rule on the constitutionality of laws and the individual constitutional complaints, constitutional courts have a large influence over the political landscape of a country. As a result, constitutional courts are among the first targets of governments with illiberal tendencies.[1] Through court-packing, reduction of the jurisdiction of the court, or amendments in the procedures used by the courts, illiberal hybrid regimes aim to ensure that the constitutional courts cannot effectively restrain executive and legislative powers.

In this context, Landau defines abusive constitutionalism as the use of constitutional change as a method to turn a state significantly less democratic than before.[2] Abusive constitutionalism leads to societal and political transformation in countries that are governed by hybrid regimes. This transformation can be seen in media, academia, public sector, civil society and education systems. Changes in the organization of public life occur in a snowball effect that makes social resistance almost impossible.[3] Due to the appointment of party-loyalists to high governmental institutions such as the judiciary, governmental policies that lead to this change do not counter any effective checks and balances. As a result, these societies turn into more closed societies by undermining the principles of liberal democracy such as the protection of individual rights and separation of powers.

Hungary, Poland and Turkey are three Council of Europe Member States that have been associated with democratic backsliding in the last decade, and the state of democracy in these countries is considered as a hybrid regime. The constitutional courts in these countries have also been affected by this backsliding, with the ruling parties amending the constitution to

[1] Andras Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (CUP 2021) 66.
[2] David Landau, 'Abusive Constitutionalism' (2013) 47 U.C. Davis L. Rev. 189, 195.
[3] Sajó (n 1) 57.

increase the seats in the constitutional courts, or by appointing judges in the place of retiring members, to prevent them from acting as a real constraint.

Within the European context, the European Court of Human Rights (ECtHR) provides an independent and binding judicial mechanism where abusive constitutionalism in illiberal contexts can be put under external scrutiny as a result of complaints filed by individuals who claim that their fundamental rights have been violated.

This thesis identifies domestic constitutional courts' role in providing hybrid regimes different grounds for not complying with ECtHR decisions. While the European Convention on Human Rights (ECHR) system provides a subsidiary, last resort mechanism to identify fundamental rights violations, domestic actors, and especially constitutional courts in hybrid regimes play an important gate-keeper role for the implementation of ECHR standards that do not necessarily require legislative amendments. These courts cite ECtHR case-law extensively, and apply the ECHR standards on a regular basis. Yet, it appears that when it comes to cases that have a high strategic priority for their respective governments, domestic constitutional courts play an active role in presenting different reasons for not complying with ECtHR judgments to the governments in hybrid regimes.

Chapter 1 will explain the conceptual framework of this research, focusing on the role of constitutional courts in hybrid regimes and situating these courts' role in eliminating external constraints on hybrid regimes. In Chapter 2, different types of non-compliance will be examined through conducting case review in these three jurisdictions. Lastly, Chapter 3 will identify the tools that are available to the Council of Europe and the ECtHR to address unique challenges posed to the Convention system by hybrid regimes.

CHAPTER 1: CONCEPTUAL FRAMEWORK

1.1 Constitutional Courts as Enablers of Hybrid Regimes

Constitutional courts are designed as an external mechanism to limit the majoritarian tendencies that might arise in constitutional democracies.[4] As guardians of the constitution, acting as an independent body they are meant to ensure limited government, to review the constitutionality of the acts of the legislative and executive branches and protect the fundamental rights of individuals. In the 'era of constitutional courts', Issacharoff contends that these courts can be instrumental and successful in limiting the monopolization of power under the executive branch.[5] It is exactly due to this rationale behind the establishment of constitutional courts, that individuals in backsliding democracies turn to them against the threats authoritarian leaders pose to democracy, rule of law and fundamental rights.[6]

Indeed, the leaders in hybrid regimes are aware of this: this is why changing the composition and competences of constitutional courts to eliminate this internal constraint is among the first tools in the playbook of authoritarian leaders to consolidate and perpetuate their powers.[7]

Having a constitutional majority in the legislative branch, Hungary's Fidesz and Turkey's Justice and Development Party (AKP) were able to pass constitutional amendments which extended the number of judges in the constitutional courts. The extra seats in the Hungarian Constitutional Court (HCC) and the Turkish Constitutional Court (TCC) were filled by these ruling parties without the involvement of the opposition. In addition to appointments to these extra seats, the long and uninterrupted tenure of Fidesz (currently 12 years) and AKP (currently

[4] András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 371.
[5] Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (CUP 2015) 12-14.
[6] David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 U.C. Davis L. Rev. 1313, 1315.
[7] Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 The University of Chicago Law Review 545, 551.

20 years) also allowed them to fill the vacancies that were opened due to end of tenure and/or retirement of former judges as well.

In contrast, lacking a constitution-amending majority, Poland's Law and Justice Party (PiS)'s term in government started with a constitutional crisis on the appointment of Constitutional Tribunal (PCT) judges. PiS-aligned Polish President denied swearing in all five judges appointed by the previous parliament, three of which the Constitutional Tribunal found legally appointed, and appointed other judges instead of them.[8] Like in Turkey and Hungary, the Polish government also appointed the judges for the seats that have become vacant during their term in government. As a result, all of the current judges in the HCC, TCC and PCT have been appointed by the ruling parties.

Backsliding from democracy towards authoritarianism[9] happens through the utilization of a number of legal or non-formal tactics by the 'would-be authoritarian leaders', including abusive constitutional amendments, changes in the normal laws, or by not following certain constitutional/democratic traditions.[10] As a part of this toolkit, Landau and Dixon define an act as 'abusive judicial review' when a judicial decision has a 'significant negative impact on the minimum core of electoral democracy'.[11] In this context, captured constitutional courts are utilized by hybrid regimes to pursue their own political agendas and implement anti-democratic constitutional change.[12]

The delegation of decision-making in certain policies to implement anti-democratic change, from the executive to the judiciary accords such decisions a presumption of legitimacy, since the courts are *prima facie* seen as a branch of government different than the executive.[13] As a

[8] Wojciej Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 62.
[9] Nancy Bermeo, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5.
[10] Landau and Dixon (n 6) 1320.
[11] ibid 1325.
[12] David Landau and Rosalind Dixon, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (OUP 2021) 82.
[13] ibid.

result, constitutional judicial review, designed to protect fundamental rights and implement the constraints of power on political actors, is open to abuse by these regimes.

This enabling role of captured constitutional courts can take different forms. In what Landau and Dixon call 'weak abusive judicial review' – these courts' dismissal of challenges to legislative or executive acts, or claims of fundamental rights violations, that undermine the core values of democracy can – have a legitimizing effect for such act, while also failing to uphold the supremacy of the constitution in the meantime.[14] Turkish Constitutional Court's refusal to review the constitutionality of emergency decrees during the state of emergency in aftermath of the coup attempt in July 2016, in defiance of its own previous jurisprudence,[15] can be seen as an example of such weak abusive judicial review.

On a higher level of political influence, the judicial review by constitutional courts may also be utilized to actively dismantle the democratic structures in place in the disguise of unconstitutionality ('strong abusive judicial review').[16] The Polish Constitutional Tribunal's decision striking down the law regulating the National Council of Judiciary,[17] which paved the way to the government to adopt a new law that increased the PiS's influence over the judiciary, can be seen as an example of this strong abusive judicial review.

1.2 External Constraints on Hybrid Regimes and Domestic Constitutional Courts

Through abusive judicial review, courts become complicit in dismantling the internal constraints on the executive power in illiberal settings. Yet, while hybrid regimes are able to take over the independent institutions in their own countries, they cannot run away from the

[14] ibid 94.
[15] Ece Göztepe, 'The Permanency of the State of Emergency in Turkey' (2018) 28 Zeitschrift für Politikwissenschaft 521, 531.
[16] Landau and Dixon, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (n 12) 97.
[17] Sadurski (n 8) 79, referring to Polish Constitutional Tribunal's K 5/17 ruling dated 20 June 2017.

supranational supervision so long as they remain a Member State of the Council of Europe (CoE).

The CoE was founded in 1949 with the aim to protect against the collapse of democracy, taking into account the experience of the Second World War.[18] In Hungary, Poland and Turkey, their membership to the Council of Europe and the mandatory jurisdiction of the European Court of Human Rights creates a layer of complexity when courts dismantle constraints on executive powers. The democratic backsliding happening in CoE Member States inevitably results in a conflict with the ECtHR jurisprudence. Leaving the CoE is usually not on the table, as these regimes are proud of their democratic legitimacy gained through election victories, both domestically and internationally.[19] Therefore, the ECtHR can be – at least on paper – considered as an external constraint on these hybrid regimes, as they are formally bound by the European Court's judgments, and there is not a way for these regimes to capture the European Court.

So, how do the hybrid regimes interact with an external constraint that they cannot control? In this conjunction, it can be observed that constitutional courts can act as a mediator between supranational organizations and governments, employing a pragmatic approach where they decide the cases that have a strategic importance to the regime in a politically expedient way while prioritizing legal considerations in others.[20]

While explaining the external constraints on Hungary, Bozóki and Hegedűs underline that Hungary's membership to the European Union results in a unique model where external actors such as the EU institutions and the ECtHR function as a 'systemic constraint' on the hybrid

[18] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 6-8.
[19] Stephen Levitsky and Lucan A. Way, 'Elections without Democracy: The Rise of Competitive Authoritarianism' (2002) 13(2) Journal of Democracy 51, 59.
[20] Alexei Trochev and Peter H. Solomon, 'Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state' (2018) 51 Communist and Post-Communist Studies 201, 208.

regime.[21] They contend that Hungary cannot afford to ignore the ECtHR's judgements on a regular and systematic basis, as this would clearly suggest that it is failing to uphold its commitment to protect basic rights under EU treaties, citing a number of cases where "even the neutralized HCC (…) accepts and applies the jurisprudence of the ECtHR".[22]

Indeed, these courts frequently cite and apply the ECHR standards in their case-law, especially when it comes to politically irrelevant cases. Yet, this thesis suggests that the domestic constitutional courts in Hungary, Poland and Turkey play an important role as a gate-keeper when it comes to the cases with political and strategic importance. Since the constitutional courts have the jurisdiction to adjudicate on the alleged violations of fundamental rights through constitutional complaint procedures, they are integral to the implementation of the ECHR standards in the domestic level.[23] Nevertheless, the judgments of constitutional courts in politically sensitive cases in Hungary, Poland and Turkey puts strains on the relationship of these three countries with the ECtHR in both procedural and substantive aspects that can be influential in the protection of fundamental rights.

Regarding the procedural aspect, this thesis takes a broader understanding of compliance and examines domestic constitutional courts' judicial behavior on non-compliance regardless of whether the ECtHR considers the domestic constitutional court as an effective remedy in a specific proceeding or not. In order to regard a remedy as effective, the Court requires that remedy to be capable of providing redress and offer reasonable prospects of success.[24] While the ECtHR has found the individual application mechanisms in Hungary,[25] Poland[26] and

[21] András Bozóki and Dániel Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union' (2018) 25 Democratization 1173, 1178-1179.
[22] ibid 1179.
[23] Article 24 of the Hungarian Fundamental Law, Article 79 of the Polish Constitution and Article 148 of the Turkish Constitution.
[24] William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 764-770; *Sejdovic v. Italy* App No 56581/00 [GC] (ECtHR, 10 March 2006) para. 45.
[25] *Szalontay v. Hungary* App No 71327/13 (decision) (ECtHR, 12 March 2019).
[26] *Szott-Medynska and Others v. Poland* App No 47414/99 (decision) (ECtHR, 9 October 2003).

Turkey[27] as an effective remedy that needs to be exhausted before applying to the European Court, these domestic constitutional courts also have other procedures such as abstract or concrete norm review, which are not seen as a remedy that needs to be exhausted.

A narrow understanding of judgment compliance obliges the domestic authorities to eliminate the consequences of a violation judgment by taking measures for that specific individual, and is applicable only on the respondent State to a given case. This requires the domestic constitutional courts, acting in their capacity in reviewing individual complaints as an effective remedy, to comply with the ECtHR's judgments in a specific case.[28]

On the other hand, a broader understanding of compliance requires the constitutional courts to interpret primary norms in accordance with the ECtHR judgments in all of their procedures that have an impact on Convention rights, regardless of whether they are considered as an effective remedy in a specific procedure or not.[29] This richer category of compliance is rooted in the international obligation of States Parties to the ECHR to perform their Convention obligations in good faith, as the principle of subsidiarity requires them to address the claims of violation of fundamental rights in the domestic level in accordance with the ECHR standards even before a case comes to the European Court.

This broader concept of compliance was used by the constitutional courts in Central-Eastern Europe during transition to democracy in 1990s, when openness to European constitutional law standards was a key feature in order "to be an equal partner of the elder, established constitutional courts" in Europe.[30] The Hungarian Constitutional Court started to cite Strasbourg cases even before Hungary officially declared its intention to be party to the

[27] *Uzun v. Turkey* App No 10755/13 (decision) (ECtHR, 30 April 2013).
[28] For an example of non-compliance with even the narrow understanding of judgment compliance, see the TCC's second *Kavala* judgment explained in Chapter 2.
[29] Alexandra Huneeus, 'Compliance with Judgments and Decisions' in Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 443.
[30] László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy' (2003) 18(1) International Sociology 133, 145.

ECHR.[31] Yet, this wave of democratization is over for a long time now, and it seems like the tides are turning in favor of a more narrow and restrictive approach in using international human rights jurisprudence in domestic cases.

Against this backdrop, this thesis focuses on the substantive aspect of the how the domestic constitutional courts are coming up with different modalities of non-compliance to distance themselves from interpreting primary norms in accordance with the jurisprudence of the ECtHR. This phenomenon is classified as abusive judicial review because the outcome of these cases of non-compliance are always in accordance with the political agenda of the executive branch, and they result in a 'significant negative impact on the minimum core of democracy' resulting in fundamental rights violations.

Disputes concerning compliance with ECHR standards as developed by the Strasbourg Court is not unique to countries that are associated with democratic backsliding. The binding effect of the ECtHR judgments, and compliance with such decisions often creates controversy in more consolidated democracies as well. The German Federal Constitutional Court's *Gorgulu*[32] decision is routinely criticized for "letting the genie out of the bottle" by paving the way for a sovereigntist constitutional understanding to take over in cases when there is a conflict between domestic laws and ECtHR jurisprudence.[33] In the United Kingdom, ECtHR's jurisprudence concerning prisoners' voting rights created a direct confrontation between the UK and Strasbourg that has even led to the UK Parliament adopting a resolution that rejected the

[31] ibid.
[32] German Federal Constitutional Court, Order of October 14, 2004, 2 BvR 1481/04, BVerfGE 111, 307 (translation available at <http:// www.bverfg.de/e/rs20041014_2bvr148104en.html>)
[33] Helen Keller and Reto Walther, 'The Bell of Gorgulu Cannot Be Unrung – Can It?' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence* (OUP 2020) 86.

ECtHR's *Hirst*[34] judgment.[35] Similarly, the Italian Constitutional Court granted itself the power to rule certain Convention standards as unconstitutional.[36]

Yet, resistance to ECtHR judgments in these countries can be distinguished from the non-compliance modalities employed by the constitutional courts in Turkey, Hungary and Poland due to two reasons: firstly, the independence of the judiciary and secondly, due to the fact that such resistance does not necessarily follow the political priorities or preferences of the government. It is the lack of independence of the constitutional courts in these three countries, and the utilization of them by the ruling regimes to pursue their own anti-democratic aims that elevates such disputes from being mere conflicts on the position of the ECtHR judgments to abusive judicial review.

The next chapter reviews how these courts fulfill their role as a gate-keeper by examining the methods used by them to avoid the compliance with ECHR standards. Studying this behavior of constitutional courts in dealing with external constraints is valuable to identify the tools that can be used by the European Court and the Committee of Ministers (CoM) in addressing non-compliance. Furthermore, the public nature of judicial proceedings before the European Court and the execution process of the judgments before the CoM allows us to see how hybrid regimes explain the purpose and reasons of their actions using the 'human rights language'. As Ginsburg and Moustafa have underlined, this provides a useful insight into the dynamics of an otherwise non-transparent political environment.[37]

[34] *Hirst v. the United Kingdom (no. 2)* App No 74025/01 [GC] (ECtHR, 6 October 2005).
[35] Ed Bates 'Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting' in M. Saul, A. Follesdal, and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (CUP 2017) 275.
[36] Italian Constitutional Court, Judgment of October 22, 2007, 348/2007 (English translation available at <https://www.cortecostituzionale.it/documenti/download/doc/recent_ judgments/S349_2007_Eng.pdf>), paras. 4.2– 4.7.
[37] Tamir Moustafa and Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tamir Moustafa and Tom Ginsburg (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008), 3.

Moreover, this examination allows us to better understand the quest of hybrid regimes seeking internal and external legitimacy for their actions[38]: when it comes to the external constraints posed on them, governments could easily block the execution of ECtHR judgments without the involvement of constitutional courts. Instead, they use pragmatic courts,[39] which do not pose a significant threat to their political priorities, as a means to eliminate external constraints. Through the involvement of courts, they are able to provide legal excuses for non-execution of ECtHR judgments to the external actors while internally, they can claim that they are abiding by the rule of law to their constituents. The judicialization of hybrid regimes' political lack of willingness to abide by external constraints show that they are trying to have their cake and eat it too.

1.3 Case Selection Criteria

In order to analyze the abusive judicial behavior of the constitutional courts in these three countries, the following criteria will be used for selecting the cases.

- Strategic importance

This thesis focuses on cases that are of symbolic, political or social importance to the regimes in order to assess whether there exists an abusive judicial behavior (i.e. achieving anti-democratic outcomes through the judiciary). As the strategic priorities of the governments in Hungary, Poland and Turkey are different and context-dependent, I will conduct a case-by-case analysis in demonstrating whether a case is of strategic importance to a regimes or not.

- Clear misapplication of established ECHR Standards

[38] ibid 5.
[39] Trochev and Solomon (n 20).

To mitigate any reasonable legal disagreement on a new developing interpretation of a Convention obligation, the selection is based on the cases of constitutional courts that are in clear violation of ECHR Standards, which have been well-established in the case-law of the ECtHR. The legal justifications of the constitutional courts in reaching a different outcome than the ECtHR will be weighted in order to assess whether there has been a manifest violation in the application of ECHR standards.

- Individual applications where there both the domestic constitutional court and the ECtHR has ruled on the same matter

Additionally, the cases where an individual has claimed the violation of a right before both the domestic constitutional court and then the ECtHR will be used to trace the direct judicial dialogue between the constitutional courts and the European Court.

CHAPTER 2: PATTERNS OF BEHAVIOR

2.1 Modalities of Non-Compliance

This thesis classifies the modalities of non-compliance in the following forms: (1) direct non-compliance, (2) silent non-compliance or (3) creative non-compliance.

The behavior of an constitutional court will be categorized as direct non-compliance if a constitutional court openly challenges the binding nature of the final judgments of the ECtHR. Non-compliance will be categorized as silent when the constitutional court does not follow the standards set by the ECtHR without addressing the reasons of why it is not adhering to such standards. Additionally, a judicial behavior will be considered as silent non-compliance if a constitutional court holds certain politically sensitive cases in its docket for an excessive period of time. Lastly, a judicial behavior will be classified as creative compliance if a constitutional court reaches a different outcome than the ECtHR jurisprudence, yet tries to justify its departure from these standards without challenging the binding nature of the ECtHR judgments.

2.2 Direct Non-Compliance

A domestic constitutional court's behavior is categorized as 'direct non-compliance' if the court directly confronts a binding judgment of the ECtHR finding violation against that Member State. Although the position of the ECtHR decisions in domestic legal systems have been debated in various Council of Europe Member States, a constitutional court's role in blocking the execution of an ECtHR judgment explicitly was developed in Russia.

After the ECtHR overruled the Russian Constitutional Court (RCC) in a number of cases such as discriminatory treatment between men and women in parental leave[40] and indiscriminate

[40] *Konstantin Markin v. Russia* App No 30078/06 (ECtHR, 7 October 2010).

bans on prisoners' voting rights,[41] the Chairman of the RCC claimed that the European Court's 'judicial activism' was problematic and can result in politicization of the Convention, causing serious confrontations between the ECtHR and the national courts.[42]

In line with these concerns, on the initiative of a number of Russian Duma deputies, the Russian Constitutional Court declared that it can render certain judgments of the ECtHR 'non-executable'[43] if the ECtHR judgment is in contradiction with the Russian Constitution and there does not exist any way for avoiding such a conflict with the Constitution except for non-execution.[44] The Russian Constitutional Court's judgment giving itself the authority to veto ECtHR judgments was later on included in the Constitutional Court Act, and eventually also in the Constitution itself.[45]

Similar to how the Russian legislature turned to the RCC to block the execution of ECtHR judgments after the European Court delivered judgments that the government was not happy with, the Polish Prosecutor General turned to the Polish Constitutional Tribunal to find a way to block the execution of ECtHR judgments when the European Court started delivering violation judgments concerning the latest judicial reforms that were conducted by the government. The Polish Constitutional Tribunal's two recent rulings[46] on the (non-)execution of ECtHR judgments concerning the rule of law crisis in Poland show that the PCT was willing to take on this new role as an internal institution to block the execution of ECtHR judgments that were of strategic importance to the regime.

[41] *Anguchov and Gladkov v. Russia* App No 11157/04 and 15162/05 (ECtHR, 4 July 2013).
[42] Valeriy Zorkin, 'Margin of Concessions' *Rossiiskaya Gazeta* (29 October 2010) <rg.ru/2010/10/29/zorkin.html> accessed 15 June 2022.
[43] Russian Constitutional Court, Judgment N 21-P/2015, dated 14 July 2015.
[44] Vladislav Starzhenetskiy, 'The Execution of ECtHR Judgments and the Right to Object of the Russian Constitutional Court', in Marten Breuer (ed) *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019) 262.
[45] Article 125 (5) of the Russian Constitution.
[46] Polish Constitutional Tribunal, Ruling K 6/21, dated 24 November 2021; Ruling K 7/21, dated 10 March 2022.

The judicial reforms, which were at the heart of the ECtHR judgments, have been in the forefront of Polish politics and their relations with the EU, as international bodies consistently found that they undermine rule of law and the independence of the judiciary.[47] Even the initiation of EU infringement proceedings against Poland due to this rule of law crisis did not stop the Polish government from continuing with the reforms, as the PiS government responded by antagonizing Brussels, stating that such proceedings are "an attack on the Polish constitution and [Polish] sovereignty".[48] Both of these rulings, where the PCT found that it can overrule ECtHR judgments, are of political and strategic importance to the regime, since they are regarding these judicial reforms.

After the European Court started delivering violation judgments on cases concerning these reforms, the Prosecutor General, who is a politician serving as the Justice Minister at the same time, turned to the Tribunal, asking for it to rule on the (non-)conformity of Article 6(1) as interpreted by the ECtHR in cases concerning the independence of the judiciary, with the Polish Constitution. In addition to the Prosecutor General, the PiS-controlled Parliament and the President also filed briefs in both of these cases, asking the Tribunal to find ECtHR's interpretation of Article 6(1) in these judgments in contravention with the Polish Constitution.

The ECtHR's *Xero Flor w Polsce sp. z.o.o v. Poland* judgment concerned an application by a private company, claiming that its right to a fair trial protected under Article 6(1) of the Convention was violated because the panel of the Tribunal, which ruled its application inadmissible, included a judge who was illegally appointed to the Tribunal.[49] As explained above,[50] the appointment of three judges who were illegally appointed to the Polish

[47] Venice Commission, *Poland Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, 11 December 2017, CDL-AD(2017)031, para. 129.
[48] Jennifer Rankin, 'Brussels launches legal action over Polish rulings against EU law' *The Guardian* (Brussels, 22 December 2021) <https://www.theguardian.com/world/2021/dec/22/brussels-launches-legal-action-over-polish-rulings-against-eu-law> accessed 15 June 2022.
[49] *Xero Flor w Polsce sp. z.o.o v. Poland* App No 4907/18 (ECtHR, 7 May 2021).
[50] See Chapter 1.1.

Constitutional Tribunal was one of the first steps of the new PiS government to capture the Tribunal. When these appointments were challenged before the PCT, the Tribunal – before it was captured – found the appointment of these three judges unconstitutional and the former President of the Tribunal denied these judges from taking office.[51]

In the meantime, the PiS-led Parliament adopted legislation that made it almost impossible for the Tribunal to rule on cases before it, such as supermajority requirements for striking down laws, and the Prime Minister refused to publish the rulings issued by the Tribunal on the Official Journal in order to prevent them from taking legal effect.[52] Eventually, after the PiS appointed a sufficient number of judges to the PCT, the Tribunal ruled again on this matter and found that the illegally appointed judges can take office.[53] In Xero Flor's application before the Constitutional Tribunal, the dissenting judge also stated that the panel that reviewed this application was composed in violation of the Constitution.

In the *Xero Flor* case, the ECtHR found that the election of three persons to the PCT in December 2015 was in 'manifest breach of domestic law' that concerned fundamental rules of the appointment process, relying heavily on the PCT's own judgment decided before the Tribunal was captured, that established that these judges were elected to seats already occupied by legally elected judges by the previous Sejm.[54] As a result, the ECtHR ruled that the participation of unlawfully elected judges at the PCT hearings violated Article 6(1) of the Convention, as the applicant company was denied its right to a tribunal established by law.

In a number of judgments issued within months after the *Xero Flor*, the ECtHR further ruled that the Disciplinary Chamber,[55] Chamber of Extraordinary Review and Public Affairs,[56] and

[51] Polish Constitutional Tribunal, Ruling K 34/15, dated 3 December 2015.
[52] Sadurski (n 8) 71-79.
[53] Polish Constitutional Tribunal, Ruling K 1/17, dated 24 October 2017.
[54] *Xero Flor* (n 49) paras. 255-275.
[55] *Reczkowicz v. Poland* App No 43447/19 (ECtHR, 22 July 2021).
[56] *Dolińska-Ficek and Ozimek v. Poland* App Nos 49868/19 and 57511/19 (ECtHR, 8 November 2021).

the Civil Chamber of the Supreme Court[57] cannot be considered as an 'independent and impartial tribunal established by law'. The Court reached this conclusion by underlining that these Chambers are consisting of judges that were appointed by the National Council of Judiciary (NCJ), an institution that cannot be considered as independent due to all of its members being appointed by the Parliament after the 2017 reforms. The reasoning of these judgments point out to the possibility that not only the aforementioned chambers of the Supreme Court, but also all ordinary, military and administrative courts in Poland may be considered as a fruit of the poisonous tree – the lack of independence of the NCJ results in all of their recommendations to the President for the appointment of judges as per Article 179 of the Polish Constitution to become tainted.[58]

Since the effective implementation of these judgments would result in preventing the PiS government from exerting its influence over the judiciary, blocking such compliance with these ECtHR judgments was of highest importance for the government – they were even willing to jeopardize Poland's relations with the EU (and billions of Euros of EU funds) on this matter. As a result, the Polish Prosecutor General turned to the captured PCT to provide the government some legal justifications to prevent the implementation of ECtHR judgments that concerned the PiS government's capture of the judiciary in general, and also the Constitutional Tribunal itself. The PCT's rulings K 6/21 and 7/21 delivered exactly what the Prosecutor General petitioned the Tribunal for.

In K 6/21, the PCT ruled that the ECtHR's judgment finding Article 6(1) applicable to Constitutional Tribunal processes was erroneous as it resulted from its "lack of knowledge of the Polish legal system".[59] PCT further continued with claiming that such an interpretation of

[57] *Advance Pharma sp. z o.o. v. Poland* App No 1469/20 (ECtHR, 3 February 2022).
[58] Marcin Szwed, 'When Is a Court Still a Court?: The ECtHR's Advance Pharma Case and the Polish Judiciary' (2022) Verfassungsblog <https://verfassungsblog.de/when-is-a-court-still-a-court-and-what-makes-a-judge-a-judge/> accessed 15 June 2022.
[59] Polish Constitutional Tribunal, Ruling K 6/21, para. 6.3.

Article 6, and the ECtHR's assessment regarding the legality of appointment of constitutional judges was an *ultra vires* act as it extended the scope of this provision without the consent of Poland.[60] As a result, the PCT ruled that ECtHR's *Xero Flor* judgment is incompatible with the Polish Constitution in so far as it construes the Article 6(1) applicable on the proceedings before the PCT, and the legality of the appointment of PCT judges. Therefore, the Tribunal found this judgment non-executable within Poland.

Similarly, in K 7/21, the PCT ruled that the ECtHR's *Reckowicz, Dolinska-Ficek, Advance Pharma and Broda/Bojara* judgments were incompatible with the Polish Constitution as the ECtHR was engaging in a "law-making" activity by expanding the scope of Article 6(1) without the consent of Poland given at the time of ratification.[61] For the Tribunal, such an interpretation of Article 6(1) was *ultra vires,* and in violation of Polish Constitution as it was challenging the principle of the finality of PCT judgments and the constitutional power of the President to appoint judges. As a result, the PCT declared the aforementioned four judgments not binding on Poland.

Both of these rulings of the Tribunal possesses legally incorrect and contradictory positions. Firstly, Article 46 of the ECHR clearly states that the States Parties shall "abide by the final judgment of the Court in any case to which they are parties." From the perspective of the ECHR, States Parties do not have the right to second-guess the ECtHR's decisions – doing so would constitute a breach of international obligations.[62] These judgments are problematic from the point of view of the Polish Constitution as well, as neither the Constitution nor any law in Poland authorizes the Tribunal to assess the legality or constitutionality of the judgments of

[60] ibid para. 7.3.
[61] Polish Constitutional Tribunal, Ruling K 7/21, dated 10 March 2022.
[62] William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015), 866-872.

international courts.[63] It appears from these that the institution that is acting *ultra vires* is not the ECtHR, but the Polish Constitutional Tribunal itself. From a substantive perspective, it is also very difficult to see how the ECtHR's judgment, which underlines that the lack of an independent judiciary would violate Article 6(1) of the Convention, would be unconstitutional for Poland as the independence of the judiciary is protected within the provisions of Polish Constitution itself as well.

The Polish government could have just defied the execution of the aforementioned ECtHR judgments by themselves without the PCT's K 6/21 and 7/21 rulings. Yet, these two rulings demonstrate how the PCT is being utilized by the hybrid regime as an institution to remove the external constraints through strong abusive judicial review, as the Tribunal actively takes a role in providing the Polish government legal justifications for not complying with ECtHR judgments after the Minister of Justice asked the Tribunal to do so. Furthermore, the fact that the Polish government did not appeal the Chamber judgments for a review in the Grand Chamber of the ECtHR also shows their ulterior motives in utilizing the PCT.

The PCT's role here points out to the elusiveness of hybrid regimes, as the Polish government is able to use these rulings as a legal excuse for the non-compliance. Under the disguise of legitimacy that comes with a court ruling, the Polish government frames their non-compliance as a dispute between apex courts in Europe, claiming that such disputes are not rare, pointing out to the German or Italian Constitutional Court judgments on similar matters.[64]

[63] Marcin Szwed, 'The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights: ECtHR 7 May 2021, No. 4907/18, Xero Flor w Polsce Sp. z O.o. v Poland' (2022) 18 European Constitutional Law Review 132, 145.

[64] Polish PM Mateusz Morawiecki, Statements in the European Parliament (Brussels, 19 October 2021) < https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament> accessed 15 June 2022.

2.3 Silent Non-Compliance

PCT's direct non-compliance by declaring certain judgments of the ECtHR unconstitutional and thus non-executable is an outlier approach within the three countries this thesis is comparing. Yet, this does not mean that the ECtHR standards are thoroughly followed by the constitutional courts in Turkey and Hungary. Instead of taking the collision course as PCT did, it can be observed that the TCC and the HCC utilize more subtle modalities where they come up with different methods of not complying with the ECtHR judgments or standards. While these methods avoid direct confrontation, they still achieve the same result of non-compliance.

To that end, I categorize a constitutional court's non-compliance as silent non-compliance when they do not apply the clearly relevant and applicable ECtHR jurisprudence in their judgments. Here, the relevant ECtHR jurisprudence that is ignored by the constitutional courts can be issued by the ECtHR directly concerning the specific case before the domestic constitutional court, or it can also be the non-compliance with the standards that the ECtHR has developed in other similar cases. This can be done in three ways: the domestic constitutional court (1) not considering applicable ECtHR jurisprudence in their judgments and the outcome is contrary to the ECHR standards, (2) evading delivering a judgment based on procedural grounds or (3) rejecting to review a case in due time when the outcome is possibly going to be against the political preferences of the government if ECHR standards are followed.

2.3.1 Ignoring ECtHR Standards Without Justification

In this vein, Turkish Constitutional Court's judgments on the individual application of Osman Kavala can be seen as an example of this silent non-compliance. Kavala was placed under pre-trial detention for charges of attempting to overthrow the government and the constitutional order related to his alleged involvement in the 2013 Gezi Park protests and the 15 July 2016 coup attempt. Kavala is a philanthropist and human rights activist in Istanbul, engaging in

activities of numerous civil society organizations. The Gezi Park protests in 2013 marked a big turning point for Turkish politics – the events started off as a protest against the construction of a shopping mall in the place of a historic park in the center of Istanbul, but turned into country-wide protests against AKP government's authoritarian tendencies, lack of public consultation, media censorship, and political Islamism. Kavala was engaged in these protests as well, and wanted to mobilize civil society in the aftermath of the Gezi Park protests to achieve a more transparent and accountable government.

President Erdogan took Gezi Park protests personally, and wanted to criminalize these protests as an attempt to overthrow his government. After the detention of Kavala, he made a number of statements to media, claiming that Kavala is the representative of George Soros in Turkey, and that he "uses his wealth to destroy this country", providing support for these acts of terror.[65]

During the phase of exhausting domestic remedies, the first TCC judgment concerning Kavala was issued in May 2019, and the Turkish Court found, in a 10-5 vote, that the applicant's pre-trial detention did not violate his right to liberty.[66] In this first judgment, the TCC cited the relevant ECtHR standards[67] on Article 5 in three paragraphs stating that there must be 'facts or information which would satisfy an objective observer that the person concerned may have committed the offence'[68]. Yet, the majority of the Turkish Court did not apply these standards in a correct manner as they did not openly explain how the evidence against him would satisfy an objective observer that Kavala has committed these crimes.

This can be categorized as silent, yet strategic, non-compliance as the TCC disregarded the established ECtHR standards concerning Article 5 without mentioning why it is doing so, and even without developing its own different standards. In essence, this judgment can be seen as

[65] *Kavala v. Turkey* App No 28749/19 (ECtHR, 10 December 2019) para. 61.
[66] Turkish Constitutional Court, App No 2018/1073, judgment of 22 May 2019.
[67] William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015), 238-239.
[68] *Fox, Campbell, and Hartley v. the United Kingdom* App Nos 12244/86, 12245/86 and 12383/86 (ECtHR, 30 August 1990), para. 32.

resulting in a violation of Article 6 due to its lack of sufficient reasoning explaining why and how the evidence presented against the applicant amounted to strong suspicion showing that he has committed such crime.

After the TCC's judgment and exhaustion of domestic remedies, the ECtHR found Kavala's pre-trial detention in violation of Article 5 of the Convention since the evidence for his deprivation of liberty was not based on a reasonable suspicion that he had committed the aforementioned crimes.[69] Furthermore, it also found that the complete lack of evidence tying the applicant to his alleged crimes, the duration of his pre-trial detention of more than 4 years, and the Turkish President's comments against the applicant were sufficient to show that Turkey was in violation of Article 18 of the Convention, pursuing an ulterior motive to silence the applicant and human rights defenders in the country.

In a surprising turn of events, the criminal court of first instance acquitted Kavala of all charges two months after the ECtHR judgment, stating that there does not exist sufficient evidence to prove that he has committed the crime of attempting to overthrow the government. Yet, on the same day of this acquittal, the Istanbul Chief Prosecutor ordered for his arrest again, based on the same evidence that he was acquitted of. President Erdogan publicly criticized this acquittal decision, stating: "They tried to acquit him through a legal maneuver yesterday. Our nation shall stay calm, we will follow this issue in determination and continue to fight for the manifestation of justice."[70] This time, they charged Kavala for political and military espionage based on the same facts upon which he was put on trial and acquitted before, and another criminal court in Istanbul ruled for his pre-trial detention.

[69] Kavala (n 65) paras. 156-160.
[70] 'Osman Kavala statement from Erdoğan: They tried to acquit' *Evrensel* (translation from Turkish) (19 February 2020) <https://www.evrensel.net/haber/397663/geziyi-hedef-alan-erdogandan-osman-kavala-aciklamasi-beraat-ettirmeye-kalktilar> accessed 15 June 2022.

Kavala lodged a second individual application to the TCC as a result of this second pre-trial detention after his acquittal. TCC's second Kavala judgment is more problematic, since this was issued a year after ECtHR's judgment. Here, the TCC explains the ECtHR's Kavala judgment as if they were the facts of the case, without entering into an examination of the European Court's conclusions. Even though the TCC stated that "the essence of the applicant's allegations is that it is unlawful to be re-arrested *on the basis of a fact that is not considered to constitute a reasonable suspicion of crime by the ECtHR*"[71], it did not make any remarks concerning the ECtHR's judgment in its evaluation of the case, and found, in an 8-7 vote, that the applicant's pre-trial detention did not constitute a violation of his right to liberty.[72] This judgment can be considered as silent non-compliance as the TCC manifestly ignores the findings of the European Court, yet does not offer any justification of why it is doing so.

TCC's stance on the Demirtas case also point to the same judicial behavior of ignoring ECHR standards. Demirtas is a prominent Kurdish politician, who was a key figure for his party to pass the 10% election threshold for the first time in the general election in June 2015. That also led to AKP losing its simple majority in the Turkish Parliament for the first time in 12 years. He also openly rejected Erdogan's ambition to switch the governmental system to a presidential one, stating in a group meeting of his party: "We will not make you [Erdogan] President!".[73] After AKP lost its parliamentary majority, the government halted the peace process that they initiated with the Kurds and initiated military operations in the South-Eastern Turkey to attract nationalist voters.[74] Meanwhile, the AKP also blocked the formation of a coalition government,

[71] Turkish Constitutional Court, App No 2020/13893, judgment of 29 December 2020, para. 67.
[72] ibid para. 102.
[73] 'We will not make you the president, HDP co-chair tells Erdoğan' *Hurriyet Daily News* (Ankara, 17 March 2015) <https://www.hurriyetdailynews.com/we-will-not-make-you-the-president-hdp-co-chair-tells-erdogan-79792> accessed 15 June 2022.
[74] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (CUP 2020) 75.

triggering early elections just 5 months later, where they won the simple majority again on a nationalist, security-based platform.

In the aftermath of these early elections, AKP government abandoned its former policy of trying to solve the Kurdish question through negotiations, and continued with military operations. Against this backdrop, the government made it one of their priorities to lift the parliamentary immunities of the MPs of the pro-Kurdish party HDP, claiming that they were aiding and abetting PKK terrorists during the military operations.[75] Accordingly, the Parliament passed a constitutional amendment consisting of a single provisional article in May 2016, which foresaw a one-time lifting of the immunities of all of the MPs, against whom criminal investigations were initiated before the adoption of that amendment. Demirtas was one of these MPs, and he was detained in November 2016 after his immunity was lifted. He was charged with a number of crimes, including leading an armed terrorist organization, public incitement to commit a crime, disseminating terror propaganda.[76] The charges brought against him were based on the political speeches he made in different occasions.

While exhausting the domestic remedies, Demirtas made an individual application to the TCC claiming that his right to liberty was violated on the basis that his pre-trial detention was not based on reasonable suspicion, alongside claiming that this pre-trial detention was also violating with his freedom of expression as all of the charges against him were based on speeches he gave as an MP and co-chair of a political party at rallies, press conferences and party events. In reviewing these alleged violations, the TCC cited a number of his speeches that were related to the military operations in South-East Turkey and found in a 16-1 vote that

[75] Erdogan (in response to a crowd shouting "we do not want murderers in the Parliament"): "That's why we bring up the lifting of immunities. (…) If you are guilty, you will be prosecuted, brother. How can I wait for your parliamentary term to end? There have been so many incidents, where you carry weapons to the terrorist organization with your car, you will carry weapons with coffins..." Hatice Senses Kurukiz, 'President Erdogan: Whoever has a pending investigation should be brought to the judiciary immediately' *Anadolu Agency* (Istanbul, 11 April 2016) <https://www.aa.com.tr/tr/turkiye/cumhurbaskani-erdogan-kimin-fezlekesi-varsa-hemen-yargiya-tasinmali/552887> accessed 15 June 2022.

[76] *Selahattin Demirtas v. Turkey (No. 2)* App No 14305/17 [GC] (ECtHR, 22 December 2020), para. 78.

"it cannot be said that there does not exist a strong suspicion of the applicant having committed a crime", and that applicant's right to liberty has not been violated.[77] In this judgment, the TCC reviewed and explained the relevant case-law and standards of ECtHR on pre-trial detention in abstract, but did not take the same reasoning in its review of the allegations without elaborating on the reasons of why its departing from such standards.[78]

The Grand Chamber of the ECtHR took a completely different approach. The European Court first found that there was an interference with Demirtas's freedom of expression as the charges brought against him are solely based on his political speeches. Then, the Court found that the constitutional amendment lifting the parliamentary immunity was not prescribed by law as amendment did not fulfill the quality of law criteria, since a one-off *ad hominem* constitutional amendment is not foreseeable.[79] Therefore, the Court found a violation of freedom of expression. Moving on to the alleged violation of right to liberty, the Court examined whether there exists reasonable suspicion for Demirtas's pre-trial detention. In conducting this examination, the Court underlined that although his speeches can be seen as shocking or disturbing to some parts of the society, viewed in their full context, they do not amount to a call or glorification for violence or terrorist indoctrination, and therefore fall within the scope of freedom of expression. Accordingly, the Court found that his right to liberty has been violated as these speeches are related mainly to the exercise of his Convention rights, and this cannot be considered as satisfying the standard of reasonable suspicion.[80] Lastly, the Court also found that Demirtas's pre-trial detention pursued ulterior motives of stifling pluralism and limiting freedom of political debate, keeping in mind that he was kept behind bars during two crucial campaigns concerning the referendum on the presidential system and a presidential

[77] Turkish Constitutional Court, App No 2016/25189, judgment of 21 December 2017, para. 158.
[78] ibid paras. 82-90.
[79] *Selahattin Demirtas* (n 76) para. 270.
[80] ibid para. 339.

election (where he was a candidate), and found a violation of Article 18 as well. As a remedy to these violations, the Court ordered his immediate release.

The legal proceedings initiated against Demirtas after the lifting of immunities resemble a Kafkaesque situation, where the prosecutors brought numerous indictments and separate cases against him based on more or less the same facts, relating to speeches he made in different occasions. He was placed under pre-trial detention in some of these cases, acquitted in some and convicted in others. By the time the Grand Chamber judgment was delivered in December 2020, Demirtas was not under pre-trial detention based on the case that he initially applied to the ECtHR for – he was under pre-trial detention based on another investigation which was based on the same facts that the Court has found insufficient to justify detention. Responding to the Government's objection that he is actually detained for another investigation, the Court stated that "instituting new criminal investigations in relation to the facts previously considered insufficient to justify detention, by means of a new legal classification, would make it possible for authorities to circumvent the right to liberty."[81] The Court's findings under Article 18 helped it to see through this legal charade that is being utilized by the prosecutors against him.

It is exactly this fragmented legal situation that the TCC fails to see through. So far, the Turkish Court has delivered judgments in 9 different individual applications lodged by Demirtas. In one of them, the TCC even found Demirtas's continued detention as a violation of his right to liberty.[82] However, by the time it delivered this judgment, he was already detained in another criminal investigation so this judgment did not have any effect on Demirtas's personal status. The TCC's stance in cases concerning Demirtas is classified as silent non-compliance, as it allows the prosecutors to circumvent the ECtHR judgment on this matter, eliminating this external constraint by abusing their powers to initiate a number of criminal investigations based

[81] ibid para. 440.
[82] Turkish Constitutional Court, App No 2017/38610, judgment of 9 June 2020.

on same facts, the very issue that the Grand Chamber tried to solve by issuing an Article 18 violation.

The Hungarian Constitutional Court's judgment regarding the "Stop Soros" legislation can be viewed under silent non-compliance modality as well. In this case, a number of civil society organizations such as Amnesty Hungary and Hungarian Helsinki Committee requested from the HCC to strike down the controversial amendments to the Criminal Code that criminalized intentionally assisting irregular migrants. The law was claimed to be unconstitutional on the grounds that it did not satisfy the quality of law requirement set forth by the ECtHR,[83] since the provision did not clearly explain what acts would constitute such offence, lacking foreseeability. [84] Venice Commission strongly criticized the law, stating that it is a disproportionate limitation of Articles 10 and 11 of the ECHR, failing to fulfill the foreseeability criterion.[85]

In this decision, the HCC took a restrictive interpretation of the crime foreseen by the amendment, stating that this crime can only be committed with a specific intent to facilitate illegal immigration, keeping humanitarian aid out of the scope of this provision.[86] Interpreting the provision in accordance with international law, the Court underlined that this provision "does not preclude natural persons and organizations from seeking to ensure that every individual in the world enjoys the rights enshrined in the Universal Declaration of Human Rights and other human rights conventions on an equal footing with everyone else." [87] Furthermore, the Hungarian Court also stated that expressing an opinion in the context of

[83] *The Sunday Times v. the United Kingdom* App No 6538/74 (ECtHR, 26 April 1979) para. 49.
[84] Complaint of Hungarian Helsinki Committee to the HCC, available at: http://public.mkab.hu/dev/dontesek.nsf/0/757eb39cc72e8780c125832b00340008/%24FILE/IV_1426_2018_ind%C3%ADtv%C3%A1ny_anonim.pdf
[85]Venice Commission and OSCE/ODIHR, *Joint Opinion on the Provisions of the So-Called "Stop Soros" Draft Legislative Package Which Directly Affect NGOs*, 25 June 2018, CDL-AD(2018)013.
[86] Hungarian Constitutional Court, Decision 3/2019. (III. 7.) AB, dated 25 February 2019.
[87] ibid para. 77.

supporting the immigrants can only be interpreted as an offence if the speech is aimed at, encouraged or intended to be an advocacy for committing a crime.[88]

The HCC's decision on this case is a good example of strategic compliance, demonstrating how the Hungarian Court found a middle ground – without taking into consideration the Venice Commission opinion and the ECtHR case-law on the matter – between taking the edge off a constitutional amendment that went too far by coming up with a constitutionally conform interpretation of the provision. Yet, avoiding to find this provision facially unconstitutional presents the risk of finding of a violation by the ECtHR, as it is highly likely that convictions arising from the application of this provision which ends up at the ECtHR will result in a violation judgment, keeping in mind the Venice Commission[89] and European Court of Justice's[90] stance. By not considering the previously established foreseeability criteria by the ECtHR, clearly and convincingly demonstrated by the complainants and the Venice Commission, HCC's judgment not striking down this law falls within this silent non-compliance category.

2.3.2 Silent Non-Compliance by Evasion

Aside from disregarding ECtHR judgments and ECHR standards by not reviewing cases in light thereof, silent non-compliance can also occur through evasion where domestic constitutional courts find procedural excuses to not rule on the merits of the case.

The handling of life imprisonment cases by the Hungarian Constitutional Court can be an example of such evasion tactics employed by constitutional courts to avoid making a confrontation both with the ECtHR and the government. Being tough on crime and increasing the severity of sanctions for criminals has been a focal point of Fidesz's policies, with this

[88] ibid para. 75.
[89] Venice Commission and OSCE/ODIHR (n 85).
[90] Case C-821-19 *Commission v. Hungary* (European Court of Justice (Grand Chamber), 16 November 2021).

policy being labelled as 'penal populism'.[91] When Fidesz came to power for the first time in 1998, one of their first policies was the amendment to the Penal Code, introducing life imprisonment without parole.[92] After they won a two-thirds majority in the Parliament in 2010 elections and enacted a new constitution, they constitutionalized life imprisonment without parole, incorporating this punishment in Article IV(2) of the Fundamental Law.

In the *Magyar* case, the ECtHR found the Hungarian life imprisonment regime in violation of Article 3 of the Convention as it did not provide for a prospect of release from prison de facto or de jure.[93] The Hungarian legislature amended the Penitentiary Code in response to this judgment, yet this new procedure was criticized[94] as still failing to meet the Strasbourg criteria since such review happens after 40 years, which is more than the maximum years of review according to ECtHR standards,[95] and leaves the final decision to the discretion of the President. After the *Magyar* judgment, an appeals court asked the HCC to declare life imprisonment provisions null and void in accordance with the ECtHR jurisprudence. Legislative amendments to the life imprisonment regime was passed before the HCC's judgment on this case.

In its judgment, the HCC rejected the case on procedural grounds without getting to the merits. The Hungarian Court ruled that since the life imprisonment regime has been amended by the legislature in the meantime, the case has "become substantially obsolete".[96] This judgment was heavily criticized as whether the new life imprisonment regime is compliant with the ECHR standards was questionable at the time of this judgment.[97] In a recent judgment, the ECtHR

[91] Zsolt Boda, Mihály Tóth, Miklós Hollán, and Attila Bartha, 'Two Decades of Penal Populism – The Case of Hungary' (2022) 47 Review of Central and East European Law 115, 119.
[92] Miklos Levay, 'Constitutionalising Life Imprisonment without Parole: The Case of Hungary' in Dirk van Zyl Smit and Catherine Appleton (eds), *Life Imprisonment and Human Rights* (Bloomsbury Publishing, 2016)
[93] *László Magyar v. Hungary* App No 73593/10 (ECtHR, 20 May 2014) paras. 49-58.
[94] Petra Bard, 'The Hungarian life imprisonment regime in front of apex courts I. - The findings of the European Court of Human Rights and the Constitutional Court' (2015) JTIBlog <https://jog.tk.hu/blog/2015/06/the-hungarian-life-imprisonment-hu> accessed 15 June 2022.
[95] *Vinter and Others v. the United Kingdom* App Nos 66069/09, 130/10 and 3896/10 [GC] (ECtHR, 9 July 2013).
[96] Hungarian Constitutional Court, Resolution 3013/2015. (I. 27.).
[97] ibid, dissenting opinion of Judge Miklós Lévay joined by Judge László Kiss.

confirmed that this new life imprisonment regime is still in violation of Article 3.[98] This can be seen as another way of silent non-compliance since the HCC found a way to get out of deciding on this matter by using a legally dubious excuse, and did not comply by the ECtHR judgment when it had the competence to do so.

Rejecting sensitive cases by finding procedural irregularities to avoid confrontation is not unique to the HCC. It can be observed that the Turkish Constitutional Court uses the "unsubstantiated complaint" test in an increasing manner.[99] According to this test, if the applicant's application is abstract in so far as it fails to demonstrate the facts of the case and in which manner his/her fundamental rights have been violated, the Court deems the application as manifestly ill-founded. Such a test is not arbitrary *per se.* Yet, it can be observed that it is being applied arbitrarily, as demonstrated in the two recent freedom of expression cases concerning Turkey.

In *Sorli v. Turkey*, the ECtHR found that the sentencing of the applicant to 11 months in prison for insulting the President was a violation of Article 10, as this interference was neither necessary nor proportional.[100] Similarly, in another case concerning an applicant who was dismissed from her job due to "liking" a number of Facebook posts that were criticizing the government, the ECtHR found that the Labor Court's position in finding her dismissal a lawful termination as violation of her freedom of expression.[101]

On the other hand, the TCC found both of these applications manifestly ill-founded, without reviewing the case in merits due to their applications being unsubstantiated.[102] However, these applications, which were found inadmissible by the Turkish Court, were not only found

[98] *Bancsók And László Magyar (No. 2) v. Hungary* App Nos 52374/15 and 53364/15 (ECtHR, 28 October 2021).
[99] Benan Molu, 'Analysis: First ECtHR judgment on insulting the president: Art. 299 must be revised' (2021) Expression Interrupted <https://www.expressioninterrupted.com/first-ecthr-judgment-on-insulting-the-president-art-299-must-be-revised/> accessed 15 June 2022.
[100] *Sorli v. Turkey* App No 42048/19 (ECtHR, 19 October 2021).
[101] *Melike v. Turkey* App No 35786/19 (ECtHR, 15 June 2021).
[102] Turkish Constitutional Court, App No 2017/37028, dated 21.03.2019.

admissible by the ECtHR, but also as substantive violations of Article 10. These cases demonstrate the arbitrary application of the "unsubstantiated complaint" test as an evasive tactic employed by the TCC due to two reasons. Firstly, it is highly unlikely that the applicants simply ignored the procedural requirements for their applications to the Turkish Court, but followed them thoroughly followed them for their application to the ECtHR. Secondly, a heavy reliance on small procedural shortcomings in applications that are concerning serious fundamental rights violations shall not be an excuse for denying review of these cases.

2.3.3 Silent Non-Compliance by Delay

Additionally, delaying sensitive cases seems to be another way for domestic constitutional courts to avoid direct confrontation, while also essentially allowing ECHR non-compliant acts to continue. For example, while the ECtHR ruled that Turkey's mandatory military service on men without any exceptions for conscientious objectors as a violation of Article 9 of the Convention,[103] TCC has been delaying the consideration of more than 45 cases before it concerning conscientious objection since 2014.[104]

Similarly, when the Hungarian Constitutional Court was requested to rule on the life imprisonment regime in Hungary, the Court delayed issuing a judgment for more than 9 months, much longer than the statutory 3 months limit. As explained above, the Court then used the fact that the legislature has amended the Penitentiary Code in the meantime as a ground to dismiss the case as it has become obsolete.

This thesis suggests that delaying the review of cases that are likely to result in violations can be considered as another means of silent non-compliance, as "justice delayed is justice denied".

[103] *Savda v. Turkey* App No 42730/05 (ECtHR, 12 June 2012).
[104] Mine Yildirim and Hulya Ucpinar, 'Report on Conscientious Objection to Military Service in Turkey, Association for Conscientious Objection' (2021) Association for Conscientious Objection <https://drive.google.com/file/d/1OgQUzlHlEhMWZ_RfLfZRVnoniOo5_aIw/view> accessed 15 June 2022.

2.4 Creative Non-Compliance

The last modality in this thesis that is categorized as creative non-compliance concerns the judgments of domestic constitutional courts when they deny using the applicable ECHR standards while also acknowledging a difference between their approach. In other words, they attempt to distinguish the ECtHR case-law from the specific case before them by using creative justifications. In this category, the courts try to come up with justifications for not applying the ECHR standards, but still do not deny the binding obligations arising from Article 46 of the ECHR.

An example in this vein from Turkey concern the cases on the pre-trial detention of the members of the judiciary after the coup attempt in 2016. The Gulen movement, which is the group that is believed by the government to be behind the coup attempt, was known for having a large number of followers within the judiciary.[105] After the coup attempt, President Erdogan stated that a purge was necessary to cleanse the state of the "virus of members of the Gulen movement."[106] In accordance with this aim, the High Council on Judges and Prosecutors sacked almost one quarter of the judges and prosecutors from their duties, and criminal investigations were brought by public prosecutors against thousands of the sacked members of the judiciary over the allegations that they are members of an armed criminal organization.[107]

To protect members of the judiciary from external influences, Turkish legislation grants special procedural safeguards for judges and prosecutors regarding criminal investigations against them.[108] However, such safeguards are not applicable if the accused is found *in flagrante*

[105] Ergun Ozbudun, 'Pending Challenges in Turkey's Judiciary' (2015) Global Turkey in Europe Policy Brief <https://www.iai.it/sites/default/files/gte_pb_20.pdf> accessed 15 June 2022.
[106] Laura Pitel, 'Turkey says purge of judiciary over after sacking 4,000' *Financial Times* (Gaziantep, 26 May 2017) <https://www.ft.com/content/0af6ebc0-421d-11e7-82b6-896b95f30f58> accessed 15 June 2022.
[107] Human Rights Watch, 'Turkey: Judges, Prosecutors Unfairly Jailed' (Istanbul, 5 August 2017) <https://www.hrw.org/news/2016/08/05/turkey-judges-prosecutors-unfairly-jailed> accessed 15 June 2022.
[108] For example, Article 46 of the Court of Cassation Law: "The opening of an investigation against the First President, the first deputy presidents, the chamber presidents and the members of the Court of Cassation, as well as the Chief Public Prosecutor and the Deputy Chief Public Prosecutor at the Court of Cassation, in respect of

delicto. The Turkish judiciary, including the TCC, have interpreted this term in a wide manner and did not allow the dismissed members of the judiciary after the coup attempt to enjoy such safeguards.

Addressing the same issue upon a very large number of applications from former members of the judiciary, the ECtHR stated that such a wide interpretation of the term *in flagrante delicto* was a violation of the lawfulness principle.[109] In an interesting judicial dialogue through court decisions, the TCC insisted on its own interpretation, stating that "*Although the final decisions of the ECtHR are binding, the interpretation of the provisions of the law regarding the detention of members of the judiciary in Turkish law is a jurisdiction that belongs to the courts of Turkey. While it is in the ECtHR's jurisdiction to examine whether Turkish courts' interpretations of national law violate the rights and freedoms guaranteed in the Convention, it is not appropriate for the ECtHR to interpret national law firsthand, replacing national courts*."[110]

This is an erroneous interpretation: when the ECtHR finds Turkish courts' wide interpretation of a domestic law in violation of the lawfulness principle, it does not mean that they are replacing national courts, they are simply fulfilling their supervisory jurisdiction. As a response to this decision, the ECtHR still stated that it does not see any reason to depart from its earlier case-law regarding this matter.[111] Cases concerning the detention of members of the judiciary can be considered as creative non-compliance, since the TCC attempted to explain the situation from a subsidiarity point of view without denying the binding force of the European Court's decisions openly, but doing so in effect.

offences related to their official duties or personal offences shall be subject to the decision of the First Presidency Board. However, in cases of discovery in flagrante delicto falling within the jurisdiction of the assize courts, the preliminary and initial investigation shall be conducted in accordance with the rules of ordinary law."

[109] *Alparslan Altan v. Turkey* App No 12778/17 (ECtHR, 16 April 2019).

[110] Turkish Constitutional Court, App No 2017/10536, judgment of 4 June 2020 para. 117.

[111] *Turan and others v. Turkey* App Nos 75805/16 and 426 others (ECtHR, 23 November 2021).

Another example of creative non-compliance can be seen in the TCC's approach towards cases concerning the insulting the President. In the Turkish Criminal Code, insulting the President is penalized with up to four years of imprisonment. Since the inauguration of the current President, this provision has been used as a silencing tool with more than 160.000 investigations opened and 13.000 people receiving convictions for insulting the president since 2014.[112] The ECtHR's jurisprudence is clear in this regard: the European Court has underlined that foreseeing a heightened protection for the head of a state against insult is not necessary in a democratic society.[113]

When an applicant claimed that the relevant provision of the Turkish Criminal Code was unconstitutional in so far as it foresees an unjustified limitation to freedom of expression through a concrete norm review procedure, the TCC found this provision constitutional. Without referring to ECtHR's related case-law, where the European Court underlined that "the special protection afforded to heads of state undermines freedom of expression"[114], the Turkish Court stated that it is in the discretion of the legislature to foresee a heightened protection for the head of state, and that it is justified to foresee a higher penalty since this provision not only protects the personality rights of the President, but also the prestige and reputation of the State itself as well.[115] On the other hand, although the TCC did not strike down this law, it found violations of freedom of expression for the extensive application of this provision on individual constitutional complaints, where the TCC does not have the competence to strike down the law but only to order the remedy of removing the consequences of the violation.[116]

[112] 'Insult cases Erdoğan says do not exist documented in Justice Ministry statistics' *English Bianet* (Istanbul, 29 September 2021) <https://bianet.org/english/law/251059-insult-cases-erdogan-says-do-not-exist-documented-in-justice-ministry-statistics> accessed 15 June 2022.
[113] *Otegi Mondragon v. Spain* App No 2034/07 (ECtHR, 15 March 2011), para. 55; *Artun and Güvener v. Turkey* App No 75510/01 (ECtHR, 26 June 2007), para. 31; *Sorli* (n 100).
[114] *Otegi Mondragon* (n 113), para. 69.
[115] Turkish Constitutional Court, E. 2016/25 K. 2016/186, judgment of 14 December 2016.
[116] Turkish Constitutional Court, App No 2017/26466, judgment of 26 May 2021; App No 2017/6162, judgment of 8 June 2021; App No 2016/36777, judgment of 26 May 2021.

TCC's behavior in cases concerning the crime of insulting the President can be seen as creative non-compliance because while the Court appears to follow the ECtHR standards in most individual constitutional complaints, it had allowed the existence of this provision in the legal sphere which is being utilized by the prosecutors in Turkey as a mechanism to silence the opposition.[117] Here, the Turkish Court is again instrumental in eliminating the external constraints of the ECtHR by not finding this provision of the criminal code facially unconstitutional.

Creative non-compliance can also occur when the domestic constitutional courts cherry-pick and interpret certain ECtHR judgments in an erroneous manner to justify their own reasoning which, in their essence, depart from ECHR standards. An example from the Polish Constitutional Tribunal can be given in this regard.

In this context, the PCT's judgment concerning the amendments to the Peaceful Assembly Law, which prioritized recurring public gatherings with historic importance over other assemblies can be examined. The purpose of this law was described as a legal measure to prevent anti-government rallies within the vicinity of PiS-sponsored events.[118] This amendment to the Assembly Law was of political significance to the PiS government, as anti-government protesters were conducting counterprotests in the close vicinity of assemblies that are in support of the government. For example, an important recurring pro-government assembly was the Smolensk marches, at which the demonstrators were commemorating the victims of the plane crash in Smolensk in 2010, where 96 people, including the President of Poland, had died. The opposition was organizing counterprotests around these marches,

[117] Cem Tecimer, 'The Curious Case of Article 299 of the Turkish Penal Code: Insulting the Turkish President' (2018) Verfassungsblog <https://verfassungsblog.de/the-curious-case-of-article-299-of-the-turkish-penal-code-insulting-the-turkish-president/> accessed 15 June 2022.
[118] Sadurski (n 8) 151.

claiming that the government was using this disaster as a means to call all political opponents as traitors.[119]

The amendments to this law was challenged before the PCT, interestingly by the Polish President, claiming that prioritization of certain rallies over others was against the principle of equality protected under Article 32 of the Polish Constitution. The panel of the Tribunal that has been assigned to this case included a number of judges that were illegally appointed to the PCT, and 7 of the 11 judges in this panel were appointed to the Tribunal by the PiS in the previous 1,5 year.

In its judgment, the PCT ruled that prioritization of recurring assemblies with historic importance was not unconstitutional, as it protected the Polish nation's values and history, and that the legislature had a large margin of discretion to regulate this area.[120] The PCT referred to a number of ECtHR judgments which underlined the states' positive obligations to protect demonstrators from counter-demonstrators[121] and states' margin of appreciation in finding the right balance when restricting fundamental rights[122].[123] Yet, these judgments do not provide any justifications for the prioritization of certain assemblies over others, and it is highly likely that placing governmental authorities in a position to review the content of an assembly and prioritize one over another is in violation of Article 14 in conjunction with Article 11, as it is a discriminatory separation. PCT's judgment also completely overlooks the findings of the ECtHR in the *Baczkowski* case, which underlined that government authorities' discriminatory approach towards certain assemblies against others was in violation of Article 14.[124]

[119] James Shotter and Evon Huber, 'Poland's Kaczynski ends monthly air crash ritual in memory of twin' *Financial Times* (Warsaw, 9 April 2018) <https://www.ft.com/content/2a08192e-3963-11e8-8eee-e06bde01c544> accessed 15 June 2022.
[120] Polish Constitutional Tribunal, KP 1/17, judgment of 16 March 2017.
[121] *Arzte für das Leben v. Austria* App No 10126/82 (ECtHR, 21 June 1988).
[122] *Handyside v. the United Kingdom* App No 5493/72 (ECtHR, 7 December 1976); *Van der Graaf v. Netherlands* App No 8704/03 (ECtHR, 1 June 2004).
[123] KP 1/17 (n 120) paras. 4.2.2.3 and 4.2.2.6.
[124] *Baczkowski v. Poland* App No 1543/06 (ECtHR, 3 May 2007).

CHAPTER 3: POSSIBLE RESPONSES TO ABUSIVE JUDICIAL REVIEW

3.1 The Changing Role of the ECtHR

The European Court has taken different roles in developing human rights law within the context of Europe since its establishment. Starting off as an ad hoc international court in the aftermath of the Second World War, Madsen explains the first two decades of the ECtHR as a time during which it was maintaining a narrow legal authority, where it employed a "relatively restrictive and often state-friendly interpretation of the Convention to facilitate states' acceptance of the system".[125] Yet, the European Court started emerging as a powerful international court after mid-70s after more states started accepting the Court's mandatory jurisdiction in individual applications. During this phase, the ECtHR took on the role of developing extensive Europe-wide minimum standards for the protection of human rights,[126] giving flesh and blood to the provisions of the Convention in real-life contexts.

While the ECtHR became labelled as the 'Supreme European Court'[127] during this era, creating minimum standards of human rights – sometimes in very politicized contexts – did not come without criticism. After the backlash of several prominent Member States against the European Court's 'activist' jurisprudence, a number of intergovernmental conferences were held on how to reform the Convention system. As a result of these negotiations, Protocol No. 15 to the ECHR added a reference to the principle of subsidiarity and doctrine of margin of appreciation in the Preamble of the Convention.

[125] Mikael Rask Madsen, 'The European Court of Human Rights: From Cold War to the Brighton Declaration and Backlash' in Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018) 244.
[126] ibid 252.
[127] Mikael Risk 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' (2007) 32 Law & Soc. Inq. 137.

Within this context, Robert Spano (current President of the ECtHR) has explained that the ECHR is currently in a 'transformative era' and stated that the Court is moving from the 'substantive embedding phase' to a 'procedural embedding phase'.[128] Accordingly, he has argued that the European Court has established most of the applicable human rights obligations arising from the Convention in the first forty years of its existence. In accordance with the spirit of Protocol No. 15, the procedural embedding phase puts a higher emphasis on the principle of subsidiarity. As a result of this shift, in essence, so long as domestic courts can demonstrate that they have taken into consideration the applicable norms of the ECHR in good faith, as developed by the ECtHR in the substantive embedding phase, the European Court will not second-guess the decisions of the domestic authorities. In this 'age of subsidiarity', the Court's assessment will be restricted to a reasonableness review of the outcome of the domestic courts.[129]

To be fair to the jurisprudence of the Court, it still exercises an important supervisory role in backsliding democracies as demonstrated in the recent judgments that were cited in Chapter 2 of this thesis. Spano has also underlined that "states that do not respect the rule of law, (…) and do not ensure the impartiality and independence of their judicial systems, oppress political opponents or mask prejudice and hostilities towards vulnerable groups or minorities, cannot expect to be afforded deference under process-based review."[130] However, Madsen shows that this new phase has already resulted in a "more limited and in some instances a less accessible Court", where the it (1) permits greater deference to Member States that are seen as

[128] Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 473.
[129] ibid 488.
[130] ibid 493.

consolidated democracies; and (2) focuses on more stringent procedural requirements in admissibility on the cases coming from Member States that are seen as illiberal democracies.[131]

In this context, compliance with the European Court's jurisprudence becomes more important from two aspects: the full implementation of the judgments of individual cases that has been decided by the ECtHR by the domestic authorities, and also the good faith application by domestic courts of the Convention standards that have been set by the European Court during the substantive embedding phase. An important requirement for this new phase for the European Court to work efficiently without lowering the standards of the protection of fundamental rights is a well-functioning domestic system for protection of fundamental rights.[132]

Although this new phase in the European Court requires a better understanding and implementation of ECHR standards by domestic authorities, as demonstrated in Chapter 2, courts in illiberal settings are increasingly coming up with different modalities to eliminate the external constraints that come with being a Member State of the Council of Europe. And, as a general shortcoming of international law, there is no way for an international organization or an external actor to force a country to fulfill their obligations arising from international agreements.

Still, the lack of a mechanism that forces Member States to abide by the European Court's judgments does not render the ECtHR completely obsolete in hybrid regimes. On the contrary, the Court fulfils a number of functions that are essential for human rights and rule of law advocates in illiberal polities.

[131] Mikael Risk Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' (2021) 2 European Convention on Human Rights Law Review 180, 207.
[132] Spano (n 128) 493.

Firstly, the ECtHR provides an independent and impartial legal avenue for individuals who cannot find such an institution within their own country due to the lack of independence of the judiciary. The judgments of the European Court has a legitimizing effect on the victim's allegations against a state, elevating their claims from mere accusations to claims that have been recognized by the highest court of human rights in the region. Furthermore, these judgments provide a concrete basis for the civil society and opposition parties to come up with policies to resist, and eventually redress these human rights violations.

The second function of the Court's judgments in illiberal contexts is regarding the elusiveness of hybrid regimes, where they hijack the vocabulary of constitutional democracy to legitimize their own anti-democratic actions.[133] In these contexts, regimes hide the real anti-democratic purposes of their acts behind seemingly neutral or democratically acceptable reasons. For example, increasing the democratic accountability of the judiciary becomes the stated goal of reforms that essentially jeopardize judicial independence and subordinate it to political branches of the government. Protecting national security by preventing terrorism becomes the cover for imprisoning political opponents. Against this backdrop, the Court's judgments on key cases can have a function to work as a litmus test to call out the real motives of a hybrid regime.

Thirdly, the Court's judgments also provide grounds for increasing international pressure on hybrid regimes. As Member States of the EU, non-compliance with ECtHR judgments results in political pressure on Poland and Hungary, where large sums of funding is made conditional upon fulfilment of certain rule of law criteria. Similarly, Turkey's record in implementing the ECtHR judgments is important for its accession negotiations with the EU – although that does not seem to be a priority recently. Dilek Kurban points out to the fact that EU using compliance

[133] Renáta Uitz, 'Constitutional Practices in Times After Liberty' in András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2021) 456.

with ECtHR judgments as an accession criterion under Copenhagen Criteria as one of the main reasons triggering reforms in the human rights field after Turkey was declared as a candidate country.[134]

Based on these reasons, the European Court still plays an important role in hybrid regimes. Furthermore, the Convention provides a number of other tools that the Court and the Committee of Ministers can employ in order to better address the unique problems that the Convention system encounters due to hybrid regimes: more frequent utilization of Article 18 and infringement proceedings.

3.2 Utilizing Article 18

Article 18 of the ECHR prohibits the restriction of the rights and freedoms enshrined in the Convention for purposes that are not allowed by the restriction provisions. Essentially, it has been stated that this provision is intended as an 'alarm bell' against possible signs of totalitarianism by the drafters of the Convention.[135] While this provision did not play a role in the first fifty years of the jurisprudence of the European Court, the rule of law decay that is seen in the last years also seem to have resulted in a heightened interest in this provision. Indeed, scholars[136] and judges at the Court[137] have argued that this provision can work as a warning sign for the risk of destruction of rule of law.

Although the ECtHR started to develop its Article 18 jurisprudence in the last two decades, it still interprets the scope of application of this provision in an 'extremely narrow' manner.[138] In

[134] Kurban (n 74) 65.
[135] Basak Cali and Kristina Hatas, 'History as an Afterthought: The (Re)discovery of Article 18 in the case law of the European Court of Human Rights' in Helmut Philipp Aust and Esra Demir-Gürsel (eds), The European Court of Human Rights: Current Challenges in Historical Perspective (Elgar 2021)159.
[136] Floris Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?' (2018) 9 Göttingen Journal of International Law 109, 113.
[137] *Navalnyy and Ofitserov v Russia* App Nos 46632/13 and 28671/14 (ECtHR, 23 February 2016), Joint Partly Dissenting Opinion of Judges Nicolaou, Keller and Dedov para. 2.
[138] Tan (n 136) 121.

the case-law of the Court, the prevailing assumption of good faith of the states makes it harder for the applicants to establish the ulterior motive underlying a violation of a Convention right. Furthermore, the Court underlines that a violation of Article 18 can be claimed only in conjunction with the violation of another, qualified Convention right.[139] While this is a reasonable interpretation of the text of Article 18, the Court has rejected the claims of violation of Article 18 in conjunction with Article 6 in a number of cases[140], stating that Article 6 does not contain a limitation clause and thus cannot form the basis of an Article 18 claim. Later on, the Court left the question of whether Article 18 can be violated in conjunction with Article 6 open.[141]

A wider scope of application for Article 18 can prove useful to address the unique challenges put forth by hybrid regimes. Firstly, extending the scope of this provision to include Article 6 is important to address rights violations in these countries, as the regimes often tend to restrict or eliminate access to tribunals, where even the independence and impartiality of such tribunals is questionable as demonstrated in the case studies in Chapter 2. Moreover, Article 18 judgments can be essential in reclaiming the language and vocabulary of liberal constitutionalism from the abusive methods of these regimes, as an Article 18 violation judgment by the ECtHR provides a more convincing and stronger basis for calling out the ulterior motives of hybrid regimes than statements coming from the opposition or international organizations.

Lastly, Article 18 judgments can be useful in providing redress to the continuing fundamental rights violations during a possible democratization in the future. By way of example, Demirtas is likely to stay behind bars until a government change in Turkey, since he is already convicted

[139] *Merabishvili v. Georgia* App No 72508/13 (ECtHR, 28 November 2017), para. 287.
[140] *Navalnyy and Ofitserov* (n 137), para. 129; *Khodorkovskiy v. Russia (No. 2)* App No 11082/06 (ECtHR, 8 November 2011), para. 16.
[141] *Ilgar Mammadov v. Azerbaijan (No. 2)* App No 919/15 (ECtHR, 16 November 2017).

in some cases, and being tried for multiple life sentences due to the facts that were considered as falling within the scope of freedom of expression by the ECtHR. Some of these convictions have already become res judicata. The ECtHR's findings on Article 18 can provide a solid basis for a new government to find a solution to the procedural problems that come with the finality of a judgment, without waiting for another 5-6 years for a judgment from the ECtHR on separate specific cases that he has been convicted of.

Due to these reasons, utilization of Article 18 more frequently by the lawyers can be useful for the European Court to develop its case-law in this area, and further enhance a tool that is indeed available to them in dealing with the hybrid regimes in the CoE Member States.

3.3 Infringement Proceedings

Additionally, the Convention provides another under-developed tool that can be useful in addressing the fundamental rights violations in hybrid regimes: the infringement proceedings foreseen under Article 46(4) of the Convention. This procedure was added to the Convention with the Protocol No. 14 in 2010 in order to increase the effectiveness of the Convention system by including an enhanced mechanism to ensure execution of judgments.[142]

According to Article 46(4), the Committee of Ministers, by two-thirds majority, can refer a question to the Court asking whether the state against which a judgment is delivered failed to fulfill its obligation to abide by the final judgment of the Court. If the Court finds that a state has indeed failed to fulfil its obligations, the Committee of Ministers can debate on further measures to be taken, which includes suspension of voting rights or even expulsion.

[142] *Ilgar Mammadov v. Azerbaijan* App No 15172/13, Article 46(4) judgment [GC] (ECtHR, 29 May 2019), para. 116.

This mechanism was used only once until recently, and the Court has issued an Article 46(4) judgment for the first time in May 2019. This case concerned the arbitrary detention of Ilgar Mammadov, an Azerbaijani opposition politician, where the ECtHR had found a violation of his right to liberty in conjunction with Article 18.[143] After the Azerbaijani government failed to fulfil its obligations by securing his immediate release for over four years, the Committee of Ministers initiated infringement proceedings. The Court clarified its approach to Article 46(4) through this judgment, where it took a narrow approach of examining whether individual measures that were ought to be taken by Azerbaijan was taken, and not examining the questions on general measures.[144] By the time the Court delivered this judgment, Mammadov was already released from prison and subsequently acquitted of all charges in 2020. While this particular example seems to show that the utilization of infringement proceedings worked out for Mammadov, there is still insufficient input concerning the overall effectivity of infringement proceedings.

The inclusion of this new mechanism to the Convention was criticized by some commentators who argued that the dynamics of non-execution, which is mostly based on political considerations, show that the infringement proceedings would be 'futile and counterproductive', with a possibility to increase the politicization of the Court, and possibly lead to further backlash.[145] These concerns seem to have found ground in the Turkish authorities when the Committee of Ministers triggered Article 46(4) for the second time, concerning the compliance of Turkey with the Court's Kavala judgment.

[143] ibid.
[144] Başak Çalı, 'No Going Nuclear in Strasbourg: The Infringement Decision in Ilgar Mammadov v. Azerbaijan by the European Court of Human Rights' (2019) Verfassungsblog <https://verfassungsblog.de/no-going-nuclear-in-strasbourg/> accessed 15 June 2022.
[145] Fiona de Londras and Kanstantsin Dzehtsiarou, 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings In The European Court Of Human Rights.' (2017) 66 International and Comparative Law Quarterly 467, 468.

After the adoption of this resolution, the Turkish Foreign Ministry released a statement saying: "While there is a large number of judgments that are waiting to be executed by the Member States on the agenda of the Committee of Ministers, (…) constantly bringing the Kavala judgment forward on the agenda is a malicious, intentional and inconsistent approach. It is evident that this prejudiced and politically motivated decision, which disregards the domestic proceedings, damages the credibility of the European human rights system. In order to ensure effectiveness of the Council of Europe's human rights system, the Committee of Ministers should set aside its biased and selective approach."[146]

While Turkey's response to the initiation of these proceedings already points out to the possible unproductiveness of using this mechanism, the infringement proceedings can be useful in dealing with hybrid regimes even if it cannot guarantee or force compliance. As explained in this thesis, hybrid regimes operate elusively, and rarely defy the authority of ECtHR judgments openly. Even the Turkish communication to the CoM concerning the execution of the Kavala judgment starts by claiming that "Turkey has never refused to implement any judgment of the European Court of Human Rights and certainly does not refuse to abide by the Kavala judgment."[147] Instead, they use different modalities, some of which explained in Chapter 2, to circumvent their obligations without the outright rejection of fundamental rights. Through the infringement proceedings, the European Court can get a unique opportunity to call out these non-compliance strategies as not compatible with the Convention.

[146] Turkish Foreign Ministry, 'Press Release Regarding the Decision Adopted by the Committee of Ministers of the Council of Europe at its 1423rd Session on the Execution of the ECtHR Judgment of Kavala v. Türkiye' <https://www.mfa.gov.tr/no_-41_-avrupa-konseyi-bakanlar-komitesi-nin-1423-toplantisinda-aihm-in-kavala-kararinin-icrasina-iliskin-alinan-karar-hk.en.mfa> accessed 15 June 2022.
[147] Committee of Ministers, 'Turkey's Views on the Execution of the judgment of the European Court of Human Rights Kavala against Turkey' Interim Resolution CM/ResDH(2022)21 adopted on 2 February 2022

To conclude, while Article 46(4) is seen as a 'nuclear option'[148], the threat posed on the rule of law and protection of fundamental rights in hybrid regimes seem to show that we live under exceptional circumstances. Therefore, the elusive strategies of hybrid regimes point out to the requirement of both the CoM and the ECtHR to use all the tools available in the Convention to counter the democratic backsliding in a number of CoE Member States.

[148] Lize R. Graz, 'The Committee Of Ministers Goes Nuclear: Infringement Proceedings Against Azerbaijan In The Case Of Ilgar Mammadov' (2017) Strasbourg Observers <https://strasbourgobservers.com/2017/12/20/the-committee-of-ministers-goes-nuclear-infringement-proceedings-against-azerbaijan-in-the-case-of-ilgar-mammadov/> accessed 15 June 2022.

CONCLUSION

In Franz Kafka's seminal novel The Trial, the main character Josef K. finds himself in an endless legal battle without ever learning about the nature of his alleged crime: "*After all, K. was living in a country governed by rule of law, it was peaceful everywhere, and the laws were respected. Who was it that dared to detain him in his own home?*"[149] The unique and elusive characteristics of hybrid regimes in Hungary, Poland and Turkey leaves the observers in a similar position as the protagonist in Kafka's novel even more than a century after this book was written. These countries have liberal constitutions in force, are members of the Council of Europe, are under the jurisdiction of European Court, and their authorities claim that they fulfil their Convention-based obligations in good faith. Still, individuals living in these countries are faced with fundamental rights violations and cannot find remedies to these violations in the domestic legal sphere.

This thesis has explored and traced how the highest domestic legal authorities – the domestic constitutional courts – contribute to, or fail to prevent, the democratic backsliding by finding new legal justifications for ECHR non-compliance. The external constraints posed by the ECtHR and Council of Europe are not taken lightly by the hybrid regimes, and captured constitutional courts prove to be important actors in eliminating the effects of the last remaining legal avenue of individuals who face fundamental rights violations. Constitutional courts employ both strong and weak forms of abusive judicial review in the context of eliminating ECtHR supervision.

In terms of strong abusive judicial review, the Polish Constitutional Tribunal's two recent judgments blocking the execution of vital ECtHR judgments concerning the judicial reforms

[149] Franz Kafka, *Dava (The Trial)* (Iletisim Yayinlari 2015) 44 (translation from Turkish).

allows the regime in Poland to use legal excuses in pre-empting international pressure on their reforms. On a more stealth level, constitutional courts in all three of the countries at the focus of this thesis also employ silent and creative non-compliance that can be labelled as weak form of abusive judicial review, where they do not directly confront the bindingness of ECtHR judgments yet still allow the continuance of fundamental rights violations.

Even though the execution of the ECtHR's judgments are impeded by resistance from national authorities, which includes the domestic constitutional courts' non-compliance modalities, the Court still fulfills important functions in the protection of fundamental rights in hybrid regimes. Its judgments provide an important basis for domestic resilience and international pressure on these regimes. Although the sovereigntist mood in a number of countries and the large backlog of cases at the ECtHR has resulted in the Court shifting to a procedural era with a heightened emphasis on the principle of subsidiarity, the Convention still has a number of tools that can be used more effectively to address the unique challenges posed by the obscure nature of hybrid regimes.

BIBLIOGRAPHY

Bard P, 'The Hungarian life imprisonment regime in front of apex courts I. - The findings of the European Court of Human Rights and the Constitutional Court' (2015) JTIBlog <https://jog.tk.hu/blog/2015/06/the-hungarian-life-imprisonment-hu>

Bates E, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010)

Bates E 'Democratic Override (or Rejection) and the Authority of the Strasbourg Court: The UK Parliament and Prisoner Voting' in M. Saul, A. Follesdal, and G. Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments: Europe and Beyond* (CUP 2017)

Bermeo N, 'On Democratic Backsliding' (2016) 27(1) Journal of Democracy 5

Boda Z, Tóth M, Hollán M, and Bartha A, 'Two Decades of Penal Populism – The Case of Hungary' (2022) 47 Review of Central and East European Law 115.

Bozóki A and Hegedűs D, 'An Externally Constrained Hybrid Regime: Hungary in the European Union' (2018) 25 Democratization 1173

Çalı B, 'No Going Nuclear in Strasbourg: The Infringement Decision in Ilgar Mammadov v. Azerbaijan by the European Court of Human Rights' (2019) Verfassungsblog <https://verfassungsblog.de/no-going-nuclear-in-strasbourg/>

Çalı B and Hatas K, 'History as an Afterthought: The (Re)discovery of Article 18 in the case law of the European Court of Human Rights' in Helmut Philipp Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical Perspective* (Elgar 2021)159.

Göztepe E, 'The Permanency of the State of Emergency in Turkey' (2018) 28 Zeitschrift für Politikwissenschaft 521

Graz LR, 'The Committee Of Ministers Goes Nuclear: Infringement Proceedings Against Azerbaijan In The Case Of Ilgar Mammadov' (2017) Strasbourg Observers <https://strasbourgobservers.com/2017/12/20/the-committee-of-ministers-goes-nuclear-infringement-proceedings-against-azerbaijan-in-the-case-of-ilgar-mammadov/>

Human Rights Watch, 'Turkey: Judges, Prosecutors Unfairly Jailed' (Istanbul, 5 August 2017) <https://www.hrw.org/news/2016/08/05/turkey-judges-prosecutors-unfairly-jailed>

Huneeus A, 'Compliance with Judgments and Decisions' in Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013)

Issacharoff S, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (CUP 2015)

Kafka F, *Dava (The Trial)* (Iletisim Yayinlari 2015)

Keller H and Walther R, 'The Bell of Gorgulu Cannot Be Unrung – Can It?' in Giuliana Ziccardi Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence* (OUP 2020)

Kurban D, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (CUP 2020)

Landau D, 'Abusive Constitutionalism' (2013) 47 U.C. Davis L. Rev. 189

Landau D and Dixon R, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (OUP 2021)

Landau D and Dixon R, 'Abusive Judicial Review: Courts Against Democracy' 53 U.C. Davis L. Rev. 1313.

Levay M, 'Constitutionalising Life Imprisonment without Parole: The Case of Hungary' in Dirk van Zyl Smit and Catherine Appleton (eds), *Life Imprisonment and Human Rights* (Bloomsbury Publishing, 2016)

Levitsky S and Way LA, 'Elections without Democracy: The Rise of Competitive Authoritarianism' (2002) 13(2) Journal of Democracy 51

Londras FD and Dzehtsiarou K, 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings In The European Court Of Human Rights.' (2017) 66 International and Comparative Law Quarterly 467

Madsen MR, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32 Law & Soc. Inq. 137

Madsen MR, 'The European Court of Human Rights: From Cold War to the Brighton Declaration and Backlash' in Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018)

Madsen MR, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' (2021) 2 European Convention on Human Rights Law Review 180

Molu B, 'Analysis: First ECtHR judgment on insulting the president: Art. 299 must be revised' (2021) Expression Interrupted <https://www.expressioninterrupted.com/first-ecthr-judgment-on-insulting-the-president-art-299-must-be-revised/>

Moustafa T and Ginsburg T, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tamir Moustafa and Tom Ginsburg (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP 2008)

Ozbudun E, 'Pending Challenges in Turkey's Judiciary' (2015) Global Turkey in Europe Policy Brief <https://www.iai.it/sites/default/files/gte_pb_20.pdf>

Sadurski W, *Poland's Constitutional Breakdown* (OUP 2019)

Sajó A, *Ruling by Cheating: Governance in Illiberal Democracy* (CUP 2021)

Sajó A and Uitz R, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017)

Schabas WA, *The European Convention on Human Rights: A Commentary* (OUP 2015)

Scheppele KL, 'Autocratic Legalism' 85 The University of Chicago Law Review 545

Sólyom L, 'The Role of Constitutional Courts in the Transition to Democracy' (2003) 18(1) International Sociology 133

Spano R, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 473

Starzhenetskiy V, 'The Execution of ECtHR Judgments and the Right to Object of the Russian Constitutional Court', in Marten Breuer (ed), *Principled Resistance to ECtHR Judgments – A New Paradigm?* (Springer 2019)

Szwed M, 'The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights: ECtHR 7 May 2021, No. 4907/18, Xero Flor w Polsce Sp. z O.o. v Poland' (2022) 18 European Constitutional Law Review 132

Szwed M, 'When Is a Court Still a Court?: The ECtHR's Advance Pharma Case and the Polish Judiciary' (2022) Verfassungsblog <https://verfassungsblog.de/when-is-a-court-still-a-court-and-what-makes-a-judge-a-judge/>

Tan F, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?' (2018) 9 Göttingen Journal of International Law 109

Tecimer C, 'The Curious Case of Article 299 of the Turkish Penal Code: Insulting the Turkish President' (2018) Verfassungsblog <https://verfassungsblog.de/the-curious-case-of-article-299-of-the-turkish-penal-code-insulting-the-turkish-president/>

Trochev A and Solomon PH, 'Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state' (2018) 51 Communist and Post-Communist Studies 201

Uitz R, 'Constitutional Practices in Times After Liberty' in András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2021)

Venice Commission, *Poland Opinion on the Draft Act Amending the Act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, 11 December 2017, CDL-AD(2017)031

Venice Commission and OSCE/ODIHR, *Joint Opinion on the Provisions of the So-Called "Stop Soros" Draft Legislative Package Which Directly Affect NGOs*, 25 June 2018, CDL-AD(2018)013

Yildirim M and Ucpinar H, 'Report on Conscientious Objection to Military Service in Turkey, Association for Conscientious Objection' (2021) Association for Conscientious

Objection
<https://drive.google.com/file/d/1OgQUzlHlEhMWZ_RfLfZRVnoniOo5_aIw/view>