ON THE EXHAUSTION OF LOCAL REMEDIES: RECONCILING SOVEREIGNTY AND JUSTICE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

ALARA HANCI*

ABSTRACT

Europe has a rule of law crisis. In the past decade, Turkey, Poland, and Hungary have undermined their democratic societies and compromised the independence of their institutions by affording unprecedented strength to their executive branch and imposing severe restrictions on the public sphere. As their illiberal policies spread, so does the frequency with which individuals adversely affected by these policies seek justice before the European Court of Human Rights. In these cases, Article 35(1) of the European Convention on Human Rights requires that they first exhaust the local remedies available in their national legal system.

Article 35(1) reflects the role of the European Court of Human Rights to act as a subsidiary to Europe's national judicial institutions and exercise a margin of appreciation for their ability to deliver a just outcome to litigants. However, this Comment shows that the principle of subsidiarity and the Court's margin of appreciation for sovereign interests have led to an excessively formalistic interpretation of Article 35(1) in cases brought against Turkey and Hungary, leading to unjust conclusions for applicants and

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undermining the Court's ability to guard against the erosion of rule of law in illiberal democracies.

If the Court is to preserve its legitimacy as an institution capable of addressing human rights violations wherever they occur within its jurisdiction, it is critical that it plays a more active role in tackling Europe's rule of law crisis. On this matter, Article 18 offers insight into the means by which the Court can provide relief to applicants and confront any unlawfully implemented state restrictions that compromise democratic governance in Member States without entirely delegitimizing these States' legal and political systems.

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INTRODUCTION

Europe has a rule of law crisis. In the past decade, Turkey, Poland, and Hungary have undermined their democratic societies and compromised the independence of their institutions by affording unprecedented strength to their executive branch, imposing severe restrictions on the public sphere, and harming their human rights record pertaining to freedom of speech and the right to due process.[1] As their illiberal policies spread, so does the frequency with which individuals adversely affected by these policies seek justice before the European Court of Human Rights ("ECtHR"), established to ensure that States respect certain human rights guarantees, while also strengthening the rule of law in Europe in furtherance of that goal.

In executing its mandate, the ECtHR was designed as a subsidiary to the national judicial institutions in Europe. A part of the Court's subsidiarity role is embodied in Article 35(1) of the European Convention on Human Rights ("ECHR" or the "Convention"), which requires that persons seeking redress before the Court first exhaust the local remedies available in their national legal system.[2] However, the question of whether individual applicants are required to exhaust local remedies that reflect structural deficiencies, and under what circumstances that requirement is dispensed with, will continue to occupy the Court's docket so long as the rule of law conditions in these countries deteriorate and endanger the accessibility, independence, and effectiveness of their judiciary.

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[1] *See Turkey: Erdoğan's Onslaught on Rights and Democracy*, HUM. RTS. WATCH (Mar. 24, 2021), https://www.hrw.org/news/2021/03/24/turkey-erdogans-onslaught-rights-and-democracy [https://perma.cc/ZE8Q-JBV3] (discussing recent government policies "against parliamentary opposition, the Kurds, and women" as efforts to "ensur[e] the [P]resident's hold on power in violation of human rights and democratic safeguards"); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Hungary 2 (2023) ("Significant human rights issues included credible reports of: actions that aimed to interfere with or diminish the independence of the judiciary; serious restrictions on freedom of expression and media, including censorship and content restrictions at the public service media broadcaster; political intimidation of and legal restrictions on civil society organizations . . . ."); Wojciech Przybylski, *Explaining Eastern Europe: Can Poland's Backsliding Be Stopped?*, 29 J. Democracy 52 (2018) (discussing the policies undertaken by Poland's governing party to weaken institutional checks and balances through changes to the judicial system).

[2] Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

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To that end, this Comment examines the impact of the exhaustion requirement on the ECtHR's ability to provide redress to victims of human rights abuses and guard against the erosion of rule of law in illiberal democracies. Based on its analysis, this Comment argues that the principle of subsidiarity, together with the Court's margin of appreciation for sovereign interests, has led to an excessively formalistic interpretation of the exhaustion rule, leading to unjust conclusions for applicants and undermining the Court's ability to help build stronger rule of law institutions in Europe.

Part I of this Comment examines the exhaustion rule as interpreted and applied by the ECtHR. It identifies the circumstances that dispense of the exhaustion requirement, namely where local remedies (1) are futile, (2) do not reasonably offer a chance of success, or (3) offer no reasonable possibility of effective remedies. It also identifies justice and sovereignty as the two jurisprudential considerations that drive the Court's strategic application of Article 35(1).

Part II then turns to the ECtHR's jurisprudence, outlining landmark cases involving three backsliding democracies: Turkey since the attempted July 2016 coup; Hungary since the election of Prime Minister Viktor Orbán; and Poland in the aftermath of the 2015 constitutional crisis. Focusing on the Court's reasoning in these cases and investigating the broader legal and political context in which the alleged human rights violations occurred, Part II compares the Court's limited engagement with the depreciated rule of law conditions in Turkey and Hungary to the active role the Court has played in mitigating the crisis in Poland. Part II highlights that, in Article 35(1) matters involving Turkey and Hungary, the Court's caselaw reflects a failure to examine the context in which the alleged violations took place, and a disregard for the fact-findings of independent third-party actors at the expense of individual applicants. Yet in adjudicating the claims brought against Poland, the Court has applied exhaustion rules more flexibly, examined the composition and the operations of the Polish high courts in great detail, and repeatedly found the courts to be incapable of providing sufficient redress as long as the constitutional crisis continues.

Part III discusses the Court's motivations that may color its conflicting judgments on Turkey, Hungary, and Poland. It argues that the ECtHR heavily favors working alongside Member States' domestic courts and sharing their burden in addressing alleged violations of human rights, rather than opposing these courts' decisions and substituting its judgments for their own. Where a

Member State (like Poland) experiences a specific instance of constitutional crisis, and its constitutional courts remain committed to the rule of law by engaging in self-policing, the Court can narrowly address the State's constitutional problems and dispose of the local remedies requirement. However, where States (such as Turkey and Hungary) exhibit a systemic fracture in their rule of law, allowing applicants to prevail on Article 35(1) risks the conclusion that the States' entire complaint mechanisms are ineffective. Such a conclusion would effectively substitute the ECtHR's judgments for those rendered by national courts, overwhelm the international tribunal with flooding complaints, and compromise the delicate balance between national and regional legal systems. Therefore, in adjudicating Article 35(1) matters that raise systemic concerns, subsidiarity and margin of appreciation prevail, and the Court defers to domestic constitutional courts.

The Court's use subsidiarity in this way has effectively rendered the fundamental rights guaranteed by the Convention inoperative, and constrained the Court's ability to address rule of law crises such that the denial of justice has remained pervasive in Turkey and Hungary. Part III thus concludes with a normative analysis of the subsidiarity principle, arguing that though reasonably based in Europe's legal and political priorities, subsidiarity as applied in illiberal democracies undermines the Court's mandate, as well as the rights principles it upholds. Part III Article 18 of the Convention as guidance on how the Court can improve the victims' access to justice for rights violations while also confronting unlawfully implemented state restrictions that compromise democratic governance in Member States without entirely delegitimizing these States' legal and political systems.

I. THE BALANCING ACT BEHIND THE EXHAUSTION RULE

a. The Defining Characteristics of the Exhaustion Requirement

The requirement to exhaust domestic remedies obliges an individual bringing a claim before an international court to first use the means of remedy available under the national law of the country against which the claim is brought. Having originated in the

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diplomatic protection of citizens abroad,[3] exhaustion has since been applied in the international human rights regime vis-à-vis regional human rights courts.[4] The ECtHR in particular deals extensively with exhaustion, frequently hearing preliminary objections to its jurisdiction on the basis of the applicant's failure to exhaust domestic remedies.[5] Such objections derive from Article 35(1) of the ECHR, the treaty that established and governs the function of the Court.[6] Per Article 35(1), "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recogni[z]ed rules of international law, and within a period of four months from the date on which the final decision was taken."[7]

Article 35(1) is essentially a balancing act between the protection of rule of law and access to justice for victims on one side, and the proper functioning of the domestic remedies regime on the other. With regards to the former, the ECtHR is tasked with verifying State compliance with the ECHR and, in doing so, strengthening the rule of law, and harmonizing national laws with the human rights protections envisioned by the Convention.[8]

To that end, the ECtHR in principle interprets exhaustion "with some degree of flexibility and without excessive formalism," and in favor of the alleged victims.[9] The Court requires that a State's legal system satisfies three criteria before compelling applicants to exhaust the State's domestic remedies. First, remedies must be

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[3] A.A. Cançado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, 12 Rev. BDI 499, 501-02 (1976).

[4] *See* Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1272 (2006) ("Global and regional human rights institutions have been vigorous in applying the local remedies rule, resulting in the dismissal of many complaints for non-exhaustion of remedies. In applying the rule, tribunals have sought adherence to the doctrine as it exists in international law . . . .").

[5] A search of the ECtHR database shows that the Court has handled over a thousand cases involving Article 35(1) objections.

[6] ECHR, *supra* note 2, § 2.

[7] ECHR, *supra* note 2, art. 35(1).

[8] *High Level Conference on the Future of the European Court of Human Rights – Brighton Declaration*, EUR. CT. H.R., ¶ 3 (Apr. 20, 2012), https://www.echr.coe.int/documents/d/echr/2012_brighton_finaldeclaration_eng [https://perma.cc/KF5D-EPXB] [hereinafter Brighton Declaration].

[9] Gherghina v. Romania, App. No. 42219/07, ¶ 87 (July 9, 2015), https://hudoc.echr.coe.int/?i=001-157408 [https://perma.cc/BX4E-QH4Q]; *see also id.* ¶ 88 (explaining that the burden of proof is on the government claiming non-exhaustion to show "that the remedy was an effective one, available in theory and in practice at the relevant time").

available and accessible "not only in theory but also in practice."[10] Remedies are considered available when applicants can pursue them without difficulty and with "a certain degree of immediacy" in the circumstances of the particular case, and considering the broader legal and political context in which the remedies operate, including the State's procedural guarantees for free and fair hearings before independent and competent tribunals.[11] Second, the available remedies must be effective such that they exist within the domestic legal system and offer reasonable prospects of success.[12] Third, the remedies must be sufficient, that is they must be capable of redressing the alleged harm in the specific case.[13] Applicants are not obliged to exhaust domestic remedies that are unavailable, ineffective, or incapable of providing redress.

In furtherance of its goal to safeguard due process and provide redress to victims, the Court also recognizes three special circumstances that dispense applicants of the obligation to exhaust domestic remedies. The first exception applies to cases in which requiring applicants to use a particular remedy would be unreasonable and impose a disproportionate burden.[14] Second, given that effective remedies require a properly functioning judiciary, the exhaustion rule is also inapplicable where remedial proceedings are futile or ineffective because the State's administrative practice shows prima facie evidence of (1) repeated acts incompatible with the ECHR, and (2) official tolerance by State authorities.[15] Accordingly, the ECtHR accepts domestic remedies as ineffective in cases of gross and systematic violations of human

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[10] EUR. CT. H.R., PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA, ¶ 122 (2022), https://www.echr.coe.int/d/admissibility_guide_eng?p_l_back_url=%2Fsearch%3Fq%3DPractical%2BGuide%2Bon%2BAdmissibility%2BCriteria [https://perma.cc/VG9M-GH7S] [hereinafter ECTHR ADMISSIBILITY CRITERIA]; Silvia D'Ascoli & Kathrin Scherrat, *Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection* 12-13 (EUI Working Paper No. 2007/02, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=964195 [https://perma.cc/4LGK-8DD6].

[11] *See generally* ECTHR ADMISSIBILITY CRITERIA, *supra* note 10, ¶¶ 118-22 (detailing what generally constitutes an available remedy, including requirements of accessibility, capability, and a reasonable likelihood of offering success).

[12] *Id.* ¶ 122.

[13] *See* D'Ascoli & Scherrat, *supra* note 10, at 13 (describing *Lawless v. Ireland*, where an internment commission did not constitute an adequate remedy for unlawful imprisonment because it could not award damages to internees).

[14] ECTHR ADMISSIBILITY CRITERIA, *supra* note 10, ¶ 138.

[15] *Id.* ¶ 137.

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rights, which the Court presumes as deriving from an absence of rule of law in the State.[16] The mere existence of a large number of individual applicants coming in from a State can also be used as evidence in establishing the existence of an administrative practice.

Though the ECtHR doctrinally follows a less formalist approach to Article 35(1), the burden sharing role envisioned by the Council of Europe, who oversees the implementation of the ECHR,[17] requires that the Court still apply the exhaustion rule firmly and consistently. The exhaustion rule derives from the idea that the ECtHR acts as a subsidiary mechanism, working alongside rather than replacing national systems and courts, and assuming that States have effective remedies available to address an alleged breach.[18] Article 13 of the ECHR reflects the subsidiarity principle—that States have effective remedies available to address an alleged breach regardless of whether ECHR provisions are incorporated into their national laws.[19] Therefore, if States' domestic legal regimes are to function properly, States must be given the opportunity to remedy an alleged violation before being held responsible before the Court, and the Court must act as a supervisor.[20]

b. Policy Justifications for the Exhaustion Doctrine

The dual principles of protection and subsidiarity are designed to apply concurrently and without overpowering each other. When

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16 D'Ascoli & Scherrat, *supra* note 10, at 14.

17 *See* Press Release, Council of Eur., Implementation of ECHR Judgments – Latest Decisions by the Committee of Ministers (Oct. 3, 2023), https://www.coe.int/en/web/human-rights-rule-of-law/-/implementation-of-judgments-from-the-european-court-of-human-rights-latest-decisions-by-the-committee-of-ministers [https://perma.cc/KWE5-DK7G] ("The Committee of Ministers oversees the execution of judgments [from the ECtHR] on the basis of information provided by the national authorities concerned, NGOs, National Human Rights Institutions . . . and other interested parties.").

18 *See* Akdivar v. Turkey, App. No. 21893/93, ¶ 65 (Sept. 16, 1996), http://hudoc.echr.coe.int/fre?i=002-9507 [https://perma.cc/C2SR-AGUM] ("[I]t is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.").

19 *See id.* ("The rule is based on the assumption, reflected in Article 13 of the Convention . . . that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law.").

20 *See* ECtHR ADMISSIBILITY CRITERIA, *supra* note 10, ¶ 104.

assessing whether certain domestic remedies were effective, the Court traditionally examined applicants' arguments in great detail and reviewed the reports and remarks of both domestic third-party intervenors and international institutions.[21] However, subsidiarity grew in prominence between 2010 and 2012, when the Council of Europe convened three conferences to address the Court's demanding docket[22] and recent challenges to its judicial activism.[23] The subsequent Interlaken,[24] Izmir,[25] and Brighton[26] Declarations reflected the Council's efforts to amend the ECHR to impose a stricter application of the principle of subsidiarity.

The ECtHR's burden-sharing role is now embodied in the Protocol 15 Amendment to the Convention. Opened for signature in June 2013, Protocol 15 drew on the matters discussed and the concerns raised within the Interlaken, Izmir, and Brighton

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[21] *See*, *e.g.*, Sheekh v. Netherlands, App. No. 1948/04, (Jan. 11, 2007), https://hudoc.echr.coe.int/eng?=001-78986 [https://perma.cc/Y55E-XZCN] (summarizing the conclusions reached in numerous country reports from the Dutch Ministry of Foreign Affairs; taking into account the evaluations of reputable non-profit organizations such as Médecins sans Frontières and Amnesty International; and discussing the position of authorities on the cause of action).

[22] *See* Brighton Declaration, *supra* note 8, ¶ 16 ("The number of applications made each year to the Court has doubled since 2004. Very large numbers of applications are now pending before all of the Court's primary judicial formations. Many applicants, including those with a potentially well-founded application, have to wait for years for a response."); *see also generally* Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125 (2008) (discussing the ECtHR's rapidly growing docket and proposals for reform to address the resulting crisis).

[23] *See* Lina Urbaitė, *Judicial Activism in the Approach of the European Court of Human Rights to Positive Obligations of the State*, 11 BALTIC Y.B. INT'L L. 211 (2011).

[24] *High Level Conference on the Future of the European Court of Human Rights – Interlaken Declaration,* EUR. CT. H.R., ¶ 2 (Feb. 19, 2010), https://www.echr.coe.int/documents/d/echr/2010_interlaken_finaldeclaration_eng [https://perma.cc/R3B4-3HRQ] [hereinafter Interlaken Declaration] (calling for a "strengthening of the principle of subsidiarity" and inviting the ECtHR to apply admissibility criteria "uniform[ly] and rigorous[ly]").

[25] *See High Level Conference on the Future of the European Court of Human Rights – Izmir Declaration*, EUR. CT. H.R., ¶ 4 (Apr. 26-27, 2011), https://www.echr.coe.int/documents/d/echr/2011_izmir_finaldeclaration_eng [https://perma.cc/85D5-TA7P] [hereinafter Izmir Declaration] (discussing admissibility as an "essential tool in managing the Court's caseload and in giving practical effect to the principle of subsidiarity").

[26] *See* Brighton Declaration, *supra* note 8, ¶ 11 ("[T]he Convention system is subsidiary to . . . human rights at national level [and] national authorities are . . . better placed than an international court to evaluate local needs and conditions.").

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Declarations.[27] Article 1 of the Protocol amended the Preamble of the Convention to include that Member States, "in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in [the ECHR], and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of" the ECtHR.[28] Protocol 15 entered into force in August 2021 and applies in all forty-six States Parties to the Convention.[29]

The Council's affirmation of the subsidiarity principle and reference to a margin of appreciation for Member States make sense from a normative perspective. The European Commission recognized the margin of appreciation doctrine in as early as 1958, opining that "a certain margin of appreciation must be conceded" to States, which are "in a better position than the Commission to know all relevant facts and to weigh in each case the different possible lines of action . . . ."[30] Later ECtHR judgments have sustained this doctrine and for decades provided States with a certain level of discretion to implement their ECHR obligations in accordance with their diverse legal and cultural traditions.[31] Protocol 15 can thus be

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[27] *See* ECHR, Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., June 24, 2013, 24 V.I.2013 (entered into force Aug. 1, 2021) [hereinafter Protocol 15 Amendment to the ECHR].

[28] *Id.* ¶¶ 7-10.

[29] *Chart of Signatures and Ratifications of Treaty 213*, COUNCIL OF EUR. TREATY OFF. (Status as of Apr. 16, 2024), https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=213 [https://perma.cc/RT52-5JNY].

[30] Greece v. United Kingdom, App. No. 176/56, Report of the Eur. Comm'n on Hum. Rts, Vol. II, at 326 (Sept. 26, 1958), https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_176-56 [https://perma.cc/Y2NH-4953].

[31] *See*, *e.g.*, Handyside v. United Kingdom, App. No. 5493/72, Judgment, ¶¶ 47-49 (Dec. 7, 1976), https://hudoc.echr.coe.int/eng?i=001-57499 [https://perma.cc/4A5P-6TYM] ("Consequently, [the ECHR] leaves to the Contracting States a margin of appreciation."); Campbell v. United Kingdom, App. No. 13590/88, Judgment ¶ 44 (Mar. 25, 1992), https://hudoc.echr.coe.int/eng?i=001-57771 [https://perma.cc/N8FZ-LXKU] ("In determining whether an interference is 'necessary in a democratic society' regard may be had to the State's margin of appreciation."); Evans v. United Kingdom, App. No. 6339/05, Judgment ¶ 77 (Apr. 10, 2007), https://hudoc.echr.coe.int/eng?i=001-80046 [https://perma.cc/L53W-59DK] (discussing the factors that must be taken into account when "determining the breadth of the margin of appreciation enjoyed by the State"); Mouvement Raëlien Suisse v. Switzerland, App. No. 16354.06, Judgment, ¶¶ 48-50 (July 13, 2012), https://hudoc.echr.coe.int/eng?i=001-112165 [https://perma.cc/ZFM3-QMDV] ("The boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition; in both situations—

regarded as simply incorporating the well-established principles of subsidiarity and margin of appreciation into the text of the Convention, while also formally recognizing the intrinsic link that exists between the two norms.[32]

Functional and practical considerations further underlie Protocol 15. Since its founding, the Court has expanded institutionally, geographically, and jurisprudentially. Its growing body of case law has transformed Europe's legal and political landscape. Within this backdrop, Protocol 15 helps align the ECtHR with the principle of subsidiarity that governs the exercise of the European Union ("EU")'s competencies.[33] The Protocol's margin of appreciation further provides national courts with a greater opportunity to resolve human rights complaints, making it harder for applicants to satisfy the Court's Article 35(1) requirement. In doing so, the Protocol serves pragmatically to alleviate the Court's over-burdened docket at a time when it "faces a docket crisis of massive proportions."[34] In designating national—and not supranational—political, administrative, and judicial actors as those primarily responsible for guaranteeing the rights of individuals, Protocol 15 additionally incentivizes States Parties to strengthen

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whether the obligations are positive or negative—the State enjoys a certain margin of appreciation.") (omitting internal citations); Paradiso v. Italy, App. No. 25358/12, Judgment, ¶¶ 181-83 (Jan. 24, 2017), https://hudoc.echr.coe.int/eng?i=001-170359 [https://perma.cc/9VZZ-PNH4] (reiterating the factors to consider when "determining the breadth of the margin of appreciation enjoyed by the State"); Beshiri v. Albania, App. No. 29026/06, Second Section Decision, ¶ 188 (Mar. 17, 2020) (referring to state authorities' wide margin of appreciation in situations involving controversial legislative schemes that carry a significant economic impact for the country), https://hudoc.echr.coe.int/fre?i=001-202475 [https://perma.cc/BS36-FMZV].

[32] *Cf.* Council of Eur., *Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms. Explanatory Report*, ¶ 7, CETS No. 213, https://www.echr.coe.int/documents/d/echr/protocol_15_explanatory_report_eng [https://perma.cc/555D-VC77] [hereinafter Council of Eur. Explanatory Report] ("[The Amendment] is intended to enhance the transparency and accessibility of these characteristics of the Convention system . . . .").

[33] At the EU level, subsidiarity "seeks to safeguard the ability of the Member States to take decisions and action," and looks for the EU's intervention where "the objectives of an action cannot be sufficiently achieved by the Member States . . . by reason of [its] scale and effects." *See The Principle of Subsidiarity*, EUR. PARL. FACT SHEETS, https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity#:~:text=In%20areas%20in%20which%20the%20EU%20does%20not%20have%20exclusive,States%2C%20but%20can%20be%20better [https://perma.cc/9GSD-XSYF] (last visited Mar. 13, 2024).

[34] Helfer, *supra* note 22, at 125.

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their judicial systems by positioning "domestic judges and administrative bodies to act as the first-line defenders of Convention rights and freedoms."[35] For this reason, the Protocol is particularly helpful in legitimizing the Court's review and mitigating criticisms of the Court's "embeddedness" in Member States' national affairs.[36]

Subsidiarity and the margin of appreciation are not judicial mandates that dictate the ECtHR's review but are rather jurisprudentially developed tools of judicial interpretation, meaning the Court uses these principles in the way it construes the rights and privileges granted by the ECHR. Article 1 of Protocol 15 affirmed the Court's "supervisory jurisdiction" over these principles and intended to preserve the Court's interpretative authority to define and apply these principles consistent with the doctrines "as developed by the Court in its case law."[37] However, the Court's greater margin for appreciation in the name of a more strictly applied principle of subsidiarity has not effectively translated into its judicial practice. As Part II will show, the Court has applied Article 35(1) in an overly restrictive manner and favored subsidiarity at the expense of human rights protections in rule-of-law compromised Member States.

II. ARTICLE 35(1) AND THE COURT'S HUMAN RIGHTS PROTECTIONS IN RULE-OF-LAW COMPROMISED STATES

a. Article 35(1) and the State of Emergency in Turkey

Beginning with the ECtHR's judgements in cases brought against Turkey, the Court has consistently refused to examine the

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[35] *Id.* at 128.

[36] *Id.* at 128; *see, e.g.*, *id.* ("[The looming docket crisis] has led the ECtHR to become increasingly embedded in the national legal systems of the Convention's [M]ember [S]tates, often exercising functions that differ radically from those that the [Convention]'s drafters and the first generations of ECtHR judges had envisioned."); Andrew McDonald, *Rishi Sunak Demands ECHR Reform Ahead of Council of Europe Summit*, POLITICO (May 16, 2023), https://www.politico.eu/article/rishi-sunak-call-european-court-of-human-rights-echr-reform-ahead-council-of-europe-summit/ [https://perma.cc/GQ8R-MRMZ] (criticizing the ECtHR's interim injunctions that blocked the United Kingdom's planned deportations to Rwanda as defeating a key aim of the U.K. government).

[37] Council of Eur. Explanatory Report, *supra* note 32, ¶ 7.

adverse effects of populist policies on the independence and effectiveness of Turkey's judicial institutions, and instead has required applicants to exhaust domestic remedies in a rule of law compromised State.

Turkey's right-wing populist government has fundamentally undermined institutional and judicial safeguards in the country.[38] The rule of law, and in conjunction human rights protections, have deteriorated even more rapidly since the attempted coup in July 2016.[39] In the aftermath of the attempt, the Turkish government proclaimed a state of emergency and issued Emergency Decrees 667 and 672.[40] These decrees authorized the National Security Council to dismiss anyone considered to be affiliated with terrorist organizations who engaged in harmful activities to national security, including members of the judiciary[41] and public servants.[42] Acting under these decrees, the government dismissed and detained more than 130,000 public servants[43] and roughly 4,400 public officials,[44] having a chilling effect on the judiciary.[45]

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[38] *See generally* S. Erdem Aytaç & Ezgi Elçi, *Populism in Turkey*, *in* POPULISM AROUND THE WORLD: A COMPARATIVE PERSPECTIVE 89 (Daniel Stockemer ed. 2019) (presenting an overview of the history of populism in Turkey and highlighting the institutional changes the majority party has implemented that strengthened the power of the executive branch).

[39] *See Turkey: Alarming Deterioration of Rights*, HUM. RTS. WATCH (Jan. 12, 2017), https://www.hrw.org/news/2017/01/12/turkey-alarming-deterioration-rights [https://perma.cc/H92E-4BAE] (criticizing Turkey's mass arrests of journalists, closure of media outlets, imprisonment of opposition politicians, and groundless dismissal of civil servants as the government "instrumentalized the violent military coup attempt" to "crack down on human rights and dismantle basic democratic safeguards").

[40] Decree No. 667, July 23, 2016, R.G. 29779 (Turk.); Decree No. 672, Sept. 1, 2016, R.G. 29818 (Turk.).

[41] Decree No. 667, art. 3, July 23, 2016, R.G. 29779 (Turk.); *see also* Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Turkey Opinion on Emergency Decree Laws Nos. 667-676 Adopted Following the Failed Coup of 15 July 2016,* 109th Plenary Sess., Opinion No. 865 (2016); Kareem Shaheen, *Turkey Dismisses 4,400 Public Servants in Latest Post-Coup Attempt Purge*, GUARDIAN (Feb. 8, 2017), https://www.theguardian.com/world/2017/feb/08/turkey-dismisses-4400-public-servants-erdogan-trump-phone-call [https://perma.cc/3Y69-AX9K].

[42] Decree No. 672, art. 2, Sept. 1, 2016, R.G. 29818 (Turk.).

[43] HÜSNU ÖNDÜL, HUM. RTS. ASS'N, EMERGENCY DECREE LAWS AND THEIR IMPACT ON HUMAN RIGHTS IN TURKEY 4 (2021), https://ihd.org.tr/en/wp-content/uploads/2022/05/EmergencyDecreeLawsReport.pdf [https://perma.cc/9LRH-FVVG].

[44] Shaheen, *supra* note 41.

[45] INT'L COMM'N JURISTS, TURKEY: THE JUDICIAL SYSTEM IN PERIL 18 (2016), https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-

https://scholarship.law.upenn.edu/jil/vol45/iss3/5
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In October 2016, the Turkish Constitutional Court ("TCC") determined that it could not review the constitutionality of the Emergency Decrees, arguing that the Constitution subjected emergency decrees only to parliamentary review and prohibited state organs from exercising authority that did not derive from the Constitution.[46] Subsequent to the TCC's decision, numerous public officials who were dismissed from their positions and placed into pre-trial detention based on suspicions of offences committed in connection with their official duties initiated proceedings against the Turkish Republic before the ECtHR.

In two of these cases, the ECtHR applied Article 35(1) strictly even though the TCC decision effectively eliminated the possibility of a constitutional review for these applicants. The applicants in *Mercan v. Turkey* and *Zihni v. Turkey*, a former judge and a former school deputy headmaster, sought an exception to Article 35(1) after failing to apply to the TCC.[47] They first argued that the Turkish legal regime lacked available remedies, as the measures taken on the basis of the emergency decrees lacked an effective and accessible appellate procedure.[48] They further argued that the available remedies at the Constitutional Court were ineffective because the TCC lost its impartiality upon the arrest of its two judges under Decree 667.[49] However, in nearly identical judgments, the ECtHR dismissed both cases for failing to exhaust local remedies.[50] According to the Court, the TCC had the constitutional authority to review appeals against the specific actions taken in implementation of the Emergency Decrees.[51] Further, as previous ECtHR judgments

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Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf [https://perma.cc/C4ZY-GZR7].

[46] *See* Turkish Constitutional Court, Constitutionality Review, Doc No. 2016/166, Dec No. 2016/159, ¶¶ 13-15, 17, 23 (Oct. 12, 2016), https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2016-159-nrm.pdf [https://perma.cc/7VLF-FQ9P]; Turkish Constitutional Court, Constitutionality Review, Doc No. 2016/167, Dec No. 2016/160, ¶¶ 13-15, 17, 23 (Oct. 12, 2016), https://normkararlarbilgibankasi.anayasa.gov.tr/Dosyalar/Kararlar/KararPDF/2016-160-nrm.pdf [https://perma.cc/SVJ8-GB23].

[47] Mercan v. Turkey, App. No. 56511/16, ¶¶ 2-9 (Nov. 8, 2016), https://hudoc.echr.coe.int/eng?i=001-169094 [https://perma.cc/2JG5-ZYEW]; Zihni v. Turkey, App. No. 59061/16, ¶¶ 3-6 (Nov. 29, 2016), https://hudoc.echr.coe.int/eng?i=001-169704 [https://perma.cc/TL35-2QQA].

[48] *Mercan*, App. No. 56511/16, ¶¶ 17-18; *Zihni*, App. No. 59061/16, ¶ 20.

[49] *Mercan*, App. No. 56511/16, ¶¶ 17-18; *Zihni*, App. No. 59061/16, ¶ 20.

[50] *Mercan*, App. No. 56511/16, ¶ 24; *Zihni*, App. No. 59061/16, ¶ 31.

[51] *Mercan*, App. No. 56511/16, ¶¶ 23-25; *Zihni*, App. No. 59061/16, ¶¶ 12, 25.

concluded, the TCC was in principle capable of providing appropriate redress, having found the pre-trial detentions of two journals unconstitutional a few months prior.[52] As such, the Court found no sufficient reason, including fears or doubts as to the TCC's impartiality, to dispense the applicants of their Article 35(1) obligation.

It is not unreasonable that the ECtHR upheld Turkey's institutional integrity and refrained from rendering a sovereign State's constitutional court ineffective merely months after the State had a national security crisis. However, the ECtHR has since conserved its rigid application of the exhaustion rule, insisting that Turkey's relevant courts are capable of review and redress without contextualizing the claims based on the compromised rule of law in the country.

In January 2017, as the TCC proved unable to handle the overwhelming number of petitions, the government issued Emergency Decree 685, introducing the Inquiry Commission on the State of Emergency Measures (the "Inquiry Commission") to examine emergency acts on an ad hoc basis.[53] Seven members comprised the Commission, five appointed by President Erdogan, and two nominated by the heavily state-affiliated Council of Judges and Prosecutors.[54] Requiring the Commission to examine the emergency measures conducted by the same authorities who appointed the Commission raised concerns regarding its impartiality. Indeed, between July 2017 and 2019, the Commission issued 77,900 judgments, ruling against the State only in 6,000 cases, and showing a 7% success rate for applicants.[55] In fact, a meaningful review of the 77,900 judgments was practically impossible considering that the Commission ruled on nearly 1,000 cases each

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52 *Mercan*, App. No. 56511/16, ¶ 11; *Zihni*, App. No. 59061/16, ¶ 26.

53 Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Turkey Emergency Decree Law No Khk/685 on the Creation of the Inquiry Commission*, Opinion No. 872 (2016).

54 *Id.*; *see also Commission Staff Working Paper Turkey 2018 Report*, COM (2018) 450 final, at 24 (Apr. 17, 2018) (noting that four of the thirteen members of the Council of Judges and Prosecutors are now appointed by the President, and seven by the Parliament by a qualified majority; clarifying that no member is elected by the judiciary itself any longer).

55 Özenç Bilgili, The Controversial Position of the European Court of Human Rights Towards the Large-Scale Human Rights Crisis in Turkey in the "Age of Subsidiarity" 35 (2018/2019) (European Master's Degree, University of Strasbourg) (Global Campus Europe).

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week.[56] The Inquiry Commission was further restrained by a narrow scope of review: it could only assess the applicants' affiliations with the proscribed terrorist groups, and not the compliance of emergency measures with domestic and international law.[57]

Despite the patent weaknesses in the composition and operation of the Inquiry Commission, the ECtHR has refused to critique the individual application procedure before the TCC. In June 2017, the Court dismissed a former judge's complaint in *Çatal v. Turkey* for failure to exhaust domestic remedies, finding that the Inquiry Commission constituted an available remedial mechanism, capable in principle of correcting any unlawful actions in the implementation of emergency decrees.[58] Later that year, Court affirmed *Çatal* in *Köksal v. Turkey*, going so far as to make an exception to its exhaustion rule in favor of the State. The ECtHR conventionally applies Article 35(1) based on the remedies available at the time when an application is lodged.[59] Even though the Inquiry Commission did not exist when Mr. Köksal submitted his complaint, the Court accepted the Commission as an available remedy that Mr. Köksal must exhaust.[60] The Court also shifted the burden of proof in favor of the State by holding that wherever the State proved the *existence* of a remedy (such as the Inquiry Commission), the applicant needed to show that the remedy did not offer reasonable chances of success.[61] Further, in line with its failure to assess the effectiveness of the Inquiry Commission in practice, the Court overlooked Mr. Köksal's argument that exhausting domestic remedies in Turkey imposed an undue burden on applicants.[62]

The ECtHR has also maintained a formalist Article 35(1) review against applicants who have pursued a plethora of legal remedies. In 2019's landmark *Alparslan v. Turkey*, the Court denied a complaint lodged by a former judge serving on the TCC challenging his

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[56] *Id.* at 36.

[57] *Id.* at 38.

[58] Çatal v. Turkey, App. No. 26808/08, ¶¶ 28-31 (Apr. 17, 2012), https://hudoc.echr.coe.int/fre?i=001-110441 [https://perma.cc/8YTE-MFZV].

[59] Köksal v. Turkey, App. No. 70478/16, ¶ 24 (June 6, 2017), https://hudoc.echr.coe.int/eng?i=001-174629 [https://perma.cc/8FJT-SHYG].

[60] *Id.*

[61] *Id.* ¶ 29.

[62] Those rejected by the Inquiry Commission needed to then bring their case before the appropriate regional administrative court, with a further appeal to the Council of State, and then finally to the Turkish Constitutional Court, in a process that could take a decade. *See* Bilgili, *supra* note 55, at 36.

suspension and pre-trial detention.[63] The applicant filed complaints before the magistrate court and the criminal division on the basis of the Turkish Criminal Code.[64] He also lodged three individual applications with the TCC, who rejected his first complaint as inadmissible for failing to exhaust remedies under the Code of Criminal Procedure ("CCP").[65] The ECtHR dismissed the complaint for the same reason given in *Köksal*, that Mr. Alparslan should have pursued the remedies available under CCP.[66] The Court did not evaluate Mr. Alparslan's argument that the CCP did not offer reasonable prospects of success to secure his release.[67]

Like in its predecessors, the Court in *Alparslan* examined the remedies that are available *in theory* without examining what these remedies looked like *in practice*, painting an incomplete picture of the due process mechanisms in Turkey. Since 2017, emergency decrees have imposed significant restrictions on the procedural safeguards for those in police custody or pre-trial detention. These restrictions have limited the criminal division's access to case files, compelled the division to conduct paper review, and precluded applicants from giving oral testimony, calling witnesses, or receiving information on incriminating evidence.[68] The resulting lack of capacity to mount an effective appeal has undermined the division's ability to render fair decisions in cases brought on the basis of the CCP. Yet without any further inquiry or accompanying analysis, the Court simply accepted an available and effective CCP as a fact, requiring the applicant living in an illiberal democracy to seek the CCP first, and depriving them of an opportunity to receive meaningful justice. The Court's elevation of form over substance has continued as recently as January 2023.[69]

Considering the sheer number of legal proceedings instituted against individuals, the protracted adjudications, the lack of

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[63] Alparslan Altan v. Turkey, App. No. 12778/17, ¶¶ 7, 16-17, 22 (Apr. 17, 2019), https://hudoc.echr.coe.int/fre?i=001-192804 [https://perma.cc/5367-JMBY].

[64] *Id.* ¶¶ 24-27.

[65] The remaining TCC applications were pending at the time of the ECtHR's judgment. *Id.* ¶¶ 29-30, 45-47.

[66] *Köksal*, App. No. 70478/16, ¶ 77.

[67] *Id.*

[68] Bilgili, *supra* note 55, at 38.

[69] Kılıç v. Turkey, App. No. 43979/17, ¶¶ 46-53 (Jan. 31, 2023), htttps://hudoc.echr.coe.int/eng?i=001-222778 [https://perma.cc/SNF8-DTBG] (stressing technicalities in applicants' claims to grant admissibility without adjudging the remedial mechanism itself).

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independence and impartiality in the court, the hindrance of and inconsistencies in court procedure, and bad faith conduct, domestic remedies in Turkey are rendered illusory. So, why has the ECtHR refused to substantively engage with and guard against the attempts to hijack the rule of law in the country? An excessive reliance on the principle of subsidiarity underlays the Court's decisions. In *Mercan*, the Court stressed its desire to allow national courts to "fulfil their fundamental role in the Convention protection system, that of the European Court being subsidiary to theirs."[70] The Court thus refused to judge the capabilities of an apex court which had yet to deny its jurisdiction over the government's emergency actions and was still reviewing detainees' complaints.[71] Likewise, the Court stressed in *Zihni* the Convention's assumption that an effective remedy system is available in the case of an alleged ECHR violation.[72]

Like in *Mercan* and *Zihni*, the Court highlighted the subsidiary nature of the Convention, and the supervisory function of the Court in *Çatal*, *Köksal*, and *Alparslan*. In *Çatal* and *Köksal*, the Court used the applicants' failure in pursuing legal proceedings before the Inquiry Commission to justify its presumption for the Commission's effectiveness. In *Alparslan*, the Court deferred to the TCC's prior judgment without conducting its independent analysis, over-protecting the interests of the State at the expense of the protection of the individual. To do so, the Court described the exigencies of the attempted military coup as strictly requiring the emergency measures taken by the national authorities and noted that Turkey had satisfied the procedural requirements authorizing its derogation from the ECHR.[73] It then accepted the state of emergency and the subsequent derogation (but not the politicization of the judiciary and the restrictions imposed on the courts) as "undoubtedly . . . contextual factor[s] that should be fully taken into account in interpreting and applying . . . the Convention."[74] As a

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[70] *Euro Court Rejects Turkish Judge's Application Tried Over Gülen Links*, HÜRRIYET DAILY NEWS (Nov. 17, 2016), https://www.hurriyetdailynews.com/euro-court-rejects-turkish-judges-application-tried-over-gulen-links-106240 [https://perma.cc/FX3Y-6R6X].

[71] *Mercan*, App. No. 56511/16, ¶¶ 24-25, 27 (listing cases in which the ECtHR declared complaints inadmissible if they were based on the length of detentions and emphasizing that the applicant did not offer the constitutional court the opportunity to resolve the question of compatibility with the ECHR).

[72] *Zihni*, App. No. 59061/16, ¶ 22.

[73] *Alparslan Altan*, App. No. 12778/17, ¶¶ 72-74.

[74] *Id.* ¶ 75.

result, the ECtHR's efforts to respect Turkey's sovereign interests has undermined the Court's responsibility to protect against democratic backsliding and promote respect for the rights safeguarded by the Convention.

b. Article 35(1) and Viktor Orbán's Hungary

Like its caselaw against Turkey, the ECtHR's judgments against Hungary reflect the Court's deference to State interests in the name of subsidiarity despite a rapid consolidation of illiberal rule. Since 2010, Prime Minister Viktor Orbán and his ruling Fidezs party have used their supermajority in parliament to overhaul the country's legal framework. Chief among these reforms is the introduction of a new constitution, which has weakened the country's rule of law protections and adversely impacted its human rights record.[75] The new constitutional provisions allow Fidezs to unilaterally appoint the president to the National Judicial Office ("NJO"), which administers the courts and oversees judicial appointments by appointing, transferring, and dismissing judges.[76] These provisions concentrate substantial judicial power in the legislature, and the Human Rights Commissioner for the Council of Europe has accordingly expressed "serious concerns" over the impact of the reforms on the independence, impartiality, and accessibility of Hungary's judiciary.[77] Indeed, Orbán's reforms have forced 274 judges into early retirement,[78] while the president of the NJO has transferred politically sensitive cases from the Metropolitan Court

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[75] *Hungary Should Address Interconnected Human Rights Issues in Refugee Protection, Civil Society Space, Independence of the Judiciary and Gender Equality*, COUNCIL OF EUR., COMM'R FOR HUM. RTS., (May 21, 2019), https://www.coe.int/en/web/commissioner/-/hungary-should-address-interconnected-human-rights-issues-in-refugee-protection-civil-society-space-independence-of-the-judiciary-and-gender-equality?fbclid=IwAR2igDUEg-B3z17V--KbraHm_rROjbSbVBtN6PuPzqRVrB7ZRVqAPaQidhU [https://perma.cc/KS3Q-FDCB].

[76] Dunja Mijatović, Council of Eur. Comm'r for Hum. Rts., *Report Following Her Visit to Hungary From 4 to 8 February 2019*, ¶¶ 91-94, Doc. No. CommDH(2019)13 (2019) [hereinafter Eur. Comm'r for Hum. Rts. Report].

[77] *Id.*

[78] HUM. RTS. WATCH, WRONG DIRECTION ON RIGHTS: ASSESSING THE IMPACT OF HUNGARY'S NEW CONSTITUTION AND LAWS 12 (2013), https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws [https://perma.cc/4EQQ-R2RG] [hereinafter HUM. RTS. WATCH, WRONG DIRECTION ON RIGHTS].

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of Budapest to first instance courts in rural areas to reduce their media exposure.[79]

Therefore, where the ECtHR reviews Article 35(1) objections by Hungary, it can raise serious questions as to the compatibility of the Hungarian judiciary with the ECHR's standards. Yet the ECtHR has disregarded the legal and political context in which Hungarian courts operate. Between 2010-2012, members of Parliament brought two cases against Hungary for failing to protect applicants from violent demonstrations[80] and fining members for criticizing the government.[81] The Court dismissed Hungary's preliminary objections on non-exhaustion grounds because Hungary lacked an individual constitutional review mechanism.[82] Though it granted relief to the applicants, the Court did not address their concerns related to the politically motivated judicial appointments and the NJO's policies narrowing the scopes of review in lower courts. Instead, the Court prioritized its subsidiary role and overlooked an opportunity to examine the structural deficiencies that were beginning to take hold.

The Court's unwillingness to send a powerful signal about the inadequacy of national rights protection in Hungary became even more pronounced after the 2012 Constitutional Court Act. In theory, Section 26(2) of the Act allowed Hungarian nationals to challenge the constitutionality of a domestic law and conferred authority to the Hungarian Constitutional Court ("HCC") to restore the status quo ante.[83] However, in practice, the HCC's accessibility is exceedingly restrictive. Between 2012-2019, the HCC declared 95%

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[79] *Id.* at 10.

[80] *See* Király v. Hungary, App. No. 10851/13, ¶ 19 (Jan. 17, 2017), https://hudoc.echr.coe.int/eng?i=001-170391 [https://perma.cc/DCY9-ELHJ]

[81] Karácsony v. Hungary, App. No. 42461/13, ¶¶ 10-23 (May 17, 2016), https://hudoc.echr.coe.int/eng?i=001-162831 [https://perma.cc/H5SK-99P7]

[82] *See*, *Király* , App. No. 10851/13, ¶¶ 48-49 (concluding that the government failed to prove the existence of a "constitutional right or a domestic judicial practice" because it has not referred to any decisions or judgments of the Hungarian Constitutional Court); *Karácsony*, App. No. 42461/13, ¶¶ 81-82 (noting the absence of a procedure whereby the applicants could obtain annulment or review of the fines imposed on them, as Hungary's Fundamental Law "excluded the possibility of external review of disciplinary decisions taken by [the] Parliament"). *Cf.* Vékony v. Hungary, App. No. 65681/13, ¶ 24 (Jan. 13, 2015), https://hudoc.echr.coe.int/?i=001-149201 [https://perma.cc/6KLR-Z7YN] (finding that a constitutional complaint procedure would not be a sufficiently effective remedy in either theory or practice).

[83] Mendrei v. Hungary, App. No. 54927/15, ¶ 35 (June 19, 2018), https://hudoc.echr.coe.int/eng?i=001-184612 [https://perma.cc/7MUT-N9YR].

of cases inadmissible and found for the complainants in 1.4% of constitutional complaints that did reach the meritorious phase.[84] There is also reason to doubt the HCC's impartiality. Under the new regulations, the judges to the HCC are selected by a committee who mirrors the political composition of the parliament, where Fidesz has secured two-thirds of the votes.[85] The HCC's effectiveness is further undermined by an increasingly narrow mandate. Article 37 of the new Constitution limits the HCC's review to laws pertaining to the budget, and only on the basis of certain rights violations.[86] Further, the Constitutional Court Act has abolished public interest litigation, prohibited the HCC from referring to precedent that predates the 2012 Constitution, and restricted the court's jurisdiction to ruling only on the procedural validity – and not the substance – of constitutional amendments.[87]

Yet in its 2018 judgment in *Mendrei v. Hungary*, the ECtHR dismissed the applicant's ECHR Art. 10 (freedom of expression) claim for failing to exhaust local remedies, requiring that Mr. Mendrei first utilize Section 26(2) before the HCC.[88] Responding to the applicant's arguments that the HCC lacked a reasonable prospect of success, the Court regarded the low success rate before the HCC as "largely of speculative and empirical nature," and thus insufficient to prove that the remedy would be ineffective specifically for Mr. Mendrei.[89] In fact, the Court noted Hungary's radically changed legal environment[90] only with regards to the introduction of the Constitutional Court Act; it did not acknowledge the Act's reforms disrupting the judiciary.

The ECtHR sustained its restrictive interpretation of Article 35(1) in the landmark *Szalontay v. Hungary*, decided in 2019. *Szalontay* involved a criminally convicted applicant who challenged the procedural deficiencies during his trial, alleging a violation of ECHR

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84 Daniel A. Karsai, *Extremist View on Subsidiarity and on Exhaustion of Domestic Remedies? Criticism of the Decision Szalontay v. Hungary*, STRASBOURG OBSERVERS (May 22, 2019), https://strasbourgobservers.com/2019/05/22/extremist-view-on-subsidiarity-and-on-exhaustion-of-domestic-remedies-criticism-of-the-decision-szalontay-v-hungary/ [https://perma.cc/TH7W-GVFX].

85 HUM. RTS. WATCH, WRONG DIRECTION ON RIGHTS, *supra* note 78.

86 *Id.* at 14-15.

87 Eur. Comm'r for Hum. Rts. Report, *supra* note 76, ¶ 93.

88 *Mendrei*, App. No. 54927/15, ¶¶ 35, 43, 44.

89 *Id.* ¶ 39.

90 *Id.* ¶ 31.

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Article 6 (right to a fair trial).[91] The applicant did not file a constitutional complaint to the HCC, seeking an exception to Article 35(1) on narrower grounds, arguing that none of the HCC's previous judgments provided a remedy in like circumstances, rendering the HCC ineffective *for him*.[92] Still, the Court dismissed his complaint. It determined that sections 26(1) and 27 of the Code of Criminal Procedure allowed the applicant to challenge the implementation of the Code and the conviction itself before the HCC.[93] Under Sections 26(1) and 27, the HCC has the authority to quash unconstitutional decisions and commence new court proceedings. Therefore, looking only to the letter of the Constitutional Court Act, it is logical that applicants submit a constitutional complaint first. However, as discussed in the preceding paragraphs, the judicial problems in Hungary may be regarded as more systemic than a failure to obtain relief at the national level due to a lack of access to the courts. So, by failing to conduct a substantive review of the facts substantiated in Mr. Szalontay's complaint, the ECtHR effectively turned a blind eye to the systemic problems with Hungary's judiciary.

The subsidiarity principle has again largely influenced the Court's restrictive interpretation of Article 35(1) in the Hungarian cases. In *Mendrei*, the Court had "the benefit of the views of the national courts."[94] The Court similarly noted its supervisory role in *Szalontay*, considering that it could not "substitute its own view of the [constitutional] issues" in the country unless the HCC was first "afforded the opportunity to examine the issues arising in the applicant's case."[95]

The Court's margin of appreciation for Hungary in *Szalontay* has also led the Court to shift the burden of proof in favor of the State, further undermining the ECtHR's suitability in dealing with rule of law-related claims in Hungary. The Court originally set a precedent in *Király* requiring the State to introduce relevant HCC cases and illustrate the domestic court capable of providing sufficient redress.[96] Accordingly, the Court observed in *Szalontay* the State's failure to provide caselaw indicating that the HCC had dealt with issues similar to that of Mr. Szalontay's case, relying only on the

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[91] Szalontay v. Hungary, App. No. 71327/13, ¶¶ 14-18, 24 (Mar. 12, 2019), https://hudoc.echr.coe.int/eng?i=001-192438 [https://perma.cc/FLM4-PE6Q].

[92] *Id.* ¶ 28.

[93] *Id.* ¶ 32.

[94] *Mendrei*, App. No. 54927/15, ¶ 24.

[95] *Szalontay*, App. No. 71327/13, ¶ 37.

[96] *Király*, App. No. 10851/13, ¶ 47.

doctrinal authority of the procedures outlined in the Constitutional Court Act.[97] Still, the Court departed from its precedent, concluding that the State's failure to show supporting constitutional jurisprudence did not "preclude the effectiveness of the remedies at issue in the instant case."[98] Though *Szalontay* is aligned with the Court's judgment in *Köksal*, the Court docket for Hungary is not nearly as overwhelming, and nor is there a state of emergency. Therefore, subsidiarity alone is not adequate to explain the Court's Turkey-level deference to the Hungarian State. Strategic considerations at the level of the European Commission may clarify the Court's conclusions.[99]

c. Article 35(1) and Poland's Constitutional Crisis

Having examined the Court's jurisprudence in Turkey and Hungary, there is a consistent refusal by the Court to review the adverse effects of the States' populist policies on the independence and effectiveness of their judicial institutions. The Court time and again requires applicants to exhaust domestic remedies in rule of law compromised States. Interestingly, that is not the case in the Court's caselaw involving Poland.

The rise of populism in Poland derives from its constitutional crisis. In October 2015, the outgoing seventh-term Sejm (the lower House of the Parliament) elected five judges to the Polish Constitutional Court ("PCC") to replace three judges whose mandates were scheduled to end in November 6, 2015, and two judges who planned to leave their posts in December.[100] The election to replace the December judges violated the right of the incoming

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[97] *Szalontay*, App. No. 71327/13, ¶ 37.

[98] *Id.* ¶ 35; *see also id.* ¶ 37 ("[B]eing aware of its supervisory role subject to the principle of subsidiarity, the Court considers that it cannot substitute its own view of the issues at hand for that of the Constitutional Court, which, for its part, has not been afforded the opportunity to examine the issues arising in the applicant's case.").

[99] *See generally* Ula Aleksandra Kos*, Signaling in European Rule of Law Cases: Hungary and Poland as Case Studies*, 23 HUM. RTS. L. REV. 1 (Nov. 8, 2023) (arguing that Hungary's conciliatory attitude compared to Poland's defiance has invited greater deference from European institutions in enforcing the EU's rule of law provisions).

[100] Xero Flor w Polsce sp. Z.o.o. v. Poland, App. No. 4907/18, ¶ 8 (May 7, 2021), https://hudoc.echr.coe.int/fre?i=001-210065 [https://perma.cc/B22N-US3J].

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eight-term Sejm to select judges to the Constitutional Court when it convened on November 12, 2015, which the PCC affirmed in December 2015.[101]

The crisis escalated in November after the eighth-term Sejm, led by the Law and Justice Party ("PiS"), adopted resolutions declaring all five prior nominations as illegitimate for lacking legal effect, even though the election of the November judges fully complied with Poland's Constitution. The newly elected five judges immediately took oath before President Andrzej Duda in accordance with PiS' November Amending Act to the Act on the Constitutional Court.[102] The PCC then repeatedly deemed both the reforms and the election unconstitutional.[103] However, in direct defiance of the PCC's authority, the PiS continued to alter the functioning of the court, requiring the five judges to be assigned cases and included in adjudicating benches.[104] In fact, in December 2016, President Duda appointed to the Presidency of the PCC one of the two December judges, who admitted the remaining three, unlawfully elected judges to the bench.[105]

The PiS also reformed the National Council of the Judiciary ("NCJ"), a supervisory body that safeguards the independence of the judiciary.[106] Prior to 2018, the members of the NCJ were elected

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[101] *Id.* ¶ 23 (considering that article 194 of the Constitution requires the Parliament to replace only those judges whose mandate expires during the Sejm's term of office).

[102] Marcin Szwed, *The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights*, 18 EUR. CONST. L. REV. 132, 134 (2022).

[103] *Xero Flor*, App. No. 4907/18, ¶ 22; Maciej Kisilowski, *Poland's "Overnight Court" Breaks All the Rules*, POLITICO (Dec. 8, 2015), https://www.politico.eu/article/law-vs-justice-poland-constitution-judges/ [https://perma.cc/XMR8-9RH9] (clarifying that the Polish Constitutional Court decided the law was unconstitutional insofar as it permitted the election of two "December" judges, but concluded that the other three judges were chosen properly and should have started their term in office in early November).

[104] *Xero Flor*, App. No. 4907/18, ¶¶ 47-48; Trybunal Konstytucyjny [Constitutional Tribunal Act] art. 90 (Council of Eur. trans., 2016) (Pol.) ("The judges of the Constitutional Court who have taken the oath of office before the President of the [Polish] Republic and who have so far not assumed judicial duties shall be included in adjudicating benches and shall be assigned cases by the President of the Constitutional Court . . . .").

[105] *See Xero Flor*, App. No. 4907/18, ¶¶ 55-60.

[106] *See* Advance Pharma, App. No. 1469/20, ¶ 6 (Feb. 3, 2022), https://hudoc.echr.coe.int/fre?i=001-215388 [https://perma.cc/HQ4Z-UZVB]; *Polish Parliament Votes for Court Reform Resolution*, REUTERS (Dec. 21, 2023), https://www.reuters.com/world/europe/polish-parliament-votes-court-reform-resolution-2023-12-21/ [https://perma.cc/5WMG-4BBS].

by assemblies of judges occupying different levels of the judiciary.[107] Since 2018, however, the Sejm, where the PiS has the majority, can elect the NCJ's judges.[108] Collectively, these reforms have allowed the PiS to take advantage of retiring judges, appoint loyal judges to all posts at the State's high courts, and fully capture the judiciary.[109] The rule of law crisis has dramatically increased the ECHR complaints filed against Poland: as recently as July 2022, applicants submitted 37 new cases before the ECtHR, alleging violations of their right to a fair trial because Polish courts could no longer meet the standards of a fair and independent tribunal established by law.[110]

In the first few years following the constitutional crisis in Poland, the ECtHR avoided answering the effective legal remedy question.[111] *Xero Flor v. Poland* (2021) changed the game. The applicant in *Xero Flor*, a turf producing company, brought a civil claim against the State Treasury for crop damage caused by animals managed by the State Forestry.[112] One of three unlawfully elected December judges sat in the five-judge bench of the PCC that discontinued the applicant's case, so Xero Flor turned to the ECtHR, alleging a violation of ECHR Article 6 (the right to a fair trial).[113] The ECtHR did not face an Article 35(1) objection by the State but still agreed with the applicant that the PCC could not be considered "established by law" because three of the 15 judges on the bench were appointed irregularly.[114]

Since *Xero Flor*, the ECtHR has gradually—but unequivocally—developed a body of jurisprudence that favors applicants in Article

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[107] *Advance Pharma*, App. No. 1469/20, ¶ 7.

[108] *Id.* ¶ 12.

[109] *See European Union's Top Court Rules Against Hungary and Poland in Rule of Law Showdown*, WORLD JUST. PROJECT (Feb. 16, 2022), https://worldjusticeproject.org/news/european-union's-top-court-rules-against-hungary-and-poland-rule-law-showdown [https://perma.cc/5XKA-G2JN].

[110] *See* European Court of Human Rights Press Release 248, Notification of 37 Applications Concerning Judicial Independence in Poland (July 25, 2022); *see also See* European Court of Human Rights Press Release 249, Notification of Rule-of-Law Case Concerning the Polish Constitutional Court (July 25, 2022).

[111] *See*, *e.g.*, Solska and Rybicka v. Poland, App. Nos. 30491/17 and 31083/17, ¶¶ 68-70 (Sept. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-186135 [https://perma.cc/4NSB-RRA3] (finding it unnecessary to examine arguments relating to the Polish Constitutional Court's unlawful composition and subsequent ineffectiveness).

[112] *See Xero Flor*, App. No. 4907/18, ¶¶ 118-23.

[113] *Id.* ¶ 1.

[114] *Id.* ¶ 41.

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35(1) matters. In *Reczkowicz v. Poland*, a former barrister complained that the Disciplinary Chamber of the Supreme Court that dealt with her disciplinary penalty and suspension from practice breached ECHR Article 6.[115] On the merits, the Court found a manifest breach of domestic law in the judicial appointments to the NCJ, such that the NCJ no longer functioned independently of the legislative and executive branch, as confirmed by the Supreme Court in a 2019 decision and then in a 2020 resolution.[116] Consequently, the Disciplinary Chamber constituted an improper tribunal, violating the Convention.

The Court went a step further in *Advance Pharma v. Poland*. There, the corporate applicant brought an ECHR Article 6 complaint before the ECtHR, noting that his Supreme Court case before the Civil Chamber had been heard by a bench of three judges appointed by the NCJ, a body that lacked procedural safeguards to maintain independence or impartiality.[117] The applicant did not lodge a constitutional complaint beforehand, contesting the rules of appointment to the Supreme Court.[118] Yet the Court granted admissibility, joining non-exhaustion to the merits as a central issue to whether the NCJ and the judicial appointments to the Civil Chamber breached the constitution, especially in light of the Supreme Court and the PCC's opposing judgments.[119] On the merits, the ECtHR denied the State's non-exhaustion objection because it did not "see sufficiently realistic prospects of success for a constitutional complaint" based on the PCC's earlier decision declining jurisdiction over President Duda's judicial appointments.[120] Separately, following the *Reczkowicz* precedent, the Court adjudged the composition of the Civil Chamber to fall below the Convention's standards because the appointments occurred despite the Supreme Court's contestations of the NCJ's lawfulness, and in "blatant defiance" of the rule of law.[121]

Xero Flor, *Reczkowicz*, and *Advance Pharma* all culminated in *Juszczyszyn v. Poland*, where the Court finally established an Article 35(1) exception at the admissibility stage for applicants who apply

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115 *See* Reczkowicz v. Poland, App. No. 43447/19, ¶¶ 1, 55 (July 22, 2021), https://hudoc.echr.coe.int/fre?i=001-211127 [https://perma.cc/VHE7-D3TP].

116 *Id.* ¶ 280.

117 *Advance Pharma*, App. No. 1469/20, ¶ 240.

118 *Id.* ¶¶ 230-32.

119 *Id.* ¶ 238.

120 *Id.* ¶¶ 318-19.

121 *Id.* ¶ 345.

to the ECtHR without seeking relief before the PCC. In *Juszczyszyn*, a former district judge brought an ECHR Article 6 claim after being suspended for questioning the irregular judicial appointments in Poland.[122] Mr. Juszczyszyn sought an exception to the exhaustion rule for his failure to seek redress before the PCC,[123] and the Court dismissed the State's non-exhaustion objection.[124] Per the Court, Poland's constitutional complaint mechanism held "no sufficiently realistic prospects of success" because the judicial reforms incapacitated the adjudicatory function of the judiciary in its interpretation and application of the ECHR.[125] *Juszczyszyn* was also significant because the Court dealt with the question of effective legal remedies at the admissibility stage rather than joining the State's objection to individual merits like it did in *Advance Pharma*. With *Juszczyszyn*, the Court finally confronted Poland's democratic backsliding head on.

III. RECONCILING THE COURT'S DIVERGENT JURISPRUDENCE IN BACKSLIDING DEMOCRACIES

a. Making Sense of the Judgments on Turkey, Hungary, and Poland

The ECtHR's strict scrutiny of the rule of law conditions in Poland stands in stark contrast to its caselaw in the Turkish and Hungarian contexts. The Court in Poland thoroughly evaluated Poland's relevant laws and constitutional remedies "in conjunction with the general context in which the Constitutional Court has operated since the end of 2015."[126] It went so far as comparing these remedies to the fundamental standards of the ECHR and the guidance provided by the Court of Justice of the European Union ("CJEU").[127] In fact, in all cases against Poland, the Court examined reports and reactions by the UN Human Rights Committee, the UN Special Rapporteur, and the Venice Commission expressing concern

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[122] *See* Juszczyszyn v. Poland, App. No. 35599/20, ¶ 24 (Oct. 6, 2022), https://hudoc.echr.coe.int/fre?i=001-219563 [https://perma.cc/Z2ED-VK4Q].

[123] *Id.* ¶ 141.

[124] *Id.* ¶ 156.

[125] *Id.* ¶¶ 149-50.

[126] *Id.* ¶ 150.

[127] *See Advance Pharma*, App. No. 1469/20, ¶ 317.

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about Poland's constitutional crisis, in particular with regards to the Sejm's refusal to implement the PCC's December 2015 judgments.[128] The Court even discussed the resolutions of the Parliamentary Assembly and the European Commission calling on Poland to cooperate with the Venice Commission and restore the functioning of democratic institutions in Poland.[129] Reviewing the findings of third-party intervenors and examining how effectively a remedy is implemented in practice allowed the Court to expressly call out the State's illiberal practices as an "affront to the rule of law."[130]

Meanwhile, the judgments in Turkey and in Hungary are short, nearly identically written texts that are devoid of meaningful review. Both domestic and international actors have repeatedly critiqued the Turkish and Hungarian government, submitted reports expressing concern over the limitations imposed upon the Constitutional Courts, and called on the Executives to correct their populist policies to align with democratic principles once again.[131] Yet all of the ECtHR's Turkey and Hungary caselaw identified in this essay excludes any and all third-party input. In no judgment does the Court examine the positions of the parties in detail, nor does it walk through the populist administration's gradual encroachment on institutions guaranteeing a separation of powers, identifying policies that facilitated its disruption of the courts' adjudicatory function.

We may once again turn to the principle of subsidiarity to explain the Court's inconsistent interpretation of Article 35(1) as far as these three illiberal democracies are concerned. Unlike the TCC or the HCC, the PCC at the outbreak of the constitutional crisis self-policed on five separate occasions, confirming the incompatibility of the Constitutional Tribunal with the Constitution and calling onto

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128 *See Xero Flor*, App. No. 4907/18, ¶ 118-23.

129 *Id.* ¶¶ 128, 137-48.

130 *See Reczkowicz*, App. No. 43447/19, ¶ 263; *Advance Pharma*, App. No. 1469/20, ¶ 319.

131 *See* Jan Strupczewski, *EU Lists Rule of Law Concerns for Hungary, Poland, Pivotal in Releasing COVID Funds*, REUTERS (July 20, 2021), https://www.reuters.com/world/europe/eu-lists-rule-of-law-concerns-hungary-poland-could-withhold-funds-2021-07-20/ [https://perma.cc/9UJC-A9FG]; Eur. Comm'n for Democracy Through Law (Venice Comm'n) & OSCE Off. For Democratic Institutions & Human Rights, *Hungary Join Opinion on the 2020 Amendments to Electoral Legislation*, Opinion No. ELE-HUN/430/2021 (Oct. 18, 2021); Eur. Comm'n for Democracy Through Law (Venice Comm'n) & Directorate General of Human Rights and Rule of Law of the Council of Europe, *Turkiye Urgent Joint Opinion on The Draft Amendments to The Penal Code Regarding The Provision on "False or Misleading Information"*, Opinion No. 1102/2022 (Oct. 21, 2022).

the Polish authorities to ensure that the PCC complies with the law.[132] Therefore, the ECtHR's judgments reinforced the Polish courts and fulfilled the Court's burden-sharing role rather than opposing their jurisprudence and undermining the national legal regime. In fact, subsidiarity explains the ECtHR's flexible interpretation of the exhaustion rule in *Mehmet Altan v. Turkey* and *Alpay v. Turkey*, where the Court granted admissibility to two detained journalists even though they did not submit individual complaints before the TCC.[133] It did so because the complaints were submitted upon the Turkish lower courts' refusal to release the applicants despite the TCC's orders.[134] The Court was thus able work alongside the TCC, not against it, and frame the non-implementation of constitutional judgment as the problem without declaring the entire complaint mechanism as ineffective.

In its overreliance on the principle of subsidiarity, the Court is further motivated by strategic concerns. Determining when local remedies have been exhausted is a controversial task with far-reaching consequences, including conflicts between the Court and Member States.[135] It is also difficult and time consuming, as it requires analyses into the competences of constitutional and high courts, the organization of the judiciary, and its effectiveness, all of which varies across Europe. So, the Court may use Article 35(1) strategically, following restrictive interpretations to reduce an overloaded docket and mitigate public criticism at the expense of individual cases. Poland's rule of law crisis is relatively confined to

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132 *See Xero Flor*, App. No. 4907/18, ¶¶ 23, 30, 44, 50, 61.

133 *See* Mehmet Hasan Altan v. Turkey, App. No. 13237/17, ¶¶ 105-09 (Mar. 20, 2018), https://hudoc.echr.coe.int/fre?i=001-181862 [https://perma.cc/JP3T-JTF3]; Alpay v. Turkey, App. No. 16538/17, ¶¶ 99-100 (Mar. 20, 2018), https://hudoc.echr.coe.int/eng?i=001-181866 [https://perma.cc/V965-FCNC].

134 *See Mehmet Hasan Altan*, App. No. 13237/17, ¶ 195; *Alpay*, App. No. 16538/17, ¶ 165 (concluding that the Turkish Constitutional Court's judgment "did not afford appropriate and sufficient redress" because "the competent assize courts rejected the applicant's application for release").

135 *See, e.g.*, *Poland: ECtHR Ruling on "Unlawful" Constitutional Court Must Spur Action*, AMNESTY INT'L (May 7, 2021), https://www.amnesty.org/en/latest/news/2021/05/poland-ecthr-ruling-on-unlawful-constitutional-court-must-spur-action-2/ [https://perma.cc/7HD8-NSKG] (asserting that the ECtHR's ruling in *Xero Flor* confirmed "what many people in Poland have known for some time: that the Constitutional Court can no longer effectively protect human rights"); Selcuk Gultasli, *Erdogan Lashes Out at ECHR's Landmark "Anti-Turkey" Ruling*, EU OBSERVER (Oct. 13, 2023), https://euobserver.com/world/157535 [https://perma.cc/V6PY-BW54] (discussing the President's strong criticism of the ECtHR for its ruling that Turkey has violated an imprisoned teacher's rights).

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the improper elections that organized the Constitutional Court, whereas the emergency measures in Turkey and the judicial reforms in Hungary raise systemic concerns. Therefore, while the Court can reach narrower conclusions in Poland, it risks rejecting entire sets of courts in Turkey and Hungary, losing the focal point between the national and European legal systems, and overwhelming the tribunal with flooding complaints.

b. Implications for Litigants and the Court's Doctrinal Coherence

Though subsidiarity remains the cornerstone of the Convention, the Court's approach to subsidiarity in rule-of-law-compromised States Parties poses a substantial danger to its legitimacy. The Court serves as the principal judicial organ for individuals to lodge complaints regarding breaches of their Convention rights. The Court's fundamental role is to ensure that States respect the rights and guarantees set out in the Convention,[136] and to "take the first steps for the collective enforcement of" these rights.[137] Therefore, the Court's legitimacy extends as far as its ability to act as a backstop when countries violate, or fail to properly protect, the rights of their citizens. Each case brought against Turkey and Hungary concerned the right to an effective remedy, guaranteed in Article 13 of the Convention.[138] Further, each complaint arose from alleged violations of the applicants' freedoms of speech, association, and movement, and their due process rights. Yet in each of these cases, the Court refused to scrutinize the legitimate concerns of applicants, international institutions, and nongovernmental organizations alike regarding the fundamental flaws that existed within the States' judicial review mechanisms. Instead, the Court heavily relied on Article 35(1) to dismiss the applicants' claims, depriving the applicants of the opportunity to seek meaningful justice, and effectively rendering inoperative the fundamental rights guaranteed by the Convention. Such a pattern in the Court's canon of construction necessarily raises doubts as to its perceived

136 ECHR, *supra* note 2, art. 19.

137 ECHR, *supra* note 2, pmbl.

138 *Id.* art. 13 ("Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

international legitimacy and adjudicatory function, as well as its ability to fairly apply the Convention.

In fact, the Court's consistent failure to engage with the compromised legal contexts in which rights violations take place has far-reaching consequences in the protection of human rights and European democracy. Grounded on the universal aspiration for the protection of fundamental freedoms,[139] the Court was designed to achieve "greater unity between its members" in the "maintenance and further reali[z]ation" of human rights.[140] Considering the grave threats Europe faces today to its democratic leadership[141] and its enjoyment of fundamental freedoms,[142] the Court's leadership is all

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[139] *Id.* pmbl. (considering the Universal Declaration of Human Rights and the Convention's "aims at securing the universal and effective recognition and observance of the [r]ights" declared in the Declaration).

[140] *Id.*

[141] *See*, *e.g.*, Jill Lawless, *The Right to Protest Is Under Threat in Britain, Undermining a Pillar of Democracy*, ASSOCIATED PRESS (Dec. 26, 2023), https://pulitzercenter.org/stories/right-protest-under-threat-britain-undermining-pillar-democracy [https://perma.cc/BBA4-EYNV] (discussing the arrests of environmental activists who undertook peaceful demonstrations in the United Kingdom); Vanessa Gera, *Many Who Struggled Against Poland's Communist System Feel They Are Fighting for Democracy Once Again*, ASSOCIATED PRESS (Oct. 13, 2023), https://pulitzercenter.org/stories/many-who-struggled-against-polands-communist-system-feel-they-are-fighting-democracy-once [https://perma.cc/NR5V-WQQG] (highlighting the strong parallels between Poland's current populist government and the policies of a communist Polish administration in the 1980s); Fareed Zakaria, *Turkey Points to a Global Trend: Free and Unfair Elections*, WASH. POST (May 19, 2023), https://www.washingtonpost.com/opinions/2023/05/19/erdogan-turkey-autocrats-manipulation-elections/ [https://perma.cc/8VFG-5JPT] (discussing Turkey's 2023 presidential elections within the context of a political field that is "massively tilted in favor of Erdogan," and comparing the election landscape in Turkey to that of India, Hungary, and Mexico).

[142] *See*, *e.g.*, Ilaria Federico, *Giorgia Meloni: One Year at the Helm of Italy's Most Right-Wing Government Since 1946*, EURONEWS (Oct. 22, 2023), https://www.euronews.com/2023/10/22/giorgia-meloni-one-year-at-the-helm-of-italys-most-right-wing-government-since-1946 [https://perma.cc/K5A4-FQRY] (describing the new Italian government's regulations restricting the rights of same-sex couples in favor of the traditional family); Press Release, Office of the High Comm'r on Human Rights, UN Commission of Inquiry on Ukraine Finds Continued War Crimes and Human Rights Violations Gravely Impacting Civilians (Oct. 20, 2023), https://www.ohchr.org/en/press-releases/2023/10/un-commission-inquiry-ukraine-finds-continued-war-crimes-and-human-rights [https://perma.cc/8G54-CZCY] (documenting further evidence of Russia's war crimes of torture, sexual violence, and deportation of children against Ukrainians, in violation of international humanitarian law and human rights principles); Lawrence Norman, *As Migration to Europe Rises, a Backlash Grows*, WALL. ST. J. (Nov. 25, 2023), https://www.wsj.com/world/europe/as-migration-to-europe-rises-a-backlash-grows-72a758fb [https://perma.cc/9MS2-Y4S7 ("Rising migration across

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the more essential in safeguarding Article 13, the protection of which helps prevent the systematic violation of other Convention rights. Yet in Turkey, Hungary, and even in Poland, the Court has refused to examine the adverse effects of populist policies on the independence and effectiveness of judicial institutions, and has simply accepted the accessibility to, and effectiveness of, domestic remedies as fact. In turn, rather than serving a transformative function, reigning in unjust policies, and facilitating their reversal for a greater, rights-based Europe, the Court has allowed unjust conclusions to persist for victims living in illiberal democracies, while States Parties have continued to jeopardize the Convention with impunity.

c. A Way Forward for the Court and Litigants: Article 18

The need for a more assertive European Court is clear. The Court's reluctance to ensure that States respect the ECHR's rights and guarantees, especially in countries where applicants lack a true means of redress for rights violations, weakens the effectiveness of the protection system set out in the Convention and undermines public confidence in the Court. However, practical and normative concerns also favor a European court that supplements, not supplants, domestic institutions.[143] It is thus difficult to imagine that subsidiarity will be narrowed in the near future in favor of an ECtHR that further embeds itself in national legal systems.

Considering the legal and policy justifications constraining the Court, it is also unreasonable to demand that the Court confronts Europe's rule of law crisis by entirely striking down Turkey's, Hungary's, and Poland's constitutional courts as inaccessible and/or ineffective. Doing so would result in an overwhelming number of applications being lodged with the Court without being appealed before the countries' apex courts first. Instead, the Court should restore a balanced judicial review, as envisioned in the Protocol 15 Amendment. On this matter, Article 18 of the ECHR offers insight as to how the Court can (1) improve victims' access to justice for rights violations, especially those whose claims would

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Europe, including the biggest surge in asylum seekers since a 2015-2016 migrant crisis, is fueling support for far-right and anti-immigration parties, potentially reshaping European politics for years.").

143 *See supra* discussions in Part I.b and Part II.a.

otherwise be defeated at the procedural stage; (2) confront unlawfully implemented state restrictions that compromise democratic governance in Member States; and still (3) avoid entirely delegitimizing these States' legal and political systems.

Article 18 provides that any restrictions on the Convention's rights permitted under the Convention "shall not be applied for any purpose other than those for which they have been prescribed."[144] For example, pursuant to Article 18, a State cannot arrest and detain a person or public official when the real reason for the arrest is to punish him for public statements that are critical of the government,[145] use the arrest as a commercial bargaining strategy in contract negotiations,[146] or deter the individual from seeking relief before the ECtHR.[147] Article 18 thus targets ulterior motives for restricting human rights, aiming to "prohibit the misuse of power" and "guard[] against State suppression of the Convention rights and freedoms 'by means of minor measures which, while made with the pretext of organi[z]ing the exercise of these freedoms on its territory, or of safeguarding the letter of the law, have the opposite effect."[148]

Until recently, Article 18 was rarely invoked, and there were only been a few cases where the Court declared a complaint under Article 18 admissible, let alone found a violation.[149] This was mainly because the Court presumed that States acted on their Convention obligations in good faith and exercised increased diligence when deciding allegations of improper motives.[150] However, in its 2017 *Merabishvili* judgment, the Court lowered the review standard to "predominant purpose": where the State pursued both an authorized and an ulterior purpose, an Article 18 violation existed if

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144 ECHR, *supra* note 2, art. 18.

145 Lutsenko v. Ukraine, App. No. 6492/11, Judgment, ¶¶ 105-110 (July 3, 2012), https://hudoc.echr.coe.int/eng?i=001-112013 [https://perma.cc/LN8D-U742].

146 Gusinskiy v. Russia, App. No. 70276/01, Judgment, ¶¶ 71-73 (May 19, 2004), https://hudoc.echr.coe.int/eng?i=001-61767 [https://perma.cc/8WVS-SV3Q].

147 Cebotari v. Moldova, App. No. 35615/06, Judgment, ¶¶ 48-53 (Nov. 13, 2007), https://hudoc.echr.coe.int/eng?i=001-83247 [https://perma.cc/39JJ-YYV3].

148 EUR. CT. H.R., GUIDE ON ARTICLE 18 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: LIMITATION ON USE OF RESTRICTIONS ON RIGHTS, ¶¶ 1-2 (2022), https://www.echr.coe.int/documents/d/echr/Guide_Art_18_ENG [https://perma.cc/N6SP-RVVG] [hereinafter ECTHR GUIDE ON ARTICLE 18].

149 *Id.* ¶ 5.

150 *Lutsenko*, App. No. 6492/11, ¶ 106; Khodorkovskiy and Levedev v. Russia, Apps. No. 11082/06 and 13772/05, Judgment, ¶ 898 (July 25, 2013), https://hudoc.echr.coe.int/eng?i=001-122697 [https://perma.cc/R6L8-HWJM].

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the ulterior purpose was predominant.[151] Article 18 violations have since gained momentum—the Court recognized seven violations between 2018-2020 alone, compared to the eight violations found in the overall history of the Court until 2018.[152]

Articles 18 and 35 are intrinsically linked. The Court examines admissibility under Article 18 in accordance with the criteria outlined in Article 35 of the Convention.[153] However, granting an Article 18 claim does not challenge the accessibility and effectiveness of a Member State's legal system as severely as dismissing an Article 35(1) objection does. The Court's move away from a good-faith presumption when reviewing Article 18 claims stands in stark contrast to its margin for appreciation for States on Article 35(1) objections. Further, unlike Article 35, Article 18 does not demand that the Court examine the systemic elements of an applicant's complaint. Instead, the Court can use any compromised rule of law institutions as contextual evidence that an ulterior purpose may be directing state action.[154] Article 18 thus guides the manner in which the Court can, in its review of Article 35(1) objections, leave the structural deficiencies of a State's judicial institutions as an open-ended question (thereby avoiding striking down a country's entire judicial system and feeding into concerns of an activist court) while still evaluating the availability and effectiveness of local remedies, especially as they pertain to that specific applicant.

Juszczyszyn and *Kavala v. Turkey* demonstrate the promise Article 18 offers for the Court to assert itself without causing great controversy. In addition to an Article 6 claim, the applicant in *Juszczyszyn* alleged an Article 18 violation,[155] arguing that the administration did not pursue any legitimate interests when

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151 Merabishvili v. Georgia, App. No. 72508/13, Judgment, ¶¶ 353-54 (Nov. 28, 2017), https://hudoc.echr.coe.int/fre?i=001-178753 [https://perma.cc/CP4H-DG6N].

152 Corina Heri, *Loyalty, Subsidiarity, and Article 18 ECHR: How the ECtHR Deals with Mala Fide Limitations of Rights*, 1 EUR. CONVENTION ON HUM. RTS. L. Rev. 25, 29 (2020).

153 *Id.* ¶ 7.

154 *See*, *e.g.*, Kavala v. Turkey, App. No. 28749/18, Judgment, ¶¶ 210-214 (Dec. 10, 2019), https://hudoc.echr.coe.int/eng?i=001-199515 [https://perma.cc/NS58-ATPD] (considering arguments by intervening human rights organizations that the present case is a "clear illustration of the increasing pressure on civil society and human rights defenders in Turkey in recent years").

155 *See* ECHR, *supra* note 2, art. 18 ("[T]he restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.").

suspending him.[156] The Court found for the applicant, assessing the suspension with "regard to judicial independence, which is a prerequisite to the rule of law," and concluded that the suspension aimed to discourage the applicant from further questioning the politically motivated judicial appointments.[157] However, the Court still recognized that the judiciary may pursue the legitimate aim of protecting the rights of others.[158] The focus on Article 18 thus facilitated the Court's balancing act: Poland benefited from a limited recognition that their judicial reforms may have a legitimate basis, while the applicant benefited from a recognition of the illegitimate acts surrounding his particular case.

The Court also found an Article 18 violation in *Kavala*. *Kavala* concerned the arrest of a long-standing human rights advocate and businessman on suspicion of attempting to overthrow the government based on his alleged involvement in the 2013 Gezi Park protests and the attempted July 106 coup.[159] The applicant remained on pre-trial detention for years, and his requests for a provisional release was denied on at least nine occasions.[160] He applied to the ECtHR on Article 5 grounds, arguing that his arrest and detention was not justified, and pursued a parallel Article 18 claim, maintaining that the detention was carried out for the purpose of judicial harassment and to discourage him and other human rights defenders from carrying out their advocacy.[161]

The government objected to Mr. Kavala's application on Article 35(1) grounds. It pointed out that the applicant's case before the TCC was still pending at the time he filed his complaint before the ECtHR, and adjudicating his case without waiting for the outcome of the TCC application "was not compatible with the principle of subsidiarity."[162] The government even recalled *Mercan*, highlighting that the Court had examined the procedure constitutional procedure "on numerous occasions, and had recogni[z]ed it as an effective domestic remedy . . . ."[163] The Court dismissed the government's objection because the TCC published its judgment denying Mr.

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156 *See Juszczyszyn*, App. No. 35599/20, ¶ 283.

157 *Id.* ¶¶ 333, 335-38.

158 *Id.* ¶ 337.

159 Kavala, App. No. 28749/18, ¶¶ 12-14.

160 *Id.* ¶ 41.

161 *Id.* ¶¶ 103, 197.

162 *Id.* ¶ 96.

163 *Id.* ¶ 97.

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Kavala's application before the Court ruled on admissibility.[164] However, like in *Mercan*, *Zihni*, and *Alparslan*, the Court did not address the controversies surrounding the TCC's jurisprudence, politically motivated judgments, and administrative troubles. Instead, the Court acknowledged subsidiarity as a fundamental principle of the Convention[165] and affirmed that "none of the material in [the Court's] possession suggested that an individual application to the Constitutional Court was not capable of affording appropriate redress for the applicant's complaint . . .."[166]

Yet in its examination of the applicant's Article 18 claim on the merits, the Court *did* consider the heavy criticisms of third-party interveners towards the criminal proceedings brought against human rights defenders in Turkey.[167] It then went on to critique the State who, in the eyes of the Court, did not present any credible information that would have created reasonable grounds to suspect the applicant,[168] and whose President made several speeches suggestive of the State's intention to silence the applicant as a human rights defender.[169] The Court thus concluded that Turkey violated Article 20 in conjunction with Article 5 of the Convention.[170]

Unwilling to judge a constitutional court as inaccessible and/or ineffective, the Court in *Kavala* struck a delicate balance like it did in *Juszczyszyn*: Turkey benefited from the continued legitimacy of its constitutional court, while the applicant benefited from the Court's recognition that his rights under the ECHR were violated. The Court was further able to directly confront Turkey's rule-of-law problem by highlighting that Turkey's restrictions affected "not merely the applicant alone, or human-rights defenders and NGO activists, but the very essence of democracy as a means of organi[z]ing society, in which individual freedom may only be limited in the general interest . . . ."[171] The Court even alluded to its authority to assess

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164 *Id.* ¶ 102.

165 *Id.* ¶ 99 ("Admittedly, as emphasi[z]ed by the [g]overnment, the principle of subsidiarity encapsulates a norm of power distribution between the Court and the [M]ember States, with the ultimate aim of securing to every person who finds himself or herself within the jurisdiction of a State the rights and freedoms provided by the Convention.").

166 *Id.* ¶ 100.

167 *Id.* ¶¶ 217, 231.

168 *Id.* ¶ 228.

169 *Id.* ¶¶ 229-30.

170 *Id.* ¶ 232.

171 *Id.* ¶ 231.

Turkey's rule of law mechanisms, opining that "where the system of national protection is incapable of responding effectively to complaints under Article 5 of the Convention, the Court may draw general or case-specific conclusions."[172]

As *Juszczyszyn* and *Kavala* show, the Court can model its Article 35(1) jurisprudence after that of Article 18 to strike a more assertive tone, scrutinize politically motivated and unlawfully implemented state restrictions that are compromising democratic rule in Member States, and grant relief to adversely impacted applicants without having to identify any endemic defects in Member States' legal systems. This further prevents a large number of applications from being lodged with the Court, which helps preserve the power distribution between the Court and Member States, as intended by the Protocol 15 Amendment.

IV. CONCLUSION

As acknowledged by the Honorable Lord Phillips, the founding President of the Supreme Court of the United Kingdom, and as echoed by Judge Julia Laffranque in the opening seminar of the judicial year for the ECtHR, "Europe needs the Convention, and Europe needs the Court."[173] The ECtHR guarantees rights that are not only theoretical but also practical and effective, serving as a counterweight to the principle of subsidiarity.

Where there is a balanced mandate, both pragmatic and normative principles support a narrower mandate for the ECtHR to act as a supplementary organ to States Parties' national legal systems, as opposed to one that supplants them. However, subsidiarity in the context of Europe's rule of law crisis has pushed for greater deference to national actors in countries where deference is the least deserved, as the countries exhibit a systematically fractured rule of law, and their constitutional courts remain uncooperative. In turn, subsidiarity in human rights practice as applied by the Court has (1) denied victims of rights violations access to justice; (2) delegitimized the Court's authority as a

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172 *Id.* ¶ 99.

173 *See* Julia Laffranque, President, Org. Comm., Eur. Ct. H.R., Subsidiarity: From Roots to Its Essence, Speech at Seminar Held to Mark the Opening of the Judicial Year of the European Court of Human Rights (Jan. 30, 2015), https://www.echr.coe.int/documents/d/echr/speech_20150130_seminar_laffranque_2015_bil [https://perma.cc/5T3Z-2HQN].

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guarantor of human rights; and (3) risked greater political at a time when unity in the region is critical for rights protections.

If the Court is to preserve its legitimacy as an international legal institution capable of addressing human rights violations wherever they occur within its jurisdiction, it must play a more active role in acknowledging and confronting Europe's rule of law crisis. To that end, Article 18 offers a model based on which the Court can strike a greater balance between sovereignty and justice, and provide relief to applicants without delegitimizing entire legal and political systems.