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'Don't Let Them Shoot the Kite'[1]: Strategic Analysis of Legal and Social Instruments in the Context of Political Incarceration of the Mother and the Child in Turkey

A case study on the likelihood analysis of success regarding judicial activism in front of national, regional, and international protection mechanism

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[1] A 1989 Turkish Drama Movie about a female political prisoner, who become friends with the child of a fellow inmate.

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Table of Contents

1. Introduction
2. Overview of the Study, the Interest of Knowledge and the Puzzle
3. Methodology
4. First Building Block of the Theory: Constitutive Power of Law both as a Strategy and Constraint
    4.1 Legal Realists' Understanding of Law and Litigation Tactics
    4.2 Critical Legal Scholars Understanding of Law and Litigation Tactics
    4.3 Why is CLS and Legal Realist Approach Does not fit to the Turkish Case
    4.4 Legal Mobilization Studies: Theoretical Foundation
    4.5 Legal Mobilization Studies: Correspondence in Turkey
    4.6 Legal Mobilization Studies: Litigation Preconditions
5. Second Building Block of the Theory: Context and Opportunity Structures
    5.1 Stages of Legal Mobilization
    5.2 Political Opportunity Structures
        5.2.1 Importance of the Willingness of the Political Elite
        5.2.2 Openness of the POS
        5.2.3 Critiques on Political Opportunity Structures
    5.3 Legal Opportunity Structures
    5.4 Beyond the Opportunity Structures, What to Look for?
6. Supportive Extralegal Strategies
    6.1 Legal Leveraging
    6.2 Exposing unjust policies and practices
    6.3 Documentation, Open Catalogue of Imprisoned Children
    6.4 Using Social Media
7. In an Authoritarian State, Why Litigation should be the Main Tactic? Similar Regimes and The Concept of Ambivalent Subjects
    7.1 Moments of Increasing Vulnerabilities and its effect on Legal Means of Right Claiming
    7.2 Trajectory of Recourse to Legal Means in Similar Regimes
    7.3 Legal Contestation in International Opportunity Structures
    7.4 The Ambivalent Subject Stripped of their Humanity, Legal Tactics Reclaiming it
8. Caveats on the Road
9. Prospective Success in a Turkish Context
    9.1 Decisive Contextual Elements
        9.1.1 The Judiciary
        9.1.2 Post-Coup Era
        9.1.3 Legacy of Children Rights in Turkey
    9.2 POS and LOS: National, Regional and International Opportunity Structures
        9.2.1 National Opportunity Structures
            9.2.1.1 Grand National Assembly Human Rights Commission
            9.2.1.2 Ombudsman Institution
            9.2.1.3 Human Rights and Equality Institution of Turkey
            9.2.1.4 Constitutional Court
        9.2.2 Regional and International Opportunity Structures
            9.2.2.1 ECtHR
            9.2.2.2 UN Committee on the Rights of the Child

9.2.3 Intermediary Conclusion: Which one seems more promising?
10. Critical Analysis of the Answer, Questions left to Explore
11. Conclusion

ABSTRACT

In this research, an instrumental case study will be conducted on the practice of the Turkish state to incarcerate Gulen Movement-affiliated mothers with their children under 6 years of age, with an interest of knowledge to determine the efficiency of recourse to a legal struggle to bring advancement of rights for these women. Peculiarities regarding the period of the aftermath of the attempted coup in Turkey will be decisive in the prospective success analysis, as the practice of incarcerating women with children intensified at this time frame. Analysis of the potentiality for reaching a positive long-term change will be made using the available political and legal opportunity structures at national, regional, and international levels, in which legal claims can be channeled. The theoretical underpinning of this paper is legal mobilization studies, which offer valuable insights into the interplay between the potential of law to bring prospective long-term advancement of rights and the suitability of the context of interaction. In that regard, inter-subjective and constitutive perception of law, which makes it a double-edged sword (in terms of either a resourceful instrument to further legal entitlements for demanding groups, or a constraint set forth by the status quo) will present meaningful insights on how law does or does not matter for the targeted social change in Turkish case.

1. INTRODUCTION

'It is our ability to think about law in a larger context that will eventually allow us to mobilize its potential'[2]. Taking this central vantage point, this study will elaborate on the potential of law to bring positive social change in Turkey regarding the case of children under 6 years of age incarcerated with their mothers. The question of the efficiency of conducting a legal struggle to bring advancement of rights, through making use of the available opportunity structures at national, regional and international levels is interested knowledge. One important caveat is the regime in Turkey is being classified as ranging from a hybrid regime[3] (between flawed democracy and authoritarianism) to competitive authoritarianism[4]. In a place where restriction of civil liberties, increasing concentration of power in the hands of one man and constant legal actions being taken for 'large-scale repression of opposition groups'[5] are the normality and independence of the judiciary have been severely compromised[6]; elaborating on mobilizing the potential of law to bring positive change is an interesting attempt worth examining. In the meantime, contextual peculiarities regarding the group affiliation of the mothers, which makes them the target of the political elite and the post-coup era that makes the targeting easier will be on focus to make accurate assumptions on whether recourse to legal means of struggle makes sense at all in this context and if so, in which channel. At this point, the theoretical foundation of the paper is legal mobilization studies, which offers valuable insights on the interplay between the potential of law to bring prospective long-term advancement of rights and the suitability of context of interaction, in terms of the existence of opportunity structures.

For the aforementioned purposes, this study will be conducted on two blocks of theory complementing each other. The first block will delve into the 'Constitutive Power of Law both as a Strategy and Constraint' (4th heading), which will be key to elaborate on the added value of 'Legal Mobilization Studies' for our case study, compared to other scholars that adopt a more pessimistic understanding of the law. Later, the key concept of mobilization studies, namely Political and Legal

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[2] Miriam Saage-Maaß and others (eds), *Transnational Legal Activism in Global Value Chains: The Ali Enterprises Factory Fire and the Struggle for Justice*, vol 6 (Springer International Publishing 2021) p. 5 <https://link.springer.com/10.1007/978-3-030-73835-8> accessed 11 July 2023.
[3] 'Democracy Index 2022 | Economist Intelligence Unit' <https://www.eiu.com/n/campaigns/democracy-index-2022/> accessed 13 July 2023.
[4] Berk Esen and Sebnem Gumuscu, 'Rising Competitive Authoritarianism in Turkey' (2016) 37 Third World Quarterly 1581 <https://www.tandfonline.com/doi/full/10.1080/01436597.2015.1135732> accessed 11 July 2023.
[5] ibid. p. 3
[6] 'Turkey: Freedom in the World 2023 Country Report' (*Freedom House*) <https://freedomhouse.org/country/turkey/freedom-world/2023> accessed 13 July 2023.

Opportunity Structures will be introduced (5th heading). Their correspondence in Turkish experience will also be included throughout the theoretical narrative. Parallel to the understanding that 'legal mobilization does not inherently disempower or empower'[7] right-claiming groups, 'Supportive Extralegal Strategies' (6th heading) will be enlisted relevant to our case study. Lastly on the theory, the question of why legal tactics in an authoritarian atmosphere, which can be unfavorable for specific groups identified as the 'enemies of the state', should still be pursued (7th heading). In the 9th section, decisive contextual elements with the available opportunity structures in Turkey will be presented. An intermediary conclusion will be given on the potentiality of success in terms of bringing positive, long-term advancement of rights regarding the most suitable channel among national, regional and international protection mechanisms.

But before all that, a short overview of the study with the puzzle in the case, as well as the basic events that led to a discriminatory practice of incarcerating certain groups of mothers due to alleged links to terrorist organizations will be demonstrated. The methodology of the study is explained afterwards to facilitate the reader to follow the study with a clear map in mind.

2. OVERVIEW OF THE STUDY, THE INTEREST OF KNOWLEDGE, AND THE PUZZLE

After the attempted coup in 2016, Turkey entered into an era of a never-ending state of emergency, which through 'granting government officials extraordinary powers'[8] culminated in the formation of a new massive group, discriminated based on their group affiliation. The respective group is named as Gulen Movement, which Turkey deems as an insidious terrorist organization that 'infiltrated' into democratic institutions of Turkey, to capture the state from the inside. Gulen Movement is first known for its expansive network of private schools to promote education established in six continents that serves over 2 million students[9]. It later became existent in many different areas such as media, education, healthcare facilities, NGOs, confederations for businesses etc. Fitzgerald defines it as an

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[7] Michael McCann, 'Law and Social Movements' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing Ltd 2004) <https://onlinelibrary.wiley.com/doi/10.1002/9780470693650.ch27> accessed 11 July 2023.

[8] Anne F Bayefsky, 'Office of the United Nations High Commissioner for Human Rights' in Anne Bayefsky (ed), *The UN Human Rights Treaty System in the 21 Century* (Brill | Nijhoff 2000) <https://brill.com/view/book/edcoll/9789004502758/B9789004502758_s044.xml> accessed 11 July 2023.

[9] Terri S Wilson and Robert L Carlsen, 'School Marketing as a Sorting Mechanism: A Critical Discourse Analysis of Charter School Websites' (2016) 91 Peabody Journal of Education 24 <http://www.tandfonline.com/doi/full/10.1080/0161956X.2016.1119564> accessed 13 July 2023.

'everyday-life-based movement' due to its omnipresence[10]. An important goal of the groups is striving for 'cultivating a generation of well-educated elites in Turkey', who can synthetize Islamic world with the modern secular tools of the existing world[11]. It was perceived as a threat by the ruling elite[12]. According to the mainstream narrative of the political elite, Gulen Movement members positioned in the Turkish Armed Forces tried to overthrow the elected government in a 2016 coup attempt. That became the legitimatizing reason for the massive purge in the civil service following the coup, which resulted in 332,884 people detained, and 101,000 individuals arrested on the grounds of their affiliation with the Gulen Movement.

As the offence claimed is extreme (which is overthrowing the elected government and constituting a national security threat) any means of sustaining the national security was perceived as appropriate. In that regard, not only civil servants from judiciary, military, or other governmental sectors, but also people, who are affiliated with the movement become the subject of the adverse measures taken by the state. For instance, working in Gulen Movement related legal and lawfully established organizations, such as schools, dormitories, hospitals or even depositing money in a bank that is known to be established by the movement, were seen enough for that person to be persecuted. Under this scheme, the practice of incarcerating pregnant women and women having children under 6 years of age (with their children), whose link with the movement can be established, became an unexceptional practice, when they are normally protected under national Law 5275 on the Execution of Penalties and Security Measures. Law 5275 foresees postponement of prison sentence against women who are pregnant or gave birth less than six months ago[13]. However, this provision is not applied to women accused of terrorism-related offences. In addition to that, a prominent international protection mechanism, which is the Convention on the Rights of the Child highlights detention to be taken as a measure of last resort and

[10] Scott T Fitzgerald, 'Conceptualizing and Understanding the Gülen Movement' (2017) 11 Sociology Compass e12461 <https://onlinelibrary.wiley.com/doi/10.1111/soc4.12461> accessed 11 July 2023.

[11] Yusuf Incetas, 'Politics, Education, and a Glocal Movement: Gulen-Inspired Educators and Their Views on Education in Politically Turbulent Times' (2018) 4 Journal of Educational Issues 191 <http://www.macrothink.org/journal/index.php/jei/article/view/13172> accessed 13 July 2023.

[12] Prime Minister Recep Tayyip Erdogan have accused the movement of setting up a "parallel state" within the bureaucracy, during the time when criminal investigation surfaced the scandalous corruption scheme (It is called as 17-25 December 2013 corruption scandal, which disclosed the embargoed 'gas for oil' scheme between Turkey and Iran that involved bribery of four ministers, money laundering, corruption, fraud, gold smuggling. It was described as a 'judicial coup' by the ruling party, claiming that the Gulen movement affiliated civil servants masterminded 'the dirty plot'). 'Turkey: The Erdogan-Gulen Showdown' (18 March 2014) <https://www.ft.com/content/1b1d4ea0-ab8e-11e3-8cae-00144feab7de> accessed 13 July 2023.

[13] Article 16/4

absolute prohibition of arbitrary imprisonment of children[14]. Turkey, as stated in its Constitution, through giving international treaties the force of law[15], and even attaching priority to the international treaties (that are duly put into effect) over the national laws in case of a conflict, is obliged to act by the principles of CRC. Nevertheless, a distinctive political atmosphere has exacerbated the jailing practice, which cause Turkey to act in non-compliance regarding both national and international provisions and principles.

Even though the Turkish state was requested to provide an exact number and disaggregated data on the incarcerated mothers and children by multiple stakeholders like UN Committee on the Rights of the Child, the latest data from the Directorate General of Prisons and Detention Houses dates to 2016[16]. In the meantime, one press briefing of the Ministry of Justice in 2021 provided a mere number of children incarcerated with their mothers as 345 (to refute the claims made in the media that the number of children incarcerated under 6 reaches thousands). However, it is doubtful that the number portrays a realistic figure, as anonymous applications by inmates to the Ombudsman[17] Institution regarding cases of 35-40 kids in a single ward have been recorded in the information bank of the Ombudsman Decisions website. Another inmate, who stayed in Izmir Sakran Prison with her child gave an anonymous testimony to a media outlet, that she stayed with 16 children and 14 mothers together in a mother-child unit. According to Human Rights Watch, 'The largest targeted group consists of those alleged to have links with the movement'[18] and the most frequent charge among the incarcerated mothers with children is the affiliation with the Gulen Movement, which is named as Fethullah Terrorist Organization[19]. So, it is a practice that was designed and applied to marginalized groups like Gulenist mothers.

That being the case, the interest knowledge of this study is to elaborate on the question of how rational it is to pursue legal means to create meaningful impact in a context where judicial independence and impartiality are almost impossible to guarantee (due to massive dismissal of judicial personal after the attempted coup and replacement of them with the loyalist) and in a situation, where the right claimant group is perceived as a threat to national and self-security of the ruling elite. Correlatedly would legal

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[14] Article 37
[15] Art. 90 of the Turkish Constitution
[16] Directorate General of Prisons and Detention Houses 'Action Reports' <https://cte.adalet.gov.tr/Home/BilgiDetay/19> accessed 12 July 2023.
[17] Ombudsman Decision Information Bank <https://kararlar.ombudsman.gov.tr/Arama/Download?url=20180321\70630\Yayin\Karar-2018-3532.pdf&tarih=2018-09-03T00:00:00 > accessed 12 July 2023.
[18] Human Rights Watch, 'Turkey: Events of 2020', *World Report 2021* (2021) <https://www.hrw.org/world-report/2021/country-chapters/turkey> accessed 12 July 2023.
[19] Ali Daglar, 'Türkiye'nin hapisteki çocukları... 700 çocuk neden cezaevinde, nasıl bir hayatları var?' (*Independent Türkçe*, 2 May 2019) <https://www.indyturk.com/article-author/ali-da%C4%9Flar>,

and political opportunity structures, in which legal demands can be raised are open or closed to access by the marginalized group of Gulen Movement members. Applying the concepts of legal mobilization studies and using legal mobilization scholars' understanding of the law with its potential to bring positive social change, general applicability of the recourse to legal means in an authoritarian context will be tested. Estimation of a prospective success or failure is the aimed knowledge of this study at the end.

It is important to highlight that a holistic understanding of the problem is needed to assess the potential impact of consulting legal means for social change and the advancement of rights in this case. It is not a mere mediocre wrongdoing through a writ of conviction decision by the Turkish national courts depriving this specific group of mothers affiliated with the movement, of their liberty. Rather, it is more of an outcome inflected from a combination of political, social, and legal problems. That is why, circumstantial elements in the post-coup era will be given certain space in this study, parallel to the approach foreseen in the legal mobilization studies, which is the theoretical foundation of this study. As legal mobilization scholars also emphasize the importance of 'context of interaction' for groups raising certain right entitlements, this study will check both the available opportunity structures at national, regional international levels that are most advantageous to ascend their claims, and the perception of the right claiming group by the political elites.

3. METHODOLOGY

Central objective of this study is to analyze with a contextual understanding, the likelihood of achieving success (in terms of long-term advancement of rights) for mothers incarcerated with their children due to terrorism related offences, using legal means of struggle in recourse to national, regional, and international courts/monitoring mechanism and opportunity structures. Context is the keyword in our study, as it has an explanatory power to illuminate the discriminatory practice targeting Gulen Movement members, especially the context regarding post-coup atmosphere. Furthermore, it inholds the existence and analysis of opportunity structures, under which we will be exploring their potentiality for bringing positive social change. That is why a methodology that gives prominence to the context and '…pellucid analysis of the contextual embedding(s) of social phenomena or individual(s) or events'[20], which corresponds to the case study methodology of qualitative research will be the appropriate approach in our study. Depending on the interest of knowledge, the type of research undertaken is an instrumental

[20] Arya Priya, 'Case Study Methodology of Qualitative Research: Key Attributes and Navigating the Conundrums in Its Application' (2021) 70 Sociological Bulletin 94 <https://doi.org/10.1177/0038022920970318> accessed 12 July 2023.

case-study. As we aim to explore potentiality of certain legal and political structures to bring positive social change, 'understanding a particular situation' helps us to pursue that 'external interest'[21], which defines the core features of instrumental case-study.

Theoretical underpinning, which has helped to determine the direction of this case study is Legal Mobilization Studies, which details the potential of law bringing positive change through giving certain weight to the context of interaction between right claimants and decision makers. Michael McCann's[22] account of law and mobilizing it in the defined political and legal opportunity structures will be the main point of reference. While fleshing the theory out, concepts in the theory and their correspondence in Turkish experience will also be presented. That is why until the 9th heading, case and the theory will be introduced in an intertwined manner.

For the aforementioned purpose of exploring a phenomenon in a context, data used in this study originates from various resources to ensure that multiple aspects of the phenomenon is understood, and more accurate/truthful account of the issue can be reached. As stated by Baxter et.al 'issue is not explored through one lens, but rather a variety of lenses which allows for multiple facets of the phenomenon to be revealed and understood'[23] in qualitative case studies. For that matter, the empirical data included in this study ranges from international NGO reports, Country Reports from various stakeholders like government agencies, EU Commission, Council of Europe, US Department of State Bureau of Democracy, Human Rights and Labor, to national documents such as Ministry of Justice Action Plans, Strategic Plans, Annual Reports of the Grand National Assembly Human Rights Commission, recommendation decisions of the national human rights institutions. Besides, UN related data has also been crucial in this study, such as Concluding Observations on the Periodic Reports, List of Issues, Turkey Periodic Report, as well as the video of the session that took place in Geneva in May 2023. As sources need to be related with the aftermath period of the coup attempt to make relatable analysis on the context that will define the likelihood of the prospective success, simple coding is applied to filter the listed relevant data. First filtering was applied to define the time bracket, between years 2016-2023, especially in the databases of Ombudsman Institution Decision Information Bank, Human Rights and Equality Institution of Turkey Database, HUDOC and the database of the decisions of Constitutional Court of Turkey. Second filtering was applied through using simple codes of 'incarcerated women',

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[21] Pamela Baxter and Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' [2015] The Qualitative Report <https://nsuworks.nova.edu/tqr/vol13/iss4/2/> accessed 12 July 2023.
[22] McCann (n 7).
[23] Baxter and Jack (n 21).

'terror-related crimes', 'children in prison', 'FETO' to establish a workable scope. All the referenced reports, both from national and international stakeholders are picked from the ones drafted after the attempted coup.

4. FIRST BUILDING BLOCK OF THEORY: CONSTITUTIVE POWER OF LAW BOTH AS A STRATEGY AND CONSTRAINT

4.1 Legal Realists' Understanding of Law and Litigation Tactics

Understanding the role of law in social change in terms of the advancement of rights is the first task of this study. There are different accounts of law when assessing its role in the ascension of rights and they elucidate from their aspect this contested role of law. Three main approaches come to the front at this point: (1) Legal realism, (2) Critical Legal Studies (hereinafter "CLS") and (3) Legal Mobilization Studies. Main common stand, which all three approaches share is the perception that law is a representative instrument of the dominant power relations in the society and 'operate in ways that perpetuate status quo inequalities'[24].

Nevertheless, the difference lies in their attribution to the potential of law to act in counter-hegemonic ways. Legal realists adopt the most pessimist approach regarding the potential of law to bring positive change within this trilogy, as they perceive litigation tactics to be futile in bringing any advancements. That is because 'law is equated with the decision of judges' and the assessment method of the social change is a strict 'linear causality', which attributes success within the restricted relation of causality where an immediate change occurs due to what courts say[25]. In other words, social change must occur on the heels of court decisions and there should be an obvious causality between the two. In a similar vein, the argument in favour of the futility of litigation tactics that realists present, arises out of the restrictive understanding of the law, which is seen as serving only the status quo interests. Furthermore, the gap, in terms of lack of connection between litigation outcomes regarding court

[24] Cheryl Holzmeyer, 'Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in *Doe v. Unocal*' (2009) 43 Law & Society Review 271 <https://onlinelibrary.wiley.com/doi/10.1111/j.1540-5893.2009.00373.x> accessed 11 July 2023.

[25] Michael McCann, 'Law, Litigation, and the Politics of Social Movements' (2021) <https://e-legal.ulb.be/volume-n05/la-mobilisation-du-droit-par-les-mouvements-sociaux-et-la-societe-civile/law-litigation-and-the-politics-of-social-movements> accessed 13 July 2023.

decisions on the one hand, and belated, or never implemented practices happening beyond courts on the other[26] feeds this futility argument. An absence or delays in the implementation of court decisions and judicial mechanisms lacking enforcement power indicates the hollowness of legal action and underscores the uselessness of legal activism according to the realists.

4.2 Critical Legal Scholars Understanding of Law and Litigation Tactics

CLS scholars are also not the most hopeful in believing legal strategies enables social change with the advancement of rights invoked. This position stems partly from their critical perception of law, which focuses on the inherent ideological bias that law and legal doctrines encompasses that is 'intertwined with dominant hierarchies'[27]. That is why one of the main goals of CLS scholars is to 'expose the indeterminacy of supposedly impartial legal doctrines and legal decisions that sustained and masked social hierarchy'[28] and exposing law's complicity with capitalist, racial or gendered hierarchies.

In line with this attitude, litigation strategies are regarded as detrimental for carrying social change, as it would lead to individualization of conflicts that are in fact originating from greater social power inequalities[29]. They ask: 'how could law be a tool for social change, in the face of Marxist explanations of law as mere epiphenomenal outgrowths of the interests of the powerful?'[30]. For that reason, CLS scholars foresee the solution in nonlegal tactics for social change, such as attacking to the '"formalism" and "objectivism" in legal education and to show its shallowness regarding politics and ideology'[31]. However, the criticism raised for the scholars of CLS regarding their dismissive and ignorant attitude towards other unconventional law makers is ironic for a group that aims to dismantle hierarchical aspects of law. For instance, the role of grassroot activists in raising legal claims and while doing that, reinterpreting law in accordance with their interests, could have been an important asset for a movement of scholars that is dissatisfied and doubtful of the idea that law is objective, rational and non-hierarchical. In other words, giving certain weight of significance to the unconventional lawmakers, such as activists within their activism, could have been an important unit of analysis, which would counterbalance the

[26] Holzmeyer (n 24).
[27] ibid.
[28] 'Law, Litigation, and the Politics of Social Movements' (n 25).
[29] Holzmeyer (n 24).
[30] 'Critical Legal Studies Movement' <https://cyber.harvard.edu/bridge/CriticalTheory/critical2.htm> accessed 13 July 2023.
[31] E Dana Neacsu, 'CLS Stands for Critical Legal Studies, If Anyone Remembers', (2000), Journal Of Law And Policy <https://brooklynworks.brooklaw.edu/jlp/vol8/iss2/2> accessed 13 July 2023.

hierarchical, status quo protecting feature of law. Identifying law only in terms of what courts do and how lawyers contest about, goes against this ultimate goal of demystifying law, which attracts criticism. That is also why, for some scholars, CLS and legal realists fail to capture the legal innovations made in the current period as they do not take the bottom-up resistance and contribution to the functionality of law for bringing social change into account[32].

4.3 Why is CLS and Legal Realist Approach Does not fit to the Turkish Case

In this section we will briefly explain why the stance adopted by CLS and Realists does not fit with our case study in terms of special trajectory of events regarding the rights struggle of imprisoned mothers and their children. Although, CLS perception of law (as being an instrument of status quo) and legal means of struggle (leading to individualization of bigger and rooted problems in the society) is capable of offering a strong argument to explain the arbitrary application of law in Turkey (to maintain the status quo through quashing the dissident under the pretext of anti-terrorism law), certain developments in the field necessitate a more elaborated approach.

Within Turkish context, extra-legal activism that takes place outside court rooms, which helps to invigorate legal claims made by the victims to national/regional and international courts, is becoming vitally important. For instance, demonstrations held in exile[33] regarding imprisoned babies with their mothers by Turkish/Kurdish community contributed to the interpretation of several legal documents from national legal regulations and application of international level conventions. These demonstrations are held by people who fled the country and living in Europe due to belonging to certain groups that are oppressed in Turkey (Gulen Movement followers and people from Kurdish ethnic descents constitute the majority with other small ethnic and religious minorities). What is important to highlight in these demonstrations is the attempt that these groups are propounding to re-interpret legal norms and their application. Protesting groups demanded from the Turkish state, to honor the principles and stick to the obligations stated in CRC[34] and national protection mechanism and advocated for the non-discriminatory

[32] Holzmeyer (n 24).
[33] First demonstrations are held in year 2017 in London, Stockholm, and Helsinki, at a time when the number of imprisoned babies peaked to 668. Demonstrations happened after an impactful social media campaign, which aimed to become a Trend Topic (TT) in the world through achieving highest number of tweets to be circulated in the platform on the issue, led organized protests to be held. Ferit Nihan, '668 Bebek Hapiste' (*Medium*, 31 October 2017) <https://medium.com/@feritnihan/668-bebek-hapiste-fdb09034e451> accessed 14 July 2023.
[34] 'Almanya'dan "tutsak bebeklere" ses oldular' *They became the voice of the 'imprisoned babies' from Germany* (*Hizmetten*, 21 November 2021) <https://hizmetten.com/almanyadan-tutsak-bebeklere-ses-oldular/> accessed 14 July 2023.

application of the relevant provisions. CLS scholars and realists do not take the grassroot potential to impact the interpretation of legal norms into account. That is why it is unsuitable for our case study, as within the mentioned demonstrations, various references are made to the Convention on the Rights of the Child, as well as national Juvenile Protection Law (especially in the protests held in Wiesbaden/Germany) and it aggravated to make a difference in legal field.

The most prominent example is the adoption of a new provision (Article 16/A - (Added on 28 March 2023 by Article 23 of the Law no. 7445) which is also known as 'Yusuf Kerim Code' that regulated the suspension of the execution of the sentence imposed on the female convict due to her child's illness. It has been adopted after a successful social mobilization aimed at reuniting convicted and imprisoned mother Gülten Sayın, with her terminally ill son, Yusuf Kerim. In total, almost 91 thousand people signed the online petition[35] for the necessary legal regulation to be created for the family to come together. Not only did the mother and the child reunited, but also a new regulation was adopted on a state-level, which did not discriminate the convicts based on the offence they committed and included also the jailed mothers with terrorism related offences. It shows the power that grassroot action possess to bring legal innovation through bottom-up resistance and negates the CLS understanding of law, which is ignorant of bottom-up resistance.

4.4 Legal Mobilization Studies Understanding of Law: Theoretical Foundation

Legal mobilization studies, on the other hand, adopts a very different view of law and interpret litigation tactics more optimistically than the scholars of legal realists and CLS. First, it differentiates itself from the former two by shifting the perception of law that operates according to the CLS/Realists in a 'top-down' matter to a 'bottom-up' approach[36]. In other words, the role of the individual or groups are essential to instrumentalize, as well as mobilize law for the defined cause, as much as the practicing authorities like courts and lawyers. For Zemans, who interprets mobilizing law in terms of claiming certain rights, sees it as another way of political participation by defining the role of citizens 'who, in the

[35] '90.651 kişi bu kampanyayı imzaladı ve başarıya ulaştırdı' *90,651 people signed this petition and made it successful* (*Change.org*) <https://www.change.org/p/yusuf-kerim-annesine-kavu%C5%9Fsun-tedavi-s%C3%BCresince-annesi-yan%C4%B1nda-olsun-yusufannesinekavussun-yusufannesiyleiyilessin-bybekirbozdag-adalet-bakanlik-tcbestepe> accessed 14 July 2023.

[36] Holzmeyer (n 23).

process of involving legal norms, employ the power of the state and so become state actor themselves'[37]. That is why legal mobilization analyst focus on how people and groups behave and make legal entitlements, as it characterizes law 'as a strategic resource available for instrumental "use" by social actors to advance their interests and causes' besides courts and lawyers[38].

Besides that, Zemans highlights the educative role of law, which is related with the use of law by groups, in which 'perceptions of desire, wants and interests are themselves strongly influenced by the nature and content of the legal norms and evolving social definitions of circumstances in which the law is appropriately invoked'[39]. He gives the example of the growing body of consumer rights in this context, which assisted public to define and acknowledge the wrong doings better and opened a window of opportunity for rectifying the situation in terms of invoking legal remedies in a violation situation. In other words, there is a reciprocal relation between the two (law and the agent), which none is dominant on the other but serve (and might be utilized) for different purposes depending on the goal of the agent or groups. From this aspect, law is perceived both as an (1) inter-subjective instrument, where people perform an active agent role of right claimants, invoking legal norms while advancing their interests through their own interpretation of legal norms, and (2) constitutive force, that defines the framework of the instrumental action that will take place. That is why 'people are at once legal subjects constructed and restrained by law, and to some limited degree also situated agents who contest and reshape legal meaning in practical interaction'[40].

4.5 Legal Mobilization Studies: Correspondence in Turkey

Legal mobilization theory, through its added value of interpretivist and constitutive understandings of law, presents meaningful insights on how law does or does not matter for the targeted social change. These accounts of law offer an explanatory power to the ways law function for much of this study. Law is a contested tool due to its openness to interpretation by all the potential agents, especially by two: right claimants and the status-quo. In conjunction with that, determining the actual potential of law in bringing positive social change, in the case of discriminatory practice of imprisoning

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[37] Frances Kahn Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77 American Political Science Review 690 <https://www.cambridge.org/core/product/identifier/S0003055400248934/type/journal_article> accessed 11 July 2023.
[38] 'Law, Litigation, and the Politics of Social Movements' (n 25).
[39] Zemans (n 37).
[40] 'Law, Litigation, and the Politics of Social Movements' (n 25).

mothers within the contextual intricacies of Turkey, will be of an immense importance to assess whether positive change might emanate from legal activism. In that regard, the examples and ways of use of law both by the Turkish state and mobilized groups on the issue of imprisoned mothers would be enlightening to analyze at this stage.

Law has been used by the Turkish state to quash groups that are perceived as a security threat, when in fact it is the oppositional figures that got a severe hit under the pretext of combatting terrorism. Taking advantage of the very vague anti-terrorism legislation[41] and Criminal Code Procedure (CCP), which allows for detention in a pre-trial stage due to strong suspicion without any indictment, many women having children under 6 goes to jail even before their indictment is written by the public officers. On the other hand, mobilized groups, on the issue of imprisoned mothers, right claimants, utilize law by referring to other existing but not applied national protection mechanisms regarding mothers who fall into conflict with law (previously mentioned Law 5275, Article 16/4) to challenge the unlawful practices. Certain right claiming, such as demanding probation measures for mothers until the child become old enough to be independent from the mother, as well as inclusive application of the relevant provisions were raised in those challenges. This is an example, where the inter-subjective aspect of law crystallizes, as certain actors from both sides (judicial authorities preserving state interests and mobilized groups on the unjust practice of imprisoning mothers) interpret their demands using a legal frame and raise their entitlements using law against each other. In other words, contestation of balance between security against the individual right of the mother and the vulnerable child is taking place in a legal ground.

In this context, advocating for the right of the mothers to enable them to enjoy the provisions prohibiting jailing mothers who are accused of terrorism related offences, was a reflection of the possibilities that law has envisaged. At this stage, another aspect of law stands out, which is the educative aspect. By means of defining possibilities ahead and creating desires/demands accordingly, the potential of law to construct meanings in terms of 'providing threats, promises, models, persuasion, legitimacy, stigma, and so on' (Galenter, 1983, as cited in McCann, 2006) comes to the front. For instance, as the mobilized groups were informed about the Law N. 5275, the possibility and option that mothers might also not be jailed, demands of the respective group also increases. Virtual means of rights claiming

[41] Mary Lawlor, Special Rapporteur on the situation of human rights defenders from UN has urged Turkey on this issue to release human rights defenders, who are jailed through application of vague terrorism charges and taking advantage of the vaguely worded anti-terrorism law in Turkey. ibid.

through online petitions[42], demonstrations held in exile, NGO reports referring to national legal protection mechanisms and parliamentarians[43] voicing the need for a legal regulation that would expand the protection to those children, are the product of introduced legal possibilities (educative aspect of law), as well as inter-subjective/communicative account of law, which allows for demands to be ascended and permits an interpretation in a bottom-up direction. At this point, the approach that is adopted in this study is rejecting the conventional and positivist perception of law, which McCann also referred to in his book that is ‘limited to discrete, determinate rules or policy actions’[44]. Rather putting the inter subjective aspect in front, as it possesses a further explanatory power.

On the other hand, the constitutive force that law possess, in terms of providing a field that is suitable to accede legal demands both in national and institutional framework, in which practical interactions can take place is observable in the individual complaint mechanisms offered to individuals both to the Constitutional Court of Turkey[45] and ECtHR in case of exhaustion of the domestic remedies, and also when the decisions of the Constitutional Court, even if it is in favor of the applicant, is not applied by the lower courts[46] . At this point, the possibility of shadow reporting to the UN Committee on

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[42] In year 2018, when the number of imprisoned children with their mothers peaked more than 700 hundred, a prominent voice for the issue from the Turkish parliament, namely Omer Faruk Gergerlioglu started a campaign using virtual petition platform called ‘Change.org’. Call for signing the petition to prevent pregnant women and mothers having babies go to jail has received 13.061 signatures. Campaign specifically referred to Article 16/4 of the National Law Number 5275, Imprisonment and Security Measures, which obliged Turkish state to postpone prison sentence against women who are pregnant or gave birth less than six months ago. This was a novel practice of rights claiming within Turkish legal framework. 'Hamile ve Yeni Doğum Yapmış Tutuklu/Hükümlü Anneler ve Bebeklerine Özgürlük!' *Freedom for Pregnant and Newborn Detained/Convicted Mothers and Their Babies!* (*Change.org*) <https://www.change.org/p/hamile-ve-yeni-do%C4%9Fum-yapm%C4%B1%C5%9F-tutuklu-h%C3%BCk%C3%BCml%C3%BC-anneler-ve-bebeklerine-%C3%B6zg%C3%BCrl%C3%BCk> accessed 14 July 2023.

[43] Omer Faruk Gergerlioglu and Sezgin Tanrikulu are the prominent ones that voice the need for a change in the parliament. Sezgin Tanrıkulu, human rights lawyer and a serving MP from Republican People’s Party (CHP), drew attention to the number of female convicts and children in prison in his speech at the Grand National Assembly of Turkey very recently. He specifically referred to the legislative power of parliament and asked from rest of the MPs to take necessary action for a conscientious legal regulation on his speech regarding the imprisonment practice of mothers by the domestic courts. He blamed parliamentarians being unconscientious. ‘Sezgin Tanrıkulu: 470 Anne, 520 Bebekle Cezaevinde’ *Sezgin Tanrıkulu: 470 mothers with 520 babies are in prison!* (*Kronos Haber*, 18 January 2023) <https://kronos36.news/tr/sezgin-tanrikulu-470-anne-520-bebekle-cezaevinde/> accessed 14 July 2023.

[44] McCann (n 6) p.507.

[45] Individual complaint mechanism has been introduced in 2010, through Law N. 5982. ‘Article 148 of the Constitution stipulates that anyone who thinks that his/her constitutional rights set forth in the European Convention on Human Rights have been infringed by a public authority will have a right to apply to the Constitutional Court after exhausting other administrative and judicial remedies’. Nazlican Ülvan, ‘Constitutional Complaint and Individual Complaint In Turkey’ (2013) *Ankara Bar Review,* p. 183 <https://dergipark.org.tr/tr/download/article-file/787284> accessed 13 July 2023.

[46] In Sahin Alpay v. Turkey case, in which the court decided that Turkey violated the right to liberty and lawful detention of the journalist Sahin Alpay (who has been detained after the coup attempt due to terrorism related offences and more precisely his affiliation with the Gulen Movement), the argument presented by the Turkish Government to name the application inadmissible ‘for failure to exhaust domestic remedies, on the grounds that his individual application to the Constitutional Court was still pending’ was not accepted by ECtHR. The reason for that is the Assize (lower national)

the Rights of the Child is an important channel to mention as well, which is constituted for the interested national/international NGOs or groups to propound their interpretation and raise their demands. The channel has been constituted by the force of law (through optional communication procedure protocols) and offers a venue for the communicative and inter-subjective aspect of law to unfold.

It must also be stated in this stage that the inter-subjective account of law also means that it can be accountable for both possibilities: a resourceful field for rights to be reclaimed or a constraint/baton in the hands of oppressive political regimes. Law, from this aspect, is a double-edged sword, where it can either provide 'normative principles and strategic resources for the conduct of social struggle' and help achieve the desired outcome or be a restraint for the demand making groups[47]. Primary object of legal mobilization studies upsurge at this point of differentiation where both roles of law – a strategic, resourceful tool (empowering) or a constraint (disempowering)- are analyzed carefully from the lenses of suitability of the context. To assess the potential of law and legal means in a given context 'to transform, or to reconstitute, the terms of social relations and power' to bring social change, certain preconditions must be existent[48].

4.6 Legal Mobilization Studies: Litigation Preconditions

From the mentioned vantages of law, legal mobilization scholars insist that pursuing litigation strategies promises high yielding results despite its equivocality in use, both by status quo and the right claimant groups. But there must be certain conditions for the law to be strategic, resourceful tool to bring positive change. At this point, the appropriateness of the 'context of interaction' between rights claimants and legal authorities (or procedures), in other words, opportuneness of the structural composition of judicial and political systems is of decisive importance[49]

This contextual adaptation of legal mobilization studies also complements the bottom-up approach, where the highlighted role of agency is strengthened with favorable conditions around. Whether the groups, individuals, or organizations, who have certain legal demands have access to necessary legal structures or the question of receptiveness/willingness of the relevant political/judicial

Court's rejection to apply Constitutional Court's judgement (parag. 115), which also created a breach with the Convention as the domestic law has not been complied by the courts. *Sahin Alpay v Turkey* App no 16538/17 (ECHR, 20 March 2018)
[47] McCann (n 7).
[48] ibid.
[49] Holzmeyer (n 24).

authorities to the demands raised by groups pursuing legal claims within the country's specific legal framework are some of the issues raised under the contextual interaction and opportuness. A more detailed account of context and core elements that must be existent to make recourse to law and strategic litigation a fruitful basis (for a prospective positive social change) will be presented in the next section of this study. But in short, legal mobilization scholars highlight the significance of 'contextual potential' to further and advance claimant's objectives in terms of legal entitlements in litigation strategies[50]. Afterall, it is how these two elements (recourse to legal means of struggle and the relevant contextual features, in which this struggle will take place), 'are articulated, that will partly condition the success or failure of the struggle'[51]

5. SECOND BUILDING BLOCK OF THEORY: CONTEXT AND OPPORTUNITY STRUCTURES

As mentioned above, the interpretative and constitutive accounts of law bring out the double-edged sword feature of it. On the basis of this account, it was inferred that law and legal mobilization strategies are not the saviors in itself for bringing the defined cause of social change, on the contrary, they might also be used as a baton in the hands of an oppressor. From this aspect, it is an effective tool for any side of the conflict. That is why the study of the real impact of legal mobilization strategies to advance human rights in a vibrant authoritarian context is a noteworthy endeavor, as it adds up to the embryonic phase of the previous studies regarding the impact of law on bringing social change in authoritarian contexts[52]. But more importantly, it will also help to contour the limits even more concretely where the context preponderates the impact and potential of law, through testing the question whether legal mobilization strategies might ever respond to the main cause of social or legislative change in relatively more restricted context of Turkish regime, in a way that it did respond in the western hemisphere.

5.1 Stages of Legal Mobilization

[50] ibid.
[51] Marie-Laurence Hébert-Dolbec and others, 'The Use of Law by Social Movements and Civil Society. Presentation of the Special Issue.' <https://e-legal.ulb.be/volume-n05/la-mobilisation-du-droit-par-les-mouvements-sociaux-et-la-societe-civile/the-use-of-law-by-social-movements-and-civil-society-presentation-of-the-special-issue> accessed 13 July 2023.
[52] ibid.

According to McCann, there are two stages in the face of a conflict or social dispute for a social movement or group that has opted to legal means of rights claiming. The first stage is raising rights consciousness among the victims or effected groups, where law is a gamechanger, as it constitutes the phase of converting the members of the injured party becoming a 'right claimant'. In this stage, marginalized groups can capitalize on certain entitlements, that has its correspondence in legal terms[53]. This 'process of ''translation'' from nonlegal grievances to legal claims' constitutes the first stage of legal mobilization, which helps to address the wrong doings that can be rectified in the second stage. The second stage is where the definition of opportunity structures will be given, in which searching for a right venue to voice these new entitlements and demands is performed by mobilized groups.

At this point, presenting the corresponding experience of the first stage of rights consciousness, in Turkish framework regarding the case incarcerated mothers would clarify the concept. The rights consciousness among the mothers and other mobilized groups was a fast-paced one due to a sharp increase of the practice after the attempted coup. It started with attracting the media attention in year 2017, mostly due to increasing number of babies in prisons and growing number of NGO reports on the issue. Data on escalation in the number of incarcerated women shows %470 increase in the number since 2005, which includes also imprisoned women who have children under 6. This caused a creation of marginalized group of mothers, who should not be in prison at the first place, since numerous legal protection mechanism, both in national and international levels safeguard them and the best interest of the child particularly[54]. One of the first reports, drafted by Journalists and Writers Foundation[55] based in USA, in October 2017, publicized first data on the number of jailed mothers with a child and shared an open catalogue of children with their photos (with the consent of their families), which was followed by other NGO's with a wider data, using the same strategy of using an open catalogue[56]. This active chasing and reporting by the overseas organizations contributed to the translation of non-legal grievances to

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[53] McCann (n 7).
[54] In national level, previously mentioned Law Number 5275, regarding imprisonment and Security Measures, Article 16/4, obliges Turkish state to postpone prison sentence against women who are pregnant or gave birth less than six months ago. Additionally, as Turkey is a contracting party to CRC and its protocol's, it must act in compliance with the treaty's insistence on non-discriminatory practices and detention to be seen as a last resort.
[55] JWF, 'The State of Turkey's Children & Victims of Unlawfulness, The Current Situation and Future Implications of the Intentional Violation of Domestic Legislation and the Convention on the Rights of the Child by the Turkish Government' (2017) <https://jwf.org/wp-content/uploads/2017/10/Children-Report-2017-.pdf> accessed 13 July 2023.
[56] Report by Advocates of Silenced Turkey (AST) from 2020 communicated a name list of the imprisoned mothers and a photography catalogue, which is 42 pages long and included 129 women.
AST, 'Born and Raised in Prison: Turkey's Captive Children. A report on Mothers and 780 Children held as political prisoners in Turkey' (2020). <https://silencedturkey.org/born-and-raised-in-prison-turkeys-captive-children> accessed 13 July 2023.

pursuit of legal claims, through stressing on the obligations of Turkey, as a contracting state party to act in compliance with the national/international human rights principles. The role of international media[57] [58] became undeniably vital at this stage through disseminating the unlawful practice, to outspeak the taboo issue, since a 'nationwide defamation campaign launched against those deemed "enemies of the state" by the government'[59] and many abstained to defend the rights of the so called 'enemies'. It would have easily caused anyone, who dared to speak out, to be labelled with the same tag of affiliating to a terrorist organization. Nevertheless, rights consciousness on the issue was achieved through NGO reports and international media recognition and coverage of the normalized practice, which compensated the perception of indifference by the people in the country.

Regarding the second stage of legal means of right claiming however, a more organized approach is needed in terms searching for ways and appropriate venues to channel the so called nonlegal grievances. At this stage 'defining the overall ''opportunity structure'' within which movements develop' is important to identify, as it will be decisive on the strategy to be chosen and the development trajectory of the social movement[60]. Opportunity structures constitute the core element of the second stage as it also determines the suitability of the context to pursue improvements of certain rights through legal means. Opportuneness of political and judicial structures, based on various criteria (such as the openness, receptivity, willingness of the actors) will shed considerable light on the functionality and effectiveness of taking the struggle to the court. On account of this, we start with illuminating the importance of political and legal opportunity structures, as they will be constituting one of the main contextual elements to inspect the effects of legal activism and its consequential role in terms of estimating the outcome of legal mobilization.

5.2 Political Opportunity Structures

By being the author of the most widely cited work that employs the concept of political opportunity structures, Kitschelt and his work on anti-nuclear movements in four democracies capitalizes

[57] See e.g., 'Hundreds of Young Turkish Children Jailed alongside Their Moms as Part of a Post-Coup Crackdown | Fox News' <https://www.foxnews.com/world/hundreds-of-young-turkish-children-jailed-alongside-their-moms-as-part-of-a-post-coup-crackdown> accessed 14 July 2023.

[58] 'Turkey: Babies behind Bars – DW – 06/23/2019' (*dw.com*) <https://www.dw.com/en/turkey-babies-behind-bars/a-49320769> accessed 11 July 2023.

[59] AST (n 55). p. 11

[60] McCann (n 7). p. 511

on the definition of the concept of political opportunity structures. According to him 'political opportunity structures (POS hereinafter) function(s) as 'filters' between the mobilization of the movement and its choice of strategies and its capacity to change the social environment'[61]. In other words, POS shapes the strategy of the mobilizing groups, in a way that would help them to achieve the desired outcome of social change. From this aspect, POS might both 'facilitate the development of protest movements in some instances and constrain them in others'.[62] For instance, Arat, in her book dating back to 2007, refers Turkish political system as an illiberal democracy, which through restrictive laws, only give free passage to adversarial confrontations in terms of strategies. In other words, restrictive laws pushed those seeking for social and political change to 'to employ more contentious strategies such as protest marches and demonstrations'[63]. One thing that is important to highlight at this point is that what Kitschelt implies by referring to the 'protest movements'. It can also be taken as referring to the general 'strategy choice' of social groups. The triology and interrelation inferred by "POS-desired social change-protest movements" can also be considered as "POS-desired social change-strategy choice".

Two important criteria regarding POS are influential to elucidate on the articulation of social movements, as well as their strategy choices. They are 'structural openness and closedness of the political system' and 'contingent receptivity of political elites to collective action'[64]. We diverge from the Kitschelt's wording used in the definition of the second criteria (which is the capacity of the POS to implement changes) and choose Hilson's 'contingent receptivity of political elites to collective action', or more concisely, willingness of the political elite. Kitschelt, as he emphasizes on the output side of policies through the assessment of capacity to implement policies, also refers to the 'overall responsiveness of politics to social movements' and 'their openness to societal demands'[65]. The overall responsiveness and capacity of politics to the mobilizing demands, also indicates the receptivity and willingness of elites to implement desired social change. Nevertheless, this paper will choose to adopt Hilson's criteria of receptivity and willingness of political elites, that is partly isolated from the capacity argument as it asserts a state-centered perception. The reason behind is that the intricacies of the undeniable weight decision-maker have in an authoritarian context needs more attention and elucidation.

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[61] Herbert P Kitschelt, 'Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies' (1986) 16 British Journal of Political Science 57 <https://www.cambridge.org/core/product/identifier/S000712340000380X/type/journal_article> accessed 11 July 2023.
[62] ibid.
[63] Zehra F. Kabasakal Arat, *Human Rights in Turkey* (University of Pennsylvania Press (May 9, 2007) p.283
[64] Chris Hilson, 'New Social Movements: The Role of Legal Opportunity' (2002) 9 Journal of European Public Policy 238 <http://www.tandfonline.com/doi/abs/10.1080/13501760110120246> accessed 11 July 2023.
[65] Kitschelt (n 61). p. 63

It is a crucial aspect to consider especially in an authoritarian mode of leadership, which ‘is characterized by a political system in which a leader or occasionally a small group exercises power within formally ill-defined but actually quite predictable norms’[66]. For that reason, the willingness and receptivity of the actors overshadow the capacity of state in those regimes.

5.2.1 Importance of the Willingness of the Political Elite

To shed more light on the willingness factor, an example can be given on the immense authority Turkish President exercises (due to constitutional change occurred in 2017 referendum) in terms of having the right to issue decrees that has the force of law (article 8, amending article 104). That means an ‘institutionalization of one-man system’ has been consolidated through merging of powers of legislative and judicial in the office of the president[67]. This implies the preponderant significance and prospective impact of his willingness on any of the demanded advancements of rights, compared to the relative importance of state capacity. Another indicator of this immune oneness has been supported by Justice Ministry through lavishing criminal prosecutions with up to four years imprisonment if any critical voice or opinion has been directed at the President[68]. This has important repercussions in the other functioning parts of the state. For instance, a very strong designation of certain groups in the country as terrorists organizations by him (in various rallies around Turkey[69], television and media, as well as through Directorate of Communications in his office[70]) -such as Gulen Movement affiliated persons,

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[66] Jerzy J Wiatr, *Political Leadership Between Democracy and Authoritarianism* (Verlag Barbara Budrich 2022) <https://shop.budrich.de/produkt/political-leadership-between-democracy-and-authoritarianism/> accessed 11 July 2023.
[67] ‘The Turkish Constitutional Referendum, Explained’ (*Brookings*) <https://www.brookings.edu/articles/the-turkish-constitutional-referendum-explained/> accessed 14 July 2023.
[68] In Amnesty’s Annual Report dating back to 2015/2016, it is stated that 105 criminal prosecutions for insulting President Erdoğan under Article 299 of the Penal Code is adjudicated and ‘Eight people were remanded in pre-trial detention’. A 17-year-old student ‘received a suspended sentence of 11 months and 20 days by a children’s court in the central Anatolian city of Konya’ for ‘for calling the President “the thieving owner of the illegal palace”’. ‘Amnesty International Report 2015/16: The State of the World’s Human Rights’ (*Amnesty International*, 23 February 2016) <https://www.amnesty.org/en/documents/pol10/2552/2016/en/> accessed 14 July 2023.
[69] In his speech at Eskisehir rally Erdogan said: “We are waging an uncompromised war against terrorists”. ‘Presidency Of The Republic Of Turkey : “We Are Waging an Uncompromised War against Terrorists”’ <https://www.tccb.gov.tr/en/news/542/94468/-we-are-waging-an-uncompromised-war-against-terrorists-> accessed 14 July 2023.
[70] President Erdoğan: “Our struggle will continue until the last member of FETÖ is neutralized, punished and removed from the boilerplate of the country and nation”. ‘Cumhurbaşkanı Erdoğan, *President Erdogan*: “FETÖ‘Nün Son Ferdi de Etkisiz Hale Getirilene, Cezasını Çekene, Ülkenin ve Milletin Kazan Defterinden Düşürülene Kadar Mücadelemiz Sürecektir” *Our struggle will continue until the last member of FETÖ is neutralized, punished and removed from the boilerplate of the country and nation* | Türkiye Cumhuriyeti, *Republic of Turkey* | İletişim Başkanlığı, *Communication Ministry*’ <https://www.iletisim.gov.tr/turkce/stratejik_iletisim_calismalari/detaylar/cumhurbaskani-erdogan-fetonun-son-ferdi-de-etkisiz-hale-getirilene-cezasini-cekene-ulkenin-ve-milletin-kazan-defterinden-dusurulene-kadar-mucadelemiz-surecektir> accessed 14 July 2023.

Kurdish activists, journalists, politicians or more generally the critical-, leads to an endorsement by the majority in the legislative branch, parliament. This stance of the President has an impact on the willingness of parliamentarians to act on issues regarding systematic violations of fundamental rights experienced by those groups. For instance, within the discussions of the 4th Judicial Reform Package in the parliament back in 2021, provisions on the possibility that probation measures regarding mothers in conflict with law having children under 15 and sentenced to prison was a hotly debated issue[71]. A month later though, provisions foreseeing the postponement of the sentence or probation measures of the imprisoned mothers was taken out from the draft of the judicial reform package, due to general fear among the benches of ruling elite that the relevant provisions might introduce sort of a disguised amnesty for women, who are accused of having links with the Gulen Movement[72]. This shows that the willingness of the ruling elite regarding taking measures on certain group of right claimants is highly affected by the willingness of a strongman and it is vital on the development of legislative regulations.

At this stage, it is important to highlight that additional new element might change the willingness of political elites in a certain political atmosphere. These changes or shifts are ‘such that political actors are willing to support policy change because they perceive the change will strengthen or preserve their own institutional positions’ [73]. In other words, the relevant shifts in the political atmosphere must be weighty enough to create a leveraging effect. This change might also relate to the image of rights claimants by the ruling elites, whether for instance they achieved an incontrovertible momentum or moral upper hand throughout their struggles. Rights claimants in our case-study, namely the mothers, who are deprived of their liberty with their children, are mostly convicted based on their affiliation with the Gulen Movement[74] or belonging to other groups that are labelled as terrorist organizations both by the strongmen -as the attractive force- and later by the state. It is not hard to predict the image of the right

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[71] ‘Küçük çocuklu anne hapse girmeyecek’ *Mothers having Children won’t be sent to Prison* (23 May 2021) <https://www.hurriyet.com.tr/gundem/kucuk-cocuklu-anne-hapse-girmeyecek-41816394> accessed 14 July 2023.

[72] ‘“Çocuklu mahpus annenin cezasının ertelenmesi” düzenlemesi mini yargı paketinden neden çıkarıldı?’ *Why was the regulation 'postponing the sentence of a mother imprisoned with a child' removed from the mini-judgment package? BBC News Türkçe* <https://www.bbc.com/turkce/haberler-turkiye-57531516> accessed 14 July 2023.

[73] Holly J McCammon and others, ‘How Movements Win: Gendered Opportunity Structures and U.S. Women’s Suffrage Movements, 1866 to 1919’ (2001) 66 American Sociological Review 49 <http://www.jstor.org/stable/2657393?origin=crossref> accessed 11 July 2023.

[74] According to Ali Daglar, from Independent Turkey news outlet, among imprisoned mothers, the most frequent charge is being convicted of having affiliation with the FETO (Fethullah Terrorist Organization), which is the name used by the Turkish media and regime narrative, instead of Gulen Movement. PKK (Kurdistan Workers Party) cases are in the second place, and judicial detainees and convicts are in the third place. “Türkiye'nin hapisteki çocukları... 700 çocuk neden cezaevinde, nasıl bir hayatları var?”. *Turkey's imprisoned children... Why are 700 children in prison, what kind of life do they have?* (13 May, 2019) <https://www.indyturk.com/node/27266/haber/türkiyenin-hapisteki-çocukları-700-çocuk-neden-cezaevinde-nasıl-bir-hayatları-var> accessed 14 July 2023

claimants in the lenses of ruling elite, as the highest office of Turkish politics, President Erdogan, called for reinstating the death penalty for these groups in various occasions speaking to hundreds of thousands of people[75][76]. However, the case of imprisoned or accused mothers affiliated with the movement had in several incidences caused a public outcry, even though the dominant discourse of the national media outlets about the Gulen movement is slanderous and unsympathetic, since the Movement is accused of masterminding[77] the coup-attempt in 2016. There are two examples for this shift in the willingness within Turkish context, where in both cases mothers had cancer patient sons and one of them was imprisoned[78], while the other mother[79] had an international travel ban, which prevented her to accompany her kid to get a cancer treatment in Germany. In both cases, besides human rights activists and organizations, various renowned persons in Turkey from politics (former foreign Minister, Ahmet Davutoglu) to art (famous actresses like Hazal Kaya) and football players have raised their voice on the issue and vital necessity to bring those children together with their mothers. A fierce social media campaign and dissemination of the videos of both children from hospitals, mobilized groups that are perceived to be either siding with the regime discourse or uninterested on the issues. Demands were to make authorities act conscientiously and find the necessary remedies for the best-interest of the child (through applying probation measures for the imprisoned mother and uplifting the travel ban for the other mother). Not

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[75] CNN 'Turkey: Erdogan Says Behead Traitors' *CNN* (16 July 2022) <https://www.cnn.com/2017/07/15/europe/turkey-coup-attempt-anniversary/index.html#:~:text=%E2%80%9CWe%20know%20who%20is%20behind,going%20to%20behead%20these%20traitors.%E2%80%9D> accessed 14 July 2023.

[76] Reuters, 'Erdogan Says He Is Ready to Back Reinstating Turkey's Death Penalty' *Reuters* (1 July 2022) <https://www.reuters.com/world/middle-east/turkeys-erdogan-says-ready-back-reinstating-death-penalty-media-2022-07-01/> accessed 14 July 2023.

[77] Robert Siegel, 'Cleric Accused Of Plotting Turkish Coup Attempt: "I Have Stood Against All Coups"' *NPR* (11 July 2017) <https://www.npr.org/sections/parallels/2017/07/11/536011222/cleric-accused-of-plotting-turkish-coup-attempt-i-have-stood-against-all-coups> accessed 14 July 2023.

[78] The mother of Yusuf Kerim, Gulten Sayın, was 'sentenced to six years, three months for working at a student dormitory in the northwestern province of Sakarya that the government subsequently closed down because of alleged ties to the Gülen movement. She was also accused of depositing money in Bank Asya, which was shuttered by the government after the coup attempt because of its links to the movement'. She was jailed even though her son, Yusuf Kerim was terminally ill and needed the care of the mother. SCF, 'Jailed Mother Reunites with Son Suffering from Cancer for Half a Day' (*Stockholm Center for Freedom*, 27 January 2023) <https://stockholmcf.org/jailed-mother-reunites-with-son-suffering-from-cancer-for-half-a-day/> accessed 14 July 2023.

[79] Zekiye Ataç, whose son Ahmet Ataç passed away in 2020, had a travel restriction due to working at a lawfully established student dormitory that was closed down by the government for alleged links with the Gulen Movement after the coup attempt. She could not leave the country to accompany her son to the treatment in Germany. The father was also in jail due to affiliation with the Gulen Movement at the time and only the 70-year-old grandmother could accompany the child. Ahmet insisted to be with his mother after spending a week in Germany and turned back to Turkey. But his health condition deteriorated in Turkey, while waiting for the lifting of Zekiye Atac's travel ban by the appeals court. By the time that they arrived together in Germany to take the second treatment, his cancer progressed to an extent that made him ineligible for the treatment. Couple of months later he passed away. TM, '8-Year-Old Cancer Patient Dies after Belated Treatment Due to Travel Ban on Mother' (*Turkish Minute*, 7 May 2020) <https://turkishminute.com/2020/05/07/8-year-old-cancer-patient-dies-after-belated-treatment-due-to-travel-ban-on-mother/> accessed 14 July 2023.

acting in compliance with these demands and putting the lives of the children on line, had the risk of jeopardizing the legitimacy of the ruling elite and questioning the moral standing of political and legal actors. That is why in both cases, necessary remedies were realized by the state. Imprisoned mother, Gulten Sayın was released and Zekiye Atac's international travel ban was lifted by the courts. Political actors become willing to support the rights of the most marginalized groups as it would preserve their positions by not threatening to damage it

5.2.2 Openness of the POS

Turning back to the other criteria besides willingness of the political elite, openness and closeness of the POS are essential for social movements demanding certain legislative regulations and improvements in the respective rights that they vindicate. According to Kitschelt 'closed regimes repress social movements' while moderately closed and repressive ones 'allow for their broad articulation but do not accede readily to their demands'[80].

Single point of reference for the notion of openness, such as access to the administration to be able to realize the social demand, does not take one far enough. In addition to that, being the core element of POS, political openness is 'likely to operate differently' for distinct dependent variables and 'for different sorts of rights claims'[81]. That is why Kitschelt's four listed factors to determine openness in a selected political system will be utilized for having a robust analytical framework to carry out our case-study. Firstly 'the number of political parties, factions, and groups that effectively articulate different demands in electoral politics influences openness'[82], while the second one refers to the independence enjoyed by the legislature in a given political system, which motivates them to develop policies without any intervention from the executive. Third factor points out to the intensity of links and intermediation mechanisms between interest-groups, organizations and the legislative, while the fourth factor considers the existence of mechanisms that aggregates demands, where 'effective policy coalitions' are build[83].

When these four variables are in accordance with the expectations, namely (1) there are multiple number of actors in the political structure that can make the intrusion of various demands more easy, (2)

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[80] Kitschelt (n 61). p. 62
[81] DS Meyer and DC Minkoff, 'Conceptualizing Political Opportunity' (2004) 82 Social Forces 1457 <https://academic.oup.com/sf/article-lookup/doi/10.1353/sof.2004.0082> accessed 11 July 2023.
[82] Kitschelt (n 61). p.63
[83] ibid.

courts are independent from the intervention of the executive, (3) intermediation mechanisms between right claimants and political actors exists to pave the way for ascension of their rights and lastly (4) the existence of effective policy coalitions and recording of the demands are guaranteed in those coalitions to make coherent policy changes, it would not be wrong to make the assumption that the relevant POS is open for a social change. However, it must also be kept in mind that, the opposite situation (closedness of POS), does not have to lead the opposite results (no possibility for a social change). According to Anderson[84], shifts in political configuration, may it be getting more closed, might also affect the mobilization intensity of social movements and direct them to enhance their activities more in counter-hegemonic ways.

A thorough analysis of the openness of Turkish political opportunity structure will be made based on these four criteria using the activity reports of the Turkish Grand National Assembly Human Rights Commission and its interaction with the stakeholders. What makes this commission (that is composed of 26 members of the parliament) important for our study is its function to act as an initial channel of access to legislative power by the human rights organizations, as well as individuals, who are given the right to submit individual complaints by law. The commission is a trusted organ to identify the amendments that needs to be made in order to harmonize the international agreements in the field of human rights that Turkey is a contracting party with the national law and propose legal regulations for this purpose[85]. In addition to that, examining the applications submitted by individuals regarding alleged violations of human rights and forward them to the relevant authorities when deemed necessary[86], shows that it is the most relevant body that would accede demands to the parliament and create an initiation of a legal regulation and social change accordingly.

5.2.3 Critiques on Political Opportunity Structures

Nevertheless, there are credible critiques on the opportunity structures concept, which needs to be elucidated. Criticism on the account of Kitschelt's concept of political opportunity structures, based on its relatively inductive nature rather than a hypothesis testing framework, stands out in the literature

[84] Lisa Vanhala, 'Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK: The Paradox of Legal Mobilization by the UK Environmental Movement' (2012) 46 Law & Society Review 523 <https://onlinelibrary.wiley.com/doi/10.1111/j.1540-5893.2012.00505.x> accessed 11 July 2023.
[85] Law number 3686 on Commission on Human Rights Inquiry, Article 4(4).
[86] ibid. Article 4(5)

that is worth mentioning[87]. When Kitschelt first employed the concept of political opportunity structures, he picked four cases to illuminate the crucial role of openness/closeness and weakness/strongness of the political systems. For Rootes (1999), cases appear to be fitting for the cause of contouring the categories and 'post-hoc attempts to put structural boxes around the suitably simplified'[88] four cases, which damages the universal applicability of categories independent of the Kitschelt's empirical study. That might have repercussions for our study as well, which takes an offbeat case in terms of discussing a systemic discriminatory practice of courts, rather than a 'new social movement' like anti-nuclear power movements, in an unordinary setting of authoritarian framework, rather than a democratic environment.

Moreover, within the category of openness or closedness, 'there is much variation in the actual openness among both the closed and opened states'[89], which leads to an omission of the impacts of grey zones in-between such as semi closed, semi opened opportunity structures. Furthermore, there are instances of closures or openings in the structures, contingent on the strategies chosen by the social movement actors for Rootes, which is also not addressed in Kitschelt's account. According to him, reason for that is the 'very loose and catholic way in which structure has been used', which caused 'failing to discriminate between more or less enduring structural conditions, on the one hand, and contingently or conjuncturally variable aspects of political systems and situations, on the other'[90].

Therefore, when the Turkish political and legal structures are addressed in this paper, the reference to the word won't be solely reflective of the formal institutions as it would be from a political scientist approach. But instead, a temporal, conjunctural, and context specific account of structures, as well as their changing openness or closedness degrees, contingent on many factors such as the choice of strategy, the political stance and image of the right claimants, existence of window of opportunities and international political context will also be included. Example regarding the case of two Gulen Movement affiliated mothers, that is given previously and their victimhood creating a social resonance that caused to open the access to political opportunity structures is a noteworthy incident displaying the fluidity of the term openness at this stage. Especially in the Gulten Sayın case, where the mother Gulten Sayın was

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[87] Christopher Rootes, 'Political Opportunity Structures - Promise, Problems and Prospects'. La Lettre de la Maison Française d'Oxford, 1999, 10, pp.71-93 <https://hal.science/hal-02553717v1/file/article5-p71-93.pdf> accessed 11 July 2023.
[88] ibid. p.77
[89] ibid. p. 78
[90] ibid. p. 80

imprisoned due to conviction of links with the Gulen movement while her son was suffering from a bone cancer, a new legislative regulation was adopted due to a momental openness of the POS.

Another very important criticism about the authors of POS, which will lead us to our next section, is tendency that show subsuming the position of law into the political systems[91]. In other words, law is perceived as an intrinsic instrument of political systems, instead of its treatment as a separate variable. To eliminate this flaw, Hilson concentrates on court-based litigation separately when referring to legal strategy taking place within legal opportunity structures (LOS hereinafter). This paper will adopt the same approach of isolating LOS from the POS in a similar vein and focus on the availability and existence of LOS separately.

5.3 Legal Opportunity Structures

Availability of opportunity structures in legal sphere corresponds to courts or quasi-judicial mechanisms that are open or accessible to raise legal claims. At this stage, there is a variety in the availability of monitoring mechanisms, which is not only limited to the national sphere. That is why we will check in three levels: national, regional, and international, the availability of legal structures that are potentially able to bring prospective success. While checking the opportunity prospective of each legal structure, whether it be court, quasi-judicial or quasi-political institutions (like Ombudsman Institution, National Human Rights Institution) or available regional and international mechanisms that are open for submitting individual complaints, 'the relevant independence and authority of the judiciary'[92] will be of an immense importance. Even though Kitschelt was criticized for considering this element under the political capacity and subordinating the role of judiciary under political structures, we will still be using this crucial element to assess the possible outcome of a judicial activism that would take place under national, regional and international legal opportunity structures.

In addition to the independence of the courts, viewing structural and contingent features of legal structures which Hilson proposes in his article will also help to define the opportuness of the relevant structures in bringing social change. He defines structural features as 'features relating to access to justice such as laws on standing and the availability of state legal funding'[93], while contingent features

[91] Hilson (n 64).
[92] Kitschelt (n 61).
[93] Hilson (n 64). p.243

correspond to the judicial receptivity and willingness, which will also be considered in relation with the element of independence of the judiciary from the executive.

At this point, the corresponding laws on standing in Turkish legal framework, providing protection to mother that is in conflict with law and having children under 6 years of age do exist[94], as it has already been touched upon in the previous part of the thesis. Nevertheless, independence of the Turkish judiciary, especially due to significant structural shortcomings in the selection of the high ranked judges, has been criticized by ICJ[95] severely, as ‘the appointment of all members of the Council is, in one way or another, presently controlled by the government’[96]. As the constitutional amendment in year 2017, which installed the presidential system, brought immense powers to the President of the Turkish Republic regarding his/her authority to shape the judiciary (such as appointing four members of the Council of Judges and Prosecutors, which is composed of thirteen members in total and remaining to be appointed by the qualified majority vote of National Assembly (composed majorly of the President’s party and coalition members)), standards on the independence of judiciary[97] from the intervention of the executive become highly challenging to maintain. This has an undeniable effect on the willingness of the judicial personnel to be receptive (or not) about the sensitive issues (perceived by the government officials), which also includes the issue of mothers having children under six years of age convicted of terrorism offences.

Considering the fact that an unofficial reward and punishment system has been introduced in the judiciary since the failed coup-attempt in Turkey and it has been used as an effective tool by the executive to intervene in decisions, willingness of the judges became immensely biased, regarding cases relating

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[94] There is both national and international legislative protection mechanisms. The most relevant regulations for our case study are national Law Number 5275, Imprisonment and Security Measures, Article 16/4, Child Protection Law (providing strong measures to restrict recourse to custodial measures) and also Turkish Constitution (Art. 90, which gives precedence to the international agreements like CRC over the national laws and Art. 41 of the Constitution by specifically referring to the protection measures that Turkey is obliged ‘to ensure the peace and welfare of the family, especially the protection of the mother and children’. White & Case LLP ‘TURKEY: Access to Justice for Children’ (10 February 2015) <https://archive.crin.org/en/library/publications/turkey-access-justice-children.html> accessed 14 July 2023.

[95] International Commission of Jurists (ICJ), ‘Turkey: the Judicial System in Peril’ (2 June 2016) <https://www.refworld.org/docid/57ee8e674.html> accessed 14 July 2023.

[96] HRA, ‘ICJ-IHOP Briefing Paper on Turkey’s Judicial Reform Strategy and Judicial Independence – HRA’ (2019) <https://ihd.org.tr/en/icj-ihop-briefing-paper-on-turkeys-judicial-reform-strategy-and-judicial-independence/> accessed 14 July 2023.

[97] The mentioned standards are to be found in several statutes, such as European Charter on the Statute for Judges, which foresees a separate authority for the judiciary, in terms of its decisions being completely independent from the executive and legislative powers regarding ‘selection, recruitment, appointment, career progress or termination of office of a judge’. Or the other international standards envisaging a selection system of judges, where the peers (other judges) get to select high council members. Ibid (no 95). p. 3

with the Gulen Movement and other perceived oppositional figures. While the judicial personnel, whose actions fall in favor of the ruling party’s opinion are promoted to higher positions in the Ministry of Justice (such as to the office of the deputy minister of judiciary[98]), judges, who refuse to turn political and deny to act in accordance with a guidance, have either been dismissed or transferred from their jobs to another city in Turkey[99] or investigated[100]. Consequently, judges incline towards adjudicating mothers with the least favorite verdicts, who are perceived by the ruling elite as security threat that needs to be eradicated. That way, they can protect themselves being the target of dismissals or transfers issued by the High Council of Judges[101] that act as a rubber stamp body, and might even be rewarded for their sided attitude.

5.4 Beyond the Opportunity Structures, What to Look for?

Having defined the core contextual elements to consult, without mitigating the significant weight of the opportunity structures, this study adopts the approach presented by both Scheingold (1974) and McCann (1994), ‘to broaden the focus beyond the "direct" causes and effects of formal legal action’[102]. In other words, structural opportunities existent in a defined political and judicial system will not be our only point of reference when assessing prospective success and failure. An additional point to make here

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[98] One of the most recent examples of this rewarding system is the appointment of Akın Gürlek to the deputy minister position in June 2023. He was the President of the 14th High Criminal Court in Istanbul, which is known for its controversial verdicts regarding imprisonment of leading politicians from oppositional parties (cases of Selahattin Demirtas, Canan Kaftancioglu) and dissident journalists (cases of Atilla Tas, Emin Colasan). More importantly, the new deputy minister has drawn public criticism the most when it refused to implement the Constitutional Court's decision on CHP Deputy Enis Berberoğlu, which was both very marginal and an act of winning the ruling benches approval. TR724 ‘Erdogan's 'tips' curiosity | #LIVE in the Media Today’ (June 22, 2023) <https://www.youtube.com/watch?v=8Cw_zkeLZ0E&t=11s> accessed 23 June 2023

[99] Arbitrary transfer of judges and prosecutors has become the new norm after the coup attempt in 2016 in Turkish political appointment system. The decisions held on 9 May 2017 and 3 July 2017, by the Council of Judges and Prosecutors (CJP) has led to transfer of 1,815 judges and prosecutors in less than two months, while on 25 July 2018, this number raised to 3,320 judges and prosecutors. ‘By 31 May 2019, the CJP transferred 3,722 judges and prosecutors’. Ibid (no 95) p. 7 Commission Staff Working Document ‘Türkiye 2022 Report’ (2022) European Commission <https://www.ab.gov.tr/siteimages/resimler/Türkiye%20Report%202022%20(1)(2).pdf> accessed 23 June 2023 p. 25

[100] For instance, court of appeals in Ankara was directly targeted by the President himself through public criticization due to its decision to acquit a former general, who was accused of participating in the coup attempt. Later ‘Council of Judges and Prosecutors opened an investigation into the acquittal decision, suspending the three judges who ruled for acquittal from their posts’. United States Department of State, '2020 Country Reports on Human Rights Practices: Turkey' <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/turkey/> accessed 14 July 2023.

[101] The Council of Judges and Prosecutors has decided to dismiss 4360 judges or prosecutors with 20 decisions taken at different times since 16 July 2016, which have been published in the Official Gazette with the names and surnames of the officials. ‘Darbe Sonrası Türkiye’de Hakim ve Savcıların Toplu İhraçları - Turkey Tribunal’ Mass Expulsions of Judges and Prosecutors in Turkey After the Coup (22 April 2022) <https://turkeytribunal.org/tr/haberler/darbe-sonrasi-turkiyede-hakim-ve-savcilarin-toplu-ihraclari/> accessed 14 July 2023.

[102] Vanhala (n 84).

is that, through broadening our focus beyond the direct results of legal action, we aim to broaden the interpretation of success and failure at the same time. The reason for attempting to renegotiate the meaning of success and failure in our case-study is the possibility that ostensible legal successes or failures might turn out to be serving for the opposite cause. Vanhala, in his paper gave the example losses in court by the environmental interest groups in UK, which helped them to 'highlight the failings of the existing system and improve future access to justice'. Or court-based success may fail to achieve the goal through lack of implementation or other means of undesired implementation of solutions.

For instance, Turkey receives extensive criticism on the overcapacity of its prisons[103] and according to the data shared by the Directorate of the General of Prisons and Detention Houses, there are 49,518 plus people or 15.9 percent over capacity[104]. This in return impacts the conditions of detained mothers in prisons, whose child needs to share the same bed with the mother, nutrition provided to be insufficient for the development of the child, as well as absence of toys, paints, notebooks and books suitable for their developmental level[105]. Nevertheless, Turkish state chooses to ameliorate the situation by allocating billions of Turkish liras to construct new prisons[106]. This in return, under the guise of implementing the recommendations regarding correcting the inhumane conditions in Turkish prisons, is a much more deteriorating step in the long term, as it would offer greater possibilities to quash dissidents even more. That is why as Hilson (2002) states, it is important not to isolate POS and LOS as the only determinants of prospective successes[107]. As successes might not actually turn out to be a long-term solution to rights violations. That is why, there must be a cautious and critical eye when assessing the outcome of the judicial mechanisms. In this respect, a thorough understanding of the problem and its roots must also be grasped for achieving long-term solution. The violative practice of incarcerating mothers with their children is not a result of legislative deficiency. But it is based more on the pretext of

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[103] Council of Europe anti-torture Committee's Report on its visit to Turkey in 2019 draws attention to the problem of prison overcrowding and large number of inmates in these prisons having no separate bed. It recommends Turkey, with reminding the previous visit reports, that 'construction of new prisons is not a lasting solution' but a 'coherent strategy' is needed to make sure imprisonment is the last measure to resort. 'Council of Europe Anti-Torture Committee Publishes Two Reports on Turkey - CPT - Www.Coe.Int' (*CPT*) <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-two-reports-on-turkey> accessed 14 July 2023.
[104] SCF, 'Turkish Prisons at 16 Percent Overcapacity: Report' (*Stockholm Center for Freedom*, 5 December 2022) <https://stockholmcf.org/turkish-prisons-at-16-percent-overcapacity-report/> accessed 14 July 2023.
[105] Subcommittee on the Rights of Convicts and Prisoners, 'Diyarbakir Penal Institutions Investigation Report' (2019) p. 7, 13, 'Elazig Penitentiary Institutions Investigation Report' (2019) p. 5, 11, 14 <https://www.tbmm.gov.tr/ihtisaskomisyonlariinsanhaklari-alt-komisyon-hukumlu> accessed 14 July 2023.
[106] According to the Stockholm Center for Freedom 'The ruling Justice and Development Party (AKP) has allocated 8.7 billion liras for the construction of 36 new prisons in the next four years, which will significantly increase Turkey's already high incarceration rate'. SCF, 'Turkish Prisons at 16 Percent Overcapacity' (n 104).
[107] Hilson (n 64). p. 241

vague anti-terrorism legislation, as well as discriminatory attitude of the courts. The framing of the problem is important to specify the remedies that will bring long-term solution. From these vantages, a decision or prospective outcome coming from any mechanism or institution must address the actual problem of discrimination based on charges of terror related offences exercised on mothers. Constructing new prisons or increasing the number of mother-child units in prisons[108], besides improving the conditions of children, and making a huge difference on their developmental abilities, would still not bring a long-term solution to the actual problem of the discriminatory practice yielded through anti-terrorism legislation. Only a right framing of the problem can lead on-target definition of remedies and prevent the reoccurrence of the same problem in future contexts.

6. SUPPORTIVE EXTRALEGAL STRATEGIES

Besides contextual features of the relevant countries that legal strategies are planned to be consulted, the importance of extralegal strategies in fortifying legal struggles are emphasized by the scholars of legal mobilization very frequently. McCann elucidates in his book practical examples of social changes occurred for better, in which legal mobilization was not the only factor that brought the advancement of rights. On the contrary, additional unconventional or conventional annexes of tactics to legal means of right claiming, helped movements to achieve the positive end results. McCann gives the example of wage-equity issue in US, which despite the approval of affirmative-action by the supreme court for remedying discrimination that women face in their jobs, 'a massive publicity campaign' put the issue on the national agenda and alerted leaders that wage equity was ''the working women's issue of the 1980s'''[109]. Vanhala (2012), in a similar vein points out to the significance of parallel use of tactics by social movements that determined to advance their rights. Furthermore, he states that for some cases, litigation may even be a last resort when 'alternative (potential) activities, resources, dynamics and complex motivations' are taken into account[110]. Next section will point out to the importance of adopting multi-faceted advocacy with the lead of legal activism/litigation tactics for bringing social change within an authoritarian context specifically. But before that, other means of mobilization that reinforce litigation will be elucidated shortly, which some of them are already in use regarding imprisoned mothers

[108] Ministry of Justice, 'Turkey' (*United States Department of State*) <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/turkey/> accessed 14 July 2023.
[109] McCann (n 7). p. 512
[110] Vanhala (n 84). p. 529

(particularly social media campaigns to raise social mobility). While doing that their plus value in bringing prospective advancement of rights will be assessed.

6.1 Legal Leveraging

The first extralegal, yet legally bound strategy mentioned by the scholars of legal mobilization studies is using legal mobilization threats or pressure tactics, namely legal leveraging, to achieve the demanded reform from public or private institutions. Those institutions are mostly afraid to lose considerable resources and 'control of decision-making autonomy – whether concerning capital investment, wage policy, externalized costs, or the like – to outside parties such as judges'[111]. Furthermore, normative power of being a right claimant has an undeniable weight. It has the potential to attract the attention of the media which could create a leveraging effect in a way that would result in activating the relevant actors due to fears of losing reputation in the face of publicity. That in return incentivize those actors to make the necessary concessions and further the advancements of rights.

That being said, 'symbolic manifestations of law (by the mobilized groups), as both a source of moral right and threat of potential outside intervention' might be enough without even recourse to litigation in specific situations[112]. 'Dramatizing the abuses', 'embarrassing particular institutional actors' and 'winning favorable media attention' are some of the leveraging tactics, which may or may not necessitate appeal to litigation in later stages[113]. Nevertheless, this tactic requires strong, independent courts, to create the necessary intimidation effect that would cause the respondents/authorities to act in compliance with their obligations or to advance the rights of the right claimants. From this aspect, the leveraging tactics might not create the desired outcome within Turkish context, as the independence of the judiciary has been taken as lacking and problematic from various authorities[114]. It is mainly due to, inter alia, 'manner of appointment of its members and their term of office' being not in accordance with the international standards. The power to select rest with the President and the Parliament instead of their

[111] McCann (n 7). p.514
[112] ibid.
[113] ibid. p. 515
[114] In Commissioners Report on her visit to Turkey in year 2019, it has been stated that due to the new system and constitutional change in 2017, Venice Commission, the Group of States against Corruption (GRECO) and the Parliamentary Assembly are more critical and pessimistic of the oversight function of the judiciary on the executive. Dunja Mijatović, 'Commissioner For Human Rights Of The Council Of Europe', (July 2019) <https://www.coe.int/en/web/commissioner/news-2020/-/asset_publisher/Arb4fRK3o8Cf/content/turkish-authorities-must-restore-judicial-independence-and-stop-targeting-and-silencing-human-rights-defenders> accessed 14 July 2023.

peers among the benches of judges and prosecutors. Lack of 'existence of safeguards against outside pressures and the question whether it presents an appearance of independence'[115] is important to highlight at this point. But more importantly, readiness of the judiciary to conform to executive finger pointing and turn into a political instrument is alarming, which has been mentioned previously in the rewarding and punishment system active in the judiciary currently. Targeting act of Turkish officials, including at the highest level[116] and their its impact has been observed in the immediate launching of investigations and proceedings by the judiciary, just after the smear and defamatory campaigns done by those figures[117]. This constitutes an obstacle to implement the leveraging tactics, which primarily rests on the power of the judiciary to oversight the executive and the decision makers.

6.2 Exposing unjust policies and practices

In her book, Duffy sets examples of strategic litigations on the field of human rights within political atmospheres, where stability and independence of the judiciary is difficult to guarantee. One of the cases that she presents takes the very politically charged issue of land rights of the Palestinians in the occupied territory, where they have no access to 'independent judicial system, in which 'to seek protection and redress for violations by Israel'[118] and a 'systemic discrimination in access to justice'[119] has been experienced by the Palestinians. Courts at this point, give 'security issues' carte blanche, where they left the 'delicate balance' of public security and fundamental rights of the individuals to the Israeli government. It bears a great resemblance to the function of the Turkish courts acting as an apologist of the state policy in imprisoning mothers with their children due to terrorism related offences. Within such a judicial atmosphere, it might be illusionary to aim at erasing the mentioned abhorrent practices of the

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[115] Ibid p. 7

[116] For example, former Interior Minister's labelling of NGOs and human rights defenders as terrorists publicly, without any court decision and 'establishing guilt in disregard of the principle of presumption of innocence' had an undeniable impact on the judiciary as it comes from 'the hierarchical superior of law enforcement forces' according to the Commissioners Report. Ibid p. 36

[117] ECtHR, in its ruling of *Kavala v. Turkey* confirms the causal relation between the defamatory statements of the politicians and launching of proceedings by the judiciary targetting Kavala (who is a philanthropist oppositional figure in Turkey, a specific target of the President) according to the Commissioner Report (Ibid p. 36-37). It quotes the public statements of the President Erdogan about Osman Kavala in its ruling word by word and adds: 'It is also significant that those charges (against Kavala) were brought following the speeches given by the President of the Republic on 21 November and 3 December 2018' .parag. 229. *Kavala v Turkey* (ECHR Application no. 28749/18) <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-199515%22]%7D> accessed 14 July 2023

[118] Helen Duffy, *Strategic Human Rights Litigation, Understanding and Maximising Impact*, (Bloomsbury Publishing, 2018)

[119] ibid p. 626

government through recourse to legal means. As Duffy states 'It may be the case that focus on long-term ambitious goals' might 'led to a sense of litigation achieving nothing'[120]. In other words, due to failure to reach the desired complete eradication of the fallacious government policies immediately of the legal activism, one may think that recourse to legal means is a hollow attempt to vindicate certain rights. But, through litigation, extra legal means of activism and mobilization is achieved by default, especially by means of exposing unjust policies and practices of the relevant states, as well as the relevant discriminatory justice system[121]. This might, in return have repercussions in the regional and international arena, which could create an outside pressure on the governments.

For instance, UN Committee on the Rights of the Child have stressed on the issue of detained mothers. In the list of issues, Turkish state was asked to respond to the Committee with an updated information on the latest issues regarding situation of children in detention centers with their primary caregivers[122]. Furthermore, in its 93rd session, Turkish delegates themselves was questioned[123] on the issue due to the exposure[124] of the situation by various NGOs in their shadow reports submitted to the Committee[125]. This has created a certain pressure and mobilization, whose effects can be observed from

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[120] ibid. p.633
[121] ibid. p.605
[122] Paragraph 12 (d) and (e) emphasizes on expediting the investigation and trial processes in cases involving children, reducing the number of children in pretrial detention and ensuring that the detention of children is used as a last resort. Additionally, paragraph 20 (d) asks for an updated statistical data for the past three years, disaggregated by age, sex, type of offence, ethnic origin, national origin, geographical location and socioeconomic status, on children detained with the adults. Committee on the Rights of the Child *List of issues in relation to the combined fourth and fifth periodic reports of Türkiye* (2022) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&CountryID=179&DocTypeID=18> accessed 14 July 2023
[123] A member of the UN Committee on the Rights of the Child, Velina Todorova asked specifically why the practice of detaining mothers with their children is allowed even though it is forbidden by law to detain mothers having babies younger than 6 months. Benoit Van Keirsblick asked additionally the exact number of children detained with adults in Turkish prisons and the additional information was asked on what is being done for the appropriate education and care programs, physical and social development of infants and children held in prison with their mothers. UN Web TV, 2714th Meeting, 93rd Session, Committee on the Rights of the Child (CRC), (17 May , 2023) <https://media.un.org/en/asset/k1g/k1ga6q8gtp> accessed 14 July 2023
[124] In the concluding observations, the Committee reflects its deep concern that discrimination persists against various groups of children, in which children, whose parents are accused of having links to terrorist organizations constitute a separate unconventional group besides conventional vulnerable groups of LGBTQI, ethnic minorities, children with disabilities. Discrimination causes 'restricted ability to benefit from basic services, including education, health and protection from violence, and to enjoy an adequate standard of living' (p. 4). Committee specifically refers the obligation of Turkey to take specific measure to fight 'against stigmatisation and discrimination of children on the ground of their parent's political or other opinion and provide remedies to these children' (p. 5). Concluding observations on the combined fourth to fifth reports of Türkiye <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FTUR%2FCO%2F4-5&Lang=en> accessed 14 July 2023
[125] For example, IAHRAG report submitted to the UN Committee points out to the extreme situation in Izmir Sakran Prison, which the information was attained through an anonymous testimony that has reported a single ward having 14 women and 16 children in that specific prison. The report also states that the number does not match with the data provided by the

the fast dissemination of the video clips extracted from the session with UN in Twitter, regarding the questioning section about the imprisoned children in Turkey, that achieved thousands of views, comments, and shares[126].

6.3 Documentation, Open Catalogue of Imprisoned Children

In relation with the exposure tactic, at the preparation stage of litigation, Duffy points out to the documentation phase, which is crucial in terms of including 'potentially valuable records of' violation for future purposes[127]. For instance, open catalogue of children behind bars with their mothers prepared by couple of NGOs[128] served the same function of documenting the peak in numbers and the discriminatory practice. The catalogue was later referenced by various media outlets. They also pointed out the reluctance shown by the Ministry of Justice and Directorate General of the Prisons and Rehabilitation Centers in providing the exact numbers and data on the imprisoned children with their primary caregivers, who are supposed to give disaggregated annual data regarding inmates. Due to the pressure through exposure, Turkish Ministry of Justice had to release a press briefing on the exact number of children with their mothers[129]. The statement also included an assurance that the state is fulfilling its obligations in regard to providing necessary nutrition to infants, educational services, playgrounds and necessary personal following the psychosocial development of the child. In addition to the exposure strategy mentioned in the previous paragraph, the documentation phase of the pre-litigation can be counted as useful by side extralegal tactic which would help to facilitate prospective struggles in court.

Directorate of the Prisons and Rehabilitation Centers in Turkey. (p.10) Civil Society in the Penal System Association (CISST) refers to the compulsory alternative probation measures for women convicted with their children aged 0-6 in its submission to the UN Committee.
<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2528&Lang=en> accessed 14 July 2023.

[126] Some of the social media accounts of certain organizations with high number of followers who shared the video clips are: Imprisoned Babies (*Tutsak Bebekler*) with almost 75 thousand followers, Prison Violations (Cezaevi İhlalleri), with more than 35 thousand followers and the Union of the Platforms for KHKs (which is a platform to raise awareness on the issue of post-coup statutory decrees that dismissed hundreds of thousands of civil servants from their professions due to terror-related offences) (*KHK'lı Platformları Birliği*) with almost 45 thousand followers made the clips reach an audience of more than 60 thousand people. Besides that, couple of other effective media organizations (such as Bold Media with more than 302 thousand followers, who by itself reached 70 thousand viewers of the video clip and Odak Dünyam with 65 thousand followers) caused the issue to be circulated among vast number of twitter users and to be placed in trend topics.

[127] ibid (no 118). p. 617

[128] ibid (no 55, 56)

[129] 'Bazı Basın Yayın Organlarında "3 Bin Çocuk Anneleriyle Cezaevinde" Şeklinde Yayınlanan ve Gerçekleri Yansıtmayan Haberlerle İlgili Basın Açıklaması' *Press Release Concerning the News That Was Published in Some Media Organs as "3 thousand Children in Prison with Their Mothers" That Does Not Reflect the Facts*
<https://cte.adalet.gov.tr/Home/SayfaDetay/basin-aciklamasi09032021045708> accessed 14 July 2023.

6.4 Using Social Media

On top of all the mentioned and further non-exhaustive list of extra-legal strategies that underpins the prospective success that can be achieved through litigation/consulting to legal means, a coverage of the issue in the media organs, especially through social media platforms, at all stages of the struggle is of an immense significance within Turkish context. According to many activists and parliamentarians dealing with the issue of imprisoned mothers in Turkey, social media creates an undeniable pressure on law enforcement officers in all levels (judges, prosecutors, wardens etc.) to uphold the law equally, as their information/identity is disclosed on these platforms in case of a violation[130]. There is a reason behind the use of 'social media', rather than consulting to conventional media coverage. The problem with the current landscape of traditional media outlets in Turkey is the fact that vast majority of them are owned by pro-government businesses, which gives the government indirect control over their agenda and coverage issues[131]. As McCann has stated in his article, such conservative business interests and dominant social groups utilizes the media very effectively 'to stigmatize less powerful people' (2021, p.19). Hence, they assist the government to steamroll the dissent. That is why online news outlets and social media platforms are preferred to raise controversial issues that receive either biased or no coverage from the conventional media outlets in the country. Some authors even suggests that 'social media have generated new communicational practices, providing novel patterns of interaction and forms of expression that stimulate wide civic participation, and hence contribute to new dynamics of social change and public mobilisation'[132]. More importantly, it visibilized the disregarded and voiced the unspoken. In

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[130] In the case of Zekiye Atac (a mother who had an international travel ban due to accusations of having links with the terrorist organization, Gulen Movement and could not accompany her cancer patient child to get a treatment in Germany), Chief Public Prosecutor's Officer in Adana had to issue a press statement due to reactions raised in social media. His personal social media account was exposed, which was later closed by him due to high number of tweets circulated with the tagging of his name.
TR724, "The Chief Prosecutor explained the mother Ataç's guilt: 'He was caught helping the victims; We've been very meticulous!'" (*Tr724*, 7 May 2020) <https://www.tr724.com/bassavcisi-anne-atacin-sucunu-acikladi-magdurlara-yardim-ederken-yakalandi-cok-titiz-davrandik/> accessed 14 July 2023.

[131] Tahiroglu also states that 'eight most popular networks besides the state-controlled TRT and the independent Fox TV and Halk TV, are owned by just five holding companies: Ciner, Doğuş, Demirören, Kalyon, and Hayat Görsel', which has 'strong personal ties with Erdoğan or with the family of his son-in-law, Berat Albayrak' regarding governmental contracts with those companies in different business sectors. M. Tahiroglu 'Snapshot – Media in Turkey: Why It Matters and Challenges Ahead' (*POMED*) <https://pomed.org/publication/snapshot-media-in-turkey-why-it-matters-and-challenges-ahead/> accessed 14 July 2023.

[132] Lázaro M Bacallao-Pino, 'Social Media Mobilisations: Articulating Participatory Processes or Visibilizing Dissent?' (2014) 8 Cyberpsychology: Journal of Psychosocial Research on Cyberspace <https://cyberpsychology.eu/article/view/4319> accessed 11 July 2023.

a highly biased landscape of conventional media as in Turkey, social media and online media outlets acted as the only channel for groups like Gulen movement to attract public attention and disclose the unjust. That is why, they are undeniably important both in terms of possessing power to reach the masses, and disclose the unjust happening, which is not covered in most of the traditional media outlets.

That being said, before passing to the next section, it is important to highlight that as human rights violations derive out of larger contextual problems in social, political, historical levels, it necessitates using multi-faceted tactics to resolve them. Aiming at social change using legal means must be coordinated with various actors, whether it be from advocacy, grassroot organizations, media outlets, international monitoring mechanisms, popular social media users etc. according to Duffy[133]. Extra-legal strategies are to be utilized in that respect, which helps to achieve long-term, implementable success, as it mobilizes multiple actors to collaborate on the same cause, through different veins.

7. IN AN AUTHORITARIAN STATE, WHY LITIGATION SHOULD BE THE MAIN TACTIC? SIMILAR REGIMES AND THE CONCEPT OF AMBIVALENT SUBJECTS

As it has been stated by most of the scholars of legal mobilization studies, leveraging practices, as well as legal mobilization per se, necessitate independent judiciary[134]. Increasing number of networks for transnational support for legal mobilization, as well as monitoring mechanism to raise claims in regional and international level still put domestic courts and their independence at core, since the implementation and enforcement of the decisions takes place in national level. Secondly, the prerequisite to exhaust domestic remedies for raising legal entitlements in regional protection and monitoring mechanisms level, like ECtHR, also enforce the significance of national courts. As Nolan states, vast majority of children rights specific litigation has been taken to the national courts so far, as the actions and violations taking place are bounded by national territories, and through the subsidiary redressing mechanisms, a more fast-paced results can be achieved[135]. Nevertheless, consulting to legal means in authoritarian regimes with the problematic of independence and impartiality of the courts is not a complete illusionary project. On the contrary, it might be the only rational, effective choice for some

[133] ibid (no 118). p. 762
[134] McCann (n 7). p. 517
[135] Aoife Nolan and Ann Skelton, '"Turning the Rights Lens Inwards": The Case for Child Rights-Consistent Strategic Litigation Practice' (2022) 22 Human Rights Law Review ngac026 <https://academic.oup.com/hrlr/article/doi/10.1093/hrlr/ngac026/6758210> accessed 11 July 2023.

groups. Moreover, there might be factors that increase the vulnerability of the power holders and make recourse to legal means an advantageous option to pick. In this section we will elaborate on the reasons for choosing legal means of struggle as the most suitable primary strategy to be adopted, by first explaining the impact of increasing vulnerabilities and later checking successful precedents in similar regimes. Through the end of this section, legal contestation in international arena and its importance in our case will be presented. At the end, an anthropological perspective on the discriminated groups will be given, as it underpins the choice of legal means from another aspect which is highly valuable.

7.1 Moments of Increasing Vulnerabilities and its effect on Legal Means of Right Claiming

An important aspect to consider is the uneven share of power between the elite and the grassroot in enforcing legal meanings. Although interpretative account of law -arising out of inter-subjective aspect-, pave the way for prolificacy in legal meaning, discourses, as well as practices, 'exercise of law's violence to enforce official meanings' is only reserved for the dominant groups to practice[136]. As McCann states: '…legal representatives of those groups with the greatest social, economic, and political power severely delimit the range of acceptable constructions and enforcement of legal meanings' for the purpose of protecting the status quo through cutting off the 'rival claims and visions of other groups'[137]. This might feature recourse to national legal tactics as a disadvantageous and irrational thing to do, especially in an authoritarian context, where the consolidation of power is more intense, that the authority to enforce preferred legal meanings by the elite is higher. But certain factors are known to be increasing the vulnerability of dominant groups and weaken their hold on official rule, which must also be taken into account when assessing the prospective impact of litigation tactics.

McCann pinpoints some of those important factors as 'relative economic volatility or crisis, international military and diplomatic instability or war, rapid internal changes in population demographics or cultural trends, and "emergencies" of all types'[138]. In other words, these factors create window of opportunity for activist groups or individuals who seek to advance their rights to raise their enforcement power. Looking at the current state of Turkish regime, economic crisis, latest earthquake, constant decrease of the ruling party's share in vote -and coalitions that it has to make to survive-, as well

[136] McCann, (no 25) p. 16
[137] ibid, p. 15
[138] ibid, p. 16

as the election period -both presidential election that has passed in May 2023 and local elections that will take place in 2024- can be demonstrated as factors that might lead to an increase in the vulnerability of the ruling clique.

One of the very latest implications, which shows that vulnerability of the elite in Turkish state is aggravating constantly (which puts a question mark on the legitimacy of their rule) is the report released by the Parliamentary Assembly of the Council of Europe (PACE) that addressed the inequal election race experienced by the oppositional parties compared to the incumbent. The report has taken the issue from the aspects of unequal funding and media coverage (especially public broadcasters like TRT[139] significantly favoring the incumbent when it is against the Law N. 2954 on Turkish Radio and Television Cooperation) to the political context allowing crackdown on the main oppositional figures with anti-terrorism purposes. This mobilization in the PACE created an image of elections that was 'free but not fair'[140]. This in return, mobilized also the general demands that Turkish state should implement the judgments of the ECtHR regarding the release of two prominent oppositional figures: Osman Kavala and Selahattin Demirtas, as well as 'recommendations from a lot of bodies of (CoE) organization from the monitoring procedures and from the Venice Commission' as has been stated by the Rapporteur Schwabe[141]. At this stage, it would not be wrong to say that resorting to legal means of action through making use of this momentum achieved in the regional level, concerted with appropriate extralegal strategies, possesses high capacity for initiating the phase of advancement of rights in Turkish context. Even though the raised critiques and issues covered in the report does not specifically address imprisoned

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[139] Law N. 2954 on Turkish Radio and Television Cooperation (TRT) regulates the Turkey's first national public broadcaster's operation, in which the obligation of the cooperation to be independent in terms of avoiding making one-sided, biased broadcasts and not to be an instrument of the interests of a political party, group, interest group, belief or thought has been indicated in its article 5. Turkish Radio and Television Law <https://www.mevzuat.gov.tr/mevzuatmetin/1.5.2954.pdf> accessed 11 July 2023.

[140] 'PACE Urges Turkey to "fulfill Obligations" in Aftermath of "Free but Not Fair" Elections' (*Bianet - Bagimsiz Iletisim Agi*) <https://www.bianet.org/english/politics/280583-pace-urges-turkey-to-fulfill-obligations-in-aftermath-of-free-but-not-fair-elections> accessed 14 July 2023.

[141] The report has come like bombshell and generated torrential reactions from both various privately owned media outlets that are known to be having close relation with the government, as well as prominent politicians from the ruling benches. One common narrative regarding the interpretation of the report was taking it as legitimizing the terrorist organizations in the country and targeting Turkish democracy (NTV gave the news with a headline "Ankara reacts to the PACE's "FETO" (Fethullah Gulen Terrorist Organization) report" while Yenisafak broadcasted it as "Turkey in Target in PACE" and TRT referred to the party spokesperson Omer Celik: "Çelik's reaction to the PACE: We condemn the approval of the report targeting the fight against the putschists").
NTV Article <https://www.ntv.com.tr/turkiye/ankaradan-akpmnin-tepki-ceken-feto-raporuna-tepki,9uQHr23XUU2Zp97in8Dh4Q> accessed 14 July 2023.
Yenisafak Article <https://www.yenisafak.com/gundem/akpmde-turkiye-hedef-alindi-4541482> accessed 14 July 2023.
TRT Article <https://www.trthaber.com/haber/gundem/celikten-akpmye-tepki-darbecilerle-mucadeleyi-hedef-gosteren-raporun-onaylanmasini-kiniyoruz-777528.html> accessed 14 July 2023

mothers, this paper is of the opinion that what is addressed in the report touches on the very core problem of misusing law, weaponizing counter terrorism legislation to quash dissident and enforcement of the rule of one group. Together they constitute a spiral of systemic rights violations, which takes form in various breaches with a common purpose to suppress the dissent.

7.2 Trajectory of Recourse to Legal Means in Similar Regimes

Looking at some examples, where recourse to law has proven its efficacy in social change within most repressive and closed regimes would be enlightening to assess its impact through a careful comparison of similarities with the Turkish context. Hereupon, Dugard's book[142] analyzing one of the most discriminative political systems in the history, namely the Apartheid regime, and elucidating on the use of law within that system by certain groups as an instrument to accede demands would be interesting to contrast. In his foreword, Dugard (1995) illustrates apartheid regime not merely as a 'failed policy' but an evil ideology, which surprisingly did not lack respect for the rules of law, but the lack of respect concerning the concept of the Rule of Law. The Rule of Law emanates from various principles, whose one of the main pillars is equality before the law and non-discrimination according to Venice Commission[143]. Nevertheless, discrimination and repression 'were not practiced outside the law in an arbitrary and unregulated manner' in the apartheid regime. But on the contrary, 'racial injustice was perpetrated in accordance with legal rules, and political repression was administered according to carefully defined legal procedures'[144].

Likewise, Turkish Anti-terrorism Law N. 3713 and specific provisions of the Penal Code (criminalizing terrorism related offences), function analogously through greasing the skids for convicting people on the basis of political motivations rather than relating to specific conducts of persons that can be linked to a potential terrorist offence[145]. In addition to that, Turkish state's use of law without the rule of law can be observed in its derogations from ECHR and ICCPR communicated in the aftermath of the coup attempt in 2016 to the Council of Europe and Secretary-General of the UN. In its derogation from

[142] Richard L. Abel, *Politics by Other Means, Law in the Struggle Against Apartheid, 1980-1994* (Routledge, 1995)
[143] Council of Europe, *Rule of Law*, <https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN#:~:text=It%20includes%20supremacy%20of%20the,regime%20of%20human%20rights%20protection. > accessed 14 July 2023.
[144] ibid (no 142)
[145] Amnesty International, 'Turkey: Weaponizing Counterterrorism. Turkey Exploits Terrorism Financing Assessment to Target Civil Society' (2020) <https://www.amnesty.org/en/wp-content/uploads/2021/07/EUR4442692021ENGLISH.pdf> accessed 14 July 2023

the ECHR (permissible under Article 15), no specific mention of the articles that will be subject to derogation has been given[146], while in its communication to the UN regarding derogations from the ICCPR, a very long list of potential articles that can be derogated was included[147]. In that long list[148], there are non-derogable rights clearly indicated in various general comments of the UN[149]. Both poles asunder strategies (of specifying the articles to be derogated or not specifying it in the case of ECHR) hints an insidious manner to cover the upcoming and ongoing infringements that will be and still is targetting fundamental rights. As the Apartheid's 'superficial adherence to rule by law' fostered 'the aura of legitimacy that 'the law' bestowed on their harsh injustice'[150], the use of possibility to derogate from certain conventions put a validating cloth to the abhorrent practices, including imprisoning mothers with children. In a similar vein, Anti-Terrorism laws are also used both by means of a weapon to oppress the opposition, and a validating book for arbitrary set of acts to be classified as playing by the rule.

However, as it was possible to find some good 'in the interstices of the laws of apartheid' in South Africa, legal rules in Turkey also offer for cracks to infiltrate legal claims. One main crack is the constitutional guarantee for the international agreements that are duly put into effect having the same force of national law (Art. 90). Moreover, there have been decisions of the national courts, stressing on the supremacy of European Convention on Human Rights over domestic laws[151] [152], which strengthens the belief that these guarantees are existent both in the legislation and the case-law, that can utilized within right context, in terms of bringing it to a fruitful opportunity structure, at the right time, concerted with a well-thought-of extralegal strategy.

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[146] Martin Scheinin, 'Turkey's Derogation from the ECHR – What to Expect?' (*EJIL: Talk!*, 27 July 2016) <https://www.ejiltalk.org/turkeys-derogation-from-the-echr-what-to-expect/> accessed 14 July 2023.
[147] Martin Scheinin, 'Turkey's Derogation from Human Rights Treaties – An Update' (*EJIL: Talk!*, 18 August 2016) <https://www.ejiltalk.org/turkeys-derogation-from-human-rights-treaties-an-update/> accessed 14 July 2023.
[148] Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27, as permissible in Article 4 of ICCPR
[149] The most interesting ones are the derogations regarding the right to remedy (Article 2/3) and humane treatment of detainees (Article 10) -which can also be linked to Article 3 of the ECHR regarding prohibition of inhumane and degrading treatment-. Both provisions are clearly mentioned in the General Comment 29 by the Human Rights Committee as constituting 'a treaty obligation inherent in the Covenant as a whole' and non-derogable by contracting state parties. (Paragraph 13, 14 cited in Scheinin, 2016).
[150] Heinz Klug, 'Law Under and After Apartheid: Abel's Sociolegal Analysis' (2000) 25 Law & Social Inquiry 657 <https://www.cambridge.org/core/product/identifier/S0897654600012466/type/journal_article> accessed 11 July 2023.
[151] Dilek Kurban and Elif Kalayc, 'Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform'.
[152] Judgement dated 22 May 1991. E. 1986/1723, K. 1991/933, decision of the 5th Chamber of the Council of State on freedom of expression ruling that 'Article 90 of the Constitution requires the execution of international conventions duly put into effect even where they are in conflict with the constitution'. Ibid (no 152)

It might seem like an improper comparison made between the regimes, as one of them has institutionalized and consolidated discrimination through legislative power (e.g., Population Registration Act in Apartheid regime, which 'classified every South African by race'[153]) and the other still designated by some as a hybrid regime[154] (between authoritarian and flawed democracy). But the methods of curtailment and disenfranchisement of certain groups from their fundamental rights reveal surprising similarities. Outlawing numerous organizations[155], re-establishment of oppositional groups in exile[156], excluding and deporting foreign correspondents[157], control of television and domination of the radio[158], limitations on what the domestic media could publish, banning books and punishing publications[159], as well as prosecuted and jailed opponents for long terms[160] are some repressions forms enlisted by Abel

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[153] 'South Africa - Apartheid, Democracy, Equality | Britannica' <https://www.britannica.com/place/South-Africa/The-unraveling-of-apartheid> accessed 14 July 2023.

[154] EIU Democracy Index 2022. Economist Intelligence <https://www.eiu.com/n/campaigns/democracy-index-2022/> accessed 14 July 2023.

[155] One of the latest tools of counterterrorism generated in Turkey, namely the Law N. 7262 on the Prevention of the Financing of the Proliferation of Weapons of Mass Destruction, whose fabricated ambiguities 'unintendedly' caused many non-profit organizations as well as human rights organizations to be restricted and closed 'under the banner of countering terrorism financing' based on FATF (Financial Action Task Force) recommendation number 8. Ibid (no 145)

[156] *CrossBorder Jurists* (initiated by a few purged Turkish jurists to watch HR violations) established in Cologne, Germany; *Volunteer Jurists* established in Geneva, Switzerland; *European Justice Initiative* (established by the victims of emergency state in Turkey); *Human Rights, Turkey*, established in New York, *Huddled Masses* established in Chicago; *Solidarity with Others* established in Brussels, Belgium; *Peace and Justice* established in Brussels, Belgium; *Advocates of Silenced Turkey (AST)* established in New Jersey, USA are some of the. For instance, "CrossBorder Jurists" in Cologne is an organization with co-chairs Mehmet Bakır Özkan (former judge/prosecutor) and Melike Demir (former investigative judge at the Council of State), both dismissed from their jobs after the coup attempt in 2016. The seven other board members are all dismissed from their jobs in Turkey as well. They publish reports, articles, news, documentaries, as well as informative posts about submitting complaints to human rights courts and monitoring committees <https://www.crossborderjurists.org.> accessed 14 July 2023.

[157] One prominent example is the detention and later deportation of a Greek correspondent/author Evangelos Areteos in August 29, 2022 "for reasons of public order". 'Turkey Deports Greek Journalist, Citing "Public Order"' *Ahval* (30 August 2022) <https://ahvalnews.com/deportation/turkey-deports-greek-journalist-citing-public-order> accessed 14 July 2023.

[158] Under Erdogan's AKP, Turkish state have increased the power of RTÜK, which is 'a state agency regulating, controlling and sanctioning to monitor shows on TV'. Not only that but also 'the production of historical dramas with conservative content that glorifies Turkey's past have flourished via Turkish Radio and Television Corporation (TRT)'. This tendency is showing parallel to the Apartheid regime, where media was a platform to offer government propaganda and its values of ethnic division according to Wassermann (2020, p.454). Jere Hokkanen, 'Political Control of Television in Turkey. Journalism Research News' (2023) <https://journalismresearchnews.org/political-control-of-television-in-turkey/> accessed 14 July 2023.

[159] According to the Turkish Ministry of Education, more than 300,000 books have been removed from Turkish schools and libraries. As of 2019, '29 publishing houses shut down by emergency decree for 'spreading terrorist propaganda''. Alison Flood. 'Turkish government destroys more than 300,000 books', *The Guardian* (August 6, 2019) <https://www.theguardian.com/books/2019/aug/06/turkish-government-destroys-more-than-300000-books> accessed 14 July 2023.

[160] Besides high-profile oppositional figures like Selahattin Demirtas, president of the pro-Kurdish party HDP and paris-born philanthropist and businessman Osman Kavala in jail since 2016, Turkey ranks first all over the world in terms of the number of imprisoned journalists. 'Turkey leads the world in jailed journalists' *The Economist* (Jan 16, 2019) <https://www.economist.com/graphic-detail/2019/01/16/turkey-leads-the-world-in-jailed-journalists?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=17210591673&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-

(1995) observed in Apartheid, which shows parallel to the practices of Turkish state after the attempted coup. That is why, the fact about apartheid regime that 'it was vulnerable to legal contestation' as it used legal institutions 'to construct and administer apartheid' might also be the case for Turkey[161]. Also, as Turkey, whose strategy is based on weaponizing law to target dissidents, is still a contracting party to various regional and international human rights conventions and their additional protocols regarding allowing certain bodies to monitor human rights situation in the country, must render an account of its practices. That is why, the aforementioned unlawful practices are open to legal contestation and moreover can be raised in various occasions to make Turkey respond to the allegations raised in vindication of certain rights.

7.3 Legal Contestation in International Opportunity Structures

The most relevant one for our study is the Committee on the Rights of the Child and the very recent session that took place in Geneva for reviewing Turkey's periodic report. In this session, Turkey has been questioned by various committee members on the detained and imprisoned mothers with their children as it has been previously mentioned. The most striking repercussion of this session that is relevant for our study is the fact that an interesting document called "2023-2028 Türkiye Child Rights Strategy Document and Action Plan"[162] has been published just a month before the session in Geneva. This document has been enormously mentioned in the session by the state party delegates. The reason why it is striking is the fact that while for the last six years no action plan has been taken and the will for such a motive was missing, the mentioned strategy plan has been issued through a circular letter by the president a month before the session in Geneva, which included measures to improve the situation of the penitentiary institutions for children staying with their mothers[163], while the previous strategy plan covering years 2013-2017 referred no such measure. This shows the effectiveness of international legal institutions and their power to further a legal contestation of dictating the obligations of the contracting state parties to act in accordance with the principles of the CRC. Especially in a context where (other

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response.anonymous&gclid=Cj0KCQjwj_ajBhCqARIsAA37s0zwjBDZlcwv_ujkD1SdneURCOkuJobYD9pag0fNJmBPJkPRJz_yyeoaAn1hEALw_wcB&gclsrc=aw.ds/> accessed 14 July 2023.

[161] ibid (no 142), p. 3

[162] Ministry of Family and Social Services <https://www.aile.gov.tr/media/134387/c-ocuk-haklari-strateji-belgesi-ve-eylem-plani-2023-ingilizce.pdf> accessed 14 July 2023.

[163] ibid. p. 80

than social media campaigns and virtual means of opposition[164]), extra parliamentary or parliamentary resistance is not tolerated within the current situation[165], this legal contestation that took place in an international arena circumvented domestic obstacles. As very few other tools have brought social change so far and only for the most extreme cases (as in cases related to mothers having children with terminal ill children) advancing the rights of mainstream incarcerated mothers, through legal means of activating international monitoring mechanisms seems like a potential channel to achieve positive change.

7.4 The Ambivalent Subject Stripped of their Humanity, Legal Tactics for Reclaiming it

A very fruitful concept of ambivalent subjects and creation of the 'undesirables' by the states, constructed by a prominent anthropolog Didier Fassin in his works regarding invisibles of the societies, will be the last part of this section by offering an anthropological perspective on the question of why litigation should be the main tactic. Fassin focuses on incarceration of certain subjects, such as asylum seekers, women in concentration camps (during Nazi period), migrants etc. and the active process of how they have been stripped of their humanity, which in return justified any draconian measure exercised on those subjects by the states in the eye of the people[166]. To make the repression acceptable in the eye of the society, states pursue disqualifying tactics, in which 'performative power of words is particularly effective in attaining this objective'[167]. He gives the example of asylum seekers being mostly designated as 'clandestins' in the media, which connotes a negative representation.

In our case study, imprisoned mothers are referred as to be 'terrorists' due to the alleged links that they have with the Gulen Movement. According to the report of a prominent NGO on the issue: 'The nationwide defamation campaign launched against those deemed "enemies of the state" by the government (which Gulen Movement is taking the lead) and it has systemically depreciated the respect and empathy that individuals might instinctively have towards expectant and current mothers. Thus,

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[164] Even virtual means of spreading information and raising awareness on issues relating to rights violations, as well as uncensored and unbiased media receives their share through facing arrest and prosecution, 'typically charged with defamation, insulting the president, or spreading terrorist propaganda' or disinformation. Human Rights Watch (n 18).
[165] 'Provincial authorities selectively used Covid-19 as a pretext to ban peaceful protests by students, workers, political opposition parties, and women's and lesbian, gay, bisexual and transgender (LGBT) people's rights activists'. ibid.
[166] Didier Fassin, 'Compassion and Repression: The Moral Economy of Immigration Policies in France' (2005) 20 Cultural Anthropology 362, p. 375 <http://doi.wiley.com/10.1525/can.2005.20.3.362> accessed 11 July 2023.
[167] ibid.

many expectant mothers have faced social ostracism in their communities and families'[168]. In that regard, with the contributions of the pro-government media outlets and their performative power in constructing a blurry image of ambivalent subjects of imprisoned mothers, they are systematically stripped of their humanity. This in return necessitated first this group of right claimants to be perceived as humans, who are entitled to certain rights like rest of the members of the society. At this stage, Duffy states that litigation tactics and the cases brought to courts/monitoring mechanisms 'enable others to see victims as individual human beings, to understand and identify with their human story, as well as see them as believers in the rule of law (which may be relevant to generating a sympathetic understanding, influencing international opinion and garnering support)"[169]. In other words, legal means of invoking certain rights has the effect of turning or reinstalling the victim on the basis of humanity in the eye of the society, which is lacking in our case regarding imprisoned mothers. That is why, ambivalent subjects in authoritarian regimes like Turkey, where the preponderant narrative on the stories of the perceived enemies are one-sided and on societal level resonance with the unjust these subjects experience is hard to create due to these biased illustrations; legal means of struggle to ascend certain rights (right to liberty, fair trial, best-interest of the child, non-discriminatory sentencing practice of national courts so on and so forth) is the first and most important strategy to adopt.

8. CAVEATS ON THE THEORETICAL FOUNDATION

One important caveat to mention is the potential that legal mobilization tactics, such as strategic litigation to generate its own counter-movements. McCann gives the popular decision of the Supreme Court, Roe v. Wade, in support of women's right to choose the abortion option, which has provoked a conservative counter movement. He also states that the followed legal tactic undermined alternative tactics that could have brought real social change. At the time of the publishment of his book in 2006, it is not for certain whether McCann anticipated the overturning of the decision by Supreme Court in year 2022 protecting the right of the women to recourse abortion[170]. But it is noteworthy evidence that counter movements generated by legal wins, might in long term, damage the actual cause.

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[168] AST, 'Born and Raised in Prison: Turkey's Captive Children. "A report on Mothers and 780 Children held as political prisoners in Turkey"' (April, 2020) p. 11 <https://silencedturkey.org/born-and-raised-in-prison-turkeys-captive-children> accessed 11 July 2023.

[169] ibid (no 118), p. 609

[170] Adam Liptak, 'In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights' *The New York Times* (24 June 2022) <https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html> accessed 14 July 2023.

Another important caveat is about the relative limitedness of the legal tactics. According to some authors, the lack of enforcement power of the decisions taken by the national, regional, or international courts (Rosenberg, 1991; Handler, 1978; McCann, 1986; Scheingold, 1974 as cited in McCann, 2006) makes legal means of social change a weak strategy to adopt. In relation to that, McCann points out to the reoccurrence of injustices happening in administrative and institutional settings even in the presence of favorable court decisions. Although McCann underscores the significance of legal tactics helping activist to win voice, influence or position in policy formation or implementation phases, denoted observations are limited to the American experience. Limited literature covering the effect of legal means in the face of a lack of enforcement power in various contexts other than western countries, might have a mitigating effect on the accuracy of our study.

Nevertheless, McCann does point out to the riskiness of legal mobilization attempts in an authoritarian context, by stating: ‘legal mobilization efforts have generated backlashes in virtually every part of the world where social movements have attempted to challenge hierarchical social power and authoritarian state rule’[171]. In other words, any endeavor to rectify the unequal power relations in an authoritarian rule, where it relies in the hands of a small group of people or a leader, would be a nonstrategic legal framing, which should be abstained. In its foreword of the book about the role of law in the struggle against apartheid In South Africa, Budlender (1995) states that there would be no possibility of success ‘if the legal attack threatened the very foundations of the system. A technically valid attack on the legality of the racial discrimination per se, or on the constitutional foundations of the state, would have been either rejected by the courts or (if upheld) promptly reversed by legislation’[172]. Soft-legal activism, as in the case of Pakistan represented by Hussain[173] and envisaging a long-term struggle of concerted mixture of legal tactics with social media publicity, demonstrations, transnational efforts of advocacy, international legal contestation and documentation of unjust practices must be pursued. With that being said, we return to the starting point that law in view of its inter-subjective and constitutive characteristics and legal tactics constructed on it, are not built-in game changers per se. They rather tend to be acting context-sensitive, which necessitates compensating it with extralegal activism and multifold strategies to unleash its inherent potential to bring social change.

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[171] McCann (no 7), p. 516
[172] Abel (no 142)
[173] Salman Hussain, ‘Breaking Silence: Ambivalent Subjects and the Ethics of Suffering in Pakistan’ (2021). <https://www.academia.edu/62218978/Human_Rights_in_a_State_of_Emergency> accessed 14 July 2023.

9. PROSPECTIVE SUCCESS IN A TURKISH CONTEXT

In this part of the study, an overview will be given on the relevant contextual elements decisive in the prospective success or failure of legal means of struggle (whether it be strategic litigation or individual complaint submission) regarding imprisoned mothers in Turkey. Next, keeping those contextual elements in mind, available POS and LOS in national, regional and international levels, and their potentiality in bringing social change and advancement of the rights of the mothers concerned will be discussed. An intermediary conclusion will be presented on the most suitable opportunity structure, which at the end, will be answering our research question whether legal means of struggle is likely to bring long-term success of advancement in the rights of the imprisoned mothers in Turkey and in which level (national, regional or international) this success seems more probable.

9.1 Decisive Contextual Elements

9.1.1 The Judiciary in Turkey

As it is stated in various parts of this study, there has been a huge crackdown on the judiciary, after the coup attempt in 2016. According to the Freedom House indices, an indication regarding independence of the judiciary in Turkey is very low (1/4), as one of the prominent reasons presented on the website related with the fact that 'more than 4,200 judges and prosecutors have been removed since 2016 and replaced with government loyalist'[174]. This in return created a tendency among the judicial personal to act in accordance with the directives of the executive, especially the guidance made by the high rank officials. Commisioner Report (2021) highlights the increasing partiality in the judicial personal and recognition of this development in the ECtHR case-law[175]. A significant indicator of this close relation is the Kavala v. Turkey case, in which ECtHR pointed out the causal relationship between the public statements of the President Erdogan about Osman Kavala and charges brought against him afterwards[176]. Also, launching of proceedings by the prosecutors in the aftermath of the defamatory targeting of NGOs by the former Interior Minister[177] is another important manifestation of this relation.

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[174] 'Turkey: Freedom in the World 2023 Country Report' (n 6).
[175] ibid (no 114), p. 4
[176] ibid (no 117)
[177] ibid (no 114)

The implicit guidance given to the judiciary is itself problematic in terms of executive intervention jeopardizing the independence of the judiciary. But more alarming is the follow-up procedure endorsed by the executive regarding whether the judicial personal is endorsing the guidance. It is highly discouraging for the remaining judges, who still aspire to be independent. For instance, according to the USSD Report in 2020, court of appeals in Ankara was directly targeted by the President himself through public criticization of the court's decision to acquit a former general, who was accused of participating in the coup attempt[178]. Later, another court reordered the former general's detention again and 'Council of Judges and Prosecutors opened an investigation into the acquittal decision (of the court of appeals in Ankara), suspending the three judges who ruled for acquittal from their posts'[179].

At this stage it is important to mention the significant structural shortcomings regarding the selection of the Council of Judges and Prosecutors. As it was mentioned previously, appointment is under the immense influence of the executive due to new authorities accorded to the President to appoint portion of the members. PACE Report (2020) has also commented on the issue and the composition of the Council of Judges and the Prosecutors, by highlighting the urgent need for a revision, as it constitutes a risk on the separation of powers. On top of all, the unofficial system of reward and punishment[180], which is a system of appointing loyal personal in higher positions as a reward and punishing those through dismissals or investigations launched against those, who depart from submitting to guidance, exacerbated partiality in the mainstream judicial personal.

According to the Commissioner Report, all these shortcomings regarding the independence of the judiciary and its partiality with the government, have an effect on the use of detentions on remand and arbitrariness observed in the loose application of the 'criminal laws to lawful acts'[181]. This in return aggravates the problem of jailing mothers with their children under six years of age (or pregnant women as well), whose lawful acts (such as working in Gulen related organizations like schools, dormitories, bank, hospitals) were taken as criminal acts after the coup attempt. When they are principally protected by both national and international law, the moment they landed in a group of so-called 'terrorists' and enemies of the state, evidentiary standards become questionable, and arresting happens 'without the full due process provided for under law'[182]. It is important to highlight at this stage that the vagueness of anti-

[178] USSD Report ibid (n 100), Section 1D.
[179] Ibid Section 1D
[180] İbid (no 50)
[181] Ibid (no 114) p.4
[182] USSD Report ibid (n 100), Section 1D

terrorism legislation in Turkey had its share in exacerbating the ‘unlawful lawful’ practices of partial courts, through allowing ‘an overly broad interpretation of the term ‘terrorism’’[183]. For instance, the so-called provisions allowed mere expressions that do not incite violence or hatred to be counted as terrorism offences. This in return permitted domestic courts to utilize law as a baton to repress undesirables in the country, through using the enforcement power that it is entitled to interpret.

9.1.2 Post-Coup Era and Right Struggles of Ambivalent Subjects

After the coup attempt in 2016, Turkey has experienced its highest number in people who have been charged on terrorism offences in its history. According to the reports, for the last six years ‘authorities had detained 332,884 and arrested 101,000 individuals … on grounds of their alleged affiliation with the Gulen movement, and 19,252 detainees remain in prisons’[184]. NGOs estimated that at least 8,500 individuals were held in pretrial detention or were imprisoned following conviction for alleged links with the PKK’[185]. Not only ordinary people, but parallel to the ultimate goal of eradicating the ‘parallel state’[186] within state, which was constituting a threat to the political elite, civil servants from military to police personnel, as well as government workers were constituting the majority of this politically charged group of people[187]. Among them, children under 6, incarcerated with their mother accused of affiliation with the movement counted 383 according to the same report[188]. This in return created a new group of socially ostracized and discriminated people, who were accused of plotting a coup on the basis of their affiliation with the Gulen Movement. In many institutional frameworks (prisons, courts, administrative institutions, hospitals etc.) they become subject to discrimination, such that even their children were targeted by the administrative personal of the schools that they attend. This fact has been reiterated by the UN Committee on the Rights of the Child in its session with Turkish delegates. One of the committee members pointed out to the ‘new groups of children being stigmatized and

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[183] Ibid Section E, Political Prisoners and Detainees
[184] Ibid Section E, Political Prisoners and Detainees
[185] Ibid Section D, Arbitrary arrest or detention
[186] It is the mostly used phrase regarding civil servants in the state (especially before the coup attempt), who are alleged to have links with the Gulen movement. It was to delegitimize the group in the eye of the society through the performative power of words coming out of highest ranked persons in the state. Erdogan and the supporters were accusing people linked with the movement in bureaucracy and other governmental sectors as constituting an illegitimate parallel state and trying to take down his legitimate government.
[187] More than 60,000 police and military personnel and more than 4,000 judges and prosecutors were in the detained. USSD, HR Report 2022, Executive Summary.
[188] Ibid, (Section 1C, Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment, and Other Related Abuses)

discriminated on the grounds of their parents' alleged association in the attempted coup'[189], which highlights the reality of children being victimized for the offences that they in no means capable of committing.

An additional hit towards this newly established group was the reluctance of lawyers to take the cases regarding defending individuals accused of ties to the Gulen Movement due to 'fear of government reprisal, including prosecution' as many have 'faced criminal charges themselves'[190]. More than 1600 were arrested on charges of affiliation with the terrorist organization, among which presidents of provincial bar associations are also included[191]. This has magnified the scale of ostracism and discrimination experienced, as many of the accused had difficulties in defending themselves. Since pre-trial detention before any indictment by the prosecutor has become the new norm for 'cases that involved politically motivated terrorism charges'[192], these people needed the legal representation the most. This being prevented increased the magnitude of the victimization.

Nevertheless, draconian measures taken to target a specific group of people, namely the Gulen Movement supporters, also created new vulnerabilities for the ruling elite concerning the legitimacy of their rule. For instance, OHCHR pointed out to the alarming pattern of arresting mothers in 2018, whose number were estimated to be around 600 at that time (the exact number of children is not given but it is at least as much as the number of mothers, since some mothers are imprisoned with their 2 or 3 children at the same time) and reminded Turkey of her obligations to provide adequate conditions 'as close as possible to conditions outside prisons'[193]. Together with the international pressure generated[194] by the NGOs abroad established by people, who fled the country, certain breakages in the legitimacy were achieved through documenting the unjust practices and leading to dissemination of the unlawful practices in the international media. The explicit questioning of the newly generated stigmatized group of children in the UN Session is an important indicator of the mentioned breakages in the legitimacy. Doubts raised

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[189] UN Web TV, 2714th Meeting, 93rd Session, Committee on the Rights of the Child (CRC), (17 May , 2023) Starting from 01:02:00 <https://media.un.org/en/asset/k1g/k1ga6q8gtp> accessed 14 July 2023
[190] USSD, HR Report 2022 (Section 1D)
[191] SCF, 'Turkey Has Prosecuted Some 1,600 Lawyers, Arrested 615 since Failed Coup: Report' (*Stockholm Center for Freedom*, 12 December 2021) <https://stockholmcf.org/turkey-has-prosecuted-some-1600-lawyers-arrested-615-since-failed-coup-report/> accessed 14 July 2023.
[192] Ibid Section 1D
[193] OHCHR, 'Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East' (January-December 2017) p.21-22. <https://www.ohchr.org/sites/default/files/Documents/Countries/TR/2018-03-19_Second_OHCHR_Turkey_Report.pdf> accessed 14 July 2023.
[194] Demonstrations held by the NGOs (Footnote 33), as well as legal assistance provided to the victims by some of the NGOs are some intermediaries in the pressure created within the mentioned context.

on the lawfulness of the regime practices (which is a very restricted competence by the civilians of the country within the national territory), as well as the unfairness of the elections reported by PACE can be counted as some of the other indicators for cracks formed in the perception regarding the legitimacy of the rule of the regime.

Not only outside mobilization led to this refractive perception of legitimacy and the rule of law in Turkey, within the territory of the country, unconventional means of exposing the discriminative attitude of the courts and unjust practices, through utilization of social media and online petition platforms[195] were effective in the creation of this authoritarian portrayal. These unconventional means were pursued to raise legal demands of the Gulen Movement affiliated mothers. There have been cases that this led creating vulnerable points inside, regarding moral stance of the ruling elite in the eye of the people. In some instances, it has even provoked certain backing away from the inhumane practices by judicial and political authorities. Previously mentioned cases of Zekiye Atac and Gulten Sayın[196] are important examples of traversing the stigma using inner vulnerabilities. In the latter case, Gulten Sayın was an imprisoned mother, who has a terminally ill son with bone cancer. The reactions regarding her continued imprisonment when the son, Yusuf Kerim was yearning for his mother, were so high that even a legislative regulation, known as 'Yusuf Kerim Code' regarding the suspension of the execution of the sentence imposed on the female convict due to her child's illness could have been adopted using the momentum achieved, to prevent such victimhood to happen in the future again.

The incident of collecting more than 90 thousand signatures through an online petition campaign for reuniting the mother and the son had an immense contribution to the achieved end result of reparations made at state level, which is the introduction of a new legal regulation that did not discriminate terror related convicts. A change in the willingness of the elites was observable as well, who normally were used to inflame hatred towards the relevant group of mothers and children due to their affiliation with the movement yet choose to be silent and affirmative throughout the new legislation procedure. It became possible through use of unconventional means, which is the social media. It acted as the only channel for groups like Gulen movement to attract public attention in order to disclose the unjust and change the political willingness, which resulted positively for Yusuf Kerim with a state-level change in the policies regarding imprisoned mothers.

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[195] E.g. Change.org

[196] Page 26

9.1.3 Legacy of Children Rights in Turkey

At this stage it is important to highlight an additional reason behind the broad approach adopted in this study, by means of taking the contextual situation into account. Regarding the analysis of prospective success in case of a legal struggle concerning the advancement of rights for the children, who are imprisoned with their mothers, checking the legacy of children rights in Turkey have the potential to bring accurate assessments. As it has been previously demonstrated, the post-coup atmosphere creating an enormous group of stigmatized people affiliated with the Gulen Movement, had adverse repercussions on the rights of children, whose parents are allegedly linked with coup plotters. What made this direct association of the violation of the child's right through the parents has a rooted explanation in the legacy of children rights in Turkey and does not simply emanate from the fact that law gave the convicted mother right to keep her child in penitentiary institution until the age of 6. It is related with the specific trajectory in Turkish context that 'Children's rights agendas are firmly intertwined with broader social issues and cannot be divorced from questions of women's rights, minority rights and social welfare in general' (Libal, 2001). In other words, children as a specific group of right claimants who are separately entitled to certain rights were never perceived as such, on the contrary 'recognition of the child as an independent person with agency'[197] stayed unachieved.

As Libal states 'In the case of Turkey, children's rights and the notion of childhood itself are situationally dependent' which has also caused the framework and legislative regulations regarding the protection of the child to be highly scattered[198] and dependent on contextual factors. That is why, the position of the parents in front of law and within the political sphere is decisive in the case of imprisoned children, as there is a weak tradition of concerning the child as a separate right holder. Consequently, for Turkish state, whose preference in the balance between state interests and individual rights have consistently and historically been in favor of the state, 'the perceived threat to sovereignty that would arise if such rights were granted (to a separate group consisted of children) overrides an interest to adhere to international rights norms' like best interest of the child. It is most apparent in the reservations[199] made regarding Articles 17, 29, 30 of the Convention on the Rights of the Child, the most contentious one

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[197] Report by White & Case LLP, ibid (no 94), p17

[198] Kathryn Libal, 'Children's Rights in Turkey' (2001) 3 Human Rights Review 35 <http://link.springer.com/10.1007/s12142-001-1004-8> accessed 11 July 2023.

[199] United Nations Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4#EndDec> accessed 11 July 2023.

being Article 30. The relevant Article concerns the rights of children belonging to ethnic and religious minorities to enjoy their differences in terms of culture, language and religion. Throughout the history of the Republic of Turkey, existence of ethnic Kurdish minority is perceived as a threat to sovereignty and this reservation/restriction made regarding the right of the child to speak his/her mother tongue or practice the specific cultural or religious rituals, demonstrates how intertwined child rights are to broader issues in Turkey regarding the protection of state security and how substantial the interest of the state has been taken compared to the individual rights.

This dependency of children rights in Turkey on broader social issues, as well as rights of other agencies, combined with preference for the state-interest and security over individual rights, is vital in our study to make assumptions on the prospective success that might or might not come from national opportunity structures in the future. Combined with the available opportunity structures in national level, this understanding will be added to the conclusion regarding the best path for bringing advancement of rights concerning imprisoned children with their mothers.

9.2 POS and LOS: National, Regional and International Opportunity Structures

9.2.1 National Opportunity Structures

Within the stages of legal mobilization, first stage concerned the translation phase, where nonlegal grievances, or in more general term 'wrong doings', are translated into legal claims through legal framing of the demands coming from relevant groups. In the case of imprisoned mothers and children, this stage has been initiated through the earliest NGO reports by Journalists and Writers Foundation and Advocates of Silenced Turkey[200]. Both US-based organizations used an open catalogue of children (attaching photos of both the mother and the child) to concretize the issue of stigmatized and marginalized group of imprisoned mothers accused of alleged links with a terrorist organization that aimed to overthrow the elected government and whose humaneness and grievances overveiled by the state under the guise of eradicating terrorism. The open catalogue in return contributed to the translation phase of a marginalized group into rights claimants, by means of creating a counter narrative against the performative words and discourses in the mainstream media in Turkey. Yet, not in each case (and in most of the cases) this group was seen as a legitimate right holder, both due to their affiliation with the 'enemy of the state', namely

[200] ibid (no 55, 56)

the Gulen Movement, and the legacy of the right of the child in Turkish context being far away from acknowledging children as a separate group of legitimate right holders. In this section, we will scan the available opportunity structures and the core variables (openness and willingness of the elite) in these structures within national framework in order to illuminate the second phase of legal mobilization, which is to define the 'overall ''opportunity structure'' within which movements develop'[201]. The question of whether they possess the capacity to overcome these shortcomings and capable of bringing positive legal change will be answered at the end of this section.

Grand National Assembly Human Rights Commission

Within political opportunity structures, Grand National Assembly Human Rights Commission plays an important role in terms of possessing an organic connection with the legislative power through its 26 members from parliament. As previously mentioned, the Commission acts as an initial channel for accessing the lawmaker by the human rights organizations, as well as individuals, who are entitled to the right to submit individual complaints. Related with that, the organ is trusted to make amendments accordingly, which would pave the way for remedying the shortcomings encountered by the people through drafting bill of laws and preparing reports. Nevertheless, no concrete legislative regulation regarding the situation of the imprisoned mothers with their children has been taken so far, except "Yusuf Kerim Code"[202]. Also, the latest law drafts proposed by the commission regarding recommendations on legislative regulations dates back to 2014[203], which means that the Commission has not proposed any regulations after the coup-attempt in 2016 despite the fact that individual complaints submitted to the National Human Rights Institution of Turkey (another national mechanism to monitor the human rights situation in Turkey) tripled from 2017 to 2021[204].

Commission publishes activity report in each legislative year, and the latest one covers the years between 2018-2020 (27th legislative year first cycle report), which includes 14 prison survey reports in its annex[205]. In those reports, various MPs visited various prisons around Turkey and pointed out to the

[201] McCann (n 7), p. 511.
[202] page 14
[203] Grand National Assembly Legislative Reports <https://tbmm.gov.tr/ihtisaskomisyonlariinsanhaklari-yasama-raporlari> accessed 11 July 2023
[204] Statistics On Applications Made To The Human Rights And Equality Institution Of Turkey In The First Quarter Of 2022 <https://www.tihek.gov.tr/kategori/pages/2022-Yili-Ilk-Ceyregi-Basvuru-Verileri> accessed 11 July 2023
[205] Commission Activity Reports in each legislative year. <https://tbmm.gov.tr/ihtisaskomisyonlariinsanhaklari-faaliyet-raporlari> accessed 11 July 2023

inadequate food provided to the children detained with their mothers, as well as lack of separate bed, toys, entertainment places. Most of the reports highlight similar inadequate conditions for children, yet no concrete, legislative step has been taken to address the systematized the issue. The reason for that is the Commission being formed majorly by the ruling party members and the independence that must be enjoyed by the legislature and its commissions lacking for that reason. This is the second factor that designates the openness of any given opportunity structure according to Kitschelt. In this regard, the same example that was given in page 17 can be mentioned once again, in which the provisions foreseeing the postponement of the sentence or probation measures for imprisoned mothers were taken out of the draft of the judicial reform package discussed in the parliament in 2021. The lack of willingness from the ruling benches regarding ameliorating the situation of imprisoned mothers, has its repercussions also in the Commission work, which makes the organ closed one for this specific issue. In addition to that, at the time of drafting this study, another discussion is going on regarding issuing a general pardon by the parliament for convicts sentenced less than 5 years in prison[206]. This is aimed at lightening the burden of overcapacity in prisons. But it precludes convicts found guilty of crimes covered in the anti-terror law, who in most cases receives at least 6 years and 4 months[207] prison sentence. It would not be wrong to say that POS are closed for groups of people who are in conflict with anti-terrorism law in Turkey.

Regarding the third factor for designating whether a national political structure is open to receive demands raised by social groups, which is the intensity of links and intermediation mechanisms between interest-groups, organizations and the legislative, Commission portrays a closed structure in that aspect as well. In the same Commission report (27th legislative year first cycle report), a list of NGOs was given, who has met with the President of Human Rights Commission, Hakan Cavusoglu. The issues that they brought to the attention of the President[208] was also listed in the same report. None of the issues or organizations specifically targeted the situation of the detained mothers in prisons.

Lastly, even though the first factor decisive in openness of the political opportunity structures, which is related with the number of fractions and political parties (whether sufficient enough in number

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[206] "Will there be a general pardon? A statement came from the Minister of Justice Yılmaz Tunç!", *Habertürk (*11.07.2023 <https://www.haberturk.com/mahkumlara-af-cikti-mi-kimleri-kapsayacak-adalet-bakani-yilmaz-tunc-tan-aciklama-geldi-3606181> accessed 11 July 2023

[207] "Situation of those sentenced to 6 years and 4 months in prison from FETÖ", *Memurlar.Net*, (27 March, 2018) <https://www.memurlar.net/haber/659131/feto-den-6-yil-4-ay-hapis-cezasi-alanin-durumu.html> accessed 11 July 2023

[208] 27th Legislative Year First Cycle Commission Activity Report, p 37-51. <https://www.tbmm.gov.tr/Files/Komisyonlar/insanHaklari/docs/2021/faaliyet_raporu_27._donem_1_%20devre.pdf> accessed 11 July 2023

to make an intrusion of any demand easier in the parliament) is trending to be increasing in Turkey[209], the majority of the parliament is comprised of the coalition between the AKP (Erdogan's ruling party) and MHP (nationalist party), named 'People's Alliance Party'. They share a common basis in overturning any reformative attempt to address the systematic violations. That is why, even though the Commission was eager to amend certain regulations to advance the rights of the Gulen Movement affiliated mothers in prison, it would have been overturned in this repressive majority, whose perception of the group is solely based on accusations of overthrowing and relegating the respective lawmakers.

Ombudsman Institution

Specifically created for women's and children's rights issues in 2012, Ombudsman is a responsible monitoring body and institution for receiving complaints of the violations caused by the acts of public administrative bodies. Although it has been established within the framework of EU accession and advancing the rights of the children and women in Turkey, it is not a judicial authority. It can issue recommendations regarding the acts of those administrative bodies, which can only take place after the applicant exhaust administrative remedies[210]. The decisions are advisory in nature and not binding, which makes the institution a mere complaint receiver and not having 'any spontaneous power to intervene in any administrative action' (Karasoy, 2015, p. 56). But it is still crucial, according to Eleftheria Pertzinidou, vice chair of the EU delegation to Turkey, 'because they are the ones who deal with particular cases of maladministration' [211].

Nevertheless, while the vast number of violations and individual complaint submissions concerns cases related to human rights (children rights make up the bulk of it) and freedom of expression, right to assembly and demonstration, no special reports by the institution has been prepared in these areas[212]. On top of that, the institution has only evaluated one case, regarding a request made by an imprisoned mother,

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[209] As new coalitions were made both by the incumbent (AKP) and the main oppositional party (CHP), with other small parties, a total of 16 party representatives are to be present in the parliament for the upcoming legislative period. Buyuk, H, "Turkey's New Parliament: More Parties and More Women", *Balkan Insight,* (May 18, 2023) <https://balkaninsight.com/2023/05/18/turkeys-new-parliament-more-parties-and-more-women/> accessed 11 July 2023

[210] Report by White & Case LLP, ibid (no 94), p. 5

[211] Ayşe Betül Bal, 'Turkish Ombudsman Institution Achieves Much in Short Time' (*Daily Sabah*, 18 November 2019) <https://www.dailysabah.com/turkey/2019/11/18/turkish-ombudsman-institution-achieves-a-lot-in-short-time> accessed 14 July 2023.

[212] ESHID, "*National Human Rights Institutions As A Human Rights Protection Mechanism The Cases Of The Ombudsman And Human Rights And Equality Institution Of Turkey"* 2020 p. 64 <https://www.esithaklar.org/wp-content/uploads/2021/04/ESHID-TIHEK-RAPORU-ENG.pdf> accessed 11 July 2023

who has been in jail with her daughter for three years. They were imprisoned when the child was 3 years old. In Article 65 of the Law No. 5275 on the Execution of Penalties and Security Measures in Turkey, children can stay with their mothers until the age of 6, who are convicted and serving their sentence in prison. The applicant convicted mother requested her daughter to stay with her in the penitentiary institution until the end of her semester term in kindergarten, as the daughter will be turning 7 in the middle of the education year. The mother has written in her petition that the daughter would be psychologically shaken if separated from her after staying together for 3 years and her education life would be interrupted through this sharp change. She also thought that her daughter did not have the mental strength to start school without her mother and demanded that she stayed with her until the end of the 2019-2020 academic year, even if not until the end of the year. She requested her petition to be forwarded to the Ministry of Justice with a recommendation decision by the institution. The request was rejected by the Ombudsperson Celile Özlem Tunçak[213] and was not forwarded to the Ministry of Justice. The Ombudsperson referred to the Law 5278 and ruled that it would be contrary to the best interests of the child for the child to stay in the penitentiary institution. However, the fact that she has been staying there since she was three was not mentioned to be breaching the best-interest of the child.

Overall, it would not be wrong to conclude that the Ombudsman Institution in Turkey is not receptive of the petitions and positive evaluation of the individual complaint submissions made by imprisoned mothers accused of terrorism related offences is missing. From these vantages, Ombudsman Institution is not an advantageous potential structure bring positive change.

Human Rights and Equality Institution of Turkey

Another national institution charged with overseeing the violations of children rights, and more generally human rights, is the National Human Rights Institution of Turkey, which was established in the same year as the Ombudsman Institution, in 2012. The authority spectrum of the institution is wider, and manifold compared to the Ombudsman. It can examine, investigate, and evaluate the violation claims. As a follow up procedure, it can notify the relevant administrative authorities or persons of the results of the NHRI's examination which might consequently lead to an initiation of a legal action. Submission of the claims of violations can be done individually for both of the institutions. Not only

[213] Rejection Decision regarding Application N. 2020/4214. 25.08.2020. <https://kararlar.ombudsman.gov.tr/Arama/Download?url=20200303\86535\Yayin\Karar-2020-4214.pdf&tarih=2020-08-25T17:04:31.065916> accessed 11 July 2023

children but also any person that is cognizant of the ongoing violation, as well as organizations can file the complaints.

Despite all the authority, the figures in the number of applications lodged on the claims of various human rights violations are very low 'considering the country's population and the prevalence of discrimination cases'[214]. For instance, the number of lodged applications were 371 and 70 in 2018 and 2019 respectively[215], which coincide with the era after the coup attempt, when hundreds of thousands of civil servants and government workers are dismissed from their jobs due to affiliation with the Gulen Movement and many were detained under the pretext of combatting terrorism.

On top of all, the institution that is supposed to be overseeing compliance of the administrative authorities or persons actions with the human rights standards has issued not even a single 'critical statement on the executive body with regard to any human rights problem in the country'[216] since it started to work in 2012. Plus, the cooperation of the institution with the standard setting institutions such as the United Nations and the Council of Europe and the affiliated bodies is highly lacking[217]. Instead, it gives prominence to Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation, which is worth mentioning as it illuminates the 'conservative point of view' that is prominent in the Institution. It also explains the observed tendency that it 'moves away from the principle of universality of human rights'[218].

Only one application lodged by a 70-year-old woman regarding her imprisoned son and his wife (with a five years old grandchild also in prison with the mother) was taken by the institution between years 2016-2023[219]. The applicant woman was taking care of the other children of the family aged seven and eight. She requested the release of his son or daughter-in-law on condition of a judicial control, within the scope of the protection of the family, and the child since she was having problems to take care

[214] ibid (no 212) p. 43

[215] Ibid, '337 out of 371 applications lodged before TIHEK in 2018 were dismissed on the ground that they were not justified based on the discrimination grounds stipulated in TIHEK Law and failed to fulfill the conditions of application set out in TIHEK Regulation.' p. 43

[216] Ibid p.52

[217] Ibid p.52

[218] Ibid p. 52

[219] Inadmissible Decision Number 2021/220 <https://www.tihek.gov.tr/public/images/kararlar/49B5AA.pdf> accessed 11 July 2023

of the two children left behind due to her elderliness. It was found inadmissible by the institution since it was out of its scope of mandate.

Overall, the equality institution was seen as an ineffective body in the eyes of the convicts charged on discriminatory terror-related offences. It is observable from the,decline on the number of applications, as well as institution itself admitting and deciding on a lower number of applications year by year. That is why the reliability of the equality institution is plummet[220] and makes it not a suitable/opportune structure to bring advancement of rights concerning imprisoned mothers.

Constitutional Court

Lastly, prospective efficiency of the Constitutional Court to bring advancement of rights regarding imprisoned mothers will be assessed very shortly, since no decision related to the group of imprisoned mothers with children could be found[221]. Although there is a legislative regulation allowing individuals to appeal their cases to the Constitutional Court, after exhausting administrative and judicial remedies[222], after the coup attempt in 2016 'large volume of appeals' regarding massive dismissals from governmental branches slowed down the pace[223]. Two members of the constitutional court were also dismissed and arrested[224] due to alleged affiliation with the movement. One of them, former Constitutional Court judge Alparslan Altan, who was convicted in the aftermath of the coup attempt and still serving an 11-year prison sentence since 2016, has an ECtHR decision on the illegality his pretrial detention[225]. Yet the Turkish courts choose not to implement the decision that was taken in 2019.

Overall, Constitutional Court had found violation in 12 percent of the applications (among total number of 109,799 applications received so far) that has been lodged in it. 30 percent of the cases each year pends at the end of the year to the next, which prolongs the process of redress and remedy even more[226]. Considered with the fact that Constitutional Court has ruled the Gulen Movement as an armed

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[220] Ibid p.43
[221] Within "Constitutional Court Decisions Data Bank" a simple filtering of cases was consulted using four keywords, namely 'mother', 'child' 'imprisonment' and 'terror' and putting a temporal frame between 2016 and 2023. <https://kararlarbilgibankasi.anayasa.gov.tr/Ara?KelimeAra%5B0%5D=Anne&KelimeAra%5B1%5D=çocuk&HerhangiBirKelimeAra%5B0%5D=hapis&BasvuruTarihiBaslangic=15%2F07%2F2016&page=9>
[222] ibid (no 45). p. 183
[223] USSD, HR Report ibid (no 100)
[224] HRW, *"Turkey: Judges, Prosecutors Unfairly Jailed"* (August 5, 2016) <https://www.hrw.org/news/2016/08/05/turkey-judges-prosecutors-unfairly-jailed> accessed 11 July 2023

[225] USSD, HR Report 2020 (Section 1D)
[226] ibid.

terrorist organization and found the actions of the Turkish state legitimate 'against those involved in, and those who actively supported, a coup attempt against the democratically elected government and to use (of) all lawful and proportionate means' targeting this group, it might not be an advantageous venue for the imprisoned mothers to seek a remedy[227]. Even though the court indicated a differential treatment of those who endorsed only the ideology of the movement but did not resort to violence or created policies within the movement and they should not be criminally prosecuted accordingly, responsibility is 'on the person to show that' he or she was not involved in the violent attempt but only worked in Gulen related organizations (like dormitories, schools, hospitals etc.)[228]. This necessitates an immense effort to self-acquittal, as well as a good intention by the domestic courts, who are already willing to adjudicate on the basis of preserving and prioritizing state security over the individual rights[229] (unless there is a shift in the political atmosphere or the case created undeniable moral upper hand that threatens the political elite). Within these circumstances, considered with the impartiality and independence problem of the judiciary in Turkey, it would not be wrong to conclude that using legal means of struggle to bring advancement of rights within national opportunity structures in general would be a hollow attempt.

9.2.2 Regional and International Opportunity Structures

9.2.2.1 ECtHR

Turning to the regional and international opportunity structures, we will start with the European Court of Human Rights and its impact so far regarding first the general response to the vindication of post-coup related violations of rights and second the approach adopted for imprisoned mothers. Following the coup-attempt in 2016, applications from Turkey 'accounted for 36% of the caseload for the ECtHR'[230]. Even though 60 percent of the decisions were not implemented in the last 10 years according to the reports[231], one case, which is Kavala[232] v. Turkey acted as a final straw. Accordingly, as

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[227] UK Government, *Country policy and information note: Gülenist movement*, Turkey, February 2022, p. 20. <https://www.gov.uk/government/publications/turkey-country-policy-and-information-notes/country-policy-and-information-note-gulenist-movement-turkey-february-2022-accessible-version>
[228] Ibid, p. 20
[229] Willingness is due to the strongmen effect in the political arena and the system of reward and punishment, which were mentioned in page 30
[230] UK Report (ibid 227) p. 22
[231] Ibid, p. 22
[232] A philanthropist businessman, also an oppositional figure in Turkey, who is specifically targeted by the President. He is accused of two offences: 'orchestrating and financing nationwide anti-government protests that erupted in 2013' and 'being part of the attempted coup in 2016'. "Osman Kavala: Turkish activist sentenced to life in prison", *BBC News*, (26 April, 2022)
<https://www.bbc.com/news/world-europe-61218241#:~:text=Kavala%20was%20first%20accused%20of,was%20charged%20with%20both%20counts.

the state refused to implement ECtHR decision to release Kavala, an infringement proceeding was initiated against Turkey by the Committee of the Ministers in Council of Europe, which was interpreted as a politically motivated interference with the independence of the judicial proceedings in Turkey by the former foreign minister[233]. For some commentators it is a strong leverage to make Turkey implement court decisions by threatening her to debar from 'its voting rights' as well as taking 'its 72-year membership in the council'[234] away.

The infringement procedure is a good sign that shows EU is willing to implement pressure tactics to make Turkey act in compliance with universal human rights standards, through pressuring her to recognize the ECtHR decisions. Nevertheless, according to the only case that was accessible within the reach of this study, namely Tuba Yazıcıoglu v. Turkey[235] lodged in ECtHR, the court had an effect of creating a backlash and legitimize the practice of imprisoning pregnant women or women with babies in Turkey. Mrs. Yazicioglu was 32 weeks pregnant when she was arrested of having links with the Gulen Movement. She lodged a complaint in Constitutional Court of Turkey and requested interim measures to be adopted claiming prison conditions endangered her life and that of her unborn child on the grounds that she risked giving birth in prison in unsanitary conditions. She referred to the national protection Law no. 5725, Art. 16/4 (postponing the prison sentence for pregnant women and until the 6 months following childbirth). Constitutional Court, the final appeal court in Turkey, rejected her request for interim measures in her pregnancy due to the closeness of the remand prison to the hospital, which facilitated her access to health services in case of a risky situation. The day after she gave birth, she was sent to prison with her newborn. Her sutures due to labor had the risk of constituting health problem due to low hygiene standards of prisons. At this stage, Mrs. Yazicioglu applied to ECtHR for interim measures to be taken by the state, arguing that the conditions of the prison in which she found herself with her newborn child were incompatible with the requirements of Articles 2 and 3 of the European Convention on Human Rights. Nevertheless, Court found the case inadmissible, since her hospitalization was ensured in prison, while she was pregnant, newborn was vaccinated, and regular medical follow-up was ensured. In addition to that, a separate complaint submitted to the Constitutional Court (after the baby borne) was still pending and due to subsidiarity principle, it was declined to be assessed on merits basis.

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[233] "CoE starts infringement proceedings against Turkey over Osman Kavala's imprisonment" *Bianet English* (2 February 2022) Bianet English. <https://bianet.org/english/law/257146-coe-starts-infringement-proceedings-against-turkey-over-osman-kavala-s-imprisonment> accessed 11 July 2023

[234] Jack Sullivan, 'Turkey a Step Closer to Suspension From the Council of Europe' (*FDD*, 4 February 2022) <https://www.fdd.org/analysis/2022/02/04/turkey-closer-suspension-council-of-europe/> accessed 14 July 2023.

[235] Application no: 68385/17

ECtHR, while reasoning the inadmissibility of the application, refers to one case that was ruled in favor of an applicant in Constitutional Court, which was a case similar to the one under consideration. Seher Arslan Köken case (No. 2017/5808 , February 14, 2017), where Court granted an interim measure to the pregnant women in prison due to the crowdedness of the ward that she was staying, as well as one of the inmates having Hepatitis B. Additionally, when the Court made an analysis of the grievance presented by the Mrs. Yazicioglu based on 2 elements: factual allegations and legal arguments, it concluded that the factual elements cannot be translated into legal arguments (and a request for interim measure) due to both the applicant and her newborn child being properly cared for by the authorities, in addition to the non-exhaustion of domestic remedies.

This inadmissibility decision in return was interpreted in the national media as ECtHR, by declining or rejecting the claims of a member of terrorist organization, legitimized the actions taken against Gulenist mothers[236]. It had a negative impact on the future struggle of advancing the rights of these mothers with their children. For instance, the decision was strategically used by the Ministry of Justice delegates in the session with the UN Committee Members on the Rights of the Child. Questions[237] regarding the practice of detaining mothers affiliated with the Movement were answered by the delegates referring the ECtHR decision, Tuba Yazicioglu v. Turkey, (in a way that even ECtHR has found the demands to interim measures inappropriate and rejected the claim of the detained mother and did not negate the practice of incarcerating the mother with the child as against the universal human rights standards). It also had a legitimizing impact on the still ongoing practice of imprisoning mothers who are accused of having links with a terrorist organization. The culture of impunity was in a way deepened through a mere acceptance of the possibility to imprison pregnant women and women having children based on allegations of having links with a movement, as it become unexceptional to see new detained mothers almost every week in the social media.

9.2.2.2 UN Committee on the Rights of the Child

The latest session of the UN Committee on the Rights of the Child with the Turkish delegates, which took place in May, will be enlightening for this study to assess the impact potential to emanate

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[236] 'Son Dakika: FETÖ'cünün Başvurusuna AİHM'den Ret - Son Dakika Milliyet' *ECHR rejected the application of FETO Terrorist Organisation Member* <https://www.milliyet.com.tr/gundem/feto-cunun-basvurusuna-aihm-den-ret-2769087> accessed 11 July 2023.
[237] UN Web TV, ibid (no 189), 02:26:00

from international organization to advance the rights of the imprisoned mothers. As Turkey is a party to the Convention on the Rights of the Child, as well as optional protocol on the communication procedures, it is obliged to present the improvements achieved in national context regarding the rights of the children periodically, as well as respond to the questions raised in the sessions that take place between Turkish delegates and the expert body of committee members. Turkish delegation responded to the questions of the members of the Committee after presenting its periodic report in May 2023. Two sessions took almost six hours, which was spread over two days. At certain moments, the delegation was pressured on the issue of detained mothers through concerns raised by the committee members Velina Todorova and Benoit Van Keirsblick. Both members stressed on the conditions and legality of incarcerated women and children in the second round of questioning (due to disregard of the same questions in the first round). The Committee brought forth the national Law N. 5275, and why this law is not being applied for the specific group of women affiliated with the Gulen Movement[238].

An additional information was requested about the conditions of Turkish prisons, whether they are adequately designed according to the needs of children and their physical, mental, social and psychological development. Even though Turkish delegates portrayed a negligent figure and responded questions with vague replies (such as imprisonment of mothers and pregnant women not constituting an absolute violation of human rights and it is not a desired practice from the side of the Turkish state either), an important development happened a month before the session that is worth mentioning at this stage. As if an informal preparation for the upcoming meeting in Geneva was pursued by the Turkish state, an interesting document called “2023-2028 Türkiye Child Rights Strategy Document and Action Plan” was published a month before the session mentioned in page 32, which included measures to improve the situation of the penitentiary institutions for children staying with their mothers, as well as an emphasis on the last-measure-to-resort feature of detention[239] is added in the document. The booklet of the strategic plan was observable in front of each delegate, which they have made a frequent reference from it throughout the session. The adopted document, even though it does not constitute a legally binding set of rules, is an important step, as it demonstrates that UN possesses a certain weight to influence the practices of Turkish state through its monitoring mechanism, even if it is on the level soft-law measures.

Another important novel and very crucial approach put forward by the Committee was its recognition of a generation of new group of children that are discriminated on the basis of their parents’

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[238] UN Web TV, ibid (no 189), 01:18:00
[239] UK Report (ibid 227) p. 77-80

alleged offences against the security of the state. This in return is a much healthier approach in terms of bringing long-term results, as the legal framing of the problem is more accurate than the ones adopted by previous opportunity structures. For instance, in the ECtHR decision mentioned previously, interim measures were the subject issue of the raised claims, while national opportunity structures were also focusing on the existence of imminent threat situations or irreparable consequences on the specific applications.

Translation of the grievances into legal entitlements by the UN Committee was approach-wise more inclusive of the broad contextual facts and circumstances of the ostracized group, which did not disregard the key phenomenon of the general discriminative attitude of the government authorities towards Gulen Movement affiliates. In exchange of this more scrupulous legal framing of the issue at hand, by means of acknowledging the fact that a certain segment of the society is being exposed to social, administrative, judicial and at times economic[240] ostracism and a massive new group of discriminated people has been formed in the country aftermath of the attempted coup in 2016, a more inclusive and long-term advancement of rights can be achieved.

9.2.3 Intermediary Conclusion: Which one seems more promising?

Concerning the deeply rooted legacy of taking children rights in conjunction with other factors (like broader social context, as well as the situation of the parent in front of law), and lack of thinking children as a separate group of right holders, national opportunity structures does not portray an advantageous venue to ascend the rights of jailed children with their mothers. On top of that, the current perception of the stigmatized group by the ruling elite makes it harder for this group to benefit from these opportunity structures, as there is a colossal wall of unwillingness from the side of the national authorities due to fear of reprisals. This also proves that the predominant group to interpret law and enforce specific meanings related with the laws, rests with the political elite in Turkey. From that aspect, the double-

[240] 'Turkish news reports have increasingly addressed the financial obstacles faced by dismissed civil servants, some of whom have been denied access to pensions and social security as well as routine banking and financial services. Purged workers are legally not allowed to work or start new businesses. "Years after coup, purged civil servants feel trapped in Turkey". KHK TV, 'Years after Coup, Purged Civil Servants Feel Trapped in Turkey' (*KHK TV*, 25 February 2020) <https://khktv.org/en/2020/02/25/years-after-coup-purged-civil-servants-feel-trapped-in-turkey/> accessed 14 July 2023.

edged sword feature of law favors the status quo in national level and an effective legal struggle in that regard cannot be maintained in national level.

As the dream of EU accession become stagnant, and the observable negligence from the Turkish side regarding the high percentage of unimplemented of the ECtHR decisions, it is not wrong to say that EU does not generate an effective pressure on Turkey at the moment to make her comply with her obligations. It is not for certain whether the infringement procedure would upset the balances in the near future. Moreover, an already existing failed case (Tuğba Yazicioglu v. Turkey) raises the concerns that the Court might function to deepen the unjust practice through recognition and acceptation of the possibility that pregnant women and women with children can be prisoned if circumstances are modified accordingly. That is why, within opportunity structures available, ECtHR does not build up the hopes regarding being an instrumental intermediary to bring positive change.

UN on the other hand, despite the fact that it does not correspond to an appropriate legal institution with an enforcement power, constitutes the most suitable option among other opportunity structures, as it does not fail to recognize the 'politicide' taken against a specific group by using all means of the state. This in return, inspires the legal framing and is more capable of bringing an inclusive, long-term positive change. As it was previously mentioned a thorough understanding of the problem and its roots must be grasped for achieving long-term solution, in which violative practice of incarcerating mothers emerges out of discrimination based on charges of terror related offences and group affiliation exercised on them. UN, by means of putting its finger on the actual problem, is on the rightest track to bring long-term positive change in the future.

10. CRITICAL ANALYSIS OF THE ANSWER, QUESTIONS LEFT TO EXPLORE

Even though, UN and the monitoring mechanisms embedded were found to be the most appropriate and fruitful channel to advance the rights of incarcerated women and their children, the exact operationalization of the advancement was not touched, which is big gap in the study. Furthermore, as there was no pending or submitted individual complaint reached to the Committee (and also within the list of cases in the follow-up procedures), the analysis was based on inferences made on the session, which lacks an actual analysis of a concrete case. This might have a mitigating effect on the validity of the conclusion.

Global Campus Europe

A second critique is the lack of thorough analysis on who can make the legal claims on behalf of the mothers and children. The potential actors (NGOs, lawyers, parents or any other actor) could not be elucidated in detail in this study, as there is a lack of organization between stakeholders that are interested on the issue. No pattern of collaboration between lawyers, international and national NGOs, civil society organizations, research institutions could be found, either due to repressiveness of the regime or unachieved rights consciousness within interested groups. As reflected on the national opportunity structures, complaint submissions and applications made on ombudsman and national human rights institution is based on individual, single-handed initiatives. Parallel to this, previously mentioned social media campaigns (and online petitions) targeted single cases and concentrated on achieving individual remedies. However, recourse to legal means of struggle and litigation necessitates a more organized approach and meticulous choice of cases, which bears the potential to bring broader change than a single victory, thorough examination of facts, claims, evidence and existing law, as well as precedents in that specific judicial system, picking of favorable courts so on and so forth[241]. In this study, the absence of analysis of these concrete steps are left to explore in future studies.

An additional and last important limitation to the study was to access case law in domestic, as well as international courts. Regarding domestic courts the minutes of the hearings (regarding civil and administrative cases) are closed to the public and can only be accessed with the permission of the judge, while for the criminal cases 'unless otherwise provided, procedural actions in the investigation phase must be confidential' according to the Turkish Criminal Procedure Law, Article 157. Plus, cases regarding children are also kept confidential and not publicized on both HUDOC database (includes ECtHR decisions) and individual communications between the victim and UN Committee. That is why, no concrete assessment of the actual case law could be presented, which caused assessments to be based on rather contextual and discoursive analysis of the Turkish political and social contexts. This is not a desired methodology for a case study whose interest of knowledge is to assess prospective success and failure of legal means of struggle, as no precedent in front of an actual judicial organ could be referenced on the issue of imprisoned mothers with their children.

11. CONCLUSION

[241] CRIN, *Realising Rights?,* 2018 <https://archive.crin.org/en/library/publications/realising-rights-un-convention-rights-child-court.html> accessed 14 July 2023.

The mentioned extralegal strategies, social media campaigns, documenting the practices for future legal struggles, exposing the unjust through NGO reports are indispensable for the litigation strategies, as they help the undesirable group to achieve certain visibleness. This is required for the group of imprisoned mothers, who are stereotyped as belonging to a group aided and abetted terroristic actions and their identity has been blurred by the performative words and discourses of the mainstream media. Making them visible as fleshed human beings at first will, assist their struggle to become a right claimant in later stages. That is only achievable through legal means of struggle that is transferred into an opportunity structure in the international arena, where the power to enforce legal meanings to certain protection mechanisms is not consolidated in few hands.

The legal contestation that took place in the 93rd session of the UN Committee with the Turkish delegates, where the effectiveness of monitoring mechanism (through questioning of the improvements and shortcomings in Geneva) proved to be a more potent structure for bringing positive social change in terms of advancement of rights. The soft-law measure adopted a month before the session took place in Geneva is one indicator of the fact. But more importantly, a more inclusive and right legal framing of the grievances, by the members of the Committee through taking the multilayered ostracism and discrimination experienced by the Gulen Movement affiliates into account is capable of bringing a rooted, overarching solution in the long-term.

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