

# Struggle for the Constitutional Court of Turkey to Balance Between Individual and Democratic Rights in Times of Political Conflict

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*Received August 17, 2023*

*Accepted February 24, 2024*

*Electronic access March 15, 2024*

Recent debates in the human rights field point out how the country is struggling to balance between individual and democratic rights in times of conflict. This debate is particularly relevant in the context of the on-going political upheavals in the country in the past decades. This article will analyze the role of the Constitutional Court of Turkey (CCT) in upholding the rule of law and democratic values in the country, while – at the same time – balancing individual human rights. Studies in this field most regularly focus on the role of the CCT in upholding democratic values and expanding individual rights. Considerable research has been done on the strength of the Constitutional Court of Turkey and the effect of externally promoted EU reforms in advancing the rule of law in the country. However, more analyses of domestic and international case law is necessary to understand how the courts are dealing with these matters, and articles that focus on these domestic-international analyses of case-law are very scarce. I use the judgments from two domestic cases with different outcomes (the Doğan Case and the Kavala Case), and the comparison between international—in the European Court of Human Rights (ECtHR)—and domestic—in the Constitutional Court of Turkey (CCT)—decisions on the Kavala Case. Contrasting domestic and international case-law is beneficial to understand human rights in Turkey, because it provides a two-fold understanding on how domestic and international courts are adjudicating rights in the middle of these democratic upheavals. I conclude that in cases with high political stakes, the CCT is not remaining totally independent for cases of freedom of expression, and this is the case particularly for the case that has dealt with actions perpetrated by the Erdogan regime.

## Introduction

In the past two decades, the Constitutional Court of Turkey has in occasions acted to advance human rights, marking a transition from the Court's past activism. In spite of this, in times of conflict, the CCT struggles to balance between individual and democratic rights. I utilize "individual rights" both as prescribed in the Constitution of Turkey and European Convention of Human Rights. For "democratic values", I use Ginsburg's definition of "a minimal set of rights to speech, association, and the ability to run for office. . . the rule of law governs administration" (Ginsburg, 2019)<sup>1</sup>. This paper asks the question: how did the Constitutional Court of Turkey balance individual and democratic rights in times of political conflict.

Firstly, an important part for the analysis is the changing political ideologies<sup>2</sup> Namely, the transition from secular center-left Kemalist ideology of the Republican People's Party (CHP) to conservative religious/Islamism of the Justice and Development Party (AKP) majority in the legislative branch, significantly reducing the policy making powers of the Kemalist Republican People's Party (CHP in Turkish). Additionally, with the referendum in 2017, President Erdogan has strengthened the power of the executive branch as well, extending his party's power in government further (Çalışkan, 2018)<sup>3</sup>. As of the most recent

2023 general and presidential elections, the electoral success of the AKP and its leader Erdogan remains a continued trend.

Second, the high Turkish judiciary including the Constitutional Court of Turkey (CCT) has played a historically significant role in the governing of Turkey; and most recently in determining the direction of the country's geopolitical future. The paper proceeds as it follows. Part I will review the literature based on the CCT as a counter-majoritarian institution. Part II will explain the methods used to find and analyze the court cases. Part III will analyze domestic and international cases to tests the hypothesis of the paper.

The CCT was not historically successful in balancing between individual and democratic rights and advancing human rights in most cases. The Court regularly acted to protect the interests and rights of the Kemalists over other groups such as the Kurdish minority or religious conservative political parties. In fact, Özbudun explains that the CCT closed down a total of 24 parties by August 2009 by purposefully misinterpreting "the principle of the national integrity of the state" in "its prohibition of rulings on a number of parties" inducing the Democrat Party in 1961 (Özbudun, 2010)<sup>4</sup>.

The CCT has had an integral role during two instances of political conflict: the Ergenekon trials and the Gezi Park events. The Ergenekon and Sledgehammer trials against a number of re-

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tired high ranking military officials suspected of planning a coup against the government. The Gezi Park events were widespread protests over the government's plans of urban development for the park.

I observe two domestic cases with contrasting outcomes. The identification of these two events, that can be considered critical junctures in light of the political upheavals in the country, allowed me to pinpoint two landmark cases for the study of human rights within the CCT (Mahoney, 2001)<sup>5</sup>. The first case, the case of Çetin Doğan—the Doğan Case—is one of the high-profile cases in the Ergenekon trials. The second case, the Kavala Case, is against a civil rights activist regarding his relation to the Gezi Park events, which were widespread protests over the government's plans of urban development for the park. Although the Kavala Case received a negative decision before the CCT, it received a definitive success before the ECtHR. The ECtHR ruled the applicant's detention unjust under the Convention<sup>6</sup> while the CCT ruled against him<sup>7</sup>.

Upon analyzing the domestic and international cases related to the protection of these rights, this paper concludes that the CCT hasn't been able to remain independent of the Erdogan regime in most cases in this area. Moreover, the contrasting judgements of the CCT and the ECtHR are proof of the divergence of values between Turkey and the EU within the past decade.

## Literature Review

### Court's Independence

Courts all over the world struggle with matters of judicial independence. This paper uses Belge's definition of judicial independence as "the formal legal arrangements established to ensure judicial autonomy, such as the constitutionalization of appointment and removal procedures and arrangements for the tenure security of judges" (Belge, 2006)<sup>8</sup>. While Belge defines the CCT as a powerful institution<sup>9</sup> in a more recent paper, Soyaltin-Collella argues—using existing literature—that due to externally promoted institutional reforms, the Court has lost its independence<sup>8,10</sup>, from other branches of the government and outside influences in the last decades. She explains that these reforms, promoted by the European Union as part of its enlargement policy through extending the rule of law (RoL) to candidate states, allowed the Turkish government to capture the judiciary using methods of resistance (Soyaltin-Collella, 2022)<sup>11,12</sup>.

The EU has regularly used judicial reforms to promote democratization in candidate states in Central and Eastern Europe (Börzel and Risse, 2012; Grabbe, 2006; Vachudova, 2014)<sup>13-15</sup>. The key factor in promoting these reforms was the EU's political conditionality (Schimmelfennig and Sedelmeier, 2004, 2005; Schimmelfennig, Engert, and Knobel, 2003; Sedelmeier, 2012)<sup>16-19</sup>.

Regarding political conditionality, Schimmelfennig and Sedelmeier write: "the desire of most CEECs to join the EU, combined with the high volume and intrusiveness of the rules attached to its membership, have allowed the EU an unprecedented influence on the restructuring of domestic institutions and the entire range of public policies in these countries" (Schimmelfennig and Sedelmeier, 2004)<sup>18</sup>. Although existing literature on these reforms reflects EU sponsored reforms as largely positive, the impact of conditionality on judicial reforms and democratization in Turkey presents a mixed picture. Muftuler-Bac argues—using a qualitative case study—that "backsliding in judicial reforms and rule of law [in Turkey] is due to the interplay of the relative weakness of the EU's political anchor and the relative strength of the domestic struggles facing political elites" (Muftuler-Bac, 2019)<sup>20</sup>.

Soyaltin-Collella outlines three methods of capturing the judiciary through implementing EU sponsored judicial reforms: formal readoption, staff politicization, and intimidation and bribery. Formal readoption allows the incumbents "to revise or remake the EU-led reforms in line with the political interests" while the other two mechanisms allow for them to take further steps to "consolidate patronage networks within the judiciary system and extend their control" (Soyaltin-Collella)<sup>11</sup>. In Turkey, Soyaltin-Collella identifies the constitutional reforms proposed 2010 as an example of formal readoption. A study of the amendments grants her arguments some credit. Nine of the amendments are aimed at restructuring the composition of the CCT. The members of the Court increase from eleven to seventeen. Additionally, the President earns the authority to directly appoint 4 members and indirectly appoint 11 members.

### Judicial Activism

Throughout the relatively short democratic history of Turkey compared to Western European nations, the Constitutional Court of Turkey (CCT) is constantly struggling to balance individual rights with democratic values. In fact, researchers have already questioned the of this court during different periods and analyzed the Court's "unwilling[ness] to protect and expand civil liberties" (Belge, 2006)<sup>8</sup>. A notable example, Ceren Belge, has explained that the Court "used its clout to protect some groups and values while suppressing the demands of others"<sup>8,21</sup>. Using a qualitative analysis of the CCT's judgements from its first establishment in the 1960s to early 2000s, Belge argues that the Court, ruling with Kemalist ideology, had preferred to use its powerful position to support the Republican People's Party's agenda instead of committing fully to the expansion of civil rights.

The current judicial activism<sup>22,23</sup> of the CCT is highly debated by scholars in the field of Judicial Politics. After reviewing and contrasting literature in the field of Judicial Politics and human rights, I identified two different patterns on the evolution

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of CCT's judicial activism in cases of human rights. In the first pattern, which happened one can note success in expanding human rights during the first few years of the AKP government. In the second pattern, there was a clear disregard of human rights by the CCT which demonstrates a decline in human rights cases after the period of 2010.

As the CCT was initially created as a non-majoritarian institution against parties with ideologies similar to the AK Party,<sup>24,8</sup> it didn't explicitly seek to extend the democratic process to historically marginalized groups such as religious conservatives who were regarded as Turkey's political periphery. With the accession of the AKP government however, the Court more actively sought to enhance democracy as that was the agenda of Erdogan's party (O'Connell, 2020). As O'Connell explains, the AKP's populist outlook allowed for the party to create policies favoring the long ignored religious conservatives who formed most of the underrepresented population (O'Connell, 2020)<sup>25</sup>.

### Political Parties and the CCT

The CCT's judicial activism was influenced by exogenous factors such as the influence of political parties. These factors are defined by "exogenous shocks that bring about radical institutional reconfigurations" – as explained by institutionalists (Mahoney and Thelen, 2010)<sup>5</sup>. The first one is the popularity of the Justice and Development Party (AKP)—especially in less urbanized geographies. The second one is the political conflict between the Islamist political factions and the Kemalist "old guard" (O'Connell, 2020)<sup>25</sup>. While investigating external influences to the Court, I observed two critical juncture points in modern Turkish political history that influenced the CCT (Mahoney, 2001)<sup>26</sup>.

O'Connell and Rodrik acknowledge the transition from inclusive and democratic politics of the AKP to exclusionary politics targeted at the "ruling elite"<sup>27,25</sup> as the Party has taken on traditional centers of power such as the military. However, these authors disagree on the warring political factions. Unlike Jamie O'Connell, Dani Rodrik identifies only two distinct political factions dominant in Turkey. While O'Connell separates the Gülenists—who led the attempted coup in 2016—from the AKP, and argues that there is little in common between the liberals and the Kemalist military and judiciary; Rodrik only distinguishes between the religious conservatives (AKP and the Gülenists) and secular Kemalists. Although Rodrik's classification can be more accurate (liberals are ideologically aligned with the Kemalists while the Gülen movement had actually "allied with the AKP until 2013"), it is useful to accept O'Connell's notion for this paper as it more accurately reflects the conflicted power structures in the Ergenekon trials against "the Kemalist military and judiciary", and later between liberals and the Erdogan government in the Gezi Park events (O'Connell, 2020)<sup>25</sup>.

Moreover, O'Connell and Rodrik presuppose that ideology

and the role of the Court in promoting human rights are connected. O'Connell explains the role of the trials as an attempt by the conservative Islamists to "carry out the national will" in line with the populist ideology. Additionally, he acknowledges the act of "rebalancing of political power—through both legitimate and dubious means" in the Ergenekon trials (O'Connell, 2020)<sup>25</sup>.

### Case Law and Judicial Activism

The most remarkable case, the Ergenekon and Sledgehammer trials as instances of "human rights violations" (O'Connell, 2020; Rodrik, 2011)<sup>25,28</sup>. The Ergenekon trials present a unique turning point in both the activism of the Constitutional Court of Turkey and the exclusionary, populist rhetoric of the AKP. Not only was this an instance of the Party seeking to diminish the tutelary power of the military over the government, but the trials also, as Rodrik argues, "discredit[ed] the Turkish judiciary and set back the democratization of Turkish politics" undermining the rule of law in the country (Rodrik, 2001)<sup>28</sup>. This is because the conditions of the trials and the legitimacy of the rulings were impaired by violations to the due process and the use of highly questionable findings by a single newspaper as evidence (Rodrik, 2001)<sup>28</sup>.

Scholarship both in judicial politics and human rights, is keen to denounce the decline in judicial activism while reassuring human rights in Turkey. the CCT has shown conflicted ability to protect democratic and individual rights in the second half, especially after the attempted coup in 2016. This paper will demonstrate empirically how the different phases of judicial activism happened. Particularly focusing on cases that highly demonstrate the lack of human rights protection in line with the two critical junctures above mentioned.

Although it is possible to consider the change in the composition of the Court as a transition from a strict application of the Kemalist ideology to a more pluralistic understanding of democracy, one should also consider the negative implications on the protection of democratic and individual rights, especially within the last decade. Thus, in contrast to the inclusive policies of both the AKP government and the case-law of the CCT in the first decade of the 21st century.

Both O'Connell and Rodrik acknowledge the transition from inclusive and democratic politics of the AKP to exclusionary politics targeted at the "ruling elite"<sup>29,25</sup> as the Party has taken on traditional centers of power such as the military. However, these authors disagree on the warring political factions. Unlike Jamie O'Connell, Dani Rodrik identifies only two distinct political factions dominant in Turkey. While O'Connell separates the Gülenists—who led the attempted coup in 2016—from the AKP, and argues that there is little in common between the liberals and the Kemalist military and judiciary; Rodrik only distinguishes between the religious conservatives (AKP and the Gülenists)

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Moreover, O’Connell and Rodrik presuppose that ideology and the role of the Court in promoting human rights are connected. O’Connell explains the role of the trials as an attempt by the conservative Islamists to “carry out the national will” in line with the populist ideology. Additionally, he acknowledges the act of “rebalancing of political power—through both legitimate and dubious means” in the Ergenekon trials (O’Connell, 2020)<sup>25</sup>.

## The Balance between Individual and Democratic Rights in Times of Conflict

The European Court of Human Rights has constantly dealt with the struggle between individual rights in a democratic society. In times of crises, domestic and international courts are battling to either reaffirm the status quo or change it. After explaining the two antagonistic domestic cases in which the CCT approved individual rights and deterred it, the paper will show how the Kavala case—adjudicated by the European Court of Human Rights—is a great example on how this supranational court unveiled some discrepancies in human rights matters.

One would expect the CCT to react more independently from the government (the AK Party) in times of crises such as the attempted coup d’état of 2016. However, as the empirical studies of this paper will demonstrate, the CCT alternated between protecting individual rights and supporting democratic values in two different domestic judgements. Although in the majority of the Ergenekon cases the CCT decided against the defendants, in the second individual application of Çetin Doğan<sup>30</sup> the CCT decided positively for the defense of individual rights, preferring to protect Doğan’s right to honor over the press’s freedom of expression. The second empirical case demonstrated an opposing view of the CCT. In fact, the Court decided that lack of Kavala’s access to his file and his continued detention were necessary to preserve the safety of the public. Thus, the CCT ruled positively for the individual rights of Çetin Doğan while protecting the interests of the majority in the Kavala Case.

Balancing between individual and democratic rights can mean different things for domestic and international courts. In the context of France, for example, the ECtHR adjudicated that applicants should be allowed to use crucifix—for example—while working, balancing rights according to Art 9 of the European Convention on Human Rights in the Case *Eweida and Others*

*v the United Kingdom* (*Eweida and Others v the United Kingdom*, Application nos. 48420/10, 59842/10, 51671/10 and 36516/10 judgement from the ECtHR). Similarly, in the recent case of *Kavala*, the European Court of Human Rights decided to maintain the individual rights of Kavala because it viewed the “extended detention of a human-rights defender [as] with the ulterior purpose of reducing him to silence” (*Kavala v. Turkey*, ECtHR).

In times of political crises, courts are expected to follow democratic values. That was also the case during previous coup d’états after the creation of the CCT with the exception of the period of military rule in 1980–1983 during which the Court completely seized all activity. In fact, the CCT had comparatively high number of annulments in most periods (Belge, 2006)<sup>8</sup>. But, since 2011 Erdogan has managed to gather majority of the political power through winning three straight national elections by 2011<sup>31</sup> and preserving a majority close to being able to call a constitutional referendum. Especially after the 2016 failed coup by the Gülenists—a political faction in connection to the AKP—Erdogan used powers given by the Emergency decrees<sup>32 33</sup> in the aftermath of the attempted coup to strike back against other traditional establishments and activists from the political left, such as Osman Kavala. In the case of *Kavala v. Turkey*, and other similar cases after 2016, the ECtHR has provided some alternative to these domestic decisions.

While one could foresee that the tendency for the CCT was to provide less protection for individual rights, the responsibilities and pressures for domestic courts differ from those of international courts. Alter explains that “creating systems of rule enforcement clarifies ambiguities, makes international commitments more credible” (Alter, 2018)<sup>34</sup>. International courts are very unlikely to be concerned with the internal political affairs of states. Thus, international courts can provide more independent judgements by “push[ing] back against rent-seeking domestic interests” (Alter, 2018)<sup>34</sup>.

Both domestic and international courts acted differently while contrasting individual and democratic values in Turkey. While the domestic courts did not manage to go against other local interests such as the AKP—hence, the interests of the AKP—the international courts started to do so. The ECtHR did manage to go against domestic interests as it has more political independence than the CCT.

## Methods

This research was conducted as follows. At the theoretical level, I used the concept of “critical juncture” (Mahoney, 2001)<sup>5</sup> to identify major events in Turkey that lead to restriction of fundamental rights, such as “freedom of expression”.

Considering that my research question focuses on “how did the Constitutional Court of Turkey balance individual and democratic rights in times of political conflict”, my inductively built



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hypothesis aimed to test whether there were divergent cases restricting human rights in the light of the current authoritarian turn in the country.

To test my hypothesis on divergent cases, as a first step, I combined the positive outcome of the Dogan decision with a negative outcome for the case of Kavala. The second step of analysis included contrasting one of the domestic decisions to the European Court of Human rights jurisprudence for the same individual – Kavala. Doing so, allowed me to critically assess whether the CCT was effective in promoting human rights, particularly for the issue of freedom of expression, in the past decade<sup>35</sup>, in order to understand the CCT’s position on democratic rights during political conflicts, I also included the first case of Osman Kavala as he was initially detained due to his involvement in the Gezi Park events.<sup>36</sup> As the second step of the research I described above, at the international level, I found the European Court of Human Rights’ (ECtHR) decision for the individual appeal of Kavala against the Turkish Republic. The ECtHR ruled in favor of Kavala, rejecting the CCT’s negative conclusion for the applicant. The contrasts regarding the decision and their reasoning in the Kavala case between the CCT and the ECtHR are important to note. A thorough analysis of the ECtHR’s final decision also serves to emphasize the potential lack of judicial independence in Turkey.

I broadly contrast “landmark” cases using some of the scientific approaches proposed by Hirschl. Considering similar domestic cases: (a) the Dogan and (b) the Kavala case – I questioned the different outcomes, namely – that the outcome of the first case was positive and granted rights to a certain extent to Dogan, and that the outcome of the Kavala case was negative. According to Hirschl, the benefit of analyzing similar cases with different outcomes is to better identify the possible explanation as to why the outcome of the cases is different. In his words:

“Put differently, because the first three possible explanations for the studied phenomenon are held constant across the two cases, possible explanation IV appears to be the most plausible explanation for the variance across cases with respect to the dependent variable. Since the results ”Y” and ”Not Y” cannot be directly attributed to any of the first three possible explanations, explanation IV is the most likely to be the cause of the different outcomes in Case A and Case B with respect to the dependent variable.” (Hirschl, 2005).

The possible explanations for the varied outcome would be as follows (i) violation of procedural rights (ii) balance between individual and democratic rights.

I analyzed both of these cases in detail to identify which pattern (a positive pattern granting rights or a negative pattern restricting rights) was more recurrent at the domestic jurisprudence of the CCT for these 4-5 cases analyzed.<sup>37</sup>

## Relevant Domestic Cases from the Constitutional Court of Turkey

**The Doğan Case** (Çetin Doğan, Application no. 2014/3494, judgement from the CCT)

The case of Çetin Doğan is an important case for this analysis. One of the reasons is that he was a retired with the rank of full general from the Turkish Armed Forces. Thus, he was one of the main suspects in connection to the Sledgehammer operation plans. The Ergenekon and Sledgehammer trials concern the evidence of two connected coup plans named the Ergenekon and Sledgehammer operations. The aim of these plans was initially to install a military junta to the Grand National Assembly of Turkey, overthrowing the AKP government (Rodrik, 2011)<sup>28</sup>. During proceedings of the case,<sup>38</sup> Istanbul 10th High Criminal Court investigated the evidence presented by the Taraf newspaper which “reached more than 5,000 pages of documents related to [Sledgehammer], among which there were documents with wet signatures”, unlike other coup plans released previously. The journalists employed by Taraf also uncovered a manifesto outlining the action by the military junta to “appoint nine judges, including Istanbul Chief Prosecutor. . . to the martial law court. Deputy Attorney General. . . and 8 judges are retiring by the putschists” suggesting additionally an attempt to restrict the independence of the judiciary by military officials (Çetin Doğan, CCT). This case is striking also because most of the documents were only from a single newspaper (Taraf), which is highly relevant to the question of the reliability of this evidence<sup>39,28</sup>. This particular case “concerns the claim [by Doğan] that the right to honor and reputation has been violated due to the news in a newspaper [Taraf]” (Çetin Doğan, CCT). The applicant argues that the “publications in question containing false accusations aimed to humiliate many retired and active-duty soldiers, especially himself, and that their personal rights were attacked” (Çetin Doğan, CCT).

In applications similar to the present application, the Constitutional Court states:

the applicant’s right to honor and dignity, which is protected in the first paragraph of Article 17 of the Constitution, and the freedom of the press guaranteed by the article 28 of the Constitution of the persons who report the subject of the complaint, and in connection with this freedom, the Constitution. Failure to protect the applicant’s right to demand protection of personal reputation without justification or with a justification that does not meet the criteria set forth by the Constitutional Court violates Article 17 of the Constitution (Çetin Doğan, CCT).

The CCT’s decision was based on Article 14 of the Turkish Civil Code which states:

Anyone whose personal rights have been unlawfully attacked may request protection from the judge against the perpetrators. Any attack on personal rights is unlawful unless justified by

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the consent of the person whose personal right is violated, by a superior private or public interest, or by the use of the authority given by the law.<sup>40</sup>

In its final judgement, the CCT examined the influence of the publication on public interest and debate; the social interest and relevancy; the condition concerning the news; the subject and result of the expressions used; the accuracy and reliability of the publication; the target of the news and their reputation; and the weight of the rights of the public as a result of the expressions used. In regard to balancing the conflicting rights between applicant's right to honor and dignity<sup>41</sup>, and the freedom of the press<sup>42</sup>; the Court Favored the rights of the applicant over the newspaper.

Note that the Court prioritized individual rights in detriment of the right of freedom of expression from the newspaper. Although the outcome is positive in terms of protection of individual rights, one needs to be critical while assessing these results. A positive outcome for Doğan in this case does not demonstrate a well-balanced decision, specially while contrasting this case with the other two negative cases mentioned in the Methods Section.<sup>43</sup>

**The Kavala Case** (Osman Kavala, Application no. 2018/1073, judgement from the CCT)

Similar to the political aims of the Ergenekon-Sledgehammer trials, the Gezi Park events presented a potential threat to the religious conservative AKP government. Unlike Ergenekon, the Gezi Park events were a series of legal forms of protesting by the civil society. An analysis from a purely political lens of the AKP might have showed that these were potentially able to disrupt the governing process—similarly to how a workers' strike might be evaluated as by the employers. Whereas the Ergenekon trials were a chance for the AKP to strike back against the military and significantly reduce its authority over the democratic process, the legal backlash against the protesters were a chance for the government to restrict their impacts on the public.

The Gezi Park events in 2013 were a series of protests against government plans of environmental zoning regulations to be made in Gezi Park in Istanbul, Taksim Square. After several videos emerged in social media that showed the use of excessive police force against peaceful protesters, the meetings and demonstration marches intensified from June to July, turning into a nation-wide protest against the government. Later, the police made several arrests and charges were brought up against individuals linked to the protests.

The applicant, Osman Kavala was first detained during the state of emergency—which lasted two years—in the aftermath of the 2016 coup attempt due to his connection with the Gezi Park events. Kavala is a civil right activist and a philanthropist. He served as the founding member, member of the board of directors or a member of the solidarity board in many non-governmental organizations.

This application to the Constitutional Court “concerns the alleged violation of the right to personal liberty and security because the detention measure is unlawful, the access to the investigation file is restricted, and the detention investigations are conducted without being brought before a judge/court” (Osman Kavala, CCT). Kavala claimed that no concrete data had been shown regarding the acts charged against him, that the accusations were abstract, that a warrant was issued for his arrest despite the lack of suspicion of a crime and no evidence justifying it. As a result, the applicant claimed that the right to a fair trial and the right to personal liberty and security were violated (Osman Kavala, CCT).

On the basis of Article 153 of the Criminal Procedure Law, it was decided to restrict the applicant's access to the investigation file. The applicant's objection was rejected. After the applicant was interrogated by the Istanbul 1st Criminal Judgeship of Peace, he was arrested on charges of attempting to abolish the constitutional order and attempting to overthrow the Government of the Republic of Turkey or prevent it from performing its duties. After the applicant's objection to the decision was rejected, he made an individual application on 12/29/2017 (Osman Kavala, CCT). The Constitutional Court based its final decision (for application number 2018/1073) on the article 19 added to the Anti-Terrorism Law<sup>44</sup> Although Kavala argued that the conditions of his detention and trial violated his right to personal liberty, the CCT acknowledged that not all instances had been exhausted, and thus decided not to rule in favor of the applicant. In Kavala Case, unlike the Doğan case, in its reasoning, the CCT states that it chose to protect the public's safety by ruling against Kavala's access to his case file.

In this second negative case, the CCT handed down a negative case, restricting Kavala's individual rights. But note that the CCT's strategy in doing so, prioritized “procedural rights”—namely the exhaustion of domestic remedies—rather the emphasizing both “procedural rights” and “democratic rights” in detriment of Kavala's individual rights.

This case is indeed more relevant for the argument provided in this paper, because we can test if the balance between rights is based on domestic laws or rather in judicial strategies of the court. By analyzing the Kavala case before the European Court of Human Rights, my aim is to understand how the argument of the ECtHR is constructed and to check if there is an inconsistency on the judicial explanation of the two courts.

## International Level

**The ECtHR case: Kavala v. Turkey** (Kavala v. Turkey, Application no. 28749/18, judgement from the ECtHR)

Initially, the ECtHR analyzed the exhaustion of domestic remedies (Kavala v. Turkey, ECtHR). On this regard, “the Court notes that the applicant, who lodged an individual application before the Turkish Constitutional Court, gave that court an op-

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portunity to remedy the alleged violation”. The ECtHR had the task of determining if the CCT’s judgement on “procedural rights” was proportionate for this case.

Note that the ECtHR, then, dismisses the explanation that “procedural rights” would apply in the Kavala Case at the Constitutional Court Level. I argue that the ECtHR’s ruling serves, then, to dismiss the explanation that one of the reasons as to why the CCT is adjudicating in this manner would be because of the lack of exhaustion remedies, for example. The European Court of Human Rights (ECtHR) considered the extent of the political context of both the Gezi Park events and the attempted coup in 2016 in relation to the continued detention of Osman Kavala. It evaluated the effect of Erdogan’s emergency powers on the detention of Kavala. In the context of the political events in Turkey—namely the attempted coup (as explained in the literature review), of which he was suspected to collaborate with—to warrant Kavala’s detention, The applicant had claimed on the alleged violation of Article 18 of the Convention<sup>45</sup>, that “his pre-trial detention and its extension had pursued an ulterior purpose, namely to silence him as an NGO activist and human-rights defender, to dissuade others from engaging in such activities and to paralyse civil society in the country” (Kavala v. Turkey, ECtHR). On this argument, the Court compared the Kavala case to *Merabishvili v. Georgia* and *Navalny v. Russia* over Article 18 (Kavala v. Turkey, p. 215 (Merabishvili v. Georgia, Application no. 72508/13, judgement from ECtHR); Kavala v. Turkey, p. 215 (Navalny v. Russia, Application no. 29580/12, judgement from ECtHR).

Finally, in its final reasoning, the Court decided unanimously that articles Art 5 § 1 (lack of reasonable suspicion that the applicant had committed an offence), and Art 5 § 4 (lack of a speedy judicial review by the Constitutional Court) had been violated for the applicant. In addition, the ECtHR held “unanimously, that there is no need to examine the complaint under Article 5 §§ 1 (c) and 3 of the Convention as to the alleged failure to provide reasons for the applicant’s pre-trial detention”. Moreover, the ECtHR held “by six votes to one, that there has been a violation of Article 18 of the Convention taken in conjunction with Article 5 § 1; and, finally, that “there is no need to examine separately the admissibility or merits of the complaints under Article 5 §§ 3 and 4 (length of pre-trial detention, alleged absence of an effective remedy on account of the lack of access to the investigation file, examination of the appeal against pre-trial detention without a hearing)”. Finally, the ECtHR concluded that “the respondent State [is] required to take every measure to put an end to the applicant’s detention and to secure his immediate release.”<sup>46</sup> The most relevant part of this decision is the understanding that there was a lack of a speedy judicial review by the Constitutional Court, according to Art 5 § 4 of the ECHR. This is crucial because it demonstrates challenges that the applicant has faced before the CCT.

## Conclusion

In this case study, I analyzed two conflicting domestic cases to determine the CCT’s ability to balance individual rights with democratic values in times of conflict during the Erdogan administration. Additionally, I contrasted the CCT’s and the ECtHR’s judgements on the Kavala Case to see the ways in which the CCT and the ECtHR adjudicated rights in times of political conflict—such as the Ergenekon trials and the Gezi Park events. For the Doğan Case, the CCT acted to protect the individual rights of Cetin Doğan over the rights of the majority. Although the CCT protected individual rights—the right of Çetin Doğan to “honor and reputation”—in further examination, one can note that the CCT was restricting freedom of expression, hence also a detriment of democratic values. Contrary to this, the CCT chose to protect the rights of the majority over the individual rights of Kavala. The Court determined that Kavala’s freedom of movement and access to his file would pose a risk to the public.

There are several explanations for this contradiction within the domestic cases. First is that, as Yesil explains, the AKP regime has a history of heavy press censorship, either directly through the government, or through commercial forces since the late 2000s (Yesil, 2014). This would directly explain the outcome of the first domestic Doğan case. Furthermore, laws such as the Press Law—which was approved in the Parliament in 2004—“impose restrictions to ‘protect individuals’ rights and reputation” (Yesil, 2014). The CCT was simply continuing trends established by the Erdogan regime, by not specifically protecting the newspaper’s rights. Thus, it is understandable that the CCT decided in favor of protecting Doğan’s rights instead of pursuing the freedom of press.

Although the domestic cases are contradictory with regard to individual rights, upon further critical examination, they represent the same trend—propensity not to grant human rights which are necessary for the evolvement of the rule of law/democratic values. Both of the cases show that the CCT was unable to remain independent of the Erdogan regime when faced with political pressure. The Doğan Case shows that the CCT continued to rule against the freedom of expression. In the Kavala Case, the Court justifies its decision of refusing procedural rights by making an argument regarding national security. Especially based on the ECtHR ruling on Kavala, the political reasoning behind the Kavala judgement becomes very clear.

From all the analyzed cases, I found that the CCT has not been able to always balance between individual rights and democratic values effectively. It’s beyond the scope of this paper to propitiate a general conclusion on all the factors that lead to the disproportionality while granting individual human rights in the first decade of the Erdogan government. However, there have been arguments in the past regarding the change in the composition of the Constitutional Court and possible causes. Further research in this area requires a study of the external factors on

the CCT in addition to other high courts in the Turkish Republic.

## References

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- 2 Namely, the transition from secular center-left Kemalist ideology of the Republican People’s Party (CHP) to conservative religious/Islamism of the Justice and Development Party (AKP).
- 3 K. Çalıřkan, *New Perspectives on Turkey*, **58**, 5–33.
- 4 E. Özbudun, *Democratization*, **17**, 125–142.
- 5 J. Mahoney and K. Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power*, Cambridge University Press.
- 6 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14.
- 7 I accessed the domestic cases through the CCT’s online database, and I used the ECtHR’s online database to find the international cases.
- 8 C. Belge, *Law Society Review*, **40**, 653–692.
- 9 Additionally, Belge emphasizes the importance of the CCT as a counter-majoritarian tool for the Republican People’s Party during its founding. This is important to note as in order to act as a counter majoritarian institution, the CCT needs to be independent of the government.
- 10 There are several definitions for “judicial independence”. For this paper, I use Belge’s definition of it as “the formal legal arrangements established to ensure judicial autonomy, such as the constitutionalization of appointment and removal procedures and arrangements for the tenure security of judges” (Belge, 2006).
- 11 D. Soyaltin-Colella, *Southeast European and Black Sea Studies*, **22**, 441–462.
- 12 Soyaltin-Colella defines these domestic “strategies of resistance” which “remak[es], distort[s], and when necessary, revers[es] EU-led reforms” as “formal readoption, staff politicization, intimidation & bribery” (Soyaltin-Colella, 2022).
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- 19 U. Sedelmeier, *The Oxford Handbook of the European Union*, Oxford University Press, p. 0.
- 20 M. Müftüler-Baç, *Asia Europe Journal*, **14**, 61–77.
- 21 Rather than the current composition of the CCT, this statement is referring to the CCT that was dominated by Kemalist ideology; this would place the observation prior to the change in the composition to religious conservative during 2010s. The author defines this trend as “selective activism”, an instance when “courts’ implicit alliances shape the values and groups they protect” (Belge, 2006).
- 22 Although there are many different interpretations of this term in the academia, this paper uses the definition given by Smithey and Ishiyama that elaborate on Ganon (1982) explaining the “several factors included in the concept of judicial activism, including (1) Majoritarianism—the degree to which policies adopted through democratic processes are judicially negated; (2) Interpretive Stability—the degree to which earlier court decisions, doctrines, or interpretations are altered; (3) Interpretive Fidelity—the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used; (4) Substance-Democratic Process distinction—the degree to which judicial decisions make substantive policy rather than affect the preservation of the democratic process; and (5) Specificity Policy—the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals” (Smithey & Ishiyama, 2002).
- 23 S. Smithey and J. Ishiyama, *Law Society Review*, **36**, 719–742.
- 24 This is because “Kemalist groups depended on non-majoritarian institutions to preserve their political power” as those groups were never as popular as parties such as the Democrat Party (DP) which was center-right and also religious conservative (Belge, 2006).
- 25 J. O’Connell, *Human Rights in a Time of Populism*, Cambridge University Press, 1st edn, p. 100–129.
- 26 J. Mahoney, *Studies in Comparative International Development*, **36**, 111–141.
- 27 This is because “Kemalist groups depended on non-majoritarian institutions to preserve their political power” as those groups were never as popular as parties such as the Democrat Party (DP) which was center-right and also religious conservative (Belge, 2006).
- 28 D. Rodrik, *Turkish Policy Quarterly*.
- 29 In this context, the “ruling elite” characterizes the “Kemalist military and judiciary” (O’Connell, 2020).
- 30 Çetin Doğan had three separate individual applications to the CCT regarding the Ergenekon trials. In the first and second applications he was found guilty due to his connection to the suspected Ergenekon coup. This paper studies the second application to the CCT which is solely about Doğan’s right to honor and not his alleged part in the coup plans. Although the CCT protected his individual right in the second application, most other applications to the CCT in connection to the Ergenekon trials were negative for the protection of the individual rights of the defendants.
- 31 The parliamentary elections in 2002, 2007 and 2011.
- 32 For detailed description of the content of the decrees and their impact of human rights see Council of Europe Opinion No. 865/2016 or the Human Rights Association Istanbul Branch’s report “Emergency Decree Laws” (Öndül, 2022).
- 33 H. Öndül, *Emergency Decree Laws and their impact on human rights on Turkey*, Human Rights Association.
- 34 K. Alter and K. Raustiala, *The Rise of International Regime Complexity — Annual Review of Law and Social Science*, <https://www.annualreviews.org/doi/abs/10.1146/annurev-lawsocsci-101317-030830>, Retrieved February 20, 2024, from.



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- 35 Using content analysis while searching for specific terms in the original language at the database of the CCT, I found three cases for Çetin Doğan—a retired high ranking military official allegedly involved in the planning of the Sledgehammer operation—regarding the Ergenekon trials. Two of the decisions were against him while one was in his favor. I analyzed the only positive decision as that incorporated balancing between individual and democratic rights the most.
- 36 These were series of protests in 2013 against government conservation of a park. The Gezi Park protests are largely regarded as environmental activism.
- 37 The empirical part only demonstrates the contrast, although I’ve analyzed all the relevant cases individually as well.
- 38 The first instance court— Kadıköy 2nd Civil Court —dismissed the application as it decided that public interest in the allegations against Doğan and the publication of the documents regarding Ergenekon-Sledgehammer trials outweighed any potential harm against personal honor and reputation. The applicant’s appeal to the rejection was approved by the 4th Civil Chamber of the Supreme Court on 2 September 2013 which later concluded that it was not possible to reach a conclusion that the digital documents confirmed a crime committed by the accused. The applicant made a final application on 7 March 2014. After the civil proceedings—the analysis of the digital documents—were finalized, the Supreme Court was unable to conclude if the documents were fabricated.
- 39 This is also a claim made by Rodrik as he argues that the evidence used in the trials were fabricated by the Taraf newspaper run by the Gulenists in order to completely incapacitate the military (Rodrik, 2011).
- 40 Constitution of the Republic of Turkey.
- 41 Protected in the first paragraph of Article 17 of the Constitution.
- 42 Guaranteed by the Article 28 of the Constitution.
- 43 Namely, the Cetin Dogan Applications no. 2021/30714 and no. 2012/943).
- 44 “For three years from the date of entry into force of this article; In terms of the crimes defined in the Second Book Fourth Part Fourth, Fifth, Sixth and Seventh Chapters of the Turkish Penal Code No. 5237 and the crimes within the scope of the Anti-Terror Law No. 3713 or crimes committed within the framework of organizational activity: . . . c) 1. Objection to detention and requests for release can be decided on the file.2. Demands for release can be decided on the file, together with the examination of the detention, for a period of thirty days at the latest.3. The examination of the detention made pursuant to Article 108 of the Criminal Procedure Law dated 4/12/2004 and numbered 5271 shall be made ex officio, at the latest, by hearing the person or the defense counsel for ninety-day periods over the file for thirty-day periods at the latest.”.
- 45 Article 18 of the European Convention on Human Rights: Limitation on use of restrictions on rights. The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.
- 46 Article 15: Derogation in time of emergency; Art 5 § 1 (c): the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; Art 18: The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed; Art 46: Binding force and execution of judgments.