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Research Article

RIGHTS-BASED CONSTITUTIONAL JURISPRUDENCE AND THE LIMITS OF PLANNING THEORY: THE ASYMMETRIC PARADIGMATIC TRANSFORMATION OF THE TURKISH CONSTITUTIONAL COURT, THE INTERPRETATIVE GROUND OF PROPORTIONALITY AND A COMPARISON WITH GERMAN CONSTITUTIONAL LAW

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ABSTRACT

Background: *In a January 2023 symposium speech, Zühtü Arslan, President of the Turkish Constitutional Court, stated that Turkish constitutional adjudication had moved from an 'ideology-based approach to a rights-based approach'. This institutional self-description names a thirty-year evolution in the case law, from the 1989 headscarf annulment ruling to the 2019 Zübeyde Füsun Üstel and Wikipedia rulings. It does not, however, account for that transformation at the level of legal theory. How does institutional history shape the law, and what grounding mechanism can explain a shift in constitutional case law? This study asks which theoretical model best*

explains the transformation in question within the 'grounding' debate in contemporary legal theory. It links this question to broader discussions of judicial reform in post-authoritarian and transitional legal systems.

Method: *The study combines doctrinal (dogmatic) legal analysis with a comparative approach. Eight decisions of the Turkish Constitutional Court (the 1989 headscarf ruling, Zübeyde Füsun Üstel, Wikipedia, Şahin Alpay, Mehmet Hasan Altan (2) and (3), Kavala (1) and (2), and Ahmet Şık (2)) were analysed on an 'extreme case' selection logic; six canonical judgements of the European Court of Human Rights (ECtHR) served as a benchmark for comparison. The theoretical framework rests on Scott Shapiro's planning theory, Nicos Stavropoulos's reframing thesis, and Mark Greenberg's moral impact theory. The study examined Turkish constitutional doctrine through eight standard works and German constitutional law through Kommers and Miller's reference work.*

Results and Conclusions: *The study presents four findings. First, the study empirically demonstrates the paradigmatic shift by comparing contrasting extreme cases. Second, the transformation is not homogeneous: the state-of-emergency rulings preserve the paradigm, the Kavala rulings mark a regression, and the 2025 Ahmet Şık (2) ruling shows continued resistance at the Section level. We conceptualised this pattern as 'asymmetric heterogeneity'. Third, the transformation cannot be explained with the conceptual tools of Shapiro's planning theory; the 'constitutional delegation' defence also falls short. Fourth, the concrete structure of proportionality review can be understood as the institutional expression of an interpretivist grounding model converging with Greenberg's moral impact theory and Berman's 'principled positivism'. This conclusion offers a theoretical basis for a more transparent style of reasoning in Turkish constitutional adjudication, suggests that openly acknowledging the moral dimension of proportionality review would strengthen judicial accountability, and proposes a generalisable conceptual framework (asymmetric heterogeneity) for analysing paradigmatic shifts in constitutional courts in transitional contexts.*

1 INTRODUCTION

Zühtü Arslan, President of the Turkish Constitutional Court, described the transformation of Turkish constitutional adjudication in his opening address at the 'Interpretation in Constitutional Adjudication' symposium held at Istanbul Medipol University on 3 January 2023: 'The Constitutional Court has moved from an ideology-based approach to a rights-based approach.'[1] This is not merely a personal observation; it is an institutional self-description offered by the Court's most authoritative representative. Arslan defines the rights-based approach through three components taken together: a priority dimension,

1 '"Anayasa Yargısında Yorum" Sempozyumu gerçekleştirildi' (*İstanbul Medipol Üniversitesi*, 3 January 2023) <https://www.medipol.edu.tr/haberler/anayasa-yargisinda-yorum-sempozyumu-gerceklestirildi> accessed 13 July 2026.

which places freedoms above other social interests; a methodological dimension, which requires interpretation in favour of freedoms; and a structural dimension, which treats the protection of rights as the rule and their restriction as the exception.[2] The philosophical origins of this formulation within Turkish constitutional doctrine are documented in Mustafa Erdoğan's *Anayasal Demokrasi* (Constitutional Democracy): Erdoğan presents Dworkin's 'rights-based' conception of the rule of law with reference to Arslan's 2001 article 'Devletin Hukuku, Hukuk Devleti ve Özgürlük Sarkacı' ('The Law of the State, the Rule of Law and the Pendulum of Liberty').[3] In that article, Arslan argues, within the framework of Dworkin's rights-based conception of the rule of law, that judges should ground their decisions in the protection of rights and freedoms rather than in utilitarian considerations.[4] The intellectual background to the institutional statement of 2023 is thus documented as a doctrinal trajectory stretching back some twenty years. What is still missing is a theoretical account of the transformation itself.

This question can be addressed productively through the reframing offered by Nicos Stavropoulos's 2017 article 'The Debate That Never Was'. Stavropoulos shows that the most familiar label in contemporary jurisprudence, the idea of a 'Hart-Dworkin debate', refers to a debate that never actually took place. His deeper contribution is showing that Dworkin's real question is not about the boundaries of law but about the nature of the grounding mechanism: how institutional history shapes the law. This reframing provides fertile ground for assessing both contemporary debates in legal theory and the paradigmatic shift in Turkish constitutional adjudication.[5]

The study's thesis rests on four pillars. First, a structured doctrinal comparison of opposing rulings can document the paradigmatic shift embodied in Arslan's institutional statement. The 1989 headscarf annulment ruling[6] represents the ideal type of the categorical-doctrinal model of interpretation, whilst the 2019 Zübeyde Füsun Üstel and Wikipedia rulings are concrete manifestations of the rights-based, proportionality-centred model.[7] Second, the transformation is not homogeneous. The Şahin Alpay and Mehmet Hasan Altan (2) rulings show the rights-based line holding even under the state of emergency,[8] whereas the Kavala rulings mark a regression from the paradigm; the 2025 Ahmet Şık (2) ruling, in turn, shows

2 ibid

3 Mustafa Erdoğan, *Anayasal Demokrasi* (11th edn, Siyasal Kitabevi, 2014) 120–1.

4 Zühtü Arslan, 'Devletin Hukuku, Hukuk Devleti ve Özgürlük Sarkacı' (2001) 13 Doğu Batı 80–1.

5 Nicos Stavropoulos, 'The Debate That Never Was' (2017) 130(8) Harvard Law Review 2082 <https://www.jstor.org/stable/44865646> accessed 13 July 2026.

6 Case E.1989/1, K.1989/12 (Turkish Constitutional Court, 7 March 1989) [1989] Official Gazette 20216 (Headscarf Annulment Ruling).

7 *Zübeyde Füsun Üstel and Others* App no 2018/17635 (Turkish Constitutional Court, 26 July 2019) [2019] Official Gazette 30893.

8 *Şahin Alpay* App No. 2016/16092 (Turkish Constitutional Court, 11 January 2018) [2018] Official Gazette 30306; *Mehmet Hasan Altan (2)* App no 2016/23672 (Turkish Constitutional Court, 11 January 2018) [2018] Official Gazette 30306.

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that resistance persists at the Section level.[9] Thirdly, it is difficult to account for this transformation using the conceptual tools of Scott Shapiro's theory of planning.[10] Fourthly, according to the interpretation advocated here, transformation is best explained within the interpretivist grounding model as reframed by Stavropoulos. The concrete structure of the proportionality test can reasonably be interpreted as the institutional expression of a grounding model that converges with Mark Greenberg's moral impact theory[11] and Mitchell Berman's formulation of 'principled positivism'.[12]

The article proceeds as follows. Part 2 sets out the study's aim, research questions and methodology, rationale for case selection, and the approach's limitations. Part 3 examines Stavropoulos's reframing thesis. Part 4 presents Shapiro's theory of planning at its strongest; it addresses and responds to the argument for 'constitutional delegation' and assesses the main lines of criticism. Part 5, which forms the article's core, examines the transformation of the Turkish Constitutional Court; it traces the origins of the rights-based approach in Turkish constitutional doctrine and formulates the thesis of 'asymmetric heterogeneity'. Part 6 analyses the Wikipedia ruling using the conceptual tools of Barak, Möller, Rivers, and Petersen; it compares different interpretations of the principle of proportionality in Turkish constitutional doctrine. Part 7 makes a targeted comparison with German constitutional law. Part 8 formulates the constructive thesis, acknowledges alternative explanations, and discusses the practical implications.

2 METHODOLOGY

This study aims to explain the transformation of the Turkish Constitutional Court's interpretative paradigm during the individual application period, within the context of the 'grounding' debate in contemporary legal theory. This aim is broken down into four research questions. First, can doctrinal analysis demonstrate that the interpretative paradigm in Turkish constitutional jurisprudence changed between 1989 and 2025? Second, is this transformation homogeneous, or does it vary by institution? Third, can Scott Shapiro's conceptual tools of planning account for this transformation? Fourth, if not, which grounding model best accounts for the structure of the transformation?

The study combines a doctrinal (dogmatic) legal analysis with a comparative approach. In the case law analysis, the study adopts the logic of selecting 'extreme examples'; this choice

9 *Ahmet Şık (2)* App No. 2022/55481 (Turkish Constitutional Court, 5 November 2025).

10 Scott J Shapiro, *Legality* (Belknap Press 2011) 269-81, 307-52.

11 Mark Greenberg, 'The Moral Impact Theory of Law' (2014) 123 Yale Law Journal 1288 <https://ssrn.com/abstract=2309689> accessed 13 July 2026.

12 Mitchell N Berman, 'Our Principled Constitution' (2018) 166 University of Pennsylvania Law Review 1326 ('social facts determine constitutional principles, and constitutional principles determine constitutional rules') <https://dx.doi.org/10.2139/ssrn.2935085> accessed 13 July 2026.

requires justification. The study selects the 1989 headscarf annulment ruling and the 2019 Zübeyde Füsun Üstel and Wikipedia rulings as ideal types of two competing paradigms: they mark the doctrinal extremes within which any explanation of transformation must operate, and each is regarded as emblematic of its own era in Turkish legal doctrine. Five state-of-emergency rulings (Şahin Alpay, Mehmet Hasan Altan (2) and (3), and Kavala (1) and (2)) serve as the 'least likely case': a rights-based paradigm faces the greatest institutional pressure precisely where claims of national security are strongest. If the paradigm holds firm there, its durability is strongly confirmed; if it falters there, the limits of transformation become apparent. The 2025 decision on Ahmet Şık (2) extends the observation window to the present day and to the Section level. Taken together, the eight judgements cover all three decision configurations (normative review, Plenary Session, Chamber), both possible outcomes (violation and no violation) and a thirty-six-year span. This selection supports a doctrinal claim about the Court's reasoning structure, not a statistical claim about the frequency of outcomes. No selection of eight judgements could support the latter claim; the article makes no such attempt.

When the article refers to the 'documentation' or 'demonstration' of a paradigm shift, it is doctrinal and interpretative: it relies on an analysis of the structure of reasoning in authentic judgement texts rather than quantitative measurement. The texts of the decisions were read from their authentic versions in the Official Gazette and the Constitutional Court Decisions Database; direct quotations are documented with page or paragraph numbers.

The selection of theoretical sources is based on three criteria. First, the primary text of planning theory (Shapiro's *Legality*) and the literature of systematic criticism directed at this theory (the Canale-Tuzet anthology, Bratman, Toh, Hershovitz, Alexy, and Plunkett) have been thoroughly reviewed; the argument for constitutional delegation, which constitutes the strongest defence of the theory within the Turkish context, is set out and examined in its own terms in Part 4. Second, Stavropoulos's 2017 contribution, Greenberg's moral impact theory, and Berman's formulation of principled positivism establish the contemporary framework of the grounding debate. Third, the four leading theorists of the theory of proportionality (Barak, Möller, Rivers, and Petersen) have been selected because of their differing responses to the question of the moral nature of judicial weighing; in particular, Petersen's empirical-realist scepticism serves as a counterbalance to the interpretation of moral weighing advocated by Barak. Turkish constitutional doctrine has been examined through the field's eight standard works (Kubalı, Tanör-Yüzbaşıoğlu, Teziç, Özbudun, Gözler's two works, Erdoğan, and Eren); these works were selected because they represent a diversity of generations, methodologies and theoretical positions; amongst them is Gözler's formalist position, which is opposed to the argument put forward in this article and is directly discussed in Part 6.

Part 7's methodological aim in comparing German constitutional law is deliberately narrow. It is not a symmetrical comparative analysis of the two systems; rather, it is a

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targeted review of the reasonableness of two specific doctrinal imports evident in the Turkish case law examined here: the argument regarding the duty of loyalty in Zübeyde Füsun Üstel's dissenting opinion (the closest parallel being the German case law on the loyalty of public officials) and the methodology of weighing up interests in the individual application phase (the accepted source being the Lüth-Alexy tradition). This is why the comparison is confined to Kommers and Miller's standard reference work; the 2017 second NPD decision is added to this work. At the national level, the analysis focuses on Articles 13, 15, 26, 27, 90, 130, and 148 of the Constitution, as well as the provisions on individual applications in Law 6216. At the international level, Article 10 of the ECHR and six landmark ECtHR judgements (Handyside, Ahmet Yıldırım, Gündüz, Erbakan, Kula, and Kavala) have served as a reference framework.

3 THE REAL QUESTION: THE GROUNDING MECHANISM AND A REINTERPRETATION OF DWORKIN'S ARGUMENT

Stavropoulos's 2017 contribution is central to reframing debates in contemporary legal theory. The twenty-seven-year period from Dworkin's 1967 article 'The Model of Rules'[13] to Hart's 1994 *Postscript* did not, historically speaking, constitute the 'Hart-Dworkin debate' as it is commonly labelled in contemporary jurisprudence. As Stavropoulos clearly states, Hart 'was not a participant, and for the most part the debate did not directly engage his work'.[14] The only genuine round of the Hart-Dworkin dialogue took place between the *Postscript* and Dworkin's 'Hart's Posthumous Reply', presented at the NYU Colloquium in 1994.

Behind Stavropoulos's historical observation lies a far more significant theoretical claim. The standard positivist reading interprets Dworkin's question as one of boundaries. Yet Dworkin's real question concerns the nature of the grounding mechanism. Both sides postulate 'a single mechanism' leading from institutional history to law but offer rival explanations of how this mechanism operates. Dworkin's thesis has been consistent since Hard Cases: legal rights are 'a subset of political rights', and the enforcement of legal rights is legitimate only when it satisfies the requirement of 'principled consistency'.[15]

Stavropoulos's interpretation draws significant parallels with Greenberg's moral impact theory but does not equate with it. In a footnote, Stavropoulos explicitly cites Greenberg's interpretation of Dworkin and does not object to it; however, in the same footnote, he notes

13 Ronald M Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 14 <https://chicagounbound.uchicago.edu/uclrev/vol35/iss1/3/> accessed 13 July 2026.

14 Stavropoulos (n 5) 2092 ('Hart was not a participant, and for the most part the debate did not directly engage his work').

15 ibid 2086–7, 2091.

that it 'may remain controversial' whether Dworkin is committed to this radical ontological thesis.[16] This nuance demonstrates that whilst the two authors agree on the moral nature of the grounding mechanism, they differ regarding the radical nature of the ontological claim.

4 PLANNING THEORY: ITS STRONGEST FORM, THE DEFENCE OF CONSTITUTIONAL DELEGATION AND STRUCTURAL TENSIONS

Scott Shapiro's theory of planning developed in *Legality* (2011) is one of the most ambitious formulations of post-Hart positivism. The theory draws its inspiration from the inadequacy of the soft conventionalist response to Dworkin's criticisms in Hart's *Postscript*.[17] As Stephen Perry has shown, Hart's claim of descriptive jurisprudence contains normative premises within itself.[18] To overcome this structural problem, Shapiro, drawing on Bratman's philosophy of intention and plan, redefines legal systems as 'planning organisations'.[19]

Planning theory's conceptual backbone rests on Raz's theory of authority. Raz's 'sources thesis' offers the most precise formulation of the positivist thesis: 'A law has a source if its contents and existence can be determined without using moral arguments.' Raz's critical passage clarifies how rules prevent renegotiation.[20]

Shapiro's most original contributions are the Simple Logic of Planning (SLOP), the General Logic of Planning (GLOP), and the economy of trust. According to SLOP, the facts a plan aims to resolve cannot determine the plan's existence or content. GLOP extends this principle to the systemic level.[21] The moral aim thesis states that the law exists to remedy the moral inadequacies of the conditions of legality.[22] The answer to the meta-interpretation question is the 'economy of trust'.[23]

16 ibid 2090, note 32 ('It may remain controversial whether he is thereby committed to the view that legal rights and obligations are (a certain subset of) the moral consequences of institutional history'; the same footnote cites Greenberg's reading of Dworkin).

17 HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 238–76 <https://doi.org/10.1093/he/9780199644704.001.0001> accessed 13 July 2026

18 Stephen R Perry, 'Hart's Methodological Positivism' (1998) 4(4) Legal Theory 438 <https://doi.org/10.1017/S1352325200001105> accessed 13 July 2026.

19 Shapiro (n 10) 118-54; Scott J Shapiro, 'On Hart's Way Out' (1998) 4 Legal Theory 469 <https://doi.org/10.1017/s1352325200001117> accessed 13 July 2026.

20 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 33 ('It is the essential exclusionary character of a rule that it resists permanent revision'), 47 ('A law has a source if its contents and existence can be determined without using moral arguments').

21 Shapiro (n 10) 274–5, 311.

22 ibid 213, 391–2 ('the fundamental aim of legal activity is to remedy the moral deficiencies of the circumstances of legality').

23 ibid 331-52.

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4.1. The Defence of Constitutional Delegation and the Response

A hypothetical advocate of Shapiro's theory could mount a serious response to the claim that the transformation in Turkish constitutional jurisprudence is incompatible with planning theory, centring on the concept of 'constitutional delegation'. This defence rests on three pillars. First, Article 13 of the Constitution explicitly incorporates the proportionality test into the constitutional text, thereby giving judges a discretionary scope; this does not violate GLOP but instead fulfils the discretionary scope envisaged by the plan. Second, Article 90 of the Constitution grants primacy to international case law, thereby embedding alignment with the ECtHR's approach within the plan. Third, the moral aim thesis is a condition of identity, not realisation, allowing the structure set out in paragraphs 125–126 of the Zübeyde Füsun Üstel ruling: 'providing protection even in the absence of moral participation'.

On closer inspection, each of these three defences faces serious objections. Pino argues that Shapiro is wrong to draw a sharp distinction between legal interpretation and moral judgement, because judges inevitably resort to value judgements even in straightforward cases. At the same time, positive law continues to constrain and guide interpretation in complex cases.[24] The Article 90 argument aligns more closely with Dworkin's coherence theory than with Shapiro's theory, as international case law is not a 'plan' but a constantly evolving interpretative practice. However, Plunkett's 2013 critique focuses on the distinction between identity and self-realisation.[25] None of this renders defence insignificant. It suggests this: defence can succeed only if the concept of 'plan' is stretched to the point where the distinctive explanatory content of planning theory begins to lose substance.

4.2. The Critical Landscape and Post-Hartian Alternatives

The broader critical literature reinforces this diagnosis along four axes: normativity, content determination, the boundary between positivism and ethics, and methodological consistency. On the normative axis, as Bratman himself observes, Shapiro's normative claim for law requires a foundation beyond the norms of planning rationality.[26] The distinction between Toh's 'plan-attitudes' and 'plan-contents' shows that the undisputed aspect of 'plan positivism' relates to plan-attitudes, whilst the aspect required by Shapiro relates to plan-

24 Giorgio Pino, ''What's the Plan?' On Interpretation and Meta-interpretation in Scott Shapiro's Legality' in Damiano Canale and Giovanni Tuzet (eds), *The Planning Theory of Law: A Critical Reading* (Springer 2013) 194–7 <https://doi.org/10.1007/978-94-007-4593-3_9> accessed 13 July 2026.

25 David Plunkett, 'Legal Positivism and the Moral Aim Thesis' (2013) 33(3) Oxford Journal of Legal Studies 586–603 <https://doi.org/10.1093/ojls/gqt009> accessed 13 July 2026.

26 Michael E Bratman, 'Reflections on Law, Normativity and Plans' in Stefano Bertea and George Pavlakos (eds), *New Essays on the Normativity of Law* (Hart 2011) 82 ('this normative claim goes beyond the norms of plan rationality that Shapiro sees as essential to law').

contents.[27] Hershovitz's conclusion regarding the determination of content carries particular weight for the argument of this article: if the choice between competing interpretative methodologies is governed by judgements concerning the purpose of law, then the theory's positivist character remains merely nominal; the English quotation reads: 'That is a kind of positivism, but it is normative, not conceptual.'[28] Davis emphasises the same point as a regression: the 'economy of trust' was supposed to resolve meta-interpretative disagreement by pointing to the planners' distribution of trust; yet the very act of determining that distribution gives rise once again to the very kind of disagreement it was meant to resolve, and so on; in Davis's words, 'It is turtles all the way down.'[29]

The post-Hartian landscape offers both allies and alternatives. Coleman, who openly acknowledges his intellectual dialogue with Shapiro, defends inclusive positivism and, in a footnote, concedes that his own line of defence regarding the 'practical difference' thesis cannot be applied to Hart.[30] In *Law as a Leap of Faith*, John Gardner formulates the sole thesis of positivism as LP* and positions Shapiro on the hard positivist line.[31] Along the positivism-morality axis, Alexy's critique shows that Shapiro's statement that 'an unjust law is a defective law' shifts him into a 'super-inclusive non-positivist' position.[32] Greenberg's moral impact theory offers a comprehensive contemporary alternative along these lines: the content of the law is that part of the moral profile created by the actions carried out by legal institutions in a legally appropriate manner.[33] Berman, who states that Greenberg developed his criticisms in a separate study, proposes an intermediate position under the heading of 'principled positivism': social phenomena determine constitutional principles, and constitutional principles determine constitutional rules; thus, whilst Hart posits 'too little law', Dworkin assumes 'too much morality'.[34] Finally, concerning to methodological

27 Kevin Toh, 'Plan-Attitudes, Plan-Contents, and Bootstrapping: Some Thoughts on the Planning Theory of Law' in John Gardner, Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 3 (OUP 2018) 4–9 <https://dx.doi.org/10.2139/ssrn.2307318> accessed 13 July 2026.

28 Scott Hershovitz, 'The Model of Plans and the Prospects for Positivism' (2014) 125(1) Ethics 163 <https://doi.org/10.1086/677069> accessed 13 July 2026.

29 Joshua P Davis, 'Legality, Morality, Duality' (2014) 1 Utah Law Review 73-5, 105 <https://doi.org/10.63140/iz-z67twkw> accessed 13 July 2026.

30 Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2001) VII, 143 ("this line of defence does not hold for Hart; for the target of Shapiro's criticism is Hart's conception of positivism").

31 John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 21–2 <https://dx.doi.org/10.1093/acprof:oso/9780199695553.001.0001> accessed 13 July 2026.

32 Robert Alexy, 'Scott J Shapiro between Positivism and Non-Positivism' (2016) 7(2) Jurisprudence 300–5 <https://doi.org/10.1080/20403313.2016.1190149> accessed 13 July 2026.

33 Greenberg (n 11) 1323 ('the content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way').

34 Berman (n 12) 1348-53 ('where Hart leaves us with too little law, Dworkin assumes too much morality').

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consistency, Canale draws attention to the 'recursive' nature of Shapiro's strategy, whilst Chiassoni diagnoses it as 'quasi-positivism'.[35]

What Parts 5 and 6 add to this literature is a test that has hitherto been lacking: a continuous confrontation between the theory and the thirty-six-year record of interpretations by a single constitutional court. There, the theory's two predictions are tested. If constitutional adjudication implements a plan within an economy of trust, then a paradigm shift of the kind Arslan announces should trace to a change in the plan; and the system's distribution of trust should resolve, rather than perpetuate, intra-institutional meta-interpretative disagreement. As we will argue later, the Turkish record refutes both predictions.

5 THE ASYMMETRICAL PARADIGMATIC TRANSFORMATION OF THE TURKISH CONSTITUTIONAL COURT AND ITS DOCTRINAL ORIGINS

5.1. The Origins of the Rights-Centred Approach in Turkish Constitutional Doctrine

Turkish constitutional doctrine has shown marked diversity over the past century, centred on the balance between rights and the state. Kubalı's classic 1971 work, *Anayasa Hukuku Dersleri* (Lectures on Constitutional Law), presents the principle of individualism and the guarantee of the essence of rights as central concepts of the 1961 Constitution: the 1961 Constitution's prohibition on infringing the essence of rights and freedoms 'laid the cornerstone of individualism'.[36] The most striking conclusion drawn by Kubalı is: 'The limits of the public interest, which must be protected and ensured, cannot encroach upon the limits of individual rights and freedoms.'[37] This formulation is the doctrinal precursor to the structural dimension articulated by Arslan in his 2023 symposium address, which regards the protection of rights as the rule and their restriction as the exception. However, Kubalı's position is not strictly rights-based; the author's defence of the 1961 Constitution as safeguarding both liberal individual rights and the ideological protection of the Atatürk reforms constitutes the doctrinal precursor to the Constitutional Court's subsequent ideology-based case law.

35 Damiano Canale, 'Looking for the Nature of Law: On Shapiro's Challenge' in Damiano Canale and Giovanni Tuzet (eds), *The Planning Theory of Law: A Critical Reading* (Springer 2013) 17 <https://doi.org/10.1007/978-94-007-4593-3_1> accessed 13 July 2026; Pierluigi Chiassoni, 'Ruling Platitudes, Old Metaphysics, and a Few Misunderstandings About Legal Positivism' in Damiano Canale and Giovanni Tuzet (eds), *The Planning Theory of Law: A Critical Reading* (Springer 2013) 161 <https://doi.org/10.1007/978-94-007-4593-3_7> accessed 13 July 2026.

36 Hüseyin Nail Kubalı, *Anayasa Hukuku Dersleri: Genel Esaslar ve Siyasi Rejimler* (Istanbul Universitesi, Hukuk Fakültesi 1971) 239–40.

37 ibid 166.

In assessing the fundamental rights regime under the 1982 Constitution, Tanör and Yüzbaşıoğlu's analysis is decisive. The authors interpret the 1961-1982 contrast through the difference between the formulas 'a state based on human rights' and 'a state respectful of human rights'; and, according to the interpretation they adopt with reference to Soysal, in the 1982 text 'priority lies with the state; human rights and freedoms come second'.[38] In this interpretation, the 1982 Constitution embodies an order in which the state takes precedence over rights; removing the guarantee of the essence of rights and replacing it with the criterion of 'the requirements of the democratic social order' concretely expresses this regression.

Erdoğan's *Anayasal Demokrasi*, however, contains the clearest liberal, rights-based formulation in Turkish constitutional doctrine. Erdoğan directly criticises the Turkish Constitutional Court: the legitimacy of constitutional adjudication can only be ensured if it serves to protect individual rights against the state; a constitutional judiciary that strays from this function, or, as in the case of the Turkish Constitutional Court, operates in exactly the opposite manner or exceeds its protective role to become an instrument of political intervention, cannot be defended.[39] Erdoğan's diagnosis, specific to Turkey, is as follows: in modernising countries where bureaucratic governance has become an official ideology, the activism of constitutional justice 'may serve to bolster the ideological state to the detriment of citizens'.[40] This criticism by Erdoğan, first published in 1996, lays the philosophical and critical foundations for the shift that Arslan formulated in 2023 as a transition from an ideology-based approach to a rights-based approach.

Özbudun's assessment of the post-2010 transformation, another leading figure in Turkish legal doctrine, is central here. Özbudun's observation, included in the 25th edition of his *Türk Anayasa Hukuku*, is clear: 'The adoption of the right to individual application through the 2010 amendment has facilitated the Court's move away from an ideology-based approach towards prioritising a rights-based approach.'[41] In the same work, Özbudun criticises the 1989 headscarf annulment ruling as an extreme example in which the Turkish Constitutional Court defined secularism as an 'absolutist ideology'.[42] However, Özbudun does not hesitate to add that a trend towards 'judicial self-restraint' has become evident in the period following 2016.[43]

38 Bülent Tanör and Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* (17th edn, Beta 2018) 86–7 (an interpretation adopted with reference to M Soysal).

39 Erdoğan (n 3) 88–9.

40 ibid 27.

41 Ergun Özbudun, *Türk Anayasa Hukuku* (25th edn, Yetkin 2025) 573 (quoting his own essay in the Festschrift for Zühtü Arslan: 'The adoption of the right to individual application through the 2010 amendment has facilitated the Court's move away from an ideology-based approach towards prioritising a rights-based approach').

42 ibid 97–9.

43 ibid 572–3.

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Eren's conceptual formulation in the 2024 edition aligns directly with Arslan's institutional statement: 'Through individual applications, the Constitutional Court has gained the ability to conduct rights-based review, and the level of protection of fundamental rights has been raised.'[44] In the same work, Eren criticises the 1989 headscarf ruling as a product of the 'rigid secularism' approach and documents that, with the 2012 ruling on elective religious education, the Constitutional Court shifted to a 'libertarian secularism' understanding.[45] The Erdoğan-Arslan-Özbudun-Eren line thus traces the intellectual lineage of the rights-based approach within Turkish doctrine as a thirty-year continuum.

5.2. The 1989 Headscarf Annulment Ruling: The Ideal Type of the Categorical-Doctrinal Paradigm

The annulment case brought by President Kenan Evren over Additional Article 16, added to the Higher Education Act 2547 by Article 2 of Act 3511, concluded with a ruling dated 7 March 1989. A defining feature of the ruling is its absence of a proportionality test; the proportionality criterion was incorporated into Article 13 only after the 2001 constitutional amendment.[46]

From a legal theory perspective, the most fruitful part of the decision is its examination of the rule of law in relation to Article 2. Here, the Constitutional Court explicitly defines the source of law: 'Laws cannot be based on or bound by religion...The source of religious rules is God... The source of law, however, is the will of the nation itself, as the will that creates the law.'[47] This formulation is a concrete application of a Kelsenian understanding of the 'grundnorm' within the Turkish constitutional order. Özbudun characterises this approach not as a normative interpretation but as a political-ideological one and demonstrates that the formulation 'a civilised way of life' in the ruling has no basis in either the 1961 or the 1982 Constitutions.[48] Eren also emphasises that this judicial precedent lacks historical, sociological, and constitutional foundations.[49]

Mehmet Çınarlı's sole dissenting vote foreshadowed the rights-based approach Zühtü Arslan would formulate thirty years later. Çınarlı explicitly advocates an interpretative

44 Abdurrahman Eren, *Anayasa Hukuku Dersleri* (6th edn, Seçkin 2024) 1203 ('through individual applications, the Constitutional Court has gained the ability to conduct rights-based review, and the level of protection of fundamental rights has been raised').

45 ibid 428–30.

46 Article 13 of the Constitution was amended by Article 2 of Law No 4709 of 3 October 2001, which explicitly incorporated the proportionality criterion into the constitutional text. See Constitution of the Republic of Turkey (adopted 7 November 1982, rev 2019) <https://www.anayasa.gov.tr/en/legislation/turkish-constitution> accessed 13 July 2026.

47 Case E.1989/1 (n 6) 11.

48 Özbudun (n 41) 97–9.

49 Eren (n 44) 297–9.

framework that treats rights as the rule and restrictions as the exception: 'It is the rule that an individual may exercise these freedoms as they see fit; the restriction of these freedoms due to certain necessities is the exception.'[50] He limits the state's right to intervene in individual clothing choices: 'Clothing is not a matter for the state, but a matter for the individual.'[51] Çınarlı's dissenting opinion aligns with Möller's global model theory centred on personal autonomy and Kubalı's doctrine of individualism.[52]

5.3. The Zübeyde Füsun Üstel Ruling: The Doctrinal Application of the Rights-Based Approach

The transition from an ideology-based approach to a rights-based approach cannot readily be interpreted, in Shapiro's classification, as a shift from an 'authority system' to an 'opportunistic system'; for the difference between these two types lies in the degree of trust placed in claims to legitimate authority, rather than in the interpretative paradigm applied to rights.[53] The Zübeyde Füsun Üstel and Others ruling demonstrates the new paradigm in action. The Plenary delivered that ruling by a majority vote, with Zühtü Arslan presiding. Of the sixteen members who participated in the decision, eight voted against it; the violation finding carried under the rule that, when votes are tied, the side on which the President sits prevails. This arithmetic is the first indication of just how contentious the decision was at an institutional level.

The most theoretically striking paragraphs of the decision are § 125 and § 126. In § 125, the Court first admits: 'In the application under consideration, the statement signed by the applicants does indeed contain content that is unacceptable to the vast majority of society.'[54] However, in § 126, this admission is framed by a theoretical principle: 'Even statements with which the Constitutional Court in no way concurs may fall within the scope of freedom of expression.'[55]

Academic freedom receives two tiers of protection. § 100 emphasises the broad scope of freedom of expression.[56] Under § 111, academics' views are subject to strict protection, even if they do not relate to their own field of expertise, are controversial or are not widely

50 Case E.1989/1 (n 6) 17, Dissenting Opinion of Mehmet Çınarlı ('it is the rule that an individual may exercise these freedoms as they see fit; the restriction of these freedoms due to certain necessities is the exception').

51 ibid 19, Dissenting Opinion of Mehmet Çınarlı ('clothing is not a matter for the State, but a matter for the individual').

52 Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 44–72 (two conceptions of personal autonomy).

53 Shapiro (n 10) 350–1 ('authority' and 'opportunistic' systems as two ideal types of legal systems).

54 *Zübeyde Füsun Üstel and Others* (n 7) § 125.

55 ibid, § 126.

56 ibid, § 100.

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accepted.[57] § 112 links this protection to the foundations of a democratic society.[58] The emphasis on self-censorship is a critical instrument of a rights-based approach.[59]

The two dissenting opinions in the ruling constitute one of the strongest examples in Turkish legal practice of the purely theoretical disagreement Dworkin describes. The second dissenting opinion invokes the distinction between concrete and potential danger.[60] The first dissenting opinion, relying on Article 130(4) of the Constitution, establishes a separate 'duty of loyalty to the state' for academic staff.[61] From the perspective of doctrinal background, it should be noted that Article 130(4) is not treated as an autonomous subject of doctrinal analysis in the standard works of Turkish constitutional law. This silence suggests that the dissenting vote's interpretation of loyalty rests on very little established doctrinal tradition; conversely, it shows how closely the majority's approach to academic freedom aligns with Erdoğan's vision of constitutional democracy.

5.4. Post-State of Emergency Decisions: Asymmetric Heterogeneity

The paradigmatic shift is not homogeneous. This heterogeneity is clearest in the post-state-of-emergency decisions. The decisions in the cases of Şahin Alpay and Mehmet Hasan Altan (2) were handed down on the same day (11 January 2018), by the same seventeen-member Plenary, and with the same 11-6 majority. Both decisions embed the prohibition of arbitrariness within Article 15 as an internal limit. The critical passage reads: 'Regardless of the grounds on which they are adopted, during periods in which extraordinary administrative procedures are applied, the detention of individuals without any indication that they have committed a crime cannot be accepted as a measure proportionate to the circumstances.'[62] Concerning freedom of expression, the objective observer test is applied.[63] Paragraph 145 of the Altan (2) judgement is particularly striking: 'For views that differ from the assessments of public authorities and the majority opinion to be treated as a criminal offence based on the intent of the person expressing them, that intent must be demonstrated by concrete facts.'[64]

57 ibid, § 111 ('the views expressed by academics remain under the strict protection of freedom of expression, even if they do not relate to their own research, professional expertise or areas of competence, or are controversial or unpopular').

58 ibid, § 112.

59 ibid, § 137.

60 ibid, Second Dissenting Opinion (Özkaya, Akyel, Seferinoğlu, Menteş), §§ 15, 25–28, 33–35.

61 ibid, First Dissenting Opinion (Özgüldür, Üstün, Topal, Güleç), §§ 1–3 (a duty of loyalty to the State based on Art 130(4) of the Constitution).

62 *Şahin Alpay* (n 8) § 109; *Mehmet Hasan Altan (2)* (n 8) § 156.

63 *Şahin Alpay* (n 8) § 130; *Mehmet Hasan Altan (2)* (n 8) § 224.

64 *Mehmet Hasan Altan (2)* (n 8) § 145.

However, the Kavala rulings present a different trajectory. The Plenary decision in Mehmet Osman Kavala (1) found no violation by a 10 - 5 majority vote. President Zühtü Arslan and two Vice-Presidents led the dissenting bloc.[65] The decision in the case of Mehmet Osman Kavala (2), meanwhile, found no violation on the merits by a narrow majority of 8 to 7. Vice-President Engin Yıldırım's dissenting opinion, which drew a parallel with Kafka's *The Trial*, is exceptional in the history of the Constitutional Court: 'The fact that the applicant was released twice and detained three times on charges based on virtually the same facts, without any significant new evidence being presented to raise strong suspicion, also resembles a Kafkaesque legal spiral.'[66]

Resistance at the Section level is evident in the decisions concerning Mehmet Hasan Altan (3) and Ahmet Şık (2). The Altan (3) ruling deemed the lower courts' continued detention of the applicant, despite the Constitutional Court's ruling of a violation, to constitute a new violation.[67] The Ahmet Şık (2) ruling, dated 5 November 2025 and delivered unanimously by the First Section, deemed it a violation that the lower court had listed theoretical principles without applying them to the specific case.[68]

This heterogeneous trajectory can be formulated as 'asymmetric heterogeneity'. The transformation is real but not monolithic; it reflects an institutional division. At the Plenary level, the rights-based line in the Kavala rulings has lost its majority and retreated into dissent. At the Section level, however, the Altan (3) and Ahmet Şık (2) rulings continue the paradigm. Arslan consistently wrote dissenting opinions in the Kavala rulings but could not hold the majority together. Özbudun's identification of a post-2016 trend towards 'judicial self-restraint' provides the doctrinal counterpart to this asymmetry.[69]

Viewed through the lens of planning theory, this pattern speaks not only to the Court but also to the theory itself. Nothing has changed in the master plan between the Şahin Alpay and Kavala (2) cases: the text of the Constitution, the individual application mechanism and the formal interpretative framework have remained the same; yet the same institution has reached conflicting outcomes at the level of the General Assembly and the Chambers on closely related issues. A theory in which the content of the law is fixed by plans and a designed economy of trust has two options here, neither of which is comfortable. Either one of the two lines of reasoning constitutes a simple misapplication of the plan, which would presume the interpretative question, the issue dividing the judges, to have been answered in advance; or the plan does not determine the answer, in which case the real

65 *Mehmet Osman Kavala* App no 2018/1073 Dissenting Opinion (Arslan, Yıldırım, Gökcan, Kuz, Hakyemez) (Turkish Constitutional Court, 22 May 2019).

66 *Mehmet Osman Kavala (2)* App no 2020/13893 Dissenting Opinion of Yıldırım (Turkish Constitutional Court, 29 December 2020) § 43.

67 *Mehmet Hasan Altan (3)* App no 2018/2620 (Turkish Constitutional Court, 9 January 2020) §§ 47–49.

68 *Ahmet Şık (2)* (n 9) §§ 16, 22.

69 Özbudun (n 41) 572–3.

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work is being done by something other than the plan. In Shapiro's account, the 'settlement' function that gives plans their raison d'être is precisely what demonstrates the absence of asymmetry; the economy of trust, designed to resolve meta-interpretative disputes, is here the very stage for that dispute.[70]

6 PROPORTIONALITY REVIEW: DOCTRINAL POSITIONS AND AN ANALYSIS OF THE WIKIPEDIA DECISION

6.1. Two Interpretations of the Principle of Proportionality in Turkish Doctrine

Turkish constitutional doctrine has developed two distinct lines of thought about the principle of proportionality. The dominant line is a German-origin consensus formulated by Fazıl Sağlam and Özbudun, divided into three sub-principles (suitability, necessity, and proportionality in the narrow sense). Özbudun argues that the 2001 amendment transformed proportionality into a constitutional rule the legislature must observe; courts have applied it more consistently and systematically in individual cases. Tanör and Yüzbaşıoğlu systematically position the principle within the 'limits of restriction': whilst the requirements of a democratic social order and the guarantee of the essence of rights lie at the outer limits of restriction, the criterion of proportionality comes into play at an earlier stage.[71]

Gözler's opposing argument is polemical, emphasising that the principle of proportionality did not feature in Turkish positive law before 2001. He criticises the doctrine and the Constitutional Court's interpretation of the former Article 13(2) as proportionality, stating that it was 'nothing more than a principle invented by the doctrine and the Constitutional Court, which did not in fact exist in Article 13'.[72] Gözler also contends that the concept of 'the essence of a right' is not functional and considers the Constitutional Court's equating of this concept with 'the requirements of a democratic social order' to be incorrect.[73] Gözler's more comprehensive theoretical stance, however, is his critique of supra-constitutionality as expressed in *Anayasa Hukukunun Genel Esasları*: if constitutional courts use principles such as 'justice' or 'modern civilisation', which lack a positive foundation, as criteria instead of constitutional norms, they lose their legitimacy.[74]

Gözler's polemical stance shows an unexpected affinity with Shapiro's theory of planning. Both theories argue that constitutional adjudication must remain within the boundaries defined by the 'plan' (Shapiro) or the 'constitutional text' (Gözler), and that it loses its

70 Shapiro (n 10) 274–5 (the settlement function of plans), 331–352 (the economy of trust as the answer to meta-interpretive disagreement).

71 Özbudun (n 41) 135-7. See also Tanör and Yüzbaşıoğlu (n 38) 162–4.

72 Kemal Gözler, *Türk Anayasa Hukuku Dersleri* (22nd edn, Ekin 2018) 133.

73 ibid 131.

74 Kemal Gözler, *Anayasa Hukukunun Genel Esasları Ders Kitabı* (7th edn, Ekin 2015) 439–40.

legitimacy when it steps outside these boundaries. However, whilst Gözler, as a Turkish constitutional lawyer, developed this formalist stance within the specific textual framework of the 1982 Constitution, Shapiro presents it as a general theory of law. The Court's case law on individual applications since 2010 does not fit comfortably within either formalist framework; neither the GLOP restriction of planning theory nor Gözler's critique of supra-constitutionalism can readily explain, from a legal-formalist perspective, the evaluative reasoning in the Zübeyde Füsun Üstel and Wikipedia judgements. Teziç's warning of a 'government of judges' in this context clarifies the issue along a different axis: the Constitutional Court's exercise of review by defining for itself what constitutes the 'requirements of a democratic society' carries the risk of a 'government of judges' from the perspective of a multi-party system.[75]

6.2. The Wikipedia Ruling in the Light of the Theory of Proportionality

The Constitutional Court's decision in Wikimedia Foundation Inc. and Others was handed down about five months after the Zübeyde Füsun Üstel decision and followed the same doctrinal framework. The decision applies the four-component proportionality framework.[76]

In Aharon Barak's model, the balancing stage is directly moral in character. Barak's precise wording is: 'This comparison is of a value-laden nature.'[77] The canonical example cited by Barak from Dieter Grimm concretises the essence of the test.[78] Barak's 'marginal social importance' formula structures the balancing between the two interests.[79] The Constitutional Court's Wikipedia ruling exemplifies this structure precisely. The Court characterises Wikipedia as a 'universal source of knowledge'; it establishes that the freedom to receive and impart information is a cornerstone of a democratic society; and it determines that the individual's right to personal development is inextricably linked to access to information. Within Barak's framework, these findings constitute judgements of marginal social importance; they are not merely sociological descriptions.

In Kai Möller's global model, constitutional rights centre on autonomy interests crucial to an individual's self-conception. Möller's anti-perfectionism test at the legitimate-purpose stage yields a particularly significant implication: it excludes justifications based on moral disapproval of specific lifestyles. In the Constitutional Court's Wikipedia ruling, whilst

75 Erdoğan Teziç, *Anayasa Hukuku (Genel Esaslar)* (23rd edn, Beta 2019) 235, 238–9.

76 *Wikimedia Foundation Inc and Others,* App No. 2017/22355 (Turkish Constitutional Court, 26 December 2019).

77 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (D Kalir tr, CUP, 2012) 342.

78 ibid 342–3.
Grimm's example shows that even a measure pursuing a legitimate aim through necessary and suitable means fails the proportionality balancing stage when protecting private property comes at the unacceptable cost of human life.

79 ibid 345–65 (the term 'marginal social importance' from 351 onwards).

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'genuine grounds' such as 'damage to the state's reputation' were set aside, the formal justification of 'national security and public order' was accepted; however, at the proportionality stage, it was found that this formal justification failed to strike a sufficient balance within the context of the specific case. Möller's reasonableness test, in contrast, delineates the limits of judicial review in the narrow sense of the proportionality test. Julian Rivers' distinction between the 'optimising' and 'state-limiting' conceptions clarifies the theoretical position of the Wikipedia ruling. In the state-limiting conception, the court acts as a gatekeeper; proportionality review focuses on the 'necessity' stage, and the 'fair balance' test is suppressed. In the 'optimising' conception, however, the court conducts a full balancing exercise. The Constitutional Court's Wikipedia ruling exemplifies the 'optimising' conception. Rivers' 'variable intensity' theory, meanwhile, proposes linking the intensity of scrutiny to the severity of the restriction on the right.[80]

Niels Petersen's empirical findings shed light on the Wikipedia ruling from a different angle. According to Petersen's coding study, the German Federal Constitutional Court relied on balancing in roughly one-third of its decisions to annul laws; the Supreme Court of Canada uses balancing far less frequently, and the Constitutional Court of South Africa is reluctant to rely on it. Petersen's most striking observation is this: courts seeking to conceal their political intentions rely not on proportionality, but on less transparent modes of reasoning, such as categorical argumentation or deductive reasoning. Petersen's reminds us that the interpretation of moral weighing advocated here is not the only possible reading of practice. That practice can also be examined as a judicial strategy. However, the conclusion of this sub-section is correct from the perspective of planning theory: if Barak is right that the decisive comparison at the weighing stage is 'value-laden', then the content of the Court's proportionality findings cannot be determined without a moral argument; and this is precisely what the sources thesis, the backbone of the planning model, necessitates.[81]

6.3. The ECtHR Standard and the Deviation from the 2014 Interpretation Methodology

The Constitutional Court's Wikipedia ruling directly follows the ECtHR's case law in Ahmet Yıldırım and Cengiz. For a comparative analysis, the ECtHR's canonical judgements must be examined. The Handyside v United Kingdom judgement provides a pluralistic definition of freedom of expression: protection applies not only to information and ideas that are favourably received, but also to those that offend, shock, or disturb the state or any section

80 Möller (n 52) 183–93, 199–204; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) Cambridge Law Journal 176, 205 <https://www.jstor.org/stable/4509179> accessed 13 July 2026.

81 Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa (CUP 2017)* 83–113, 156 ('if they want to hide political intentions, courts rather resort to modes of reasoning that are less transparent than proportionality, such as categorical argumentation or deductive reasoning'). See also: Raz (n 20) 47.

of society. The Gündüz v Turkey and Erbakan v Turkey judgements, meanwhile, reflect the ECtHR's concrete-versus-potential-danger distinction, set out in the dissenting opinion in the Zübeyde Füsun Üstel judgement. According to the Gündüz judgement, defending sharia without inciting violence cannot, in itself, be regarded as hate speech. The Erbakan judgement, meanwhile, considers the period of four-year, five-month period between the speech and the prosecution as a factor in assessing current risk and imminent danger. The Kula v Turkey judgement provides a precedent on academic freedom parallel to the Zübeyde Füsun Üstel judgement; it finds that even the mildest administrative sanction may have a 'chilling effect'. In contrast, the Kavala v Turkey judgement clearly diverges from the Constitutional Court's Kavala rulings: the ECtHR found a violation of Article 18, establishing that the measures aimed at silencing the applicant.[82]

According to Teziç's analysis, in its 2014 judgement (App No. 2014/256), the Constitutional Court did not recognise the 1989 and 1991 judgements as rules meeting the legality requirement, because a statutory basis is necessary for the restriction of fundamental rights.[83] This constitutes a doctrinally documented statement that the interpretative methodology underwent a fundamental change during the individual application period. The fact that the Constitutional Court, having indirectly accepted the dress code ban in higher education institutions through its 'interpretative rejection' decision in 1991, subsequently declared the same ban invalid in 2014 on the grounds of the legality requirement, is a textbook example of what Dworkin describes as a theoretical disagreement: two entirely different interpretative frameworks applied to the same legal material.[84]

82 *Ahmet Yıldırım v Turkey* App no 3111/10 (ECtHR, 18 December 2012) <https://hudoc.echr.coe.int/fre?i=001-115705> accessed 13 July 2026; *Cengiz and Others v Turkey* App Nos. 48226/10 and 14027/11 (ECtHR, 1 December 2015) <https://hudoc.echr.coe.int/eng?i=001-159188> accessed 13 July 2026; *Erbakan v Turkey* App No. 59405/00 (ECtHR, 6 July 2006) § 68 (the 'current risk' and 'imminent danger' criteria; the four years and five months between the speech and the prosecution) <https://hudoc.echr.coe.int/eng?i=001-76232> accessed 13 July 2026; *Gündüz v Turkey* App No. 35071/97 (ECtHR, 4 December 2003) § 51 ('the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as 'hate speech'') <https://hudoc.echr.coe.int/eng?i=001-61522> accessed 13 July 2026; *Handyside v United Kingdom* App No. 5493/72 (ECtHR, 7 December 1976) § 49 ('applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population') <https://hudoc.echr.coe.int/eng?i=001-57499> accessed 13 July 2026; *Kavala v Turkey* App No. 28749/18 (ECtHR, 10 December 2019) §§ 221-232 (violation of Art 18) <https://hudoc.echr.coe.int/eng?i=001-199515> accessed 13 July 2026; *Kavala v Turkey* App No. 28749/18, proceedings under Art 46 § 4 (ECtHR, 11 July 2022) § 142 (reproducing §§ 221-232 of the principal judgment) <https://hudoc.echr.coe.int/eng?i=001-218516> accessed 13 July 2026; *Kula v Turkey* App No. 20233/06 (ECtHR, 19 June 2018) §§ 38, 39 <https://hudoc.echr.coe.int/eng?i=001-184289> accessed 13 July 2026.

83 Teziç (n 75) 273.

84 ibid 271–3.

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7 A COMPARATIVE PERSPECTIVE: GERMAN CONSTITUTIONAL LAW AND THE TURKISH CONSTITUTIONAL COURT

As stated in Part 2, this part has a narrow aim: to test two doctrinal imports evident in Turkish case law against German sources. The first concerns the duty of loyalty in the Üstel dissenting opinion; its closest counterpart is German case law on the constitutional loyalty of public officials. The second is the methodology of weighing up the merits during the individual application phase; the accepted line of reasoning derives from Lüth and Alexy. A third strand, the fate of militant democracy, provides a counterpoint that links the two systems' recent trajectories. Kommers and Miller's reference work provides the framework.

7.1. Verfassungstreue and the Dissenting Opinion in the Zübeyde Füsun Üstel Case

The first dissenting opinion in the Zübeyde Füsun Üstel judgement established a separate 'duty of loyalty to the state' for academic staff, based on Article 130(4) of the Constitution. The closest equivalent in German constitutional law is case law on the constitutional duty of loyalty of public servants. The Civil Servant Loyalty Case (2 BvL 13/73, 1975), as cited by Kommers and Miller, held that excluding 'disloyal' individuals from public service does not constitute discrimination based on political opinion.[85] However, two significant differences should be noted. First, whilst German case law links the duty to the status of a public servant, the Turkish dissenting opinion treats Article 130(4) as a content-based restriction on academic freedom of expression. Second, the fact that standard works of Turkish legal doctrine have not treated Article 130(4) as the source of such a duty of loyalty suggests that the dissenting opinion's interpretation rests on little established doctrinal tradition. Tanör and Yüzbaşıoğlu's observation regarding the post-2010 shift, a 'departure from established case law', identifies the trajectory of the majority opinion's jurisprudence.[86]

7.2. The Lüth Judgement, the Objective Order of Values, and the Limits of Balancing

The Lüth Case (1 BvR 400/51, 1958) presents the first dogmatic formulation of the balancing methodology in German constitutional law.[87]

85 Case 2 BvL 13/73 *Civil Servant Loyalty Case* (Bundesverfassungsgericht, 22 May 1975) BVerfGE 39/334 <https://www.fallrecht.de/bv039334.html> accessed 13 July 2026; Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke UP 2012) 434 (Civil Servant Loyalty Case, a brief reference noting that the exclusion of 'disloyal' persons from public service does not constitute discrimination on grounds of political opinion).

86 Tanör and Yüzbaşıoğlu (n 38) 109–10, 183.

87 Case 1 BvR 400/51 *Lüth Case* (Bundesverfassungsgericht, 15 January 1958) BVerfGE 7/198 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1958/01/rs19580115_1bvr040051en.html> accessed 13 July 2026.

Alexy also plays a central role in German doctrine. Kommers and Miller present Alexy as Germany's leading theorist of constitutional balancing; Alexy treats constitutional rights as 'optimisation requirements'. Since 2012, the Turkish Constitutional Court has followed this three-stage German model in its proportionality framework for decisions on individual applications. However, the Turkish Constitutional Court applies its balancing analysis within a doctrinal and institutional context that differs from German doctrine. The Aviation Security Act case (1 BvR 357/05, 2006) is an important example illustrating the limits of proportionality review.[88]

The judgement reaffirmed the absolute nature of the principle of human dignity; it categorically prohibited the instrumentalisation of helpless individuals on a hijacked aircraft for the purpose of protecting others. In other words, the balance is the standard grammar of the German model, yet it rests on absolute limits. Both of these features reappear in the Turkish Court's case law on individual applications: the four-part framework is applied in conjunction with the inviolable essence of the right under Article 13.[89]

7.3. The Decline of Militant Democracy: From the 2003 Rejection to the 2017 NPD Decision

Kommers and Miller's analysis shows that the German Federal Constitutional Court has recently pushed the doctrine of militant democracy into the background. The NPD Party Ban Dismissal Case (2 BvB 1, 2, 3/01, 2003) is a concrete example of this.[90] Kommers and Miller's finding is as follows: in recent years, the Court has adopted a more tolerant stance towards so-called anti-democratic parties, defending their institutional rights with the same rigour with which it protects other electoral groups.[91]

The second NPD ruling (2 BvB 1/13), dated 17 January 2017, essentially confirmed and further clarified this line of reasoning. The Second Senate unanimously rejected the Federal Council's request to declare the NPD unconstitutional. The Court found that the party pursued objectives directed against the free democratic basic order, that its concept of an ethnically defined 'people's community' (Volksgemeinschaft) was incompatible with human dignity, and that it acted systematically in pursuit of its objectives; however, it ruled that a

88 Case 1 BvR 357/05 *Aviation Security Act Case* (Bundesverfassungsgericht, 15 February 2006) BVerfGE 115/118 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html> accessed 13 July 2026.

89 Kommers and Miller (n 85) 66–7 ('Germany's leading theorist of constitutional balancing'; optimisation requirements), 396-8 (Aviation Security Act Case), 442-50 (Lüth case).

90 ibid., 295–300; Case 2 BvB 1, 2, 3/01 *NPD Party Ban Dismissal Case* (Bundesverfassungsgericht, 18 March 2003) BVerfGE 107/339 <https://www.servat.unibe.ch/dfr/bv107339.html> accessed 13 July 2026.

91 Kommers and Miller (n 85) 292–3, 300–1 ('in recent years, however, the Court has exhibited a more tolerant attitude toward so-called antidemocratic parties, defending their institutional rights with the same vigour with which it safeguards other electoral groups').

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ban required concrete and substantial indications ('potential') that the party's efforts could succeed, and that the NPD, with its marginal electoral success and limited access to society, had not crossed this threshold. With this ruling, the Senate explicitly rejected the stricter standard set out in the 1956 KPD decision, which held that the absence of any prospect of success would not preclude a ban.[92] Within a matter of months, the framers of the Constitution amended Article 21 of the Basic Law, thereby providing for the exclusion of parties deemed unconstitutional from state funding, a measure less severe than a ban.[93] The 2017 ruling thus completes the pattern described by Kommers and Miller: an anti-democratic party can be condemned in the harshest doctrinal terms and yet be protected in its institutional existence, because the danger it poses is speculative rather than concrete. The structural similarity with the Turkish court's ruling in the case of Zübeyde Füsun Üstel is clear: in both courts, the decisive move is the same; condemnation of the content is distinguished from the silencing of the speaker, and silencing is linked not to the offensiveness of the message but to a concrete and demonstrable threat. From a comparative perspective, the distinction between concrete and potential danger on which the case against Üstel is based is precisely the line along which the German court resolved its own most challenging case concerning militant democracy.

8 CONCLUSION: PROPORTIONALITY AS THE INSTITUTIONAL EXPRESSION OF INTERPRETATIVE GROUNDING

This study presents four interrelated arguments. First, a structured doctrinal comparison documents the paradigmatic shift in the Turkish Constitutional Court during the post-2012 era of individual applications. The gulf between the categorical-doctrinal approach of the 1989 headscarf ruling and the rights-based approach in the 2019 Zübeyde Füsun Üstel and Wikipedia rulings provides the clearest evidence of this transformation.

This transformation addresses a conceptual need long articulated in Turkish constitutional doctrine. Erdoğan's criticism of the Turkish Constitutional Court, Arslan's rights-based rule of law concept (2000-01) drawing on Dworkin, Özbudun's identification of the post-2010 transition, and Eren's formulation of the shift from rigid secularism to libertarian secularism all demonstrate the continuity of this trajectory within Turkish legal doctrine. Second, this transformation is not homogeneous; it exhibits asymmetric heterogeneity. Whilst the Şahin Alpay and Altan (2) rulings upheld the paradigm even under a state of emergency, the

92 Case 2 BvB 1/13 *NPD Ban Proceedings II* (Bundesverfassungsgericht, 17 January 2017) BVerfGE 144/20 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html> accessed 13 July 2026.

93 Basic Law for the Federal Republic of Germany 'Grundgesetz' (amended 22 March 2025) art 21(3) <https://www.gesetze-im-internet.de/englisch_gg/> accessed 13 July 2026.

Kavala rulings signify a regression from the paradigm; the Ahmet Şık (2) ruling reveals that resistance persists at the Section level as of 2025. Third, Shapiro's theory of planning struggles to account for this transformation, even under the strongest interpretation of constitutional delegation. The record corroborates neither of the two predictions formulated at the end of Part 4: the paradigm shift cannot be traced to any change in the master plan, and the Court's meta-interpretative disagreement has become entrenched rather than resolved by the system's economy of trust. Gözler's polemical position within Turkish constitutional doctrine supports this observation from a different angle: Gözler's critique of supra-constitutionality and Shapiro's GLOP limitation share the same formalist logic; however, the evaluative reasoning in the 2014 constitutional ruling and the 2019 Zübeyde Füsun Üstel judgement does not fit comfortably within either of these formalist frameworks. Fourth, under the interpretation advocated here, Stavropoulos's reframed interpretivist grounding model best explains transformation; the concrete structure of the proportionality test aligns with Greenberg's formulation.[94]

The scope of these claims must be clearly stated. The argument is interpretative, and alternative explanations of the same trajectory exist. Changes in the composition of the Court, strategic alignment with the European Court of Human Rights (ECtHR) under the pressure of Article 46, and broader political dynamics may have contributed to the pattern documented here; a formalist reading, however, would characterise the same decisions not as an expression of a new grounding model, but as deviations from the text of the Constitution. This article's claim is one of best fit: among the theoretical models examined, the interpretivist grounding model most closely matches the structure of reasoning exhibited by the decisions. Testing this claim against rival explanations requires further research, including a systematic quantitative analysis of the Court's case law on individual applications.

This constructive thesis has practical implications. Proportionality review in Turkish constitutional jurisprudence requires deeper moral reasoning than practitioners generally acknowledge. This recognition supports more transparent reasoning. Oder's assessment of the first five years of individual application offers an important starting point: constitutional courts become trend-setting, as the German Federal Constitutional Court has, above all through the principle of proportionality, only when it transforms strict adherence to Strasbourg case law into original and progressive interpretation.[95] Recognising the different structural demands of constitutional law necessitates the development of a field-specific sensitivity within the field of legal theory; this is also consistent with the proposal put forward by Plunkett and Shapiro in their 2017 metanormative framework.[96] The

94 Greenberg (n 11) 1323.

95 Bertil Emrah Oder, 'Bireysel Başvuru Kararlarının Anayasa'nın Yorumuna Etkileri' (2018) 35 Anayasa Yargısı 17–8.

96 David Plunkett and Scott J Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (2017) 128(1) Ethics 64–7 <https://www.jstor.org/stable/26541822> accessed 13 July 2026.

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asymmetrical paradigmatic transformation of the Turkish Constitutional Court can be interpreted as the concrete expression, at the institutional level, of such a field-sensitivity. Turkish constitutional doctrine now has sufficient conceptual tools to account for this transformation: Erdoğan's *Anayasal Demokrasi*, Özbudun's identification of the transformation, Eren's formulation of rights-based review, and, finally, Arslan's institutional declaration are concrete products of this doctrinal line.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВОЗАХИСНА КОНСТИТУЦІЙНА ЮРИСПРУДЕНЦІЯ ТА МЕЖІ ТЕОРІЇ ПЛАНУВАННЯ: АСИМЕТРИЧНА ПАРАДИГМАЛЬНА ТРАНСФОРМАЦІЯ КОНСТИТУЦІЙНОГО СУДУ ТУРЕЧЧИНИ, ІНТЕРПРЕТАТИВНІ ЗАСАДИ ПРИНЦИПУ ПРОПОРЦІЙНОСТІ ТА ПОРІВНЯННЯ З КОНСТИТУЦІЙНИМ ПРАВОМ НІМЕЧЧИНИ

Абдуллах Ер'їгіт

АНОТАЦІЯ

Передумови. *У січні 2023 року Голова Конституційного суду Туреччини Зюхтю Арслан під час виступу на симпозіумі заявив, що турецьке конституційне судочинство здійснило перехід від «ідеологічно орієнтованого підходу до підходу, заснованого на правах людини». Така інституційна самоідентифікація позначає тридцятирічну еволюцію судової практики — від рішення 1989 року щодо конституційності законодавчого регулювання носіння хустки (хіджабу) до рішень 2019 року в справах «Зюбейде Фюсун Юстель» та «Вікіпедія». Утім, вона не розкриває сутності цієї трансформації на рівні теорії права. Яким чином інституційна історія впливає на право і який механізм обґрунтування права дає змогу пояснити зміни в конституційній судовій практиці? У межах сучасної теоретико-правової дискусії щодо обґрунтування права це дослідження з'ясовує, яка*

теоретична модель здатна пояснити зазначену трансформацію, та пов'язує це питання з ширшим дискурсом щодо судової реформи в поставторитарних правових системах і правових системах перехідного типу.

Методи. *У дослідженні поєднано доктринальний (догматичний) юридичний аналіз із порівняльно-правовим підходом. За логікою відбору граничних випадків (extreme case) проаналізовано вісім рішень Конституційного суду Туреччини (рішення 1989 року щодо хустки (хіджабу), справи «Зюбейде Фюсун Юстель», «Вікіпедія», «Шахін Алпай», «Мехмет Хасан Алтан (2) і (3)», «Кавала (1) і (2)» та «Ахмет Шик (2)»); для порівняння використано шість знакових рішень Європейського суду з прав людини (ЄСПЛ). Теоретичну основу дослідження становлять теорія планування (planning theory) Скотта Шапіро, теза про переосмислення (reframing thesis) Нікоса Ставропулоса та теорія морального впливу (Moral Impact Theory) Марка Грінберга. Конституційно-правову доктрину Туреччини проаналізовано на підставі восьми фундаментальних наукових праць, а конституційне право Німеччини — на підставі праці Коммерса та Міллера.*

Результати та висновки. *У статті сформульовано чотири висновки. По-перше, парадигмальний зсув емпірично підтверджується за допомогою порівняння контрастних граничних випадків. По-друге, ця трансформація не є однорідною: рішення у справах, пов'язаних з режимом надзвичайного стану, засвідчують збереження попередньої парадигми, рішення у справах Кавали свідчать про регрес, а рішення 2025 року у справі «Ахмет Шик (2)» свідчить про подальший опір змінам на рівні судової палати; зазначену закономірність тут концептуалізовано як «асиметричну гетерогенність». По-третє, зазначену трансформацію неможливо пояснити концептуальним інструментарієм теорії планування Шапіро; аргумент щодо «конституційного делегування» також виявляється неспроможним. По-четверте, структура перевірки дотримання принципу пропорційності може розглядатися як інституційне вираження інтерпретативістської моделі обґрунтування, що збігається з теорією морального впливу Грінберга та концепцією «принципового позитивізму» (principled positivism) Бермана. Отримані результати створюють теоретичне підґрунтя для більш прозорого стилю юридичної аргументації в конституційному судочинстві Туреччини. Автор також обґрунтовує, що відкрите визнання морального виміру судової перевірки дотримання принципу пропорційності посилить підзвітність судової влади. Крім того, стаття пропонує узагальнювану концептуальну модель — «асиметричну гетерогенність» — для аналізу парадигмальних змін у практиці конституційних судів держав із правовими системами перехідного типу.*

Ключові слова: *орієнтований на права підхід; перевірка дотримання пропорційності; теорія планування; конституційне судочинство; теоретичні розбіжності; теорія морального впливу; асиметрична гетерогенність.*

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ABSTRACT IN TURKISH*

Araştırma Makalesi

HAK TEMELLI ANAYASA YARGISI VE PLANLAMA TEORİSİNİN SINIRLARI: TÜRK ANAYASA MAHKEMESİNİN ASİMETRİK PARADİGMATİK DÖNÜŞÜMÜ, ORANTILILIĞIN YORUMSAL TEMELI VE ALMAN ANAYASA HUKUKUYLA KARŞILAŞTIRMA

Abdullah Eryiğit

ÖZET

Arka Plan: Dönemin *Türkiye Anayasa Mahkemesi Başkanı Zühtü Arslan, Ocak 2023'te düzenlenen bir sempozyumda yaptığı konuşmada, Türk anayasa yargısının "ideoloji temelli bir yaklaşımdan hak temelli bir yaklaşıma" geçtiğini ifade etmiştir. Bu kurumsal öz-tanımlama, 1989 tarihli Başörtüsü İptal Kararı'ndan 2019 tarihli Zübeyde Füsun Üstel ve Wikipedia kararlarına uzanan otuz yıllık bir içtihat gelişimini ifade etmektedir; ancak söz konusu dönüşümü hukuk teorisi düzeyinde açıklamamaktadır. Kurumsal tarih hukuku nasıl şekillendirir ve anayasal içtihattaki bir değişim hangi temellendirme mekanizması aracılığıyla açıklanabilir? Bu çalışma, söz konusu dönüşümü çağdaş hukuk teorisindeki "temellendirme" tartışması çerçevesinde hangi teorik modelin açıklayabileceğini araştırmakta ve bu soruyu otoriterlik sonrası ve geçiş dönemi hukuk sistemlerinde yargısal reform konusundaki daha geniş tartışmalarla ilişkilendirmektedir.*

Metodoloji: *Çalışma, doktriner (dogmatik) hukuk analizini karşılaştırmalı bir yaklaşımla birleştirmektedir. Türkiye Anayasa Mahkemesinin sekiz kararı (1989 tarihli Başörtüsü kararı, Zübeyde Füsun Üstel, Wikipedia, Şahin Alpay, Mehmet Hasan Altan (2) ve (3), Kavala (1) ve (2) ile Ahmet Şık (2)) "uç örnek" seçim mantığı çerçevesinde incelenmiş; Avrupa İnsan Hakları Mahkemesinin (AİHM) altı kanonik kararı ise karşılaştırma ölçütü olarak kullanılmıştır. Teorik çerçeve, Scott Shapiro'nun planlama teorisi, Nicos Stavropoulos'un yeniden çerçeveleme tezi ve Mark Greenberg'in Ahlaki Etki Teorisi üzerine kurulmuştur. Türk anayasa hukuku doktrini sekiz temel eser üzerinden, Alman anayasa hukuku ise Kommers ve Miller'ın başvuru eseri üzerinden incelenmiştir.*

Bulgular ve Sonuçlar: *Çalışma dört temel bulgu ortaya koymaktadır. Birincisi, paradigmatik değişim, birbirinden farklı uç örneklerin karşılaştırılması yoluyla ampirik olarak ortaya konulabilir. İkincisi, dönüşüm homojen değildir: olağanüstü hâl kararları paradigmanın korunduğunu gösterirken, Kavala kararları bir gerilemeye işaret etmekte;*

* The publication metadata in Turkish is presented as submitted by the authors.

2025 tarihli Ahmet Şık (2) kararı ise Bölüm düzeyinde devam eden direnci göstermektedir. Bu örüntü, burada "asimetrik heterojenlik" (asymmetric heterogeneity) kavramıyla ifade edilmektedir. Üçüncüsü, dönüşüm Shapiro'nun planlama teorisinin kavramsal araçlarıyla açıklanamamaktadır; "anayasal yetkilendirme" (constitutional delegation) savunması da yeterli değildir. Dördüncüsü, orantılılık denetiminin somut yapısı, Greenberg'in Ahlaki Etki Teorisi ve Berman'ın "ilke pozitivizmi" (principled positivism) ile örtüşen yorumcu bir temellendirme modelinin kurumsal tezahürü olarak anlaşılabilir.

Bu sonuç, Türk anayasa yargısında daha şeffaf bir muhakeme tarzı için teorik bir temel sunmakta; orantılılık denetiminin ahlaki boyutunun açıkça kabul edilmesinin yargısal hesap verebilirliği güçlendireceğini ileri sürmekte ve geçiş dönemi bağlamlarında anayasa mahkemelerindeki paradigmatik değişimleri analiz etmek için genelleştirilebilir bir kavramsal çerçeve ("asimetrik heterojenlik") önermektedir.

Anahtar Kelimeler: *hak temelli yaklaşım; orantılılık denetimi; planlama teorisi; anayasa yargısı; teorik uyuşmazlık; Ahlaki Etki Teorisi; asimetrik heterojenlik.*

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