Imprisonment in Defiance of the Law

Enemy Criminal Law in Türkiye in the Light of the European Court of Human Rights Judgments in Osman Kavala and Can Atalay

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Abstract

In its judgment of 17 November 2026 in *Şerafettin Can Atalay v. Türkiye*, the European Court of Human Rights found that Can Atalay, who remained in prison despite his election as Member of Parliament for Hatay and despite two separate violation judgments of the Constitutional Court, had suffered violations of his right to liberty, of his right to a speedy and effective review of the lawfulness of his detention, and of his right to stand for election; the Court further held that his continued imprisonment served to silence him and to stifle pluralism. This is the fourth Strasbourg judgment concerning the same proceedings. *Kavala v. Turkey* (2019) concerned the initial pre-trial detention, the infringement proceedings in *Kavala v. Türkiye* [GC] (2022) the failure to comply with that judgment, *Kavala v. Türkiye* (*No. 2*) [GC] (2026) the conviction itself, and *Şerafettin Can Atalay* the continued imprisonment after the election and the refusal to comply with the Constitutional Court's judgments. This paper reads the four judgments together as stages of a single set of proceedings and assesses the practices they identify in the light of Günther Jakobs's theory of enemy criminal law (*Feindstrafrecht*). It concludes that the judgments document a system of criminal justice in which the principle of legality is stretched, pre-trial detention turns into punishment, judicial independence is undermined by the threat of disciplinary action, criminal procedure becomes an instrument of silencing, and non-compliance with judicial decisions, both domestic and international, has become normal. These practices bear every hallmark of enemy criminal law, yet they also go beyond Jakobs's model. The limits that Jakobs himself drew for enemy criminal law, namely that the enemy is not a political category, that measures must be laid down by statute, that a minimum of rule-of-law adjudication must be guaranteed, that the way back must be kept open and that enemy criminal law must be openly named as such, have each been crossed in these proceedings; even the judges who recognised the "enemy's" rights were targeted. What emerges is not an enemy criminal law that Jakobs intended or described, but a state of exception in which the rule itself is suspended. Finally, since Atalay was convicted of aiding the offence attributed to Kavala, the principle of limited accessoriness means that the Grand Chamber judgment, which treats Kavala's conviction as devoid of effect under the Convention,

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also deprives Atalay's conviction of its basis.

Introduction

When voters in a country elect a person to Parliament, when the Constitutional Court twice rules that this person must be released, and when he nevertheless cannot leave prison, one can no longer speak of a trial; one must speak of imprisonment carried on by judicial means. This is precisely what the European Court of Human Rights (ECtHR) found in *Şerafettin Can Atalay v. Türkiye*, delivered on 17 November 2026.[1]

Read on its own, however, the judgment is read incompletely. Can Atalay was tried under the same indictment as Osman Kavala and was convicted of aiding the offence that Kavala was held to have committed as principal. Within seven years the ECtHR has delivered four judgments concerning these proceedings. *Kavala v. Turkey* (2019) found that the initial detention lacked reasonable suspicion and pursued the aim of silencing the applicant.[2] In the infringement proceedings in *Kavala v. Türkiye* [GC] (2022) the Court found that Türkiye had failed to comply with that judgment.[3] *Kavala v. Türkiye* (*No. 2*) [GC] (2026) held that the conviction itself was incompatible with the Convention.[4] *Şerafettin Can Atalay* (2026) examined how, on the basis of the same conviction, a Member of Parliament was kept in prison in defiance of the judgments of the Constitutional Court.

Together, these four judgments cover every stage of a single prosecution, from suspicion to the execution of the sentence. This paper first sets out the course of the proceedings and then discusses the judgments in turn. It then assesses the picture that emerges when the judgments are read together, what that picture says about the Turkish criminal justice system, and what it means in terms of the theory of enemy criminal law.

I. From Gezi to Strasbourg: A Chronology

A. How a Protest Was Turned into an "Attempt to Overthrow the Government"

Can Atalay is a lawyer and human rights defender. During the protests that began in May 2013 against the plan to build the Artillery Barracks (*Topçu Kışlası*) in Gezi Park under the Taksim Pedestrianisation Project, he was a member and legal adviser of Taksim Solidarity, a platform bringing together numerous associations, trade unions, professional organisations and political parties. Osman Kavala is a businessman who has been involved in founding many civil society organisations working in the fields of human rights, culture and the environment. Kavala has been deprived of his liberty since 18 October 2017. Some six years after the events, on 19 February 2019, an indictment was filed against sixteen persons, including Atalay and Kavala. According to the indictment, the defendants had planned the Gezi events in advance and had acted with the aim of plunging the country into chaos and overthrowing the government. The acts attributed to Atalay consisted largely of telephone conversations, speeches made at the protests and social media posts concerning administrative actions for the annulment of zoning

[1] ECtHR, *Şerafettin Can Atalay v. Türkiye*, no. 11503/24, 17 November 2026. The judgment was delivered by the Second Section and will become final in accordance with Article 44 § 2 of the Convention.

[2] ECtHR, *Kavala v. Turkey*, no. 28749/18, 10 December 2019.

[3] ECtHR, *Proceedings under Article 46 § 4 in the case of Kavala v. Türkiye* [GC], no. 28749/18, 11 July 2022.

[4] ECtHR, *Kavala v. Türkiye* (*No. 2*) [GC], no. 2170/24, 25 August 2026.

plans.[5]

On 10 December 2019 the ECtHR held that Kavala's detention was in breach of the Convention and that he must be released immediately.[6] On 18 February 2020 the Istanbul 30th Assize Court acquitted Kavala of the charges relating to the Gezi events. On the same day, however, he was taken into custody again, this time in an investigation concerning the coup attempt, and was remanded in custody the following day. On that same day the Council of Judges and Prosecutors (HSK) opened an inquiry into the three judges who had delivered the acquittal.[7] The acquittal was quashed on appeal in January 2021 and the case was transferred to the Istanbul 13th Assize Court. On 25 April 2022 that court sentenced Kavala to aggravated life imprisonment under Article 312 of the Turkish Criminal Code (TCK), and sentenced Atalay to eighteen years' imprisonment for aiding that offence (Article 39 TCK), ordering his detention. In the appeal proceedings the continuation of detention was justified by the severity of the sentence and by the fact that the offence appeared in the statutory catalogue of offences that constitute grounds for detention.[8]

The Court of Cassation upheld the conviction on 28 September 2023. One detail of that decision is highly instructive for a criminal lawyer. According to the Court of Cassation, Atalay's acts did not in fact amount to aiding the offence but to the offence of attempting to overthrow the government itself. Since there had been no appeal against the legal characterisation of the offence, however, the judgment was not quashed on that ground but upheld.[9] The same acts, in the same case file, could thus amount to aiding in the eyes of one court and to perpetration in the eyes of another. If the legal characterisation in a judgment that keeps a person in prison for eighteen years is this fluid, one must ask what kind of guarantee the principle of legality still offers.

B. Election, Immunity and Two High Courts

While the appeal on points of law was pending, Can Atalay was elected Member of Parliament for Hatay for the Workers' Party of Turkey (TİP) in the elections of 14 May 2023. Under Article 83 § 2 of the Constitution, a member of parliament alleged to have committed an offence before or after election may not be arrested, interrogated, detained or tried unless the Assembly decides otherwise. Cases where a member is caught in the act of committing an offence requiring a heavy penalty, and cases under Article 14 of the Constitution, provided that an investigation was initiated before the election, are excluded from this rule. Article 83 § 3 provides that the execution of a criminal sentence imposed on a member before or after election is suspended until the member ceases to hold office.[10]

[5] *Şerafettin Can Atalay v. Türkiye*, §§ 5-7.
[6] *Kavala v. Turkey*, §§ 157, 232, 240.
[7] *Kavala v. Türkiye (No. 2)*, §§ 32, 208.
[8] *Şerafettin Can Atalay v. Türkiye*, §§ 8-10.
[9] *Şerafettin Can Atalay v. Türkiye*, § 22.
[10] Parliamentary immunity is a procedural precondition. In the situations listed in Article 83 of the Constitution, the court must therefore order a stay of proceedings under Article 223 § 8 CCP, or wait until the parliamentary mandate ends or the immunity is lifted. See **Murat Volkan Dülger**/**Şaban Cankat Taşkın**, Ceza Muhakemesi Hukuku, 3rd ed., Seçkin Yayıncılık, Ankara, 2026, p. 341. In German law, too, immunity is regarded as a personal procedural bar, and it is accepted that, even where the judgment has become final, the custodial part of the sentence cannot be executed while the immunity subsists. See **Markus Mavany**, LR StPO, Band 5, Teilband 1, 27. Aufl., Jörg-Peter Becker/Volker Erb/Robert Esser/Kirsten Graalmann-Scheerer/Hans Hilger/Alexander Ignor (eds.), Walter de Gruyter, Berlin/Boston, 2020, § 152a, mn. 55-56.

Since its judgments in *Ömer Faruk Gergerlioğlu* and *Leyla Güven*, the Constitutional Court has held that neither the Constitution nor statute defines which offences fall under Article 14, so that this exception lacks a clear and foreseeable legal basis.[11] In its decision of 26 October 2022 the Plenary Criminal Chambers of the Court of Cassation also expressly accepted that the Constitutional Court's individual application judgments are binding and that the scope of Article 14 must be determined in line with them.[12] More importantly still, the 3rd Criminal Chamber of the Court of Cassation itself applied the same principle in a decision of 4 April 2023, only three months before its decision rejecting Atalay's request.[13]

Nevertheless, on 13 July 2023 the same Chamber dismissed Atalay's request for release and for a stay of the proceedings, holding that the offence under Article 312 fell within the scope of Article 14. On 25 October 2023, in *Şerafettin Can Atalay (2)*, the Plenary of the Constitutional Court found violations of the applicant's right to liberty and security and of his right to be elected and to engage in political activities; it ordered a retrial, a stay of execution of the judgment, his release and a stay of the proceedings.[14]

What followed is a chain of events without precedent in Turkish judicial history. On 8 November 2023 the 3rd Criminal Chamber of the Court of Cassation decided not to comply with the Constitutional Court's judgment, to forward its decision to Parliament and to file a criminal complaint against the Constitutional Court judges who had voted for a violation; two days later it issued a press statement accusing the Constitutional Court of acting like a "super appeal court" and of plunging the legal order into chaos. On 21 December 2023, in *Şerafettin Can Atalay (3)*, the Constitutional Court again found the violations and added a violation of the right of individual application.[15] On 3 January 2024 the Court of Cassation refused to comply with that judgment as well. When its decision was read out in the Plenary of the Grand National Assembly on 30 January 2024, Atalay's parliamentary mandate was declared forfeited. In its decision of 22 February 2024 the Constitutional Court stated that, after its violation judgment, there was no final judgment in existence, that the document read out was the Court of Cassation's decision not to comply with the Constitutional Court's judgment, that this had no basis whatsoever in Turkish law, and that the resulting situation was one of fact (*de facto*), not of law (*de jure*).[16]

While these decisions were being taken, statements supporting the Court of Cassation and targeting the Constitutional Court were made at the highest level of political power. The President defended the stance of the Court of Cassation and in January 2024 criticised the

[11] Constitutional Court [Plenary], *Ömer Faruk Gergerlioğlu*, no. 2019/10634, 1 July 2021; Constitutional Court [Plenary], *Leyla Güven*, no. 2018/26689, 7 April 2022.

[12] Court of Cassation, Plenary Criminal Chambers, 26 October 2022, E. 2020/16-462, K. 2022/671. To the same effect, on the obligation to take the Constitutional Court's judgments into account in the course of proceedings, see Court of Cassation, 2nd Civil Chamber, 22 December 2016, E. 2016/19574, K. 2016/16369.

[13] Court of Cassation, 3rd Criminal Chamber, 4 April 2023, E. 2023/3102, K. 2023/1966. Although the ECtHR judgment gives the decision number as "2023/966", the decision number in the Court of Cassation's case-law search system is 2023/1966. For earlier decisions of the Chamber to the same effect, see Court of Cassation, 3rd Criminal Chamber, 4 November 2021, E. 2021/7929, K. 2021/9940; 11 October 2022, E. 2022/7608, K. 2022/6526; 22 November 2022, E. 2022/1232, K. 2022/8359. See also *Şerafettin Can Atalay v. Türkiye*, §§ 60-63, 162.

[14] Constitutional Court [Plenary], *Şerafettin Can Atalay (2)*, no. 2023/53898, 25 October 2023. The judgment is in line with the Constitutional Court's earlier case-law on parliamentary immunity. See Constitutional Court [Plenary], *Kadri Enis Berberoğlu (2)*, no. 2018/30030, 17 September 2020. Although the ECtHR judgment gives the application number of this judgment as "2018/20030", the application number in the Constitutional Court's case-law database is 2018/30030.

[15] Constitutional Court [Plenary], *Şerafettin Can Atalay (3)*, no. 2023/99744, 21 December 2023.

[16] *Şerafettin Can Atalay v. Türkiye*, §§ 32-49.

opposition for trying to "dig a tunnel" from the prison to Parliament in order to rescue a "terrorist" sentenced to eighteen years. The President's Chief Adviser and Deputy Chair of the Legal Policies Board likewise found the Court of Cassation's non-compliance decision correct, said that its courage was beyond dispute, and described it as a litmus test showing who stood by the national judiciary.[17]

II. Four Judgments, One Prosecution

A. Kavala v. Turkey (*2019*)*: Detention without Suspicion*

The first judgment concerns the very beginning of the proceedings. The ECtHR found that Kavala's arrest and continued detention could not be justified by a reasonable suspicion based on an objective assessment of the acts in question. The measures were based not only on facts that could not reasonably be considered criminal under domestic law but largely on facts relating to the exercise of rights protected by the Convention. In the Court's view, the very fact that such acts were included in the indictment as constituent elements of the offence diminished the reasonableness of the suspicion.[18]

The ECtHR further found a violation of Article 18 of the Convention. The real purpose of the measures was to silence Kavala, and the charges were likely to have a chilling effect on the work of human rights defenders.[19] The Court therefore held that the Government must take every necessary measure to put an end to Kavala's detention and to secure his immediate release.[20]

B. Kavala v. Türkiye [*GC*] (*2022*)*: A Judgment Not Complied With*

Kavala was not released. In February 2022 the Committee of Ministers of the Council of Europe triggered the infringement procedure under Article 46 § 4 of the Convention and referred to the Court the question whether Türkiye had complied with the judgment. On 11 July 2022 the Grand Chamber found that the measures taken by Türkiye did not allow it to conclude that the State had acted in good faith, in a manner compatible with the conclusions and the spirit of the judgment, and that Türkiye had failed to fulfil its obligation to comply with the judgment.[21] In

[17] *Şerafettin Can Atalay v. Türkiye*, §§ 50-52. The statements are rendered on the basis of the English translation given in the ECtHR judgment.

[18] *Kavala v. Turkey*, § 157. Reasonable suspicion presupposes the existence of facts or information that would satisfy an objective observer that the person concerned may have committed the offence. See **William A. Schabas**, The European Convention on Human Rights: A Commentary, Oxford University Press, Oxford, 2015, p. 238.

[19] *Kavala v. Turkey*, § 232. For the general principles on the application of Article 18 of the Convention, see ECtHR, *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017, §§ 287-317. As regards Türkiye, to the same effect, see ECtHR, *Selahattin Demirtaş v. Turkey (No. 2)* [GC], no. 14305/17, 22 December 2020, §§ 436-437. On Article 18 as a provision designed to prevent covert evasion of Convention obligations, and on the need to have regard, in applying it, to the direct link between the protection of human rights and democracy, see **İlyas Doğan**, "Hakkın Sınırlanmasının Sınırı", in İlyas Doğan (ed.), Avrupa İnsan Hakları Sözleşmesi Hukuku, 2nd ed., Astana Yayınları, Ankara, 2021, pp. 339, 341; **Schabas**, ECHR Commentary, p. 627. On Article 18 as a safeguard against misuse of power and breach of good faith, on the finding in *Gusinskiy v. Russia* of a violation of Article 5 taken together with Article 18 where criminal proceedings and detention were used as an instrument of commercial bargaining, and on proof of bad faith as the greatest obstacle in such applications, see **David Harris**/**Michael O'Boyle**/**Ed Bates**/**Carla Buckley**, Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights, 2nd ed., Oxford University Press, Oxford, 2009, pp. 652-653.

[20] *Kavala v. Turkey*, § 240.

[21] *Kavala v. Türkiye* [GC] (Art. 46 § 4), §§ 173-174. For the judgment in which this procedure was used for the first time in the Convention system, see ECtHR, *Proceedings under Article 46 § 4 in the case of Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019. On this procedure as one intended to be used by the Committee of Ministers only in exceptional circumstances, see **Schabas**, ECHR Commentary, pp. 865-866. On the absence in the

its assessment of good faith the Grand Chamber expressly took into account the HSK inquiry into the judges who had delivered the acquittal.[22] It also emphasised that the conviction relied on facts relating to the Gezi events, in respect of which the 2019 judgment had found that there was plainly no reasonable suspicion.[23]

C. Kavala v. Türkiye (No. 2) [*GC*] (*2026*): *A Conviction Devoid of Effect*

The third judgment concerns the conviction itself. The Grand Chamber found that Article 312 TCK had been extended in an unforeseeable manner in the context of the Gezi events, so that the interference could not be regarded as "prescribed by law";[24] that the trial suffered from serious shortcomings impairing the very essence of the right to a fair trial;[25] and that the post-conviction imprisonment was unlawful because it was based on a judgment delivered as a result of a flagrant denial of justice.[26] The predominant purpose of all these measures was to punish and silence Kavala for his role in the Gezi demonstrations and for the views he had expressed as a human rights defender.[27] The aggravated life sentence without the possibility of parole, moreover, violates Article 3 of the Convention.[28]

As to individual measures, the Grand Chamber required that Kavala be released at the earliest possible date and that the conviction be regarded as devoid of effect under Convention law.[29] As to general measures, it stated that prosecutions and detentions of political opponents, human rights defenders and journalists on the basis of broadly interpreted or artificially inflated charges constitute a systemic problem.[30]

D. Şerafettin Can Atalay v. Türkiye (*2026*): *Imprisonment after the Election*

1. The Scope of the Review The *Atalay* judgment does not concern the conviction but only the continued imprisonment after his election as a Member of Parliament and after the Constitutional Court's judgments. This limitation stems from the applicant's own choice. The compatibility of the conviction itself with the Convention was examined in *Kavala* (*No. 2*).[31]

2. Unlawful Imprisonment According to the ECtHR, the Constitutional Court's violation judgments amount in substance to an acknowledgement that Article 5 § 1 of the Convention had been breached. The Constitutional Court is the highest judicial authority empowered to interpret authoritatively the constitutional guarantees of individual rights. For another court to call into question the power to give final and binding decisions conferred on a constitutional

Convention system of any direct sanction against a State failing to comply with judgments, and on the very remote likelihood of the sanctions of suspension and expulsion under the Statute of the Council of Europe being applied, see **Harris**/**O'Boyle**/**Bates**/**Buckley**, ECHR, (2), p. 883.

[22] *Kavala v. Türkiye* [GC] (Art. 46 § 4), § 168.
[23] *Kavala v. Türkiye* [GC] (Art. 46 § 4), § 172.
[24] *Kavala v. Türkiye* (*No. 2*), §§ 168-171.
[25] *Kavala v. Türkiye* (*No. 2*), §§ 204-211.
[26] *Kavala v. Türkiye* (*No. 2*), §§ 246-248.
[27] *Kavala v. Türkiye* (*No. 2*), § 279.
[28] *Kavala v. Türkiye* (*No. 2*), § 289.
[29] *Kavala v. Türkiye* (*No. 2*), § 309.
[30] *Kavala v. Türkiye* (*No. 2*), § 310.
[31] *Şerafettin Can Atalay v. Türkiye*, §§ 76, 78.

court is incompatible with the principles of the rule of law and legal certainty.[32]

The ECtHR also found that the Plenary Criminal Chambers of the Court of Cassation, and the 3rd Criminal Chamber itself, had previously accepted that the Constitutional Court's judgments were binding, but that no reference whatsoever was made to those decisions in Atalay's case. Contradictory interpretations of the same provisions by the high courts undermine the foreseeability of the law. The Court rejected the Government's argument that "the conviction remains valid unless the court concerned accepts the request for a retrial", regarding it as an approach that makes the Constitutional Court's judgments subject to the approval of the court concerned.[33] In the ECtHR's view, Atalay's imprisonment from the moment of his election as a Member of Parliament was unlawful. This conclusion applies both to the period of pre-trial detention before the Court of Cassation upheld the conviction and to the subsequent period of imprisonment as a convicted person. In neither period could the deprivation of liberty be regarded as "lawful" or "in accordance with a procedure prescribed by law" within the meaning of the Convention.[34]

3. A Review without Consequences The Constitutional Court reviewed the lawfulness of the imprisonment speedily: within three months in the first application and within one month in the second. The problem lay not in the quality of the review but in its outcome, since the release orders were not implemented. At the date of the judgment the applicant was still in prison, some three years after the Constitutional Court's first judgment. A review that cannot secure release is not the review required by Article 5 § 4 of the Convention.[35] The ECtHR expressly stated that this finding did not call into question the general effectiveness of the individual application. The problem lies not with the Constitutional Court but with the courts that fail to comply with its judgments.[36]

4. Disregarding the Will of the Electorate Article 3 of Protocol No. 1 guarantees not only the right to stand for election but also the right, once elected, to sit as a member of parliament. The fact that the applicant could not take his seat in Parliament and that his mandate was revoked on the strength of a conviction resting on decisions found unlawful by the Constitutional Court is incompatible with the rule of law. This interference violated not only the applicant's right to

[32] *Şerafettin Can Atalay v. Türkiye*, §§ 86, 90-91. The ECtHR first set out this principle in two cases concerning journalists, in which the first-instance courts had failed to comply with the Constitutional Court's judgments ordering release. See ECtHR, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018, § 139; ECtHR, *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018, § 118. For the Constitutional Court judgments that were not implemented, see Constitutional Court [Plenary], *Mehmet Hasan Altan* (2), no. 2016/23672, 11 January 2018; Constitutional Court [Plenary], *Şahin Alpay* (2), no. 2016/16092, 11 January 2018.

[33] *Şerafettin Can Atalay v. Türkiye*, §§ 88-89, 92.

[34] *Şerafettin Can Atalay v. Türkiye*, §§ 95-96.

[35] *Şerafettin Can Atalay v. Türkiye*, §§ 116-121. A court within the meaning of Article 5 § 4 of the Convention must have the power to put an end to a deprivation of liberty it finds unlawful, that is, to order release. A body that can only make recommendations is not a court in this sense. See **Schabas**, ECHR Commentary, p. 255. On the purpose of this guarantee as securing the release of a person unlawfully deprived of liberty, see **Harris/O'Boyle/Bates/Buckley**, ECHR, (2), p. 184. The Constitutional Court likewise accepts that the non-implementation of its judgments amounts to a continuation of the violation and results in a second violation of the right concerned. See Constitutional Court, *Aligül Alkaya and Others* (2), no. 2016/12506, 7 November 2019. For the general principles on redressing violations, see Constitutional Court [Plenary], *Mehmet Doğan*, no. 2014/8875, 7 June 2018.

[36] *Şerafettin Can Atalay v. Türkiye*, §§ 120, 122-123.

stand for election but also the free expression of the opinion of the people.[37] Yet Article 83 § 3 of the Constitution defers the execution of a member's sentence until the end of the mandate, even where the conviction is final.

5. The Real Purpose: Silencing Although aware that bad faith may be accepted only on a high standard of proof, the ECtHR, assessing the specific and contextual circumstances of the case together, accepted that this threshold had been met.[38] It relied on the following elements: the applicant was a human rights defender, and a violation of Article 18 had already been found in the *Kavala* judgments concerning the same proceedings; the second refusal to implement the Constitutional Court's judgments was unprecedented; the 3rd Criminal Chamber of the Court of Cassation departed without explanation from the principles laid down by the Plenary Criminal Chambers and by itself; criminal complaints were filed against Constitutional Court judges; statements by the President and his adviser coincided with the reasoning of the Court of Cassation; and the findings of the Venice Commission and of the Council of Europe Commissioner for Human Rights concerning judicial independence.[39]

In the Court's view, these circumstances, taken as a whole, show that the imprisonment resulting from the Court of Cassation's refusal to implement the Constitutional Court's judgments pursued the aim of silencing the applicant and stifling pluralism, and was likely to have a chilling effect on the work of human rights defenders.[40] The ECtHR also stated expressly that the Court of Cassation's stance could not be explained merely by a difference in interpretation between two high courts.[41]

6. Judgment and Dissent The ECtHR required Türkiye to end the applicant's imprisonment, to release him immediately and to enable him to exercise his parliamentary mandate; as a general measure, it required Türkiye to ensure full implementation of the Constitutional Court's judgments.[42] The judgment was adopted unanimously as regards Article 5 § 4 and by six votes to one as regards the other violations. Even Judge Saadet Yüksel, elected in respect of Türkiye, emphasised in her separate opinion that disagreeing with the Constitutional Court's interpretation is one thing and refusing to implement its judgments is another, and described the failure to implement them as a clear and serious violation of the right of individual application.[43] The judgment is a Chamber judgment and will become final in accordance with Article 44 § 2 of the Convention.

[37] *Şerafettin Can Atalay v. Türkiye*, §§ 130-131, 140-143. To the same effect, on an elected representative's inability to take part in parliamentary work because of detention as a violation of Article 3 of Protocol No. 1, see *Selahattin Demirtaş v. Turkey (No. 2)*, §§ 386, 397.

[38] *Şerafettin Can Atalay v. Türkiye*, §§ 156-158.

[39] *Şerafettin Can Atalay v. Türkiye*, §§ 159-167. The ECtHR had already accepted, with regard to Türkiye, that statements by senior public officials may be taken into account as contextual elements in establishing an ulterior purpose. See *Selahattin Demirtaş v. Turkey (No. 2)*, §§ 436-437; ECtHR, *Selahattin Demirtaş v. Türkiye (No. 4)*, no. 13609/20, 8 July 2025.

[40] *Şerafettin Can Atalay v. Türkiye*, § 168.

[41] *Şerafettin Can Atalay v. Türkiye*, § 164.

[42] *Şerafettin Can Atalay v. Türkiye*, §§ 176-177.

[43] *Şerafettin Can Atalay v. Türkiye*, partly dissenting, partly concurring opinion of Judge Yüksel, §§ 14-15.

III. Reading the Four Judgments Together

A. The Same Purpose, a Widening Target

In three of the four judgments a violation of Article 18 of the Convention was found, and the reason was the same each time: silencing. The target, however, widens with each judgment. In 2019 the target was a human rights defender and, through him, civil society.[44] In 2026 the Grand Chamber found that the aim of silencing extended beyond detention to the prosecution and the conviction as a whole.[45] In *Atalay* the target is the will of the electorate and political pluralism.[46]

More importantly, the source of bad faith shifts. In the *Kavala* judgments the ulterior purpose was located in the conduct of the investigating and prosecuting authorities and in the conviction. In *Atalay*, for the first time, that purpose is linked directly to the decisions of a high court, the Court of Cassation, refusing to comply with binding judgments. This means that the highest tier of criminal justice has now become part of the picture as well.

B. Two Layers of Non-Compliance

In *Kavala*, Türkiye failed to comply with the ECtHR's judgment and faced infringement proceedings, a procedure rarely used in the history of the Convention. In *Atalay*, the Court of Cassation failed to comply with the Constitutional Court's judgments. These two instances of non-compliance are not independent of each other. The *Atalay* judgment takes its assessment that non-compliance with the Constitutional Court's judgments undermines the rule of law and the effectiveness of the individual application directly from *Kavala* (*No. 2*).[47] According to the Grand Chamber, the Constitutional Court is the cornerstone of the national protection of the rights guaranteed both by the Constitution and by the Convention, and full compliance with its judgments is mandatory.[48]

The two cases also show that domestic protection can be rendered inoperative in two different ways. In *Kavala*, the problem was the Constitutional Court itself. The Grand Chamber regarded the failure to decide Kavala's individual applications for more than four years as procedural inaction seriously undermining the effectiveness of that remedy.[49] In *Atalay*, by contrast, the Constitutional Court decided quickly and correctly, but its judgments were not implemented. In one case protection was delayed; in the other it was granted but deprived of effect. The outcome is the same in both: the applicants are in prison.

C. Limited Accessoriness: No Principal, No Aider

For a criminal lawyer, this is the most important consequence of reading the four judgments together. Atalay was convicted of aiding the offence that Kavala was held to have committed as principal.[50] Participation in Turkish law rests on the principle of limited accessoriness. The

[44] *Kavala v. Turkey*, § 232.
[45] *Kavala v. Türkiye* (*No. 2*), § 279.
[46] *Şerafettin Can Atalay v. Türkiye*, § 168.
[47] *Şerafettin Can Atalay v. Türkiye*, §§ 122-123, 164; *Kavala v. Türkiye* (*No. 2*), §§ 130-132.
[48] *Kavala v. Türkiye* (*No. 2*), § 132.
[49] *Kavala v. Türkiye* (*No. 2*), §§ 122-128.
[50] *Şerafettin Can Atalay v. Türkiye*, § 9.

liability of the aider depends on an act committed intentionally and unlawfully (Article 40 § 1 TCK).[51] The Grand Chamber, however, treated Kavala's conviction as devoid of effect under Convention law, because it rested on an unforeseeable extension of Article 312 and on activities protected by the Convention.[52] If the principal offence has been constructed in this way, it is incompatible with the system of participation in criminal law to maintain that the liability of an aider dependent on it can survive.

What this conclusion means in procedural law is not yet clear. Article 311 § 1 (f) of the Code of Criminal Procedure (CCP) makes it a ground for reopening that a final judgment of the ECtHR has found that the judgment was delivered in breach of the Convention. In practice, this avenue is open to the applicant in whose favour the violation was found. Kavala and Atalay, however, were convicted in the same judgment on the basis of the same facts. In our view, once the incompatibility of that judgment with the Convention has been conclusively established, reaching a different result for the aider, whose conviction depends on that of the principal, is incompatible both with the unity of the legal order and with the principle of accessoriness.[53] On the other hand, since the *Atalay* judgment did not examine the conviction, it would not be correct to transfer the findings concerning Kavala directly to Atalay. The Grand Chamber's findings on the interpretation of Article 312 therefore provide a strong basis, at the very least, for Atalay's applications concerning the right to a fair trial and freedom of expression and assembly that are pending before the Constitutional Court.[54]

D. The Instrumentalisation of Criminal Proceedings

The Grand Chamber found that in Kavala's case fundamental procedural safeguards had been circumvented through successive prosecutions, changes in the legal characterisation of the offences and repeated detentions, and that the authority of both domestic and international judicial decisions had been neutralised; it expressly described this as an "instrumentalisation of criminal law".[55] In the section on general measures it also stated that the excessive use of

[51] The Plenary Criminal Chambers of the Court of Cassation have also consistently held that an accomplice who does not carry out the act described in the statutory definition is liable for the act committed only under the rule of accessoriness laid down in Article 40 TCK. See Court of Cassation, Plenary Criminal Chambers, 25 March 2026, E. 2024/415, K. 2026/186; 20 May 2026, E. 2025/227, K. 2026/323. On the principle of limited accessoriness, see **Murat Volkan Dülger**, Ceza Hukuku Genel Hükümler, 4th ed., Seçkin Yayıncılık, Ankara, 2026, p. 1115. For the same rule in German law, see **Bernd Schünemann**/**Luís Greco**, LK StGB, Band 2, 13. Aufl., Gabriele Cirener/Henning Radtke/Ruth Rissing-van Saan/Thomas Rönnau/Wilhelm Schluckebier (eds.), Walter de Gruyter, Berlin/Boston, 2021, Vor §§ 26, 27, mn. 19-20; **Bettina Noltenius**, "Die Lehre von der Beteiligung", in Eric Hilgendorf/Hans Kudlich/Brian Valerius (eds.), Handbuch des Strafrechts, Band 3, C.F. Müller, Heidelberg, 2021, § 50, mn. 68; **Günter Heine**/**Bettina Weißer**, S/S StGB, Albin Eser/Walter Perron/Detlev Sternberg-Lieben/Jörg Eisele (eds.), 30. Aufl., C. H. Beck, München, 2019, Vor §§ 25 ff., mn. 22; **Urs Kindhäuser**/**Eric Hilgendorf**, Strafgesetzbuch, Lehr- und Praxiskommentar, 10. Aufl., Nomos, Baden-Baden, 2025, Vor §§ 25-31, mn. 17-18.

[52] *Kavala v. Türkiye* (*No. 2*), §§ 171, 309.

[53] **Dülger**/**Taşkın**, CMK, (3), pp. 918-919. In German law, the prevailing view holds that the ground for reopening based on an ECtHR judgment (StPO § 359 Nr. 6) has effect only *inter partes* and confers a right to reopening only on the convicted person who personally obtained the judgment finding a violation. This result is criticised in the literature, and its extension at least to parallel applications pending under the pilot-judgment procedure has been advocated. See **Frank Peter Schuster**, LR StPO, Band 9, Teilband 1, 27. Aufl., Jörg-Peter Becker/Volker Erb/Robert Esser/Kirsten Graalmann-Scheerer/Hans Hilger/Alexander Ignor (eds.), Walter de Gruyter, Berlin/Boston, 2022, § 359, mn. 173-176. Atalay, however, obtained a judgment finding a violation from the ECtHR on his own application. The problem is that this judgment does not cover the conviction.

[54] On these applications by Atalay pending before the Constitutional Court, see *Şerafettin Can Atalay v. Türkiye*, §§ 44-46.

[55] *Kavala v. Türkiye* (*No. 2*), § 278.

detention, broad legal characterisations and successive prosecutions may indicate a misuse of the State's "repressive apparatus".[56]

The *Atalay* judgment shows another form of the same instrument. In *Kavala*, the deprivation of liberty was prolonged through new investigations and new characterisations. In *Atalay*, no new step was even necessary; it was enough not to implement the release orders. In one case the instrument is prosecution, in the other execution. The purpose and the result are the same.

E. Differences between the Judgments

When reading the four judgments together, their differences must not be overlooked. *Kavala* (*No. 2*) is a final Grand Chamber judgment adopted by fifteen votes to two. *Şerafettin Can Atalay*, by contrast, is a Chamber judgment that is not yet final and was adopted by six votes to one; a referral to the Grand Chamber may be requested. Moreover, the scope of *Atalay* is limited, by the applicant's choice, to the period after the election. These differences do not change the fact that the judgments support one another, but they determine the extent to which the findings in one may be carried over to the other.

IV. Turkish Criminal Justice in the Mirror of the Judgments

A. Stretching the Principle of Legality

Article 312 TCK punishes attempting, by force and violence, to abolish the government or to prevent it, in whole or in part, from performing its duties. It is one of the offences carrying the heaviest penalties in the Turkish Criminal Code, and its elements must be interpreted narrowly. According to the Grand Chamber, however, the domestic courts derived the material element of this offence from the sum of forms of conduct that are not in themselves criminal and are protected by the Convention, such as civil society activities, lobbying, international contacts and organisational support for peaceful demonstrations.[57]

This finding points to a chronic problem of Turkish criminal law. Ordinarily, the judge starts from the statutory definition of the offence and examines whether the facts fit it. In these proceedings the direction was reversed: the events were interpreted first, and the offence was then derived from that interpretation. In Article 312 the attempt is itself incorporated into the definition of the offence.[58] For that reason, the concrete existence of the act of execution, that is, of force and violence, is of paramount importance. A person who did not personally use force or violence, and who has not been shown to have called for it, can be regarded as a principal or an aider of this offence only by interpreting the definition of the offence so broadly that it amounts to analogy, which the law does not permit.[59] The Grand Chamber's warning is clear:

[56] *Kavala v. Türkiye* (*No. 2*), § 312.

[57] *Kavala v. Türkiye* (*No. 2*), §§ 168-171.

[58] On the nature of such "undertaking" offences (*kalkışma suçları*), see **Dülger**, GH, (4), p. 447. In German law, too, high treason (*Hochverrat*) is framed as a genuine undertaking offence (*echtes Unternehmensdelikt*) covering both the completed offence and the attempt. See **Kindhäuser**/**Hilgendorf**, NHK StGB, (10), Vor §§ 81-83a, mn. 3.

[59] On the prohibition of analogy as a requirement not only of legal certainty but also of the separation of powers, and on the confusion of analogy and interpretation in practice, see **Dülger**, GH, (4), pp. 159-160. In German scholarship, too, it is accepted that the prohibition of analogy is addressed primarily to the judge, that the possible literal meaning of the statute marks the outermost limit of judicial interpretation, and that the prohibition rests on both the rule-of-law and the democratic principle. See **Gerhard Dannecker**/**Jan C. Schuhr**, LK StGB, Band 1, 13. Aufl., Gabriele Cirener/Henning Radtke/Ruth Rissing-van Saan/Thomas Rönnau/Wilhelm Schluckebier

such an interpretation carries the risk of retrospectively attributing to all participants isolated acts of violence occurring at the margins of nationwide protest movements, and makes freedom of assembly and expression subject to an absolute obligation to maintain public order.[60]

B. The Erosion of the Principle of Personal Responsibility

Criminal responsibility is personal (Article 38 § 7 of the Constitution; Article 20 § 1 TCK). No one may be held responsible for the act of another. The Grand Chamber found that the domestic courts' interpretation held the applicant indirectly responsible for acts of violence committed by third parties, without his direct participation, instigation or encouragement. Relying on a person's presumed influence or structural role within a social movement, without examining the source of the violence and the individual responsibility of the perpetrators, places a manifestly disproportionate criminal burden on civil society actors.[61]

C. Reversing the Burden of Proof

The presumption of innocence requires the prosecution to prove every element of the offence beyond reasonable doubt. According to the Grand Chamber, however, the conviction rested largely on contextual and insufficiently individualised inferences, and the burden of rebutting general assumptions was placed on the defendant. The element of "force and violence" was established by relying on all the acts of violence that occurred during the events, without assessing individually the incidents attributable to the defendant.[62] The finding of the 2019 judgment points in the same direction: the inclusion in the indictment of acts protected by the Convention as elements of the offence diminishes the reasonableness of the suspicion from the outset.[63]

This picture is not foreign to Turkish criminal proceedings. In broadly defined offences, evidence is often built on the profile of the person rather than on the act. Whom someone has met, which association they belong to, which meeting they attended and what they shared take the place of the elements of the offence. Yet the purpose of criminal proceedings is to prove not who a person is but what that person did.

D. Detention Turned into Punishment

Article 100 § 3 CCP establishes, for catalogue offences, a statutory presumption of a risk of flight or of tampering with evidence. Article 312 is among those offences. The continuation of Atalay's detention during the appeal proceedings was based on the severity of the sentence and on the

(eds.), Walter de Gruyter, Berlin/Boston, 2020, § 1, mn. 238, 242; **Bernd Hecker**, S/S StGB, (30), § 1, mn. 25; **Kindhäuser**/**Hilgendorf**, NHK StGB, (10), § 1, mn. 6-7.

[60] *Kavala v. Türkiye* (*No. 2*), § 170. In German law, with regard to *Hochverrat*, which may be regarded as the counterpart of Article 312, it is likewise accepted that criminal law must be kept within constitutional bounds of proportionality in the field of political dispute, so that force or the threat of force satisfies the definition of the offence only where it is objectively capable of breaking the resistance of constitutional organs. See **Mark Steinsiek**, LK StGB, Band 7, 13. Aufl., Gabriele Cirener/Henning Radtke/Ruth Rissing-van Saan/Thomas Rönnau/Wilhelm Schluckebier (eds.), Walter de Gruyter, Berlin/Boston, 2021, § 81, mn. 17; **Detlev Sternberg-Lieben**, S/S StGB, (30), § 81, mn. 4.

[61] *Kavala v. Türkiye* (*No. 2*), § 169. On the principle of personal criminal responsibility, see **Dülger**, GH, (4), p. 476.

[62] *Kavala v. Türkiye* (*No. 2*), §§ 204-206.

[63] *Kavala v. Turkey*, § 157.

offence's inclusion in the catalogue.[64] The ECtHR, however, has stressed for many years that the severity of the sentence cannot in itself justify detention and that the grounds for detention must be specific and individualised.[65]

In these proceedings, detention ceased to be a procedural measure and took the place of punishment.[66] Osman Kavala has been continuously deprived of his liberty since 18 October 2017. The ECtHR has found the whole of that period to be in breach of the Convention. The detention up to the 2019 judgment lacked reasonable suspicion, the detention between 10 December 2019 and 25 April 2022 was arbitrary, and the imprisonment after the conviction is unlawful.[67] Can Atalay has been in prison since 25 April 2022, first as a detainee and, after the Court of Cassation's decision of 28 September 2023 upholding the conviction, as a convicted prisoner. More than half of that period has elapsed since the Constitutional Court's release orders.

E. Judicial Independence and the Threat of Discipline

Perhaps the most instructive moment in these proceedings is the day after the acquittal of 18 February 2020. The HSK opened an inquiry into the three judges who had delivered the acquittal and subsequently brought disciplinary proceedings. According to the Grand Chamber, such proceedings, opened after an acquittal that was, moreover, consistent with the requirements of the ECtHR's 2019 judgment, were by their nature capable of exerting a chilling pressure on the judges concerned and, more generally, of undermining judicial independence in the subsequent proceedings. The repeated transfer of the case from one court to another and the presence on the bench, at the stage when the judgment was delivered, of a judge with past close links to the ruling party reinforced those doubts.[68]

In a system in which a judge faces disciplinary proceedings for delivering an acquittal, the message to other judges is clear. The Grand Chamber assessed these problems together with structural deficiencies in the mechanisms for appointment, transfer and discipline and with the non-implementation of the Constitutional Court's judgments, and spoke of a "profound deterioration" affecting judicial independence in Türkiye.[69] Since 2017 the Venice Commission has likewise repeatedly stated that the composition of the HSK gives the executive decisive

[64] *Şerafettin Can Atalay v. Türkiye*, § 10.

[65] ECtHR, *Yağcı and Sargın v. Turkey*, nos. 16419/90 and 16426/90, 8 June 1995, § 52; ECtHR, *Becciev v. Moldova*, no. 9190/03, 4 October 2005, § 58; ECtHR, *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, § 140. The Constitutional Court likewise accepts that, even for catalogue offences, the grounds for detention must rest on concrete facts and be individualised. See Constitutional Court, *Halas Aslan*, no. 2014/4994, 16 February 2017, §§ 75-78. On the point that, for catalogue offences, the statute merely presumes the existence of grounds for detention, and that in practice this presumption is applied as if it were a mandatory rule, turning detention into an anticipatory punishment, see **Dülger**/**Taşkın**, CMK, (3), pp. 398-399. In German law, too, it is accepted that the provision on detention for serious offences (StPO § 112 Abs. 3) does not mean automatic detention, that the Federal Constitutional Court upheld it as constitutional only by narrowing it in accordance with the principle of proportionality, and that the judge must examine the circumstances of the specific case and set them out in the detention order. See **Detlef Lind**, LR StPO, Band 4, Teilband 1, 27. Aufl., Jörg-Peter Becker/Volker Erb/Robert Esser/Kirsten Graalmann-Scheerer/Hans Hilger/Alexander Ignor (eds.), Walter de Gruyter, Berlin/Boston, 2019, § 112, mn. 99-101.

[66] On pre-trial detention as something that is not, and may not be directed towards, an anticipated punishment, and on the danger of purposes not provided for by law being concealed behind stereotyped reasoning (*apokryphe Haftgründe*), see **Lind**, LR StPO, (27), Vor § 112, mn. 27-28.

[67] *Kavala v. Turkey*, § 157; *Kavala v. Türkiye* (*No. 2*), §§ 247-249.

[68] *Kavala v. Türkiye* (*No. 2*), §§ 208-209. The same inquiry was also taken into account in assessing whether Türkiye had complied with the 2019 judgment. See *Kavala v. Türkiye* [GC] (Art. 46 § 4), § 168.

[69] *Kavala v. Türkiye* (*No. 2*), §§ 210-211.

influence over the judiciary.[70]

F. There Is No Law of Non-Compliance

Under Article 153 § 6 of the Constitution, the decisions of the Constitutional Court are binding on the legislative, executive and judicial organs, on the administrative authorities, and on natural and legal persons. Article 50 § 2 of Law No. 6216 requires that, where the violation results from a court decision, a retrial be held and the consequences of the violation be redressed.[71] In *Kadri Enis Berberoğlu* (3), the Constitutional Court stated that the rule of law is not mere rhetoric, that failure to comply with its judgments is a grave breach of the principle of the rule of law, and that it entails criminal, administrative and civil liability.[72]

In Atalay's case, however, the criminal complaint was directed not at those who failed to comply with the judgments but at those who delivered them. A court that failed to comply with a binding judicial decision accused the judges who had delivered it. The ECtHR stated that this criminal complaint alone raised questions as to the unity of the legal order.[73] In our view, this episode sums up the point that Turkish criminal justice has reached: criminal law can now be used not as a means of protection against violations of rights but as a means of threatening the judges who find such violations. The concern expressed in December 2025 by the Council of Europe Commissioner for Human Rights about the non-implementation of the Constitutional Court's judgments in the cases of Can Atalay and Tayfun Kahraman likewise shows that the problem is not confined to a single case.[74]

G. A Sentence without Hope

These proceedings have also brought another structural problem to light. Aggravated life imprisonment imposed under Article 312 TCK is among the sentences to which conditional release does not apply. According to the Grand Chamber, there is accordingly no prospect of release and no mechanism allowing the sentence to be reviewed in the light of changes in the prisoner's personal situation and dangerousness. The incompatibility with Article 3 of the Convention arises not at some later stage of the execution of the sentence but at the moment the sentence is imposed.[75] If the most severe penalty of a criminal justice system is incompatible with human dignity, that system's conception of punishment must also be questioned.

V. Enemy Criminal Law: The Limits Drawn by Jakobs and Turkish Practice

A. Jakobs's Theory

Within criminal law theory, the most suitable framework for making sense of the practices seen in these proceedings is Günther Jakobs's theory of enemy criminal law (*Feindstrafrecht*). Jakobs

[70] *Şerafettin Can Atalay v. Türkiye*, § 68.

[71] In such a case the court has no discretion as to whether to hold a retrial. See **Dülger**/**Taşkın**, CMK, (3), p. 919.

[72] Constitutional Court [Plenary], *Kadri Enis Berberoğlu* (3), no. 2020/32949, 21 January 2021, §§ 141-142. See also *Şerafettin Can Atalay v. Türkiye*, §§ 57-58.

[73] *Şerafettin Can Atalay v. Türkiye*, § 163.

[74] *Şerafettin Can Atalay v. Türkiye*, § 67.

[75] *Kavala v. Türkiye* (*No. 2*), § 289. To the same effect, see ECtHR, *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, 9 July 2013, § 122. On aggravated life imprisonment without the possibility of conditional release in Türkiye as a violation of Article 3 of the Convention, see ECtHR, *Öcalan v. Turkey* (*No. 2*), nos. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014, §§ 202-207. See also **Dülger**, GH, (4), pp. 1289-1290.

first used the concept in 1985, in a paper critically examining the criminalisation of conduct in the domain preceding the violation of a legal interest (*Vorfeld einer Rechtsgutsverletzung*).[76] In his later work he turned a distinction that began as a descriptive observation into a model he defends.[77]

The core of the theory is the contrast between two kinds of criminal law. In citizen criminal law (*Bürgerstrafrecht*), punishment is a form of communication. The State tells the offender that, through his act, he has culpably caused harm, and takes him seriously as an addressee of the legal order, that is, as a person. In enemy criminal law, by contrast, the issue is not a response to a past act but the prevention of future acts. In Jakobs's words, the offender is no longer addressed; he is treated as a "cognitively questionable figure" against whom one secures oneself. For Jakobs, the enemy is a person who, through his attitude, his way of life or his membership of an organisation, has probably turned away from the law permanently and does not offer the minimum cognitive assurance that he will behave as a person.[78]

The literature identifies five hallmarks of enemy criminal law: the extension of criminal liability into the domain preceding the violation of a legal interest; the absence of any reduction of punishment, or even its aggravation, despite that extension; the use of the offender's dangerousness rather than the act as the criterion; the erosion of procedural safeguards through frequent resort to coercive measures; and the shift from criminal legislation to "combat legislation" (*Bekämpfungsgesetzgebung*). Jakobs acknowledges that the two kinds of criminal law are ideal types rarely found in pure form in reality, but regards openly naming enemy criminal law as necessary for keeping citizen criminal law free of it.[79]

B. The Limits Jakobs Drew for Enemy Criminal Law

As its critics rightly point out, the theory of enemy criminal law is a dangerous one. It must be acknowledged, however, that Jakobs did not conceive of enemy criminal law as unlimited State violence. In his own texts he expressly drew the limits that measures directed against the enemy must respect. Before the *Kavala* and *Atalay* proceedings can be assessed, these limits must first be set out.

First, the enemy is not a political category. Jakobs specifically states that his concept of the enemy has no connection with Carl Schmitt's concept, which locates the essence of the political in the friend-enemy distinction.[80] His enemy is not the adversary of those in power but the person whose conduct shows that, through his attitude, way of life or membership of an organisation, he has permanently turned away from the law.[81] The extent of the measures to be taken against the enemy depends on two factors: the citizens' need for security and the potential for violence of the unreliable person.[82]

Second, enemy criminal law is also bound by the principle of legality. For Jakobs, enemy

[76] **Günther Jakobs**, "Kriminalisierung im Vorfeld einer Rechtsgutsverletzung", ZStW, vol. 97, 1985, pp. 751-785.
[77] **Günther Jakobs**, "Bürgerstrafrecht und Feindstrafrecht", HRRS 2004, pp. 88-95.
[78] **Günther Jakobs**, "On the Theory of Enemy Criminal Law", in Markus D. Dubber (ed.), Foundational Texts in Modern Criminal Law, Oxford University Press, Oxford, 2014, pp. 420-421.
[79] **Jakobs**, On the Theory of Enemy Criminal Law, p. 421; **Jakobs**, Bürgerstrafrecht und Feindstrafrecht, p. 92. On these hallmarks, see also **Dülger**, GH, (4), pp. 291-296.
[80] **Jakobs**, On the Theory of Enemy Criminal Law, p. 420, fn. 40.
[81] **Jakobs**, On the Theory of Enemy Criminal Law, p. 420.
[82] **Jakobs**, On the Theory of Enemy Criminal Law, p. 424.

criminal law is intertwined with elements of citizen criminal law; the principle of certainty and a trial meeting, at least in broad outline, the principles of the rule of law apply to the enemy as well. A person cannot be reacted to merely because he fits the abstract type of the enemy; both the hostile conduct and the measure to be taken against it must be laid down by statute.[83]

Third, the exclusion is partial, and the way back must be kept open. Jakobs states that coercion directed against the enemy excludes the person from the law partially rather than completely, and that the excluded person remains within the legal order to the extent that he is afforded a trial and, where possible, a procedure for his return. The other citizens, too, are bound to treat the excluded person only in this way and to this extent.[84] He also accepts that, because of human dignity, the way back to full status must be kept open as far as possible.[85] The State need not exclude the enemy from all rights, nor is it obliged to do everything it is free to do.[86]

Fourth, severe punishment for preparatory acts is not legitimate. Jakobs expressly regards the provision of § 30 of the German Criminal Code, which punishes the preparation of an offence with penalties close to the lower limit for attempt, as illegitimate because of the exceptional severity of the penalty. In his view, that penalty is linked not to an entrenched criminal disposition of the offender but to a wrong that has not yet materialised.[87]

Fifth, enemy criminal law must be openly named as such. One of Jakobs's reasons for developing the theory was to prevent the two kinds of criminal law from merging. Whoever does not wish to strip citizen criminal law of its constitutional qualities should call what must be done against the enemy by another name.[88] Enemy criminal law is conceived as a "contained war" (*eingehegter Krieg*), not as an unlimited one.[89]

C. Traces of Enemy Criminal Law in the Kavala *and* Atalay *Proceedings*

Viewed against these criteria, almost every practice identified in the four judgments corresponds to a hallmark of enemy criminal law.

First, there has been a shift from an act-based criminal law (*Tatstrafrecht*) to an actor-based criminal law (*Täterstrafrecht*). The Grand Chamber found that the conviction rested not on acts personally attributable to the applicant but on his presumed influence and "strategic role" within civil society.[90] This is, in the manner Jakobs describes, the punishment of who a person is and how "dangerous" he is considered to be, rather than of what he did.

Second, criminal liability has been brought forward while punishment has been aggravated. Article 312 TCK is in itself a provision that brings liability forward by incorporating the attempt into the definition of the offence.[91] That provision was applied to persons not shown to have

[83] **Jakobs**, On the Theory of Enemy Criminal Law, p. 422.
[84] **Jakobs**, On the Theory of Enemy Criminal Law, p. 423.
[85] **Jakobs**, On the Theory of Enemy Criminal Law, p. 417.
[86] **Jakobs**, Bürgerstrafrecht und Feindstrafrecht, p. 90.
[87] **Jakobs**, On the Theory of Enemy Criminal Law, p. 422.
[88] **Jakobs**, Bürgerstrafrecht und Feindstrafrecht, p. 92.
[89] **Jakobs**, On the Theory of Enemy Criminal Law, p. 423, fn. 59.
[90] *Kavala v. Türkiye* (*No.* 2), §§ 168-169, 205. On the distinction between act-based and actor-based criminal law, see **Dülger**, GH, (4), pp. 288, 367. On the German Criminal Code as an act-based criminal law that links punishment to the concrete act rather than to the offender's personality, see **Jörg Eisele**, S/S StGB, (30), Vor §§ 13 ff., mn. 3.
[91] On undertaking offences, which bring criminal liability forward and do not distinguish between completion and attempt, as one of the instruments of the programme of "advancing the front line of combat" in the

used force or violence or to have called for it, and the result was aggravated life imprisonment without the possibility of conditional release. In Jakobs's language, this is not a punishment imposed on an offender but the permanent neutralisation of a "source of danger". That is precisely why the Grand Chamber found the sentence incompatible with Article 3 of the Convention: it leaves the prisoner no hope and no possibility of review.[92]

Third, procedural safeguards have been suspended. Detention prolonged on the ground that the offence is a catalogue offence, requests to hear witnesses rejected with stereotyped reasoning, new charges based on the same facts after an acquittal, and disciplinary proceedings against the judges who acquitted are all features of proceedings in which procedural guarantees are not applied to the enemy.

Fourth, and perhaps most strikingly, communication has been cut off. For Jakobs, punishing a citizen means speaking to him in the language of law. The Constitutional Court's violation judgments are likewise the legal order's communication with Atalay in that language. They state that his rights have been violated and that he must be released and allowed to take up his parliamentary mandate. The Court of Cassation's refusal to implement them means that Atalay is no longer seen as a person addressed by the legal order but merely as a danger to be neutralised. The President's description of Atalay as a "terrorist" is the political expression of this transformation: a Member of Parliament declared an enemy without any judicial decision to that effect.[93]

D. Limits Crossed beyond Jakobs

The *Kavala* and *Atalay* proceedings not only bear the hallmarks of enemy criminal law; they also cross almost all of the limits Jakobs drew for that theory. Jakobs put forward a dangerous and controversial theory, but he neither intended nor described the practices seen in these proceedings. This becomes evident when the limits are compared one by one.

First, the category of the enemy has changed entirely. Jakobs's enemy is a person with a potential for violence whose conduct shows that he has permanently turned away from the law. Kavala and Atalay, by contrast, are, according to the ECtHR, a human rights defender, a lawyer and an elected Member of Parliament against whom there was not even a reasonable suspicion and who were exercising rights protected by the Convention.[94] No personal act of violence has been attributed to either of them.[95] Here, the enemy has been made an enemy not because he turned away from the law but because he exercised the rights the law grants him.

Second, enemy criminal law has drifted in a direction Jakobs expressly rejected, towards the concept of the political enemy. In three judgments the ECtHR found that the ulterior purpose was silencing, and in *Kavala* (*No. 2*) also punishing a human rights defender for his views.[96] Jakobs's enemy criminal law is aimed at preventing future offences. Here, what is being exacted is a price not for a future danger but for views expressed and civil society activity carried out in

National Socialist criminal law of intent (*Willensstrafrecht*), see **Ralf Kölbel**, "Vorbereitungshandlungen", in Hilgendorf/Kudlich/Valerius (eds.), Handbuch des Strafrechts, Band 3, § 56, mn. 20-21.

[92] *Kavala v. Türkiye* (*No. 2*), § 289.

[93] *Şerafettin Can Atalay v. Türkiye*, §§ 51, 165.

[94] *Kavala v. Turkey*, § 157; *Kavala v. Türkiye* (*No. 2*), § 168.

[95] *Kavala v. Türkiye* (*No. 2*), §§ 169, 205.

[96] *Kavala v. Turkey*, § 232; *Kavala v. Türkiye* (*No. 2*), § 279; *Şerafettin Can Atalay v. Türkiye*, § 168.

the past. This picture is closer to Schmitt's friend-enemy distinction than to Jakobs.

Third, the principle of legality, which Jakobs says binds even enemy criminal law, has been violated. According to the Grand Chamber, Article 312 TCK was extended in an unforeseeable manner.[97] Articles 14 and 83 of the Constitution, on which Atalay's imprisonment after his election rested, are likewise not foreseeable because of the contradictory interpretations of the high courts.[98] There is neither a hostile conduct defined by statute nor a statutory response of the kind Jakobs requires. What there is, is an offence constructed after the fact by interpretation and an immunity removed after the fact by interpretation.

Fourth, the minimum rule-of-law trial that Jakobs grants even to the enemy was not provided. The Grand Chamber found that the proceedings leading to Kavala's conviction involved a flagrant denial of justice and impaired the very essence of the right to a fair trial.[99] Jakobs argues that measures such as covert investigation and the interception of communications may be used against the enemy, but he does not defend a trial in which evidence is not assessed, witnesses are not heard and judges who acquit face disciplinary proceedings.[100]

Fifth, the way back that Jakobs wants kept open has been closed. The aggravated life sentence imposed on Kavala allows neither conditional release nor review.[101] Jakobs's partial exclusion has been replaced by a total exclusion providing for no procedure of return. As regards Atalay, the way back was opened by the Constitutional Court's judgments, but those judgments were not implemented. The way back was thus not merely left unprovided for; it was closed after it had been opened.

Sixth, the disproportionate punishment that Jakobs regards as illegitimate has been applied in its most severe form. While Jakobs does not regard as legitimate even a provision imposing penalties close to those for attempt on preparatory acts, in the Gezi case persons to whom no act of violence was personally attributed were sentenced to aggravated life imprisonment and to eighteen years' imprisonment under a provision that incorporates the attempt into the definition of the offence.[102]

Seventh, enemy criminal law has not been openly named but has been disguised as citizen criminal law. Jakobs wants what is done against the enemy to be called by a different name and citizen criminal law to be kept free of it. In Türkiye, by contrast, measures against the enemy have been applied using all the forms of citizen criminal law: indictment, trial, appeal and appeal on points of law. The form belongs to citizen criminal law, the substance to enemy criminal law. This is exactly the danger Jakobs warned against: instruments developed against the enemy are being turned, without limit, against the citizen.

Eighth, and perhaps most importantly, the category of the enemy has expanded to include the organs of the legal order itself. In Jakobs's model the enemy is the person who stands

[97] *Kavala v. Türkiye (No. 2)*, § 171.
[98] *Şerafettin Can Atalay v. Türkiye*, § 92.
[99] *Kavala v. Türkiye (No. 2)*, §§ 211, 247.
[100] **Jakobs**, On the Theory of Enemy Criminal Law, pp. 422, 424.
[101] *Kavala v. Türkiye (No. 2)*, § 289.
[102] German scholarship likewise stresses that the prohibition of punishment exceeding guilt must be emphasised in particular in the face of the debate on enemy criminal law, and that a sentencing practice distinguishing between citizens and enemies of society would violate the social consensus on justice and on punishment proportionate to guilt, thereby endangering fundamental achievements of the rule of law. See **Franz Streng**, "Strafzumessung", in Hilgendorf/Kudlich/Valerius (eds.), Handbuch des Strafrechts, Band 3, § 66, mn. 39.

outside the legal order and against whom it protects itself. The legal order, that is, judges, courts and the constitution, sets the framework even for the contained war waged against the enemy. In the *Kavala* and *Atalay* proceedings, however, the three judges who acquitted faced disciplinary proceedings, and the Constitutional Court judges who found violations faced a criminal complaint.[103] The judge who recognises the enemy's rights is counted on the enemy's side as well. No theory of enemy criminal law envisages a State declaring its own constitutional court an enemy. At this point one must speak no longer of enemy criminal law but of a state of exception in which the rule itself has been suspended.

E. From Enemy Criminal Law to a State of Exception

Jakobs's theory remains at the centre of our criticism. A conception that makes treating a person as a person conditional on that person offering an assurance of fidelity to the law is highly susceptible, in the hands of an order lacking rule-of-law guarantees, to becoming an instrument for suppressing opponents. The *Kavala* and *Atalay* proceedings show that this danger is not abstract.[104] Yet it would also be unfair to Jakobs to equate these proceedings with his theory. Jakobs conceived of enemy criminal law as a "contained war", limited to terrorist organisations and organised crime, laid down by statute, openly named, with the way back kept open and bound to the minimum guarantees of the rule of law.

Turkish practice has crossed each of these limits. The enemy has become not the person who turns away from the law but the person who exercises his rights; the measures have been built not by statute but by interpretation; the trial has not met minimum guarantees; the way back has been closed; enemy criminal law has been disguised as citizen criminal law; and in the end, even the judges who recognised the enemy's rights have been targeted. Jakobs's enemy is at least a "source of danger". In these proceedings, the danger lies not in the person declared an enemy but in the fact that the law is on his side. The ulterior purpose that the ECtHR calls "silencing" is the legal name of this transformation. And this is where the real significance of the Strasbourg judgments lies: they demand that Kavala and Atalay, faced with an order that has declared them enemies, be treated once again as persons.

VI. What Must Happen Now?

As to individual measures, the two judgments point in the same direction. Kavala must be released at the earliest possible date and the consequences of his conviction must be redressed.[105] Can Atalay must be released immediately and enabled to take up his parliamentary mandate.[106] In Atalay's case there is no need to wait for the ECtHR judgment to become final, since the Constitutional Court's judgments of 25 October and 21 December

[103] *Kavala v. Türkiye (No. 2)*, § 208; *Şerafettin Can Atalay v. Türkiye*, § 34.

[104] German scholarship likewise emphasises that the fight against terrorism cannot lead to the constitutional guarantees of the rule of law being placed at the State's disposal, that abandoning even one of those guarantees would create the danger of a special criminal law resembling the law of war, that is, an enemy criminal law, and that the Basic Law does not permit this. See **Tobias Engelstätter**, LK StGB, Band 7, 13. Aufl., Gabriele Cirener/Henning Radtke/Ruth Rissing-van Saan/Thomas Rönnau/Wilhelm Schluckebier (eds.), Walter de Gruyter, Berlin/Boston, 2021, § 89a, mn. 59. On the concept of the enemy as too indeterminate to establish who is to be regarded as an enemy, and on the erosion of defendants' guarantees as incompatible with human dignity, the rule of law, the principle of guilt and the presumption of innocence, see **Eisele**, S/S StGB, (30), Vor §§ 13 ff., mn. 6.

[105] *Kavala v. Türkiye (No. 2)*, § 309.

[106] *Şerafettin Can Atalay v. Türkiye*, § 176.

2023 are already binding and require no further step to be implemented. Article 90 § 5 of the Constitution also provides that, in the event of a conflict between international agreements on fundamental rights and freedoms and statutes, the provisions of the international agreements prevail.

As to general measures, the two judgments likewise converge on the same headings: full compliance with the Constitutional Court's judgments; strengthening the institutional guarantees concerning the appointment, assignment and discipline of judges; preventing the instrumentalisation of criminal proceedings for purposes other than the impartial administration of justice; and reviewing sentences that exclude conditional release.[107] It may also be argued that the Committee of Ministers of the Council of Europe should supervise the execution of these judgments, which arise from the same proceedings and point to the same structural problems, jointly. These are not problems to be solved by releasing one prisoner. They require a comprehensive judicial reform, ranging from the composition of the HSK and the law of pre-trial detention to broadly defined offences and the binding force of high court judgments.

Conclusion

The four judgments document four stages of the same prosecution: detention without suspicion, a judgment not complied with, a conviction devoid of effect, and imprisonment continued in defiance of the Constitutional Court. At each stage the law produced a decision that would have restored the person's liberty; each time that decision was neutralised, either by another investigation or by not being implemented. The only thing that can explain a deprivation of liberty that continues in spite of all these rules is, as the ECtHR has found three times, a purpose outside the law. That purpose is silencing.

These proceedings are a mirror of Turkish criminal justice. In that mirror one sees an interpretation of the offence that turns a protest into an attempted coup, a conception of responsibility that attributes the violence of others to the defendant, an evidentiary regime that treats a personal profile as evidence, a practice of detention that takes the place of punishment, a governance structure that opens disciplinary proceedings against judges who acquit, and a high court that disregards binding judgments. What appears in that mirror is a picture even darker than Jakobs's enemy criminal law. Even Jakobs did not define the enemy as a political adversary, and he required that measures against the enemy be laid down by statute, that a minimum rule-of-law trial be guaranteed and that the way back be kept open. Here, by contrast, the enemy is not the person who turns away from the law but the person who exercises his rights; the instruments used against him have been disguised as citizen criminal law, and in the end even the judges who recognised his rights have been targeted. None of these problems began with Kavala or Atalay, and none of them will end with their release.

The legitimacy of a criminal justice system is tested not where it is strongest but in how it treats the weakest. If Osman Kavala and Can Atalay are still in prison today, the reason is not a judicial decision delivered against them but judicial decisions that have not been implemented. The rule of law stands not on courts delivering judgments but on those judgments being complied with.

[107] *Kavala v. Türkiye (No. 2)*, §§ 310-312; *Şerafettin Can Atalay v. Türkiye*, § 177.