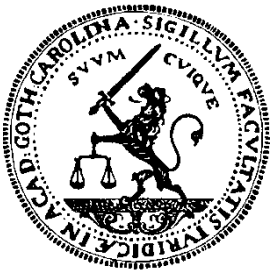


FACULTY OF LAW

LUND UNIVERSITY

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# No friends but the mountains… and the Copenhagen Criteria?

A study on Türkiye's fulfilment of the Copenhagen political criteria in relation to the human rights of Kurdish people

JURM02 Graduate thesis

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# Table of contents

# Summary

During the Swedish NATO negotiations, the Turkish president Recep Tayyip Erdoğan once again raised the question of whether Türkiye could be welcomed into the EU. This thesis examines Türkiye's shortcomings concerning their EU accession, focusing on the human rights of Kurdish people by answering the research questions: what is the state of human rights of the Kurdish people in Türkiye, and what changes would need to be enacted for Türkiye to see a possibility of becoming an EU Member State? The thesis examines the development of Turkish law and the treatment of Kurdish people, Türkiye's history with the EU, and Türkiye's compliance with international and European human rights law with regard to Kurdish people.

In 2018, negotiations regarding Türkiye's accession to the EU were discontinued, mainly due to the Turkish State's disregard for the first point of the Copenhagen criteria, concerning democracy, rule of law, human rights and the protection of minorities. This is a result of backsliding in all mentioned areas. Kurdish people in Türkiye have been particularly affected by the current political climate. This is largely an effect of the attempted coup in 2016, after which Kurdish people have been systematically arrested for claims of terrorism, and suspended from professions, especially in the public sector.

Türkiye has a history of subpar adherence to human rights, especially regarding the rights of its Kurdish minority, evident in both legislation and in practice. These problems remain today. The Turkish State is the country with the highest number of convictions in the European Court of Human Rights, where systematic human rights violations against Kurds are apparent in several areas, such as the right to a free trial, the right to liberty and security and the freedom of expression. For a long time, the use of Kurdish language has been *de facto* prohibited in Türkiye, and it is still restricted. Pro-Kurdish political parties have continuously been shut down, and elected politicians representing pro-Kurdish policies are regularly removed from duty, or even imprisoned. Moreover, Türkiye does not recognise Kurds as a minority, indicating that they are not given minority protection by the State.

# Sammanfattning

Under Nato-förhandlingarna väckte Turkiets president Recep Tayyip Erdoğan ännu en gång frågan om Turkiet kan bli välkomnat in i EU. Examensarbetet undersöker Turkiets tillkortakommanden gällande sitt anslutande till EU, med fokus på kurders mänskliga rättigheter genom att besvara frågeställningarna: hur ser kurders mänskliga rättigheter ut i Turkiet idag och vilka åtgärder behöver Turkiet göra för att se möjligheten till ett EU-medlemskap? För att besvara detta analyseras den turkiska rättsutvecklingen i relation till kurder, utvecklingen av Turkiets relation till EU och Turkiets efterföljande av internationella instrument för mänskliga rättigheter vad gäller kurder.

Under 2018 avslutades förhandlingarna gällande Turkiets anslutande till EU, huvudsakligen på grund av statens åsidosättande av innehållet i den första punkten av Köpenhamnskriterierna gällande demokrati, rättsstatsprincipen, mänskliga rättigheter och skydd för minoriteter. Det är ett resultat av tillbakagång (*backsliding*) inom alla nämnda områden. Kurdiska personer i Turkiet har blivit speciellt påverkade av det nuvarande politiska klimatet. Det har till stor del orsak i den misslyckade kuppen 2016, efter vilken kurdiska personer blivit systematiskt arresterade över anklagelser om terrorism, samt blivit avstängda från yrken, speciellt inom den offentliga sektorn.

Turkiet har en historia av bristfälligt upprätthållande av mänskliga rättigheter, speciellt gällande rättigheterna av dess kurdiska minoritet, vilket framgår både i lagstiftning och praktiken. Dessa problem fortsätter idag; den turkiska staten är det land med störst mängd fällande domar i Europadomstolen, där systematiska brott mot kurders mänskliga rättigheter är märkbara inom flera områden, såsom rätten till rättvis rättegång**,** rätten till frihet och säkerhet samt yttrandefrihet. Under en lång tid har användandet av det kurdiska språket varit *de facto* förbjudet i Turkiet och det är fortfarande begränsat. Pro-kurdiska politiska partier har kontinuerligt blivit nedstängda**,** och valda politiker som representerar pro-kurdisk politik är regelbundet avsatta från sina ämbeten, eller till och med fängslade. Dessutom erkänner inte Turkiet kurder som en minoritet, vilket indikerar att de inte ges minoritetsskydd av staten.

# Bi kurtî

Serokkomarê Tirkiyê Recep Tayyip Erdoğan di dema danûstendinên Natoyê de careke din anî ziman ku gelo Yekîtîya Ewrûpayê ji bo endametîyê dê pêşwazîya Tirkîyeyê bike yan na. Di vê tezê de kêmasîyên Tirkîyê tê lêkolîn-kirin da ku bikaribe têkeve Yekîtîya Ewrûpayê û fokus li ser mafê mirovan ya kurdan e.  Ji bo ku meriv bikaribe bersiva vê bide, divê meriv pêşveçûna hiqûqa tirkan û di dîrokê de miameleya li gelê kurd hatîye kirin analîz bike. Her weha divê meriv di belgeyên mafê mirovan ya navneteweyî de jî lê binêre ka Tirkîye ji bo mafên gelê kurd li gor wan belgeyan tevgeriyaye.

Ji ber ku Tirkîyê xala yekem a krîterên Kopenhagê ku parastina demokrasî, mafê mirovan û minoriteyan û dewleta hiqûqê ye, wek dewlet ev yek binpê kirin, ji ber wê yekê, di 2018an de, muzakereyên (danûstendin) ji bo YE ya bi Tirkîyê re hatin rawestandin. Ev di hemû warên ku tên behskirin de, encama paşveçûnê ye. Kesên Kurd li Tirkiyeyê bi taybetî ketine bin bandora atmosfera siyasî ya heyî. Sebebeke mezin ya vê yekê jî darbeya 2016an ya neserketî ye, ji ber ku wê demê kesên kurd bi awayekî sîstematîk bi sûcên terorê dihatin girtin. Ji kar dihatin avêtin, bi taybetî jî ji daireyên resmî.

Di warê rêzgirtin û hurmeta li hember mafê mirovan de Tirkîye xwedî dîrokeke xerab e, bi taybetî li hember mafê mînorîte yên wek kurdan de, hem di qanûnan de û hem jî di pratîkê de ev yek hatîye îspatkirin ku wan ev maf binpê kirine. Ev pirsgirêk îro jî her berdewam e; Dewleta Tirk di Dadgeha Mafên Mirovan a Ewropayê de welatê herî pir hatîye mahkûmkirin, ji ber ku bi awayekî sîstematîk di gelek waran de, li dijî mafên mirovî ya kurdan sûcdar û gunehbar in, mafê azadî û ewlehî û azadîya derbirînê li vî welatî hatîye binpê kirin. Ev demeke dirêj e li Tirkiyeyê bikaranîna zimanê kurdî *de facto* hatiye qedexekirin. Û hê jî li gelek ciyan û di gelek waran de axaftina bi kurdî sînorkirî ye û tê astengkirin. Partiyên siyasî yên kurdan her tim hatine girtin û siyasetmedarên hilbijartî yên ku temsîla siyaseta kurdî dikin misêwa ji karê xwe tên dûrxistin an jî dikevin zindanê. Her weha Tirkîye kurdan wek kêm-netewe(mînorîte) qebûl nake, ev yek tê wê maneyê ku dewlet di vî warî de li wan xwedî dernakeve û wan naparêze.

# Förord

Under gymnasiet berättade jag för en lärare att jag ville bli jurist och studera i Lund. Jag möttes av ett skratt. Och nu är vi här. Jag har inte alltid haft det lätt, men jag är stolt över att kunna se tillbaka och inse hur mycket jag har växt, trots, men också tack vare mina motgångar. När jag sitter här fem och ett halvt år efter att ha klivit in i Pufendorfsalen den 16 januari 2019 har allt gått så fort, men jag har hunnit så mycket. Stundtals har jag inte vetat om jag kommer kunna ta mig igenom juristprogrammet, än mindre livet. Men jag gjorde det, och livet är inte så kefft ändå.

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I want to send a special thank you to my supervisor, Ayşegul Sirakaya, for all your help and your invaluable advice. It has been a joy to be able to discuss all topics surrounding this thesis, and to sometimes wander away from this. I

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Om ni pallat er igenom mitt långa, blödiga förord, har ni ett ännu längre examensarbete att se fram emot att läsa. Jag hoppas att ni finner intresse i vad jag har att säga och att ni kan få ut något värdefullt från detta ämne, som ligger mig så varmt om hjärtat.

Siliva, over and out.

*Siliva Yesil Aydin*
Lund, maj 2024.

# Abbreviations

| | |
|---|---|
| AKP | Adalet ve Kalkınma Partisi (Justice and Development Party) |
| BDP | Barış ve Demokrasi Partisi (Peace and Democracy Party) |
| CAT | Committee against Torture |
| CERD | Committee on the Elimination of Racial Discrimination |
| CHP | Cumhuriyet Halk Partisi (Republican People's Party) |
| ECHR | European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| FCNM | Framework Convention for the Protection of National Minorities |
| HDP | Halkların Demokratik Partisi (People's Democratic Party) |
| HEP | Halkın Emek Partisi (People's Labour Party) |
| HRC | Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICERD | Convention on the Elimination of Racial Discrimination |
| IS | Islamic State of Iraq and the Levant |
| LPP | Law on Political Parties |
| MHP | Milliyetçi Hareket Partisi (Nationalist Movement Party) |
| PKK | Partîya Karkerên Kurdistan (Kurdistan Workers' Party) |

| | |
|---|---|
| Rome Statute | Rome Statute of the International Criminal Court |
| SSC | State Security Court |
| TCC | Turkish Constitutional Court |
| TİP | Türkiye İşçi Partisi (Workers Party of Turkey) |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCAT | United Nation's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| UNHRC | United Nations Human Rights Council |
| VCLT | Vienna Convention on the Law of Treaties |
| Venice Commission | European Commission for Democracy through Law |
| YPG | Yekîneyên Parastina Gel (People's Protection Units) |

# 1 Introduction

## 1.1 Background

In May 2022, Sweden submitted its application for membership to the North Atlantic Treaty Organisation (NATO).[1] This prompted a long process between Sweden and Türkiye, a NATO Member state, regarding the conditions of Türkiye's ratification of Sweden's Accession Protocol. The main objection from Türkiye consisted of the claim that Sweden was a 'safe haven for terrorists',[2] referring primarily to the Kurdish Workers' Party (PKK).[3] During negotiations on the terms of accession, President Recep Tayyip Erdoğan proclaimed that Türkiye would support Sweden's application to NATO, on the condition that "the Europeans" would re-initiate negotiations on a Turkish membership in the European Union (EU).[4]

In 1987, Türkiye submitted its application to the EU. After convening in Helsinki, 10 and 11 December 1999, the EU officially declared it as a candidate country. This was followed by years of discussions regarding the necessary measures for to be accepted as a Member State. In 2018, discussions were discontinued, as Türkiye failed to follow up on these necessary measures to a satisfactory level. Although Türkiye seemed at first to aspire meeting the accession criteria for the EU, known as the Copenhagen criteria, the recent shift towards authoritarianism has led to a standstill in the accession negotiations. The shift has caused regression in the areas of democracy, rule of law, and human rights, all of which are principles set forward by the Copenhagen criteria. Furthermore, the situation of Kurdish people, which have been an essential question within the accession negotiations, has worsened, linked with

[1] The Swedish Ministry for Foreign Affairs, 'Official Letter of Application' (17 May 2022) <https://www.regeringen.se/contentassets/27aef1765766464886d678d6db840d98/sveriges-natoansokan.pdf>

[2] Ylva Lindahl (ed), 'Sverige och Nato' *Utrikelpolitiska institutet* <https://www.ui.se/landguiden/internationella-organisationer/nato/sverige-och-nato/> accessed 18 April 2024.

[3] Oscar Schau 'Erdogan: Sverige har inte gjort tillräckligt' *Sveriges Television* (4 November 2023) <https://www.svt.se/nyheter/utrikes/erdogan-sverige-har-inte-gjort-tillrackligt>.

[4] Linnea Carlén 'Erdogan: "Öppna vägen" för turkiskt EU-medlemskap' *Sveriges Television* (10 July 2023) <https://www.svt.se/nyheter/inrikes/senaste-nytt-i-nato-processen?inlagg=1fe585772505cbdee764e90bc552f5f1>.

the backsliding of the areas mentioned. The Copenhagen criteria also include a principle requiring respect for and protection of minorities, which makes the matter of Kurdish people in Türkiye particularly salient to EU accession.

According to the World Justice Project's Rule of Law Index 2023, Türkiye is globally ranked 117 out of 142 countries regarding the adherence to the rule of law, 137th concerning constraints on government power, and 133th for fundamental rights.[5] Furthermore, Türkiye has been given the Global freedom status 'Not free' by the Freedom House.[6]

## 1.2 Purpose and Research Questions

This thesis aims to analyse the circumstances regarding a possible Turkish EU membership, focusing on what it could mean for the rights of the Kurdish population. It is necessary to examine the past and present rights of Kurds in Türkiye. Furthermore, this thesis aims to examine what measures Türkiye needs to take in order to make EU membership a possibility. This includes examining human rights law, and whether compliance to such would be a sufficient step towards EU membership. This thesis will also include an analysis of what the compliance of such law could mean for the Kurdish people's rights.

As such, this thesis will address the following research questions:

- What is the current state of the human rights of Kurdish people in Türkiye?
- What measures would need to be taken in order for Türkiye to see a possibility of becoming an EU member country?

## 1.3 Methodology, Theory and Material

### 1.3.1 Methodology

[5] World Justice Project, 'Rule of Law Index: Türkiye' (2023) <https://worldjusticeproject.org/rule-of-law-index/country/2023/Turkiye/> accessed 20 January 2024.

[6] Freedom House, 'Freedom in The World 2024: Turkey' (2024) <https://freedomhouse.org/country/turkey/freedom-world/2024> accessed 20 January 2024.

As the aim of this thesis allows for an examination of international human rights law, the chosen methodology is primarily a legal dogmatic method, supplemented by a legal analytical method.[7]

The legal dogmatic method is the traditional legal method, using recognised legal sources to find the answers, by identifying, systemising and explaining the law.[8] The Statue of the International Court of Justice recognises five sources as international legal sources, in Article 38(1). These consist of: treaties between states, customary international law (including peremptory norms, *jus cogens*), general principles of law and subsidiary means for the determination of rules of international law, such as judicial decisions and doctrine. This, however, is not an exhaustive list of sources that can be regarded as international legal sources and therefore be examined in accordance with the legal dogmatic method. There are also sources that carry normative value, outside of what is considered as traditional judicial sources. Not being legally binding, they are categorised as 'soft law'. Moreover, since judicial institutions such as legislatures and courts use international human rights soft law as a source in relation to national law, it is especially reasonable to consider such sources as international legal sources which the legal dogmatic method can thus be considered to include.[9]

As previously mentioned, the legal dogmatic method is used to examine legal sources. It can be used for examining currently existing law, so-called *de lege lata* arguments, and for suggesting future changes in the law, so called *de lege ferenda* arguments.[10] Both means of argumentation are upheld in this thesis. *De lege lata* is the primary form of argumentation, with *de lege ferenda* argumentation mainly taking place in the analysis.

[7] In Swedish known as "rättsdogmatisk metod" and "rättsanalytisk metod".

[8] Jan Kleineman 'Rättsdogmatisk metod' in Maria Nääv & Mauro Zamboni (eds), *Juridisk Metodlära* (2nd edition, Lund: Studentlitteratur 2018) 21, 21.

[9] Sandesh Sivakumaran, 'International Humanitarian Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 503, 512 f.

[10] Nääv & Zamboni (n 8) 36.

As a complement to the legal dogmatic method, the legal analytical method is used. The two legal methods are rather similar in form, with slight, yet significant, differences. For instance, the legal analytical method allows for a deeper analysis regarding the legal sources. While the legal dogmatic method intends to identify and explain established law, the legal analytical method permits further criticism and deeper scrutiny of both the law, but also of the results of the legal dogmatic method. Moreover, the legal analytical method allows a wider use of sources, not being restricted to recognised, established legal sources.[11] This is particularly relevant to chapter 2, which examines information from literature outside legal doctrine.

### 1.3.2 Theory

This thesis is based on several theoretical foundations and perspectives that shape its content and analysis. These serve as guidance in responding to the research questions and the purpose.

First, this thesis is written with an underlying human rights perspective, as the scope of the essay is formed with a human rights-approach, and with the sources primarily being based on human rights law. The choice of perspective stipulates the foundations for the aim and method. It serves as a lens used during the process of writing and reading the thesis. A human rights perspective also determines which material is used; in this case, the selected material being focused on human rights of the Kurdish people in Türkiye. The human rights perspective allows for inspecting to what extent Türkiye has complied with human rights law, such as ECHR and ICCPR, in relation to Kurdish people in the State.

The second theoretical framework in this thesis is a legal development perspective. A legal development perspective is closely entwined with the methodology of legal history, which examines changes in law and their function

[11] Claes Sandgren, *Rättsvetenskap för uppsatsförfattare: ämne, material, metod, argumentation och språk* (5th edition, Norstedts Juridik 2021) 53 f.

in the society, mainly based on analysing legal sources and doctrine.[12] It is mainly applied in chapter 2, but also, to some extent, in other chapters. This is because chapter 2 seeks to examine and present how the situation for Kurdish people in Türkiye have appeared historically, and how it has developed throughout the years. The legal development perspective is particularly useful in relation to the methods used in this essay. The historical legal sources examined and analysed in chapter 2, in accordance with the legal dogmatic method and the legal analytical method, are regarded with the overlaying questioning on how the law has developed and changed through time, for better and for worse. The legal development perspective is also applied in other chapters, such as on Türkiye's road towards becoming a Candidate State for the EU, and Türkiye's legal development as a response to criticism from the EU.

Lastly, the thesis is written, and shall be read, with the fact that my hypothesis is that the ultimate solution to the problems lifted in this thesis, and to all problems regarding the human rights of Kurdish people, is a free Kurdistan. As will be clear for the reader, the situation of Kurdish people in Türkiye is a result of many years of oppression, beginning long before the starting point of the historical overview presented in this thesis. As of recent developments in countries occupying Kurdistan in general, and Türkiye in particular, it does not seem like the rights of Kurds will progress. For that reason, I believe the only solution to the lacking human rights of Kurds is independence as a sovereign state. The 20th century was a turning point in terms of self-determination, sovereignty and decolonialisation, in which the UN served as an important tool. I believe it is time for Kurdistan to follow the steps of the previously oppressed.

### 1.3.3 Material

The material chosen for the research consist of both primary and secondary sources. The primary sources include international legal sources, both legally

[12] David Ibbetson, 'Comparative Legal History: A Methodology' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press 2012) 131, 135.

binding, established law, and soft law. UN instruments are used to present Türkiye's obligations in the areas of democracy, rule of law, and human rights, mainly focusing on the Bill of Rights, which consist of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Documents from several UN bodies are used to identify Türkiye's shortcomings in those areas. Additionally, some material stems from the Council of Europe, in particular the European Convention on Human Rights (ECHR) and case-law from the European Court of Human Rights (ECtHR). The cases are chosen based on if they involve a Kurdish person or the Kurdish issue in some way. Furthermore, I have chosen cases that are graded with the importance levels *Key cases*, *1* or *2*, in the importance scale implemented by the ECtHR.[13] EU law and EU documents are both also used, mainly in chapter 3. In order to provide understanding on Türkiye's treatment of Kurdish people as to in accordance with their national legislation, and the development of such, as well as Turkish progress in reforms towards fulfilment of the Copenhagen criteria, this thesis examines relevant Turkish law, including case-law. Most Turkish legal sources are cited correctly with both the English name, number and date for adoption of the law, as well as the Official Gazette date and number. However, some Turkish legislations seem to be unavailable other than being presented in secondary sources, especially if said law is annulled. The same goes for case-law. In these instances, I have compared several sources presenting that law, and considered it as valid and reliable if the content of the law is consistent among the sources.

Lastly, reports issued by international organisations such as the Human Rights Watch and Amnesty International, as well as a report from the Swedish government are used to analyse the political and legal situation in Türkiye. There are current tensions between Türkiye and Sweden, which might affect the reliability of remarks from the Swedish Government on the matter.

[13] The European Court of Human Rights, 'HUDOC User Manual' (2022) 8 <https://www.echr.coe.int/documents/d/echr/HUDOC_Manual_ENG> accessed 2 February 2024.

However, as the report was issued in 2021, before the NATO-negotiations and the tensions between the countries, I consider the report to be objective and reliable.

The secondary sources in this essay consist of academic literature in the form of books and articles, published by scholars of international law, human rights, political science and history. Both Swedish and international literature is used. The historical overview in chapter 2 consist both of literature in and outside the area of law, as the chapter is focused on both legal development and the cultural, historical and political development. As the third chapter in the thesis also covers a historical overview on Türkiye's relations to the EU, the material used in the chapter will include doctrine both inside and outside the area of law. The other chapters, however, mostly contain sources from the legal doctrine. However, other doctrine occasionally occurs in all chapters, as the thesis covers the overlapping area of politics and law. This includes doctrine in the area of political science and international relations, that is used, for example, to explain the political context of several international instruments, such as the implementation of the UN Charter.

## 1.4 Delimitation and Clarifications

### 1.4.1 Delimitation

The rights of Kurdish people and the question on the liberation of Kurdistan is an undeniably complex question. Many scholars have published work on the matter, and the subject is a recurrent one in both national and international politics. Kurdistan is today split up between Iran, Iraq, Syria and Türkiye. The situation for Kurdish people in these areas are exceedingly different depending on the country to which they belong. Due to the scope of the thesis the subject is limited to Kurdish people in Türkiye. This thesis analyses several international documents and their execution by Türkiye. This will be focused on Türkiye's shortcomings, and limited to Kurdish people's rights. A lot of legal documents could be relevant in regards to the subject, but due to the extent of the essay, a selection of the most applicable and significant documents is made. These mainly consist of UN law and the ECHR. The examined

UN law mainly consist of the Bill of Rights. Other instruments are relevant for the scope of the thesis, but as the Bill of Rights covers the areas of such instruments, the thesis does not examine other UN treaties. However, reports from UN bodies established by such treaties are used to examine Türkiye's shortcomings to the areas covered by the thesis.

Regarding the EU in the scope of the essay, the main focus lies on the Copenhagen Criteria and documents from and before the accession negotiations with Türkiye. Although the Copenhagen Criteria contains several principles, the focus in the thesis is held on its first point, the political criteria. The first point names democracy and rule of law, and also human rights and protection of minorities, as principles needing to be upheld in order for an accepted EU accession. The thesis does not greatly examine or analyse other EU sources other than those mentioned, as it is not applicable for Türkiye, not being EU Members. Some EU treaties will however be shortly presented for understanding the values of the Union in the areas of democracy, rule of law, human rights and minority protection, for further comprehension on the values from which the political Copenhagen criteria are assessed. Another factor that has affected Türkiye's accession to the EU is its relations to Cyprus. The issues between the two countries has had a big influence on the prolonged accession negotiations.[14] Due to the scope of the essay, this aspect of the Turkish accession to the EU will not be examined.

Furthermore, the historical overview in chapter 2, on Kurdish rights in Türkiye, other than a brief presentation of the Kurds, begins from the Treaty of Sèvres in 1920[15]. The history of Kurdish people, and the conflicts between ethnic groups in the region, began long before that. However, the Treaty of Sèvres marked the beginning of the conflict in the context of modern law, policies and ideas, such as nationalism and democracy. Furthermore, it shall be said the modern history of Kurdish people in Türkiye is profoundly eventful. I will not cover all historical events and legal developments in Türkiye

[14] See for example Natalie Martin, *Security and the Turkey-EU Accession Process: Norms, Reforms and the Cyprus Issue* (Palgrave Macmillan 2015) 137.

[15] Treaty of Peace Between the Allied and Associated Powers and Turkey, Signed at Sèvres, 10 August 1920.

regarding the area of the thesis, but rather present important shifts and defining moments of modern history.

Lastly, the question regarding a free and independent Kurdistan is both interesting and complex. Due to the scope of the thesis, this is only touched on briefly. This is also due to the fact that a large amount of published work on the matter of Kurdistan already focuses on the question of independence and sovereignty.

### 1.4.2 Clarifications

The question regarding if Kurdish people shall be deemed as an indigenous group is both fascinating and complex. It is a matter which has been up for dispute several times.[16] As in the case for many other ethnic groups in the Middle East, the status of indigeneity in the area is, to put it briefly, controversial. Due to the scope of my thesis, I will not discuss the question of indigeneity concerning Kurds. For the sake of simplicity, and to not open up for a discussion on the matter, the Kurdish people will be viewed as an ethnic group, and consequently as a national minority in Türkiye, even if that is also a somewhat controversial claim according to Türkiye, who have not recognised Kurdish people as a minority group, with reference to the treaty of Lausanne.

The Kurds in Türkiye are mainly populated in the South-Eastern part of the country. Therefore, 'South-East Türkiye' is mentioned in reference to the areas densely populated by Kurds. In this thesis, the term 'Kurdish regions' is also used as a way to describe these regions in Türkiye. Similarly, I occasionally use 'Kurdish' to describe a specific place, for instance 'Kurdish village'. This is also used to describe the dense, often majority population of Kurdish people in the specific area.

Lastly, this thesis presents and examines the previous State Security Court of Türkiye. It is also known as the 'National Security Court'. In order to remain

[16] See for example Aynur Ünal, 'Indigeneity Discourse within Kurdish Political Movement' (2017) 2 Securitologia 55–67.

consistent, I will hereinafter use 'State Security Court' in this thesis, even when the referenced source use the word 'National Security Court'.

## 1.5 Previous research

As mentioned above (see chapter 1.4), many works have been published on the matter of Kurdistan and the rights of Kurdish people in Türkiye. Several articles and books have been published on Türkiye's accession to the European Union. However, the vast majority focuses on Türkiye in overall rather than the Kurds. There are some published works on the question of Kurdish people and Türkiye in the EU accession. However, not one has been published after the 2000s, after which the political situation in Türkiye has had a massive transformation. Below, some works on the matter are presented.

In 2005, Kerim Yildiz published the book *The Kurds in Turkey: EU Accession and Human Rights*. This book includes some of the content that will be relevant for this essay. One important difference is the fact that the book was published in 2005, meaning that there has been a significant change of circumstances since the release of the book. For instance, there has since then been a continuous development in Türkiye towards being a more authoritarian and conservative state, which is of importance when examining the present-day situation for Kurds in Türkiye and Türkiye's current chances of becoming an EU member state. This will be explored further in chapter 2.

Similarly, the Centre of European Policy Studies published a Policy Brief written by Michael Emerson, titled 'Has Turkey fulfilled the Copenhagen Political Criteria?', which identifies several measures which Türkiye should make in order to become a member state in the EU. However, it was published in 2004, and its content reflects the Turkish policies of that time. The measures recommended are not all far-sighted, but rather specific for its time. Furthermore, the report is not concentrated on the Kurdish people, but instead on all areas of improvement concerning Türkiye. Lastly, as it is a Policy Brief, it provides short recommendations without elaboration; it does not go in-depth on the measures needed to be taken from Türkiye.

Lastly, it shall be noted that a Linnea Carlqvist wrote a Master thesis in 2008 for the Faculty of Law in Lund University, titled 'The European Union and Turkey - The conditions of accession and the challenge of future enlargement'. Although the thesis discusses Türkiye's possible accession to the EU, the similarities between my thesis and the one mentioned are not many. Carlqvist's thesis is centred on EU law, examining the organisational structure of the EU and the process of accession, and has a clear focus on the, by that time, ongoing enlargement of the EU, and Türkiye's challenges relating to partaking in such an enlargement. Indeed, the situation of Kurdish people in Türkiye is discussed, but not to the same extent as in this thesis. Similarly, as for the other mentioned previous work, the thesis was written in 2008, meaning that significant developments in Türkiye's policies and relations to the EU have taken place since the time of the publishing of Carqvist's thesis.

## 1.6 Outline

Following the introductory chapter, is a chapter on the situation for the Kurdish people in Türkiye. Firstly, a brief introduction of the ethnic group is made. The chapter also consists of a historical retrospective on the rights, and the lack thereof, for Kurdish people in Türkiye and how they have changed throughout history, beginning from the signing of the Treaty of Sèvres.

The third chapter examines the EU, focusing on the Copenhagen Criteria in the context of Türkiye's path towards EU membership. The chapter also amounts for discussions about a Turkish EU membership and the reasoning behind not accepting them as a Member State.

Following this, chapter 4 consists of a description of central UN human rights law, namely the Bill of Rights. The purpose of the chapter is to present and examine Türkiye's obligations concerning international law in the areas on the rule of law, democracy, human rights and minority rights. Linked to this, the chapter presents and discusses Türkiye's shortcomings in those areas in the context of Kurds.

Chapter 5 focuses on the European Convention on Human Rights. In this chapter, several Articles of the Convention are examined together with case law from the European Court of the Human Rights concerning cases against Türkiye that in some way involve Kurdish people's rights. The ECHR and its case law are then analysed, with a focus on the common areas where Türkiye violates the Convention.

Chapter 2-5 include analyses containing discussions based on what has been presented in the respective chapters. Afterwards, the thesis finishes with a discussion supported on what has been presented in the previous chapters. The discussion synthesises the separate analyses into a unified discussion on the whole matter, and is held with the research questions in consideration.

# 2 Kurdistan, Türkiye and the Kurdish people – A historical overview

This chapter contains a brief account on the legal and political situation of the Kurdish people throughout recent history. The chapter begins with a short introduction on the Kurdish people and Kurdistan. Afterwards follow an examination of the events and treaties, which were crucial to the foundation of the modern political and judicial issues concerning the Kurdish people. Following this is a historic overview consisting of legal development and political changes in relation to the Kurdish people, stemming from the birth of the modern Turkish State to the current situation in Türkiye. The chapter ends with an analysis on the key findings in the chapter.

## 2.1 Kurds and Kurdistan

The Kurds are generally accepted as the largest group of people without a state in the world.[17] The geographic area where Kurdish people constitute the majority of the population is defined as Kurdistan.[18] It is believed that the first time Kurdistan was included in a map was in the eleventh century.[19] However, Kurdish history can be traced back as far as 12 000 years ago, to the settlement of people in the Kurdish mountains.[20] This is however not entirely certain, since the early history of the Kurds is difficult to assert. One reason for this is that the Kurds have not been hegemonic for over 800 years, which has resulted in that Kurdish history has been disregarded or appropriated by others.[21] The Kurdish people have until fairly recent history remained tribal and regional. The origins of nationalism are often traced to the Sheikh Ubeydullah Revolt of 1880, whose goal was a unification of Ottoman and Iranian Kurdistan.[22] Although Kurdistan has never been an independent State in the modern

[17] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 4.

[18] Mehrdad R Izady, *The Kurds: A Concise Handbook* (Taylor & Francis 1992) 1.

[19] Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 2.

[20] Izady (n 18) 87.

[21] Ibid 23.

[22] Bozarslan, Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 104, 104.

sense, Kurdish people have periodically throughout history ruled over the area in which they have lived.[23] Since the First World War, Kurdistan has been divided among several countries: Türkiye, Iran, Iraq, and Syria, as well as a small division which was distributed to the former Soviet Union.[24]

Kurdish people are distinguished with a shared ethnicity, language and culture.[25] The Kurdish language consists of several dialects, with the two most spoken being Kurmanji, which is the most common dialect in Northern Kurdistan, today's South-Eastern Türkiye, and Sorani.[26] Kurdish culture is distinct in clothing and jewellery. Another important trait of Kurdish culture is the importance of nature, in particular flowers.[27] In Kurdish culture a common theme is the mountains, which is closely linked to the Kurdish struggle and resistance.[28] One example is the phrase 'the only friends of the Kurds are the mountains' which has been popularised as 'The Kurds have no friends but the mountains'.[29] Myths are central in Kurdish culture, in the form of folklore and folk tale. Often, Kurdish folk stories are symbolic tales, also connected to struggle and resistance, as well as to the origin of the Kurdish people.[30]

## 2.2 The Aftermath of the First World War – the Treaties of Sèvres 1920 and Lausanne 1923

### 2.2.1 The Treaty of Sèvres 1920 and the fall of the Ottoman Empire

[23] Jaffer Sheyholislami, *Kurdish Identity, Discourse, and New Media* (1. ed, Palgrave Macmillan 2011) 49 f.

[24] Mehrdad R Izady, *The Kurds: A Concise Handbook* (Taylor & Francis 1992) 3.

[25] Jaffer Sheyholislami, *Kurdish Identity, Discourse, and New Media* (1. ed, Palgrave Macmillan 2011) 54 f.

[26] Hashem Ahmadzadeh, 'From the Wandering Poets to the Stateless Novelists' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 687–706, 689.

[27] Mehrdad R Izady, *The Kurds: A Concise Handbook* (Taylor & Francis 1992) 237.

[28] Jaffer Sheyholislami, *Kurdish Identity, Discourse, and New Media* (1. ed, Palgrave Macmillan 2011) 56.

[29] Ibid; this quote has also been the inspiration for my title.

[30] Mehrdad R Izady, *The Kurds: A Concise Handbook* (Taylor & Francis 1992) 240 f.

Following the First World War, the Ottoman Empire came to an end.[31] This more or less coincided with the advocacy for establishing nation borders, and therewith national rights and self-determination.[32] The idea of this was particularly asserted by the Allied Powers of the first World War[33], who initiated democratic processes after the War.[34] Before this, the idea of a nation-state was quite unknown in the Middle East.[35]

#### *2.2.1.1 The Sykes-Picot Agreement and its Development*

In 1916, before the end of the First World War, an agreement called the Sykes-Picot-Sazonov Collusive Deal, or the Sykes-Picot Agreement after the exit of Russia following their revolution, was formed. It consisted of plans on how to divide the territories of the Ottoman Empire, between Britain, France and Tsarist Russia.[36] In this Agreement, Kurdistan was to be divided between a French-administrated area, including Syria and Lebanon, a British-administered area, including Iraq 'and other Arab States', a Russian-administered area, including today's Armenia and Azerbaijan, as well as to the Persian sphere. This mapping was done without adhering to Kurdish opinions.[37] While the Kurdish people were not a primary concern for Britain, the area of Mosul, which was given to France, was.[38] Britain wanted control over the territory, due to economic and military strategic reasons. As for the economic aspect, Mosul was rich in oil and agriculture. In order to achieve control over the territory, Britain laid out different proposals regarding Kurdistan, involving autonomy for Kurdistan, with 'foreign' (British) assistance, either as a nation or as a part of Persia, but nonetheless involving British control.

[31] Djene Rhys Bajalan 'The Kurdish Movement and the End of the Ottoman Empire, 1880–1923' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 104–137, 105.

[32] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187–1216, 1187.

[33] France, Italy, Japan, the United Kingdom and the United States.

[34] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187–1216, 1187.

[35] Izady (n 19) 59.

[36] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187–1216, 1191.

[37] Ibid 1191 f.

[38] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 117 f.

However, these suggestions were rejected by France.[39] Eventually, France gave control over Mosul to Britain.[40] Although, Britain still wanted control of the area north of Mosul, to avoid Turkish land between the proposed state of Armenia and the British and French-mandated areas of Syria and Mesopotamia as declared in the Sykes-Picot Agreement. This was seen as dangerous by both Britain and France because of the Turkish tendency for intrigue.[41] However, neither of the two countries wanted judicial responsibility for that area, North Kurdistan, due to the rebellious inclination of its Kurdish population, which had been prevalent during Britain's short-lived administration of the area.[42] Thus, two suggestions were considered: that North Kurdistan be returned to Turkish sovereignty, but with local autonomy under British and French supervision, or that North Kurdistan be separated from the Türkiye, and become an independent State, with protection from Turkish aggression, but without Anglo-French control.[43]

#### *2.2.1.2 The Treaty of Sèvres and Kurdish Self-Determination*

On 10 August 1920, the Allies signed, together with representatives from the Ottoman Empire, the Treaty of Sèvres. Noteworthy of the Treaty are Articles 62–64, which determined local autonomy for the Kurdish areas in the middle east. Additionally, the Treaty of Sèvres stipulated the possibility for Kurdish people to separate from Türkiye, and thus become an independent state, without allowing Türkiye to refuse giving over the rights to those areas.[44] The Treaty of Sèvres also allowed the possibility for Southern Kurdistan[45] to be included in the future state of Kurdistan.[46] However, the Treaty failed to

[39] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1192.

[40] Paul C Helmreich, *From Paris to Sèvres: The Partition of the Ottoman Empire at the Peace Conference of 1919-1920* (Ohio State University Press 1974) 206.

[41] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 121.

[42] Paul C Helmreich, *From Paris to Sèvres: The Partition of the Ottoman Empire at the Peace Conference of 1919-1920* (Ohio State University Press 1974) 204 f.

[43] Ibid 105.

[44] Articles 62–64 in the Treaty of Sèvres.

[45] The part currently belonging to Iraq.

[46] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 137.

exclude the Kurdish territories in Syria, the city of Dersim[47], which was given to Türkiye, and lastly to demarcate the border between Kurdistan and Armenia, as President Wilson chose to include a border more to Armenia's liking, meaning that some lands inhabited mainly by Kurds would belong to Armenia.[48] Also, East Kurdistan belonged to Persia.[49] Regardless of the fact that the determined forms of Kurdish self-determination was rather limited in the Treaty, it still established a recognition of the Kurdish people as a national community with the potential of self-rule and independence.[50] These provisions were largely an effect of Britain's strategic lobbying in the Paris Peace Conference 1919-1920, to prevent the presented concerns of Türkiye in that area, as previously presented, and to stop the expansion of Bolshevik Russia.[51]

The provisions of the Treaty were not welcomed in particular by the then progressing Turkish nationalist movement called Young Turks[52], led by Mustafa Kemal[53] (hereinafter called "Atatürk"), and the Kurds alike. Besides Kurdistan being given autonomy and possibly gaining complete independence, big parts of the land of the former Ottoman Empire was distributed to neighbouring countries to Türkiye. The Treaty was essentially punishment for losing the First World War.[54] For these reasons, among others, the Treaty would be very short-lived.

[47] The Turkish name for Dersim is Tunceli. I will however continue using the Kurdish name for the city, due to the historic significance of Dersim.

[48] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 137.

[49] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1197.

[50] Djene Rhys Bajalan 'The Kurdish Movement and the End of the Ottoman Empire, 1880–1923' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 104, 128.

[51] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1195.

[52] Britannica, T. Editors of Encyclopaedia 'Young Turks' *Encyclopedia Britannica* (11 January 2024) <https://www.britannica.com/topic/Young-Turks-Turkish-nationalist-movement> accessed 8 April 2024.

[53] Also known as Mustafa Kemal Pasha, Mustafa Kemal Atatürk, and Ghazi Mustafa Kemal.

[54] Philip Marshall Brown, 'From Sèvres to Lausanne' (1924) 18(1) The American Journal of International Law 113, 113.

The Treaty of Sèvres was never ratified.[55] Following the signing of the Treaty were years of failure from its both Parties. The Allied Forces failed to enforce it, while the Kemalists did not abide by it.[56] Atatürk was determined to hold on to the 'Ottoman Muslim majority'.[57] It is noteworthy that the unification of the 'Ottoman Muslim majority' was not due to ambitions of a Muslim State with religious values, as Kemalists intended to secularise the State, which is shown in the secular Constitution implemented in 1924.[58] Regarding the Kurds, the substantial exclusion of Kurdish territories in the Treaty of Sèvres given to the Kurds was dissatisfactory, leading to the rejection of the Treaty from Kurds in Eastern Anatolia.[59] Moreover, the extensive border of Armenia covering Kurdish territories also gave rise to fear of the Armenian nation.[60] Kemalists successfully mobilised 'Ottoman political discourse' by promoting Sunni Muslim unity and by successfully invoking fear in Kurds of Armenian ascendancy in Kurdish regions.[61] This idea was, however, not shared by all. Attempts of resistance against Kemalist forces were made, most famously by the Alevis backed-up by neighbouring Sunni Muslims in the Koçgiri Rebellion.[62] The rebellion nevertheless failed, as the Kemalist forces put down the attempts.[63] Following this, Great Britain withdrew its support of an independent Kurdistan.[64]

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[55] Ann Elizabeth Montgomery, 'The Making of the Treaty of Sèvres of 10 August 1920' (1972) 15(4) The Historical Journal 775, 775.

[56] Loqman Radpey, 'The Sèvres Centennial: Self-Determination and the Kurds' (2020) 24(20) American Journal of International Law (ASIL Insights) <https://www.asil.org/insights/volume/24/issue/20/sevres-centennial-self-determination-and-kurds> accessed 8 April 2024.

[57] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1197.

[58] The Constitution of the Republic of Turkey (adopted 20 April 1924).

[59] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1197.

[60] Ibid.

[61] Djene Rhys Bajalan 'The Kurdish Movement and the End of the Ottoman Empire, 1880–1923' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 104, 129.

[62] Robert W Olson, *The Emergence of Kurdish Nationalism and the Sheikh Said Rebellion, 1880 - 1925* (University of Texas Press 1991) 28–29.

[63] Djene Rhys Bajalan 'The Kurdish Movement and the End of the Ottoman Empire, 1880–1923' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 104, 130.

[64] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1197.

### 2.2.2 The Treaty of Lausanne 1923 and the birth of the modern Turkish state

Britain's newly found disinterest in Kurdish self-rule, instead focusing on preserving control over Southern Kurdistan, and Turkish nationalists' success in defeating both Armenia and Greece, as well as Türkiye's rise in power and diplomatic recognition, from France for instance, gave rise to an increased interest for Britain in appeasing the Kemalists. This was mostly to ensure that Türkiye would not invade the Iraqi Kurdish regions, particularly Mosul.[65] Additionally, this was a component in the strategy to exclude Bolshevik Russia.[66] As a result, new negotiations took place, leading to the signing of a new treaty – the Treaty of Lausanne, signed 24 July 1923[67].[68] Noteworthy is the fact that the Treaty of Lausanne is the only peace treaty of the First World War in which genuine negotiations were made between the victors and losers of the War.[69]

This new treaty established new Turkish state borders covering the whole Anatolian peninsula, including Northern and Western Kurdistan.[70] In fact, the Treaty of Lausanne makes no mention of either Kurdistan or Armenia.[71] It does not even mention the Kurdish people as a distinctive community.[72] The Treaty parts accepted 'complete abolition of the Capitulation in Turkey in every respect'[73], which stands as a clear contrast to the Treaty of Sèvres, in which Türkiye was obligated to accept decisions made by the Allied Forces

[65] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 138.

[66] Djene Rhys Bajalan 'The Kurdish Movement and the End of the Ottoman Empire, 1880–1923' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi, *The Cambridge History of the Kurds* (Cambridge University Press 2021) 104, 131.

[67] Treaty of Peace with Turkey, Signed at Lausanne, 24 July 1923.

[68] Jörg Fisch and Anita Mage, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (Cambridge University Press 2015) 155.

[69] Helmreich (n 43) 321.

[70] Mehrdad R Izady, *The Kurds: A Concise Handbook* (Taylor & Francis 1992) 61.

[71] Philip Marshall Brown, 'From Sèvres to Lausanne' (1924) 18(1) The American Journal of International Law 113, 113.

[72] Djene Rhys Bajalan 'The Kurdish Movement and the End of the Ottoman Empire, 1880–1923' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 104, 131.

[73] Article 28 of the Treaty of Lausanne.

regarding the lands and territories given to Türkiye.[74] Article 64 in the Treaty of Sèvres serves as an example, concerning the possibility of the Kurdish territories to gain complete independence.

While the Treaty of Lausanne does include protection of minority rights, as stated in Articles 37-44, it does not state any named group or peoples as minorities. In fact, the Treaty recognises a very narrow view on the term 'minority'. The protection only explicitly covers the protection of non-Muslim minorities, which in practice excludes Muslim minorities from partaking in these minority rights.[75] Ethnicity as a basis of minority status, or even national identity is thus disregarded in the Treaty.[76] Kurdish people were regarded as a Muslim minority, and were therefore grouped with the majority, regardless of the ethnic and sectarian differences.[77] The only exception where Kurds technically could be granted rights can be found in Article 39, which states that all Turkish nationals shall be free to use any language 'in private intercourse, in commerce, religion, in the press, or in publications of any kind or at public meetings'.[78] However, this is of no use as Türkiye have since then never recognised their minorities as such.[79] Thus, it can be said that the Treaty of Lausanne and the making of modern Türkiye 'went hand in hand with forgetting, denying, and suppressing the Kurds, including their ethnic identity and language'.[80]

## 2.3 The 1920s to the 1940s: Denial, Assimilation and Forced Resettlement of Kurdish People

[74] Philip Marshall Brown, 'From Sèvres to Lausanne' (1924) 18(1) The American Journal of International Law 113, 114.

[75] Zelal B. Kızılkan Kısacık, 'The Impact of the EU on Minority Rights – The Kurds as a Case' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *tiition in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 205, 211.

[76] Ibid.

[77] Ibid 212.

[78] Article 39(4) of the Treaty of Lausanne.

[79] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1201.

[80] Welat Zeydanhoğlu, 'Repression or Reform? – An Analysis of the AKP's Kurdish Language Policy' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 162, 166.

### 2.3.1 The New Turkish State and 'Turkishness'

The strategy of the Turkish State, has since the creation of modern Türkiye, been to deny the existence of Kurdish people, and to promote 'Turkishness'. This can be exemplified by the referring to Kurdish people as "Mountain Turks", a label that continued on being used well into the 1980's.[81] Following the signing of the Treaty of Lausanne, Türkiye was quick to realise that the Allied Powers were not particularly prone to press for observation on the Articles concerning minority rights. A year after signing the Treaty, an official decree concerning the abolishing of the Caliphate was stipulated, banning all Kurdish schools, organisations and publications, as well as banning Kurdish religious fraternities and seminaries.[82]

In February 1925, the first Kurdish rebellion occurred after the formation of the modern Turkish State, the Sheikh Said rebellion. The rebellion was religiously motivated, as a reaction to the secularisation process of Türkiye, and was done with the intention of creating a Muslim Kurdish State.[83] However, it was quickly ended by the Turkish Republican army, and many of the rebels were hanged only a few months later.[84] Hundreds of rebels and their supporters were executed in the Kurdish region by the Turkish Government. Pictures of these executions were displayed on national papers, putting a fear of the Turkish State among the Kurdish people. These have been compared with the displays of torture in France during the 18th century, where Michel Foucault analyses such displays as 'means of perpetuating the power of the King.[85] By attributing fear to the Kurdish people, and by dismissing Kurds as a small group that would not be able to constitute a nation, 'Kurdism' was rebuffed

[81] Cengiz Gunes and Welat Zeydanhoğlu, 'Introduction – Turkey and the Kurds' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 9.

[82] Law No. 430 of Tedrisi Tedrisat (adopted 3 March 1924) Official Gazette 6 March 1924 No. 63; see also Mehrdad R Izady, *The Kurds: A Concise Handbook* (Taylor & Francis 1992) 61.

[83] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187, 1201.

[84] Ibid 61.

[85] Ramazan Aras, 'State Sovereignty and the Politics of Fear – Ethnography of Political Violence and the Kurdish Struggle in Turkey' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 89, 91; see also Michel Foucault and Alan Sheridan (tr), *Discipline and Punish: The Birth of the Prison* (Pantheon Books 1977) 50.

by the Kemalists after the rebellion.[86] Martin van Bruinessen has described the measures against the Kurdish people during this time as an 'ethnocide'.[87]

Claims of cultural, linguistic and political rights of Kurdish people were further penalised by Articles 141 and 142 of the Turkish Penal Code implemented in 1926, which prohibited 'establishing organisations' or 'making propaganda' contradicting the Turkish Constitution's declared public rights 'on considerations of race' or aimed to destroy or diminish 'national feeling'.[88] Article 142(3) which prohibited propaganda with these aims, was later termed 'Kurdish Propaganda Crime' by the Turkish Constitutional Court (TCC).[89] These actions were considered to conflict with Turkish nationalism, which the judiciary later expressed as the 'founding principle of the Turkish State and legal system'.[90] These cases show how the legislative actions taken in the 1920s had a long lasting effect in Türkiye's criminalisation of Kurdish people.

### 2.3.2 Forced Resettlement and the Dersim Rebellion

The late 1920s and the 1930s continued with the notion of 'drowning the Kurdish in a considerable mass of Turks' through enforcements on resettlements.[91] In 1934, the new Turkish Resettlement Law[92] was adopted. It is generally regarded as a tool for the colonialisation and assimilation of the Kurdish

[86] Loqman Radpey, 'Kurdistan on the Sèvres Centenary: How a Distinct People Became the World's Largest Stateless Nation' (2022) 50 Nationalities Papers 1187–1216, 1201.

[87] Martin van Bruinessen, 'Constructions of Ethnic Identity in the Late Ottoman Empire and Republican Turkey: The Kurds and their Others' (1997) presented at the workshop 'Social Identities in the late Ottoman Empire' in New York University 7.

[88] Articles 141(4) and 142(3) of the Turkish Criminal Law No. 765 *Official Gazette* 13 March 1926 No. 320 (adopted 1 March 1926); Derya Bayır, 'The Role of the Judicial System in the Politicide of the Kurdish Opposition' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 21, 26 f.

[89] Turkish Constitutional Court Decision (3 February 1987) Y(9)DC, E.1986/7202,K.1987/569.

[90] Turkish Constitutional Court Decision (5 October 1976) Y(9)CD, E.1976/48, K. 1976/47.

[91] See Settlement Law No. 885 *Official Gazette* 1 July 1926 No. 409 (adopted 31 May 1926).

[92] Settlement Law No. 2510 *Official Gazette* 21 June 1934 No. 2733 (adopted 14 June 1934).

provinces by forced resettlement.[93] The law categorised Türkiye into three zones:

> '(i) localities to be reserved for the habitation in compact form of persons possessing Turkish culture; (ii) regions to which populations of non-Turkish culture for assimilation into Turkish language were to be moved; (iii) regions to be completely evacuated.'[94]

The third zone, which would be completely evacuated, consisted of areas where the Kurds mostly lived, and where the mother tongue was the Kurdish language. They were to be resettled in zone two and thus be dissolved among a majority of Turks. The resettlement would ban Kurdish people from composing more than five percent of the areas in which they resettled.[95] It was even suggested to send village children to boarding schools, where they would be required to speak exclusively in Turkish and consequently lose their Kurdish identity.[96] The same year, the Turkish Surname Law[97] was enacted, also as a mean of "Turkification". Article 2 of the Surname Law forbade surnames related to 'tribes, and foreign races and ethnicities', and they were required to be taken from the Turkish language.[98]

The ideas of the Turkification were, according to the historian David McDowall, inspired by the ideas of social engineering promoted by many European intellectuals, and the practice of the then prevailing Nazi Germany.[99] As the Kurdish people made up around 20 percent of the Turkish population, the implementation of the Settlement Law would be difficult to

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[93] Joost Jongerden, *The Settlement Issue in Turkey and the Kurds: An Analysis of Spatial Policies, Modernity and War* (Brill 2007) 174.

[94] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 207; see also Articles 2, 12, 23 and 14 of the Settlement Law.

[95] Ceng Sagnic, 'Mountain Turks: State Ideology and the Kurds in Turkey' (2010) 3 Information, Society and Justice Journal 127, 131.

[96] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 207.

[97] Surname Law No. 2525 *Official Gazette* 21 June 1934 (adopted 21 June 1934).

[98] Meltem Türköz, 'Surname Narratives and the State–Society Boundary: Memories of Turkey's Family Name Law of 1934' (2007) 43 Middle Eastern Studies 893, 893 f.

[99] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 207.

achieve.[100] To test the execution of the new law, Dersim was chosen as a test subject.[101] What was distinctive for the province is that the area was very rocky and poor, with the inhabitants mainly supporting themselves through agriculture and husbandry.[102] Additionally a factor that determined Dersim as a test subject, was the fact that they lived in virtual autonomy, with a history of rebelling against authorities on matters where their tribal autonomy was challenged. Further, they were notoriously known to be in favour of Kurdish nationalism, had difficulties in collecting taxes for military recruitment, and resisted the disarmament policies of Türkiye.[103] Thus, Dersim, with their distinct culture, pro-Kurdish values and their well-armed, stubborn, population was viewed as a threat to the Turkish State.[104] The result was the Tunceli Law of 1935, purposed to establishing control over Dersim.[105] This gave rise to the Dersim rebellion, also called by several scholars and others as the Dersim massacre or Dersim genocide, which marked the fourth serious rising against the modern Turkish State Its repercussions directly affected Kurdish people well into the 1960s.[106]

In 1936, a state of siege was declared for Dersim.[107] In 1937, military operations embarked, with around 25 000 troops gathering around Dersim. On the other side were around 1500 Kurds of Dersim. The leaders of Dersim sent emissaries to the appointed general of the military governor in charge of the operation, pleading for permission to administer themselves. As a response, he had the emissaries executed.[108] In revenge, the rebels of Dersim retaliated

[100] Ibid.

[101] Nicole Watts, 'Relocating Dersim: Turkish State-Building and Kurdish Resistance, 1931–1938' (2000) 23 New Perspectives on Turkey 5, 11.

[102] Ibid.

[103] Mehmet Orhan, 'Kurdish Rebellions and Conflict Groups in Turkey during the 1920s and 1930s' (2012) 32 Journal of Muslim Minority Affairs 339, 351.

[104] Nicole Watts, 'Relocating Dersim: Turkish State-Building and Kurdish Resistance, 1931–1938' (2000) 23 New Perspectives on Turkey 5, 12 ff.

[105] Law on the Administration of the Province of Tunceli No. 2884 *Official Gazette* 2 January 1936 No. 3195 (adopted 25 December 1935, annulled 1 January 1947).

[106] Hay Eytan and Cohen Yanarocakin, 'A Tale of Political Consciousness: The Rise of a Nonviolent Kurdish Political Movement in Turkey' in Ofra Bengio (ed), *Kurdish Awakening: Nation Building in a Fragmented Homeland* (University of Texas Press 2014) 137, 139.

[107] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 208.

[108] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 208.

in the spring of 1937.[109] Turkish troops stormed Dersim, using air force to target hiding Kurdish fighters. Additionally, they bombed villages assumed to shelter rebels.[110] A great number of villages were destroyed and burned.[111] The prisons were filled with non-combatants and intellectuals were executed or exiled. Several leaders of the rebellion were also executed immediately by capture.[112] There are reports on 'refugees immolated in woods, collective suicides of Kurdish villagers throwing themselves off cliffs, and women and girls drowning themselves in rivers from fear of rape'.[113]

Around 40 000 Kurds were killed, and officially 3000 but perhaps even more were deported.[114] These are estimated numbers based on comparisons between Turkish documentations and documents from people in Dersim. Later publications mention the number of deported up to 100 000.[115] The remaining population was put under strict supervision. It was not until 1946 that the special emergency regime put in Dersim was lifted, and the deported families could return. This event is significant as it shows Türkiye's administrative targeting of Kurdish people through law, as well as serving as an example of Kurdish resistance as a reaction to State measures.[116]

As for the Resettlement Law, it was not possible to enforce in the Kurdish provinces, as the number of people for which a displacement was planned was too large for the operation. Instead, assimilation strategies were enforced

[109] Mehmet Orhan, 'Kurdish Rebellions and Conflict Groups in Turkey during the 1920s and 1930s' (2012) 32 Journal of Muslim Minority Affairs 339, 351 f.

[110] Nicole Watts, 'Relocating Dersim: Turkish State-Building and Kurdish Resistance, 1931–1938' (2000) 23 New Perspectives on Turkey 5, 22.

[111] Martin van Bruinessen, 'Genocide of the Kurds' in Israel W Charny (ed), *The Widening Circle of Genocide* (Facts on File 1994) 168.

[112] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 208.

[113] Mehrdad R Izady, *The Kurds: A Concise Handbook* (Taylor & Francis 1992) 62.

[114] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 209.

[115] Martin van Bruinessen, 'Genocide of the Kurds' in Israel W Charny (ed), *The Widening Circle of Genocide* (Facts on File 1994) 169.

[116] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 89.

in high force, with great focus on implementing previously mentioned Turkish language-boarding schools.[117]

## 2.4 The Beginnings of a Kurdish Political Movement

Until 1946, Atatürk's Party, the Republican People's Party (CHP) had been the sole Party of Türkiye. This ended when the Democrat Party (DP) was established, and quickly ascended to leadership by mobilisation of marginal communities.[118] They were particularly popular among the Kurdish population, with promises of correcting past faults, and lifting the restrictions on the forced resettled Kurds, making it possible for them to return to their places of origin.[119] Although the DP Government initially presented some improvements concerning Kurdish people's rights, it later took several new repressing measures, such as persecution of Kurdish expressions of dissent.[120]

In the late 1950s, the first trace of a Kurdish political movement, after decades of rest, could be seen.[121] Unlike the previous attempts of mobilisation, the new political movement was mainly led by university students and professionals. This meant a change in means of expression. Contrary to the previous revolts against the Turkish army, the new movement centred around demanding cultural recognition, political rights and regional autonomy by invoking

[117] David McDowall, *A Modern History of the Kurds* (3., revupdated ed, reprint, I.B. Tauris 2013) 209 f.

[118] Evren Balta, 'Turkey's Nation-Building and the Kurdish Question' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 107.

[119] Ibid 107 f.

[120] For example, Law Concerning Crimes Committed against Atatürk No. 5816 *Official Gazette 31* July 1951 No. 7872 (adopted 25 July 1951).

[121] Hay Eytan Cohen Yanarocakin, 'A Tale of Political Consciousness: The Rise of a Nonviolent Kurdish Political Movement in Turkey' in Ofra Bengio (ed), *Kurdish Awakening: Nation Building in a Fragmented Homeland* (University of Texas Press 2014) 139.

the new Turkish Constitution of 1961.[122] The movement functioned through for instance newspapers, associations and political parties.[123]

In 1960, a coup d'état was carried out by the Turkish military. The primary objective of the military revolution was to reinstate the rule of law rooted in principles of a democratic parliamentary and to ensure their protection through sufficient constitutional safeguards.[124] This led to the implementation of the 1961 Constitution.[125] Another aim of the coup was to hinder the emergence of the Kurdish political movement. Within the first days of the coup, around 485 Kurdish people were arrested and imprisoned in a military camp.[126] Mass political trials ensued.[127]

The first significant case punishing the Kurdish movement concerned Musa Anter's publication *İleri Yurd*, released in 1958-1959, which was a defiance of the prohibition of the Kurdish language.[128] The publication was eventually banned by the Turkish Government the year of its first launch, and consequently led to the imprisonment of fifty Kurdish intellectuals, with accusations of communism[129] and for writing in Kurdish in the publication.[130] One of the imprisoned intellectuals was killed in custody, which led to them being known as 'the 49ers'.[131] The case is significant as it was the first mass trial of

[122] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 90.

[123] Mesut Teğen, 'Kurdish Nationalism in Turkey, 1898-2018' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 311, 318.

[124] Kemal H Karpat, *Social Change and Politics in Turkey: A Structural-Historical Analysis* (Brill 1973) 317.

[125] Constitution of the Republic of Turkey Law No. 334 *Official Gazette* 20 July 1961 No. 10859 (adopted 9 July 1961).

[126] Mesut Teğen, 'Kurdish Nationalism in Turkey, 1898-2018' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 311, 318.

[127] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 90.

[128] Ibid.

[129] Hay Eytan Cohen Yanarocakin, 'A Tale of Political Consciousness: The Rise of a Nonviolent Kurdish Political Movement in Turkey' in Ofra Bengio (ed), *Kurdish Awakening: Nation Building in a Fragmented Homeland* (University of Texas Press 2014) 137, 139.

[130] Mesut Teğen, 'Kurdish Nationalism in Turkey, 1898-2018' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 311, 319.

[131] Hay Eytan Cohen Yanarocakin, 'A Tale of Political Consciousness: The Rise of a

Kurdish dissidents, followed by many more.[132] Meanwhile, assimilation policies continued, for instance by renaming Kurdish places with Turkish names.[133] Also, a government circular was issued, forbidding the use of 'any foreign word for which a Turkish equivalent existed', which can also be interpreted by Article 3 of the 1961 Constitution, stating that the language of Türkiye is Turkish.[134]

In 1961, the Worker's Party of Turkey (TİP) was founded, which largely focused on ethnic discrimination against Kurdish people and the underdevelopment of South-Eastern Türkiye.[135] The Party was a result, and an influence, of rising socialist values concerning the Kurdish question, due to the socio-economic underdevelopment of the Kurdish regions.[136] Eventually, Kurdish people founded their own organisations, such as the Revolutionary Culture Hearths of the East (DDKO), calling for Kurdish independence and autonomy, and departed from the Turkish leftists. The organisation issued a 150-page defence on Kurdish rights and identity, containing Kurdish history, language and society.[137] DDKO was banned soon after its creation.[138]

In 12 March 1971, Turkish military intervention commenced in Türkiye in the form of a coup, with martial law introduced in several Kurdish provinces. Thousands of activists were detained in prisons. This was motivated by the Interior Minister with several reasons, such as the rise of 'extreme leftists and urban guerrillas' and the 'separatist question in the East', meaning the

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Nonviolent Kurdish Political Movement in Turkey' in Ofra Bengio (ed), *Kurdish Awakening: Nation Building in a Fragmented Homeland* (University of Texas Press 2014) 137–154, 139.

[132] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 91.

[133] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 92.

[134] Lewis Geoffrey, 'The Present State of the Turkish Language' (1985) 71 Proceedings of the British Academy 103, 113.

[135] Mesut Teğen, 'Kurdish Nationalism in Turkey, 1898-2018' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 311, 319.

[136] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 92.

[137] David McDowall, *A Modern History of the Kurds* (3., rev updated ed, reprint, I.B. Tauris 2013) 412.

[138] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 92.

Kurdish nationalist movement.[139] The Turkish State's intolerance of opposing opinions and ideological polarisation led to the creation of Kurdistan Workers' Party (PKK), a revolutionary leftist group founded from a branch of DDKO, which rapidly gained supporters, and almost as rapidly were marked as terrorists.[140]

## 2.5 The 1980s – the Military Coup d'état and Kurdish Revivalism

### 2.5.1 The 1980 Coup d'état

On 12 September 1980, the Turkish military took control over the Government through a coup and transferred the State authority from the Grand National Assembly to the military-led National Security Council.[141] The drafting of a new Constitution soon began, adopted 1982 and currently in force.[142] With the new Constitution came provisions opening up for an establishment of a State Security Court.[143] The new military Government declared martial law in the nation, and prohibited all political activity, including all political parties.[144] This flattened all Kurdish parties and organisations. During the years following the coup, thousands of Kurdish activists were imprisoned, and many more fled the country.[145] According to David McDowall, the official number of arrested Kurds was less than 4,500, but the International

[139] David McDowall, *A Modern History of the Kurds* (3., rev updated ed, reprint, I.B. Tauris 2013) 412.

[140] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 92 f.

[141] Evren Balta, 'Turkey's Nation-Building and the Kurdish Question' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 101, 110.

[142] Constitution of the Republic of Turkey Law No. 2709 *Official Gazette* 9 November 1982 No. 17863 (adopted 7 November 1982).

[143] Articles 143 and 145 of the 1982 Constitution.

[144] Ibid.

[145] Mesut Teğen, 'Kurdish Nationalism in Turkey, 1898-2018' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 311, 321.

League for Human Rights claimed that more than 81,000 Kurds had been detained between 1980 and 1982.[146]

Policies and legal measures were implemented with the purpose to diminish the Kurdish identity, in particular the Kurdish language, and to ensure that Kurdish movements would not reappear, according to human rights law post-doctor Dilek Kurban.[147] According to Article 26 and 28 of the 1982 Constitution, no expressions or publications were allowed in any language prohibited by law.[148] Article 42, which is still in force, states that languages other than Turkish are forbidden to be taught as mother tongues in education. Moreover, a law was cast in 1983 forbidding expressions in 'any language apart from the primary official language of states recognised by the Turkish state'.[149] Criminal provisions in the Turkish Penal Code were applied increasingly to restrict the free speech and political activity of Kurdish people, prosecuting them routinely, in particular for violating Articles 141 and 142, as well as Articles 158 and 159 which prohibited 'insulting' the President, Parliament, Government and military authorities.[150]

Additionally, the Law on Political Parties (LPP) was adopted in 1983, stating that political parties are prohibited from basing 'their existence on a region, race, […] community […] or use such names'.[151] Further, political parties are according to Article 78(a) barred from promoting policies that do not abide to Article 3 of the Constitution and principles such as that individuals and groups are prohibited from exercising sovereignty. Article 3 of the Constitution states that the 'Turkish State, with its territory and nation, is an indivisible entity', and that its language is Turkish. Article 89 of the Constitution stated

[146] David McDowall, *A Modern History of the Kurds* (3., rev updated ed, reprint, I.B. Tauris 2013) 416.

[147] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 93 f.

[148] Repealed on 3 October 2001 by Act No. 4709.

[149] Article 2 of the Law Concerning Publications and Broadcasts in Languages Other Than Turkish No. 2932 *Official Gazette* 22 October 1983 No. 18199 (adopted 19 October 1983, repealed 25 January 1991).

[150] Nader Entessar, *Kurdish Politics in the Middle East* (Rev ed, Lexington Books 2010) 125.

[151] Article 78(b) of the Law on Political Parties No. 2820 *Official Gazette* 24 April 1983 No. 18027 (adopted 22 April 1983).

that ‘no political party may concern itself with the defence, development, or diffusion of any non-Turkish language or culture; nor shall they seek to create minorities within our frontiers to destroy our national unity’.[152] Similarly, Article 81 of the LPP prohibits political parties from upholding the existence of minorities in Türkiye based on distinctions such as race or language, from creating minorities in Türkiye by ‘preserving, developing or spreading languages and cultures’ that are not Turkish, and using other languages other than Turkish in any aspect of political participation and association. Dilek Kurban has noted that all these provisions targeted Kurdish people and the Kurdish language, despite not being explicitly mentioned.[153]

In reaction to the State’s extensive measures against Kurdish people, PKK gained increased support, and in 1984, it declared war against the Turkish State.[154] This by launching a series of attacks on Turkish military forces in the Kurdish regions.[155] The Turkish forces responded by intensifying measures in all areas of Kurdish society.[156] This included arresting thousands of Kurdish people, arming villages, evacuating border villages, and creating private police forces, as well as establishing the Village Guard System in 1985, which was first implemented by the Village Law of 1924, aimed to arm villages lacking State military presence.[157] In 1984, the State Security Court (SSC), with exclusive jurisdiction in terrorism-related charges, began operating in several provinces, as a result of the military junta’s provision in Article

[152] This provision is not available to find in any official legal document. However, several academics have cited this as a provision of the Constitution, see for example Michael M Gunter, ‘The Kurdish Problem in Turkey’ (1988) 42 Middle East Journal 389, 399.

[153] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey’s Kurdish Conflict* (Cambridge University Press 2020) 94.

[154] Evren Balta, ‘Turkey’s Nation-Building and the Kurdish Question’ in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 101, 111.

[155] David McDowall, *A Modern History of the Kurds* (3., rev updated ed, reprint, I.B. Tauris 2013) 420.

[156] Mesut Teğen, ‘Kurdish Nationalism in Turkey, 1898-2018’ in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 311, 323.

[157] Evren Balta, ‘Turkey’s Nation-Building and the Kurdish Question’ in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 101, 111; see also Law on Temporary Village Guards No. 442 *Official Gazette* 7 April 1924 no. 68 (adopted 18 March 1924) as amended by Act no. 3175 26 March 1985.

143 of the Constitution.[158] The SSC consisted of three judges, one being a military judge. They were given authorisations beyond those of the ordinary courts, such as considerably longer permitted detention periods without judicial oversight.[159]

### 2.5.2 Kurdish Revivalism

Towards the end of the 1980s, a shift in the formal political arena was prompted. A non-violent political movement resurfaced in Türkiye, whilst PKK and the Turkish military were entangled in a civil war.[160] One reason for the emergence of these parties was the abolition of certain Articles in the Turkish Penal Code, which had previously restricted freedom of expression.[161] Also, the martial law was lifted, but was immediately replaced with a state of emergency in most Kurdish provinces.[162] Additionally, the revival coincided with Türkiye's recognition of individual claims to the ECtHR (see chapter 5.1). Thus, the new non-violent Kurdish movement consisted of bringing the State before the Turkish courts and the ECtHR for human rights violations against Kurds, as well as Kurdish politicians running for election.[163] Furthermore, the new movement was more focused on cohabitation, pluralism and progress rather than independence.[164]

However, efforts in the 1990s, to advocate for Kurdish cultural and political rights through a political movement were hindered by rulings of the TCC, that

[158] Law on the Establishment of State Security Courts and their Adjudication Procedures no. 2845 *Official Gazette* 19 June 1983 No. 18081 (adopted 16 June 1983).

[159] Article 30 of the Law on the Amendment of Certain Provisions of the Law of Criminal Procedure and the Law on the Establishment of State Security Courts and their Adjudicative Procedures no. 3842 Official Gazette 1 December 1992 no. 21422 (adopted 18 November 1992).

[160] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 99.

[161] Ayhan Kaya 'Multiculturalism and Minorities in Turkey' in Raymond C Taras (ed), *Challenging Multiculturalism: European Models of Diversity* (Edinburgh University Press 2012) 297, 306.

[162] Evren Balta, 'Turkey's Nation-Building and the Kurdish Question' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 101, 112.

[163] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 99.

[164] Mesut Teğen, 'Kurdish Nationalism in Turkey, 1898-2018' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 311, 326.

raised doubts concerning the legitimacy of a party formed around a specific ethnic identity.[165] This claim was supported by Article 78 of the LPP. The provisions concerning political participation, as previously presented (see chapter 2.5.1) indicate that political parties have to base their policies on Turkish nationalist values in order to be allowed to form and to operate. This is also emphasised in Article 4 of the LPP, which states that political parties are required 'work with commitment to the principles and revolutions of Atatürk'. The assertion of the Turkish language as the only language allowed in Türkiye was further affirmed by the restrictions of freedom of expression in Article 26 and 28 in the 1982 Constitution.

The attempts for political participation were not received well by the Turkish State in the light of the escalated PKK violence. The clashes resulted in the Turkish army implementing counter-insurgency policies in the Kurdish regions.[166] Even as the Law Concerning Publications and Broadcasts in Languages Other Than Turkish was repealed in 1991, a new law was implemented the same year, namely the Anti-terror Law.[167] The law converted all existing judgements on death sentences in Türkiye, to prison sentences, according to Article 17 and Temporary Articles 1 and 4. However, the Anti-Terror Law meant that crimes against the security of the State were regulated in both the new legislation and the Turkish Penal Code, thus facilitating two convictions for the same act.[168] Additionally, the Anti-Terror Law criminalised aim, rather than action, as an individual could be charged with terrorist offences without taking criminal action. Furthermore, the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that terrorist crimes according to the Law, includes aims and actions which do not entail grave

[165] Ayhan Kaya 'Multiculturalism and Minorities in Turkey' in Raymond C Taras (ed), *Challenging Multiculturalism: European Models of Diversity* (Edinburgh University Press 2012) 297, 306.

[166] Welat Zeydanhoğlu, 'Repression or Reform? – An Analysis of the AKP's Kurdish Language Policy' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 162, 168.

[167] Law on Fight Against Terrorism no. 3713 *Official Gazette* 12 April 1991 no. 20843 Repetitions (adopted 12 April 1991).

[168] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 99.

violence.[169] The Anti-Terror Law is still in force, albeit with amendments stemmed from pressure to revise the law from the EU during the 2000s.[170]

There are several instances where pro-Kurdish political parties have been shut down. Also, numerous individuals have been punished for breaching the provisions concerning political membership. One example is the Kurdish activist Leyla Zana who was elected to the Parliament with 45 000 votes, making her the first Kurdish woman to ever hold a Parliamentary seat in Türkiye.[171] She was a member of the People's Labour Party (HEP), which was shut down due to allegations of separatist propaganda (see chapter 5.3.3.1). The members of HEP therefore ran as candidates of the Social Democratic Populist Party (SHP) and entered Parliament on their list.[172] Elected Members of the Parliament are required to take the Parliament oath. Leyla Zana, along with her party colleague Hatip Dicle, took it in Kurdish, causing objections from the non-HEP SHP Deputies and accusations of separatism according to Bruce Kuniholm. Leyla Zana famously said in her oath 'I accept this constitutional ceremony in the name of the fraternity between the Turkish and Kurdish peoples'.[173] Leyla Zana was not punished for this incident *per se*, as the law forbidding expressions in other languages other than Turkish was no longer in effect, as mentioned.[174] She, together with leading party colleagues were however arrested and imprisoned after the dissolving of their newly founded Democracy Party (DEP), for separatist propaganda and involvement with the PKK.[175] This case is significant as it became closely entwined with the EU

[169] United Nations Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Addendum, Mission to Turkey' (16 November 2006) A/HRC/4/26/Add.2 §§ 14-15.

[170] See for example European Commission, 'Turkey 2016 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2016 Communication on EU Enlargement Policy' [2016] COM 715 final 5 f.

[171] Bruce Kuniholm, 'Sovereignty, Democracy and Identity: Turkey's Kurdish Problem and the West's Turkish Problem' (1996) 1 Mediterranean Politics 353, 360.

[172] Ibid.

[173] Ibid.

[174] Human Rights Watch, 'Questions and Answers: Freedom of Expression and Language Rights in Turkey' (2002) <https://www.hrw.org/legacy/press/2002/08/turkeyqa041902.htm> accessed 17 February 2024.

[175] *Sadak and Others v. Turkey (No. 2)*, nos. 25144/94 and 8 others, § 22 ECHR 2002-IV.

accession aspirations, as the EU demanded that the convicted politicians would be released and that Türkiye would revise their Anti-Terror Law.[176]

Several other pro-Kurdish parties were dissolved during the 1990s. Cases revolving these are examined in chapter 5.3.3.1. According to Dilek Kurban, a 'cat-and-mouse game' ensued after the dissolving of HEP, in which the same party members would establish a new party immediately after the previous being closed down, and where the State would follow by shutting down the new party as soon as it was founded, and so on.[177]

As for the armed conflict between PKK and the Turkish military, forced disappearances of Kurds not necessarily PKK members – and extrajudicial executions became frequent methods of violence as the war intensified. This continued until PKK's leader Abdullah Öcalan was arrested in 1999 and the PKK subsequently announced a ceasefire.[178]

## 2.6 Towards Democracy

The acceptance of Türkiye as a candidate State for the EU meant a passage in policies and legislative measures, and fuelled a series of progressive reforms.[179] In 2002, the Justice and Development Party (AKP) was elected to Government. During that time, AKP was deemed as a pragmatic and pro-European Party with Islamic roots.[180] With the beginning of their governance, various reforms promoting democracy and human rights ensued. The legal regulations around torture saw a vast improvement. Freedom of expression and association became less restricted. Related to this, broadcasting and teaching in the Kurdish language were in theory lifted from their previous

[176] Bruce Kuniholm, 'Sovereignty, Democracy and Identity: Turkey's Kurdish Problem and the West's Turkish Problem' (1996) 1 Mediterranean Politics 353, 36; see for example European Parliament, 'Resolution on the Release of Leyla Zana' [1998] OJ C 328/194.

[177] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 100 f.

[178] Evren Balta, 'Turkey's Nation-Building and the Kurdish Question' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 101, 113 f.

[179] Ayhan Kaya 'Multiculturalism and Minorities in Turkey' in Raymond C Taras (ed), *Challenging Multiculturalism: European Models of Diversity* (Edinburgh University Press 2012) 297, 308 f.

[180] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 23.

prohibition.[181] This was however only permitted on a restricted scale.[182] The reforms were possible due to an amendment of the 1982 Constitution, lifting the prohibition of the use of the Kurdish language.[183] Other reforms included the removal of military judges from SSC as well as the following abolition of such courts, official recognition of (some) minorities[184] and the release of political prisoners.[185] This included the release of Leyla Zana and her DEP colleagues in 2004, which was welcomed by the EU.[186]

The State implemented a new Criminal Code which brought several positive changes as to the respect of human rights.[187] For example, the mentioned improvement regarding the regulations of torture was a product of the new Criminal Code.[188] The new legislation meant an increase in punishment for public officers who tortured another person.[189] However, many restrictions on fundamental human rights remained restricted. As for torture, the Criminal Code of 2004 includes a statute of limitation in its Articles 66–72. Torture is included as a criminal offence in subject to the statute of limitations. The statute of limitation also includes statutory periods after which punishment may not be executed, in accordance with 68. Depending on the severity of the action, punishment for torture could be disregarded if a time limit of 10 years has passed without legal action. According to Amnesty International's report on Türkiye from 2005, it is a common occurrence that trials of alleged offenders

[181] Ibid.

[182] European Commission, 'Regular Report on Turkey's Progress towards Accession' [2004] COM/656 FINAL 56; see also the 1982 Constitution of the Republic of Turkey cf. its amendments of Article 26 and Article 28 by Act No. 4709.

[183] European Commission, 'Regular Report on Turkey's Progress towards Accession' [2004] COM/656 FINAL 56

[184] Armenians, Jewish people and Greeks, i.e. the minority groups recognised by the Treaty of Lausanne.

[185] Ayhan Kaya 'Multiculturalism and Minorities in Turkey' in Raymond C Taras (ed), *Challenging Multiculturalism: European Models of Diversity* (Edinburgh University Press 2012) 297, 309.

[186] European Parliament, 'Resolution on the 2004 Regular Report and the Recommendation of the European Commission on Turkey's Progress towards Accession' [2005] OJ C 226E/189 § 7.

[187] Turkish Criminal Code no. 5237 Official Gazette 12 October 2004 no. 25611 (adopted 26 September 2004).

[188] Article 94 and 95 of the Criminal Code; see also Amnesty International, 'Turkey: Freedom of expression/torture/prisoners of conscience' (12 May 2005) EUR 44/016/2005.

[189] Amnesty International, 'Turkey: Freedom of expression/torture/prisoners of conscience' (12 May 2005) EUR 44/016/2005.

of the crime are deliberately delayed and eventually abandoned due to such provisions, leading to a culture of impunity.[190] Other breaches of human rights could also be seen in the 2004 Criminal Code. For example, the previous Penal Code included criminalisation of actions and expressions that 'insults or belittle' the State, which had been used to punish people for dissenting opinions.[191] This provision was rephrased, albeit still regulated, in the 2004 Criminal Code's Article 301.[192] Amnesty International expressed concerns regarding this, lifting that the organisation had repeatedly called for the abolition of the precious provision. There existed a fear that this Article would be used to punish legitimate expressions of dissenting opinions, as it had before.[193]

In the early days of the AKP governmental rule, the party gained popularity in the Kurdish regions. Beginnings of advances towards a better situation for the Kurds in Türkiye, a series of action called the 'Kurdish initiative', in terms of partial linguistic and cultural rights, along with a liberal rhetoric referring to cultural diversity and Islamic unity resulted in high percentages for AKP in the election of 2007.[194] The AKP government had interest in the Kurdish issue as a mean to undermine the power of the military army's influence in Turkish politics. The military involvement in Turkish politics is largely rooted in the Kurdish issue, which it perceives as a threat to territorial integrity. This perspective, shared by the judiciary, bureaucracy, and civil society aligned with the military, prioritises security-oriented policies and views advancements in minority rights as risking national unity. This security-focused approach strengthens the military authority at the expense of democratic

[190] Amnesty International, 'Turkey: Freedom of expression/torture/prisoners of conscience' (12 May 2005) EUR 44/016/2005.

[191] Article 195 of the Turkish Criminal Law of 1926; see also Amnesty International, 'Turkey: Freedom of expression/torture/prisoners of conscience' (12 May 2005) EUR 44/016/2005.

[192] Articles 297–299 of the Turkish Criminal Code of 2004; see also Amnesty International, 'Turkey: Freedom of expression/torture/prisoners of conscience' (12 May 2005) EUR 44/016/2005.

[193] Amnesty International, 'Turkey: Freedom of expression/torture/prisoners of conscience' (12 May 2005) EUR 44/016/2005.

[194] Zelal B. Kızılkan Kısacık, 'The Impact of the EU on Minority Rights – The Kurds as a Case' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 205, 220.

institutions. Implementing a rights-based solution to the Kurdish problem would challenge the military dominance, rebalancing power in favour of the democratically elected government.[195]

## 2.7 Retreating to Conservatism and Authoritarianism

If familiar with the current situation in Türkiye, in particular in regards to the democracy, rule of law and respect for human rights, it is not unreasonable to find perplexity over the sudden turn of policies. The progressing towards democracy and the somewhat developing respect for human rights of Kurdish people in the 1990s and 2000s is a big contrast to the current authoritarian rule with backsliding in areas such as democracy, rule of law and human rights of Kurdish people.

### 2.7.1 Beginnings of a shift towards Authoritarianism

Beginning from the 2000s, a global trend entered in the form of decelerating democracy, and autocratic states becoming prominent actors in the global arena. Türkiye is a known example of this. Similar to the judicial and legal changes presented in this section, the global trend was conducted by means of regression from democracy through a process called 'backsliding', in which measures degenerating democracy is taken by elected governments, in this case the AKP government.[196]

2008 marked a shift in Turkish politics. Political pressure came from the EU, showing disapproval of the lack of reform progress regarding the areas of democracy, rule of law, human rights and the respect and protection of minorities as determined by the EU in order for Turkish accession to the Union. Simultaneously, AKP's biggest political opposition CHP, as well as the

[195] Zelal B. Kızılkan Kısacık, 'The Impact of the EU on Minority Rights – The Kurds as a Case' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 205, 220.

[196] Selin Esen, 'The Turkish Constitutional Court and Emergency Regimes in the Age of Democratic Backsliding' in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court: A View from Europe* (Routledge 2024) 157, 159.

Nationalist Movement Party (MHP) pointed sharp criticism against AKP's actions. CHP's criticism mainly consisted of disapproval concerning AKP's reforms towards increased Islamisation.[197] Moreover, both parties expressed firm critique against measures taken on Kurdish rights. As a result, AKP slowed the process and redefined it as the 'democratic initiative' or 'National Oneness and Brotherhood Project'.[198] Another big influence on the political and judicial shift in AKP after 2008 was the attempted 'judicial coup d'état', in which the Turkish chief prosecutor tried to terminate AKP for anti-secular activities, due to the Party supporting headscarves being worn in universities.[199] The TCC eventually did not close down AKP, but did however cut its state funding by 50 percent. This occurrence further embedded the AKP's defensive stance compared to earlier.[200]

From then onwards, the AKP ruled government began to determinately use constitutional amendments in the ambitions to influence and transform Turkish democratic institutions, and thus began the path towards centralisation and authoritarianism.[201] One of the reasons to this shift was the aforementioned case against AKP, along with other decisions from the TCC[202], which established tensions between the TCC and the AKP government. This prompted AKP to implement constitutional amendments, in order to overthrow judgements. In 2007, the TCC had prevented AKP from electing its presidential candidate. According to Article 95 of the 1982 Constitution, the Turkish president is elected by the Turkish Grand National Assembly, where two thirds of the votes are required in the first two rounds, in order for the president to be

[197] Natalie Martin, *Security and the Turkey-EU Accession Process: Norms, Reforms and the Cyprus Issue* (Palgrave Macmillan 2015) 128.

[198] Derya Erdem, 'The Representation of the Democratic Society Party (DTP) in the Mainstream Media' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 47, 57.

[199] See Turkish Constitutional Court (5 June 2008) E 2008/16 K 2008/116 *Official Gazette* 22 October 2008 No. 27032 (Headscarf Decision of 2008).

[200] Natalie Martin, *Security and the Turkey-EU Accession Process: Norms, Reforms and the Cyprus Issue* (Palgrave Macmillan 2015) 129.

[201] Selin Esen, 'The Turkish Constitutional Court and Emergency Regimes in the Age of Democratic Backsliding' in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court: A View from Europe* (Routledge 2024) 157, 160.

[202] See for example Turkish Constitutional Court (1 May 2007) E. 2007/45 K. 2007/54 *Official Gazette* 27 June 2007 No. 26565.

approved. The third and fourth round requires absolute majority of the total number of members in the Assembly, according to the Article. Moreover, the Constitution does not specify a quorum for the meeting of the Assembly; thus, the general rule in Article 96 is applicable, which sets the quorum to one third of the full Assembly. AKP's presidential candidate was rejected by the first two rounds, and elected by AKP alone in the third and fourth rounds. Oppositional Assembly deputies boycotted the first two rounds of the 2007 presidential Assembly election, resulting in the two-third quorum not being filled, and CHP carried the case to the TCC which asserted that the session requires a two-thirds majority to commence. This led to a deadlock in the presidential election, after which the Assembly decided to declare new elections.[203]

The new parliamentary election resulted in AKP being given 46.7 percent of the votes and 340 out of the 550 seats in the Assembly. AKP's presidential candidate was then elected by AKP and MHP, which consequently altered the governmental form from parliamentary to a semi-presidential system. This new system gave further political power to the president.[204] In this election, the pro-Kurdish party, the Democratic Society Party (DTP), found representation in the Turkish Parliament by supporting independent candidates.[205]

At this point in time, AKP was still fairly popular among Kurdish voters, as previously mentioned (see chapter 2.6). The progressions of Kurdish rights implemented by AKP in the 2000s were approved by the Kurds, and continued on until the 2010s. However, the progression in rights concerning Kurdish people would stop along with the rise of authoritarianism.[206] In 2010, the

[203] Selin Esen, 'The Turkish Constitutional Court and Emergency Regimes in the Age of Democratic Backsliding' in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court: A View from Europe* (Routledge 2024) 157, 160; see also Turkish Constitutional Court Decision (1 May 2007) E. 2007/45 K. 2007/54.

[204] Selin Esen, 'The Turkish Constitutional Court and Emergency Regimes in the Age of Democratic Backsliding' in Mirosław Granat (ed), *Constitutionality of Law without a Constitutional Court: A View from Europe* (Routledge 2024) 157, 160.

[205] Cengiz Gunes and Welat Zeydanhoğlu, 'Introduction – Turkey and the Kurds' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 6.

[206] Özlem Kaygusuz, 'Belonging to a Republic or Something Else: An Assessment of the Evolution and Challenges to Modern Citizenship in Contemporary Turkey' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 15, 33.

Government introduced changes in regulations regarding the judiciary, including the Government seizing judicial oversight over the TCC and the Supreme Council of the Military, as well as increasing the number of members of the higher courts selected by the president and the parliament. This meant a big enlargement of control over the courts, meaning a decrease in the independence of the judiciary.[207]

After the election of 2011, AKP commenced a social engineering project emphasising a religious-nationalist standpoint. Changes consisted of regression towards a time before adhering to European values, including restrictions on minority rights.[208] During AKP's election campaign, then Prime Minister Erdoğan continued promoting the Party's ambitions to improve rights of the Kurdish people, stating that their policies no longer denied the existence of Kurdish identity. In reality, AKP had in their progressive reforms regarding Kurdish people promoted 'toleration without formal recognition'.[209] Also, the claims of further improvement on pro-Kurdish reforms proved to be nothing but an election strategy, as the direct period after the elections consisted of intensified measures against Kurdish people, such as the implementation of a comprehensive anti-terror policy, which resulted in increased numbers of military attacks against PKK. The policy was also used to suppress the Peace and Democracy Party (BDP), the leading pro-Kurdish party in Türkiye of that time.[210] One of the attacks resulted in the death of 35 Kurds, mainly children, in a bombing from a Turkish airplane targeting a group of civilians in December 2011.[211] the two years following the elections included a rise in

[207] Şebnem Gümuşçü, 'The Emerging Predominant Party System in Turkey' (2013) 48 Government and Opposition 223, 228.

[208] Özlem Kaygusuz, 'Belonging to a Republic or Something Else: An Assessment of the Evolution and Challenges to Modern Citizenship in Contemporary Turkey' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 15, 33.

[209]Cengiz Gunes, 'IPolitical Reconciliation in Turkey – Challenges and Prospects' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 257, 271.

[210] Cengiz Gunes, 'Political Reconciliation in Turkey – Challenges and Prospects' in Cengiz Gunes and Welat Zeydanhoğlu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation, and Reconciliation* (Routledge 2014) 257, 271.

[211] Amnesty International (ed), *The State of the Worlds Human Rights* (Amnesty International Ltd 2012) 341.

prosecutions under the Turkish Anti-Terror Law[212], particularly consisting of journalists and Kurdish activists who expressed criticism against the treatment of Kurds in Türkiye.[213] In 2012, The Organisation for Security and Co-operation in Europe (OSCE) listed the 78 imprisoned journalists in Türkiye of the time.[214] Reading from OSCE's list, around 68 percent of the cases were related to the Kurdish issue.

These developments raised concern from several international organisations, such as the Human Rights Watch, which expressed that 'the non-resolution of the Kurdish issue remained the single greatest obstacle to progress on human rights in [Türkiye]'.[215] Moreover, the Council of Europe's Commissioner for Human Rights raised concerns regarding Article 6 in the Anti-Terror Law which allows for suspension of publications involving terrorism, as its application in reality mainly was used to shut down Kurdish newspapers.[216] The Turkish Special Authorised Courts, the reformed version of the previous State Security Courts, had 68,000 ongoing investigations on suspected terrorism as of 2012. For comparison, they had 8000 open investigations in 2001. These Courts have been criticised for making convictions based on weak evidence, such as 'inconclusive digital material, unreliable witness accounts or objects like the keffiyeh or books' as evidence of terrorism.[217] This had been proven by the ECtHR to be a breach of Article 10 of the ECHR.[218] The Commissioner for Human Rights also expressed worry about

[212] Law on the Fight Against Terrorism.

[213] Amnesty International (ed), *The State of the Worlds Human Rights* (Amnesty International Ltd 2012) 342.

[214] Organisation for Security and Co-operation in Europe, 'Updated List of Imprisoned Journalists in Turkey Including Recent Releases' (2012) https://www.osce.org/files/f/documents/9/7/91070.pdf accessed 17 May 2024.

[215] Human Rights Watch, 'World Report 2013: Turkey – Events of 2012' (2013) <https://www.hrw.org/world-report/2013/country-chapters/turkey> accessed 2 May 2024.

[216] Commissioner for Human Rights of the Council of Europe, 'Freedom of Expression and Media Freedom in Turkey' (2011) CommDH 25 § 29.

[217] Aslı Iğsız, 'Brand Turkey and the Gezi Protests: Authoritarianism in Flux, Law and Neoliberalism' in Umut Özkırımlı (ed), *The Making of a Protest Movement in Turkey: #occupygezi* (Palgrave Macmillan 2014) 25–49, 30.

[218] See for example *Ürper and others v. Turkey (No. 2)* nos. 14526/07 and 6 others, §§ 43–45, 20 January 2010.

the human rights situation in Türkiye in general, stating that the will to protect human rights was undermined by the will to protect the State.[219]

Although a shift towards authoritarianism took place in the late 2000s to the early 2010s, some positive actions still occurred. For example, in 2011, Prime Minister Erdoğan recognised the massacre in Dersim in the 1930s, making him the first Turkish leader to do so.[220] The shift towards authoritarianism would be more intensified following critical events occurring in Türkiye in the 2010s.

### 2.7.2 Sharpened Authoritarianism

In 2013, the largest public reaction to Türkiye's declining democracy took place, known as the Gezi Park protests. The protests initially originated as a response to the Turkish government's plans to demolish the Gezi Park, a small park in Istanbul's city centre in order to build a shopping mall.[221] However, as a counter-reaction to violent police intervention, demonstrations sparked nationwide.[222] Many groups seized the opportunity to raise their specific objections against the AKP government, including academics, anti-war activists, LGBTQ+ persons, and Kurds.[223] Overall, a total of around 3,5 million Turkish citizens partook in these protests taking place in 80 out of 81 of Türkiye's provinces.[224] The main subjects of complaints revolved around the Turkish legal development towards authoritarianism specified to the concentration of power, the arbitrary application of the Anti-Terror Law and national

[219] Commissioner for Human Rights of the Council of Europe, 'Administration of Justice and Protection of Human Rights in Turkey' (2012) CommDH 2 § 127.

[220] BBC News, 'Turkey PM Erdogan apologises for 1930s Kurdish killings' (2011) <https://www.bbc.com/news/world-europe-15857429> accessed 5 May 2024.

[221] Susanna Verney, Anna Bosco and Senem Aydın-Düzgit, 'Introduction – The AKP on the Road to Presidentialism' in Susannah Verney, Anna Bosco and Senem Aydın-Düzgit (eds), *The AKP Since Gezi Park: Moving to Regime Change in Turkey* (Routledge 2020) 8, 11.

[222] Soli Özel, 'A Moment of Elation: The Gezi Protests/Resistance and the Fading of the AKP Project' in Umut Özkırımlı (ed), *The Making of a Protest Movement in Turkey: #occupygezi* (Palgrave Macmillan 2014) 7, 19.

[223] Susanna Verney, Anna Bosco and Senem Aydın-Düzgit, 'Introduction – The AKP on the Road to Presidentialism' in Susannah Verney, Anna Bosco and Senem Aydın-Düzgit (eds), *The AKP Since Gezi Park: Moving to Regime Change in Turkey* (Routledge 2020) 8, 11.

[224] Soli Özel, 'A Moment of Elation: The Gezi Protests/Resistance and the Fading of the AKP Project' in Umut Özkırımlı (ed), *The Making of a Protest Movement in Turkey: #occupygezi* (Palgrave Macmillan 2014) 7, 8.

security in form of military actions and police brutality.[225] Ergo, the Gezi Park protests became a symbol of a repressing State, which led to a broad mobilisation with social demands of many aspects against the Government.[226]

These areas of the State were however further sharpened in response to the protests, as Türkiye took a significant authoritarian turn.[227] The Turkish government responded to the criticism by increasing restrictions of media freedom, in particular targeting Kurdish voices.[228] Further, AKP regarded itself as synonymous with the State. Hence, criticism against the Party was viewed as criticism against the State, which enabled AKP to use the full power of State to restrict, punish and control dissenting expressions.[229] This, by for example applying Article 301 of the Turkish Criminal Code, which prohibits defamation against the Turkish State and its government.[230]

The effects of the Gezi protests, and Türkiye's seeming satisfaction of Islamic State of Iraq and the Levant's (IS) forces attacks on Kobanê, targeting Kurds in Syria in 2014 had a significant effect on Kurdish people's view on AKP.[231] Simultaneously, the People's Democratic Party (HDP), a pro-Kurdish party with many candidates belonging to marginalised groups, many being part of minority groups such as Kurds, was on the rise.[232] By combining forces with

[225] Aslı Iğsız, 'Brand Turkey and the Gezi Protests: Authoritarianism in Flux, Law and Neoliberalism' in Umut Özkırımlı (ed), *The Making of a Protest Movement in Turkey: #occupygezi* (Palgrave Macmillan 2014) 25, 26 ff and 37.

[226] Hayriye Özen, 'An Unfinished Grassroot Populism: The Gezi Park Protests in Turkey and their Aftermath' (2015) 20 South European Society and Politics 533, 534.

[227] Mehmet Gurses and David Romano, 'Kurds in a New Century – Prostpects and Challenges' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 289, 299.

[228] Özlem Kaygusuz, 'Belonging to a Republic or Something Else: An Assessment of the Evolution and Challenges to Modern Citizenship in Contemporary Turkey' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 15, 34.

[229] Zeynep N. Kaya and Matthew Whiting, 'The HDP, the AKP and the Battle for Turkish Democracy' in Güneş Murat Tezcür (ed), *A Century of Kurdish Politics: Citizenship, Statehood and Diplomacy* (Routledge, Taylor & Francis Group 2019) 77, 81.

[230] Zeynep N Kaya and Matthew Whiting, 'The HDP, the AKP and the Battle for Turkish Democracy' (2019) 18 Ethnopolitics 92, 96 f.

[231] Mehmet Gurses and David Romano, 'Kurds in a New Century – Prostpects and Challenges' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 289, 299.

[232] Zeynep N. Kaya and Matthew Whiting, 'The HDP, the AKP and the Battle for Turkish Democracy' in Güneş Murat Tezcür (ed), *A Century of Kurdish Politics: Citizenship, Statehood and Diplomacy* (Routledge, Taylor & Francis Group 2019) 77, 78.

BDP, who entered their candidates under HDP in the national election of 2015, HDP gained enough votes to cross the national threshold, thus receiving mandate in the parliament.[233]

After the 2015 elections, President Erdoğan, elected as such after the 2014 presidential elections, implemented a more anti-Kurdish agenda, including revoking of the reforms which had previously to some extent allowed the Kurdish language, culture and political groups promoting pro-Kurdish policies.[234] The coalition between AKP, MHP and the Patriotic Party ( also known as Vatan Party) gave rise to unprecedented coercive measures taken by the executive 'in the name of state security'. Restrictions in human rights such as the freedom of expression led to the arrest of many journalists, leaders of the civil society and intellectuals, with systematic breaches in the right to a fair trial. The Kurdish movement was especially targeted.[235]

Another event which has deeply affected Turkish politics and law is the attempted coup in 2016. Members of the military conducted a violent coup attempt on 15 July 2016 by capturing airports, roads and bridges in Türkiye's largest cities. However, the coup was deemed as a failure by the morning after.[236] 237 people were killed and 2191 were injured during the coup attempt.[237] The government has since accused the Gülen Movement as instigators of the coup attempt, whereas they have continuously denied involvement.[238] Speculations have been expressed about the coup being staged by

[233] Zeynep N. Kaya and Matthew Whiting, 'The HDP, the AKP and the Battle for Turkish Democracy' in Güneş Murat Tezcür (ed), *A Century of Kurdish Politics: Citizenship, Statehood and Diplomacy* (Routledge, Taylor & Francis Group 2019) 77, 82.

[234] Mehmet Gurses and David Romano, 'Kurds in a New Century – Prostpects and Challenges' in Hamit Bozarslan, Cengiz Gunes and Veli Yadirgi (eds), *The Cambridge History of the Kurds* (Cambridge University Press 2021) 289, 299.

[235] Özlem Kaygusuz, 'Belonging to a Republic or Something Else: An Assessment of the Evolution and Challenges to Modern Citizenship in Contemporary Turkey' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 15, 34.

[236] Simon Waldman and Emre Caliskan, 'Factional and Unprofessional: Turkey's Military and the July 2016 Attempted Coup' (2020) 16 Democracy and Security 123, 139.

[237] Amnesty International (ed), *The State of the World's Human Rights* (Am-nesty International Ltd 2017) 367.

[238] Köksal Avincan, 'The Resurgence of Enforced Disappearances in the Aftermath of the July 15, 2016 Failed Coup Attempt in Turkey: A Systematic Analysis of Human Rights Violations' (2024) 25 Human Rights Review 67, 70 f.

Erdoğans government, partly due to the fact that they did not allow a proper investigation following the coup, or that they did not offer an explanation for the events that occurred that night.[239]

Following the attempted coup, President Erdoğan took further steps towards an authoritarian rule, further drifting away from a democratic Türkiye.[240] Days after the coup, the Turkish government declared a State of Emergency, which was continuously prolonged, lasting for two years. During that time, 37 Decree Laws were implemented by the government, opening up for the possibility to judge instigators and allies of the coup attempt, and the dismissal of employees in the public sector.[241] The state of emergency and the Decree Laws meant derogation from several Articles in the ICCPR and the ECHR.[242] Those covered by the Decree Laws were however not limited to persons involved in the attempted coup; instead, mass prosecutions and dismissals were enacted against political opponents.[243] The direct effects of the state of emergency and the Decree laws have been that authorities, under the command of the Government

> 'have:
>
> - Arrested, sacked, or suspended over 130 000 people, including soldiers, judges, teachers, police officers, businesspeople, and sports officials;

[239] Mina M. Gul, 'Human Rights Violations in Türkiye: Loss of Job, Mobbing, Loss of Freedom of Travel, Denial of Health Services, and Persecution' (2023) 7 American Journal of Qualitative Research 220, 224.

[240] Aylin Güney and Emre İşeri, 'Linkage Theory and Autocratic Regime-Survival Strategies in a Post-Liberal Order: The Case of Authoritarian Middle Power Turkey (2013–2022)' [2024] Journal of Balkan and Near Eastern Studies 1, 8.

[241] Köksal Avincan, 'The Resurgence of Enforced Disappearances in the Aftermath of the July 15, 2016 Failed Coup Attempt in Turkey: A Systematic Analysis of Human Rights Violations' (2024) 25 Human Rights Review 67, 71; see for example Decree with Force of Law No. 667 (adopted 22 July 2016) and Decree with Force of Law No. 670 (adopted 17 August 2016).

[242] Amnesty International (ed), *The State of the World's Human Rights* (Am-nesty International Ltd 2017) 367.

[243] Köksal Avincan, 'The Resurgence of Enforced Disappearances in the Aftermath of the July 15, 2016 Failed Coup Attempt in Turkey: A Systematic Analysis of Human Rights Violations' (2024) 25 Human Rights Review 67, 71.

- Detained nearly 130 journalists;

- Imprisoned or removed almost 50 000 military, police, and other security personnel from their posts;

- Suspended 3725 personnel from the armed forces, totalling one-third of the general and admiral staff;

- Suspended 143 admirals and generals (out of a total general staff of 375);

- Dismissed 262 military judges and prosecutors;

- Dismissed 47 district governors and arrested 30 out of 81 provincial governors;

- Dismissed 3000 judges and prosecutors and detained over 1500 lawyers, and confiscated their personal properties;

- Dismissed more than 15 000 Education Ministry officials and revoked licenses of 21 000 teachers, and fired 3623 professors and 1500 deans;

- Closed 1043 private schools, 1299 charities and foundations, 19 trade unions, 15 universities, 35 medical institutions, and military schools, and placed them under state control; and

- Closed more than 100 media outlets.'[244]

Just months before, the Turkish government lifted the immunity of Parliamentarians by amending the Constitutions Articles 83 and 85.[245] According

[244] Birol A Yeşilada, 'Turkey and the European Union' in Birol A. Yeşilada, *Oxford Research Encyclopedia of Politics* (Oxford University Press 2020) 12 f.

[245] Constitutional Amendment as to Lifting Parliamentary Immunity Law No. 6718 (adopted 20 May 2016).

to the Amendment's Article 1, the lifting of immunity shall be directed towards Members of the Parliament who are under investigation of crime. This opened up the possibility to detain and imprison Members of the HDP. As of 2023, most of the Kurdish politicians and parliamentarians in HDP, including the co-chairs Selahattin Demirtaş and Figen Yüksekdağ, were imprisoned or detained. Further, the coup led to the majority of the elected pro-Kurdish mayors being either removed from office or even imprisoned.[246] The case of Selahattin Demirtaş has been internationally recognised, due to his high political status and Türkiye's authoritarian shift, as well as due to the circumstances around his convictions.[247]

In September and October 2014, IS attacked the Kurdish populated town Kobanê, where the People's Protection Units (YPG), with links to PKK, fought back. Following this, demonstrations broke out in Türkiye in solidarity with Kobanê. HDP encouraged these demonstrations through a series of tweets, and condemned the Governments embargo over Kobanê, as Türkiye had closed the borders for volunteers to enter Syria to fight in Kobanê. The demonstrations became violent, with clashes between groups and forceful interventions by security forces. Demirtaş expressed condemnation against the said violence. According to the Public prosecutors, the violence had taken place due to encouragements from HDP.[248]

In 2011, Demirtaş gave a speech in front of the parliamentary group of BDP, where he by that time was a co-chair. During this, he called for the Government to move PKK's leader Öcalan to house arrest. He also called for the Government to negotiate with Öcalan as a part of the 'Solution Process'

[246] Özlem Kaygusuz, 'Belonging to a Republic or Something Else: An Assessment of the Evolution and Challenges to Modern Citizenship in Contemporary Turkey' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 15, 34.

[247] See for example Human Rights Watch, 'Turkey: Release Politicians Wrongfully Detained for 7 Years' (3 November 2023) <https://www.hrw.org/news/2023/11/03/turkey-release-politicians-wrongfully-detained-7-years> accessed 4 May 2024.

[248] *Selahattin Demirtaş v. Turkey (No. 2)* [GC], no. 14305/17, §§ 17–20, 23–24 22 December 2020.

concerning the Kurdish question.[249] The 'Solution Process' was initiated towards the end of 2012. During this process, a delegation of parliamentary members, including Demirtaş, visited Öcalan several times in prison. On 28 February 2015, the 'Dolmabahçe consensus', a reconciliation declaration, was presented by the delegation and the Deputy Prime Minister, who declared that the consensus meant progress towards halting terrorism in Türkiye. However, President Erdoğan stated that an agreement between the Government and a terrorist organisation was not an option.[250]

In June and July 2015, a series of attacks took place in the Kurdish regions. Two were instigated by IS, and one by PKK. After the PKK attack, armed clashes resumed between the two. The Turkish President expressed in a statement to the attacks that HDP leaders must 'pay the price' for the terrorist acts. On the same day, Demirtaş stated that they do not condone murder of anyone, regardless of their stance. [251] Following this, between 10 and 19 August 2015, nineteen towns, mainly in South-Eastern Türkiye, declared self-governance. Local governors ordered curfews in various South-Eastern towns. In these towns, security forces carried out operations, using heavy weaponry, after which armed clashes between them and PKK ensued.[252] Demirtaş stated in response that the people want self-governance and that they have the power to resist, fight and protect themselves.[253]

On 10 October 2015, one of the deadliest terrorist attacks committed in Türkiye, was carried out by IS in Ankara. The victims were mainly demonstrators protesting against the surge of violence in the State, something several organisations, including HDP, had encouraged.[254] Following this, the applicant made several statements, once as a participant of the Democratic Society Congress, on the resistance against the Government, implying that the Government is fascist and cruel. In response, President Erdoğan stated that

[249] *Selahattin Demirtaş v. Turkey (No. 2)* § 28; see also Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 106.
[250] *Selahattin Demirtaş v. Turkey (No. 2)* § 29.
[251] *Selahattin Demirtaş v. Turkey (No. 2)* §§ 33 and 36.
[252] *Selahattin Demirtaş v. Turkey (No. 2)* §§ 37–41.
[253] *Selahattin Demirtaş v. Turkey (No. 2)* § 42.
[254] *Selahattin Demirtaş v. Turkey (No. 2)* § 43.

Demirtaş's statements were treasonous and a clear provocation, and that they amounted to crimes against the Constitution. Other members of the Party as well as mayors and others were also suspected of crime. Erdoğan stated that the messages were intended to divide the State, and that there cannot be a 'State within a State'.[255]

In May 2016, the parliamentary immunity was lifted. Afterwards, Demirtaş, amongst others, was detained in wait of a trial during a criminal investigation.[256] During his time as a Member of Parliament, 93 investigation reports were drawn up on him, most of which included terrorist offences. Between July and October 2016, the Public prosecutors sent six summonses for Demirtaş to give evidence regarding the criminal investigations, but he did not appear.[257] The Magistrate's Court later ordered a search of his home and the day after 4 November 2016, security forces carried out operations against him, after which he was arrested and detained. On the same day, Demirtaş appeared before the Public prosecutor, where he argued that the arrest and detention was ordered by the President due to his politics and refused to answer questions concerning the accusations against him. Before the Diyarbakir 2nd Magistrate's Court, he further claimed entitlement to parliamentary immunity according to Article 83(1) of the Constitution, which had not been amended. This was dismissed and he was thus detained with suspicion of membership in a terrorist organisation, referring to PKK and its urban branch KCK, and of public incitement to commit a crime.[258] He was later charged for dissemination of propaganda in accordance with Article 7(2) of the Anti-Terrorist Law.[259] The Court's assessment is presented in chapter 5.3.3.2, but it was concluded that several violations of the ECHR had taken place.

Under the state of emergency after the coup attempt, human rights violations increased drastically in Türkiye, especially concerning Kurdish people. This was a consequence of Article 9 of the emergency decree, which stated that

[255] *Selahattin Demirtaş v. Turkey (No. 2)* §§ 45-49.
[256] *Selahattin Demirtaş v. Turkey (No. 2)* § 59.
[257] *Selahattin Demirtaş v. Turkey (No. 2)* §§ 62-64.
[258] *Selahattin Demirtaş v. Turkey (No. 2)* §§ 65-70, 73.
[259] *Selahattin Demirtaş v. Turkey (No. 2)* §§ 109-110.

civil servants who serve during the state of emergency are not in any way legally responsible for their actions. Due to this, numerous prosecutors dropped criminal charges concerning torture, and several judges did not allow recordings of allegations of torture during their trials. This was considered as a big setback concerning human rights and the rule of law.[260] One day before the attempted coup, a law on amendments to the Armed Forces Personnel Law was entered into force.[261] According to Article 12 of this law, members of armed forces partaking in counter-terrorism operations who are suspected of crime for acts carried out in their operations will not be prosecuted unless a permit for investigation is given. According to the Human Rights Council's Special Rapporteur on Torture, this entails a *de facto* immunity from prosecution for actions carried out in South-Eastern Türkiye in the name of counter-terrorism.[262]

Another backsliding in the area of the rule of law was the Constitutional amendments introduced in 2017 as a result of a referendum. These amendments switched Türkiye from a parliamentary system, to presidential governance and led to inability to balance against abuses of executive power, decreased parliamentary influence, as well as establishing control for the President over nearly all judicial matters. This new system has for example given Erdoğan the authority to appoint all high judges of the courts, and to usurp the decisions of the Parliament by decrees.[263] The Council of Europe's European Commission for Democracy through Law (Venice Commission) raised concerns regarding the situation of Türkiye during which the referendum was executed, as the state of emergency meant substantive restrictions on freedom of expression and freedom of assembly. The Venice Commission raised particular concern for the 'extremely unfavourable environment for journalism'

[260] Hasan Aydin and Koksal Avincan, 'Intellectual Crimes and Serious Violation of Human Rights in Turkey: A Narrative Inquiry' (2020) 24 The International Journal of Human Rights 1127, 1130 f.

[261] Law on Amendments to the Armed Forces Personnel Law and Other Laws no. 6722 Official Gazette 14 July 2016 no. 29770 (adopted 23 June 2016).

[262] Human Rights Council, 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Turkey' (18 December 2017) A/HRC/37/50/Add.1 § 69.

[263] Article 104 of the Constitution of Türkiye as amended 16 April 2017 by Act No. 6771; see also Human Rights Watch, 'World Report: Events of 2017' (2018) 560.

and the increasingly one-sided public debate in Türkiye during the time, and that it in such a situation could hardly be possible to hold a meaningful, inclusive, and democratic referendum campaign.[264] The Government implemented, the same year, an ad hoc commission with the task of reviewing decisions made during the state of emergency. However, it is not independent, as the appointed members of the ad hoc commission were appointed by the very same authorities mandated to approve dismissals and closures of cases.[265]

Concerning the freedom of expression, it was noted by the Human Rights Watch that Türkiye is world-leading in the imprisonment of journalists and media workers, which increased after the attempted coup of 2016. It was further noted that most media lack independence, and essentially all channels not shut down following the attempted coup promote AKP's policies.[266] Moreover, many Kurdish journalists were prosecuted with allegations of involvement with the PKK.[267]

The State of emergency lasted two years, and was lifted 19 July 2018. After its lifting, the dismissing of public servants continued, by delegation of the task to institutions.[268] Also, several restrictions and regulations set by the Decrees of the state of emergency were intact by the enforcement of Law No. 7145, which served as a new counterterrorism legislation, and would be enforced for three years.[269] The law includes provisions that enable arbitrary dismissal of judges, detention without charge for up to 12 days without supervision from a court, and restrictions concerning the freedom of

[264] European Commission for Democracy through Law, 'Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017' (13 March 2017) CDL-AD(2017)005 § 132.

[265] Human Rights Watch, 'World Report: Events of 2017' (2018) 560.

[266] Ibid 561.

[267] Ibid.

[268] Hasan Aydin and Koksal Avincan, 'Intellectual Crimes and Serious Violation of Human Rights in Turkey: A Narrative Inquiry' (2020) 24 The International Journal of Human Rights 1127, 1129.

[269] Law No. 7145 on the Amendments of Some Laws and Emergency Decrees *Official Gazette* 31 July 2018 No. 30495 (adopted 25 July 2018).

assembly.[270] Türkiye has been criticised in general regarding applications of provisions concerning anti-terrorism. In a public statement from Amnesty International in 2019, it is stated that Türkiye frequently uses anti-terror legislation to prosecute persons who express opinions that might be shared by groups deemed as terrorist by the State, even if they are not opinions advocating violence, hatred or discrimination. This is, according to Amnesty International, a way for the State to restrict freedom of expression for persons with opinions other than those of the Government.[271]

Following this have been years where terrorism charges continue to be misused, according to the Human Rights Watch, for justification of imprisonment of dissidents, often holding pro-Kurdish values. The new executive political control over the judiciary has resulted in a drastic increase of systematically detaining and convicting individuals and groups regarded by the Government as political opponents, without substantial evidence. A large number of these convictions have been on Kurds or sympathisers of Kurdish rights.[272] Related to this, Türkiye has still yet to release the former co-chair of HDP, Selahattin Demirtaş, despite the order from the ECtHR to do so following the judgement in the case of *Demirtaş v. Turkey (No. 2)* (see chapter 5.3.3.2).[273] By the time of the local elections of this spring, the 65 HDP mayors elected in 2019 have gone down to six.[274] Also, there is currently an ongoing case before the Turkish Constitutional Court, concerning closing down HDP, originating from 2021.[275]

## 2.8 Analysis

[270] Human Rights Foundation, 'The Collapse of the Rule of Law and Human Rights in Turkey: The Ineffectiveness of Domestic Remedies and the Failure of the ECtHR's Response' (2019) 18.

[271] Amnesty International, 'Turkey: "Judicial Reform" Package is a Lost Oppurtunity to Address Deep Flaws in the Justice System' (2019) EUR 44/1161/2019 2 f.

[272] Human Rights Watch, 'World Report 2020: Events of 2019' (2020) 573 ff.

[273] Human Rights Watch, 'World Report 2024: Events of 2023' (2024) 635.

[274] Dilek Kurban, 'Authoritarian Rule by Law: Erdoğan and the European Court of Human Rights' (1 April 2024) 12 <https://papers.ssrn.com/abstract=4787781> accessed 15 May 2024.

[275] Freedom House, 'Freedom of the World 2024' (2024) <https://freedomhouse.org/country/turkey/freedom-world/2024> accessed 20 January 2024.

To avoid a long tangent on the missed opportunity for gaining independence as given by the Treaty of Sèvres, the Treaty will not be discussed in great detail. It is, as written above (see chapter 2.2.1), not difficult to understand that the Treaty would be seen as an insult to the newly fallen Ottoman Turks, who after centuries of reign were reduced in such great mass. Seeing as the Kurdish people did not have a strong history of nationalism before the 20th century, it may be difficult to grasp why the group would want autonomy after many years of, from the Turkish view, a fairly peaceful coexistence. Possibly, the historical regional nature of the Kurdish people was the very reason for wanting autonomy, as they were not interested in adhering to a centralised State system.

The colonial culture of the European Powers, particularly Britain, has had a great effect on modern Kurdish history, as is made clear in chapter 2.2. If they were not so hungry for control over the Middle East, the claim for Kurdish independence would perhaps be more valid. This, as the Treaty of Sèvres might then have included all areas of Kurdistan as autonomous, not only the areas protecting Mosul from Turkish borders. However, Türkiye was in possession of a significant army, and was more structured and unified, which Kurdish people were not. Therefore, it is unlikely that Kurdistan would be able to resist Turkish intervention without the backing of the Allies and their forces.

Concerning the continuous restrictions of freedom of expression, and the anti-terror legislation in Türkiye, Amnesty International's remark on the repeated application of such laws is clearly evident in the Kurdish case. As will be seen in chapter 5.2, the Turkish State frequently uses allegations of involvement with the PKK, or affinity with PKK values as a way to restrict Kurdish opinions. As Amnesty International stated, individuals are often prosecuted for advocating for political ideas that might be shared by labelled terrorist groups. Such ideas are often, in the context of PKK, merely opinions stating that Kurdish people are oppressed by the Turkish Government, and demands of better living situations, including human rights. This is further brought up in Article 5.2. Further, article 301 of the Penal Code (see chapter 2.6) is also a

frequently used way to silence opinions opposing the Government. It is not entirely easy to interpret what constitutes as a defamation of the nation, State, Parliament, Government and legal institutions is reasonably, and where the line goes between such a defamation, and merely expressions of criticism of policies and beliefs enacted by said organs.

In a democracy, freedom of expression must allow expressions of dissenting opinions from those of the Government without being regarded as insulting the State. To its extreme, the application of this provision could result in punishment for even partaking in, or advocating for, opposing Parties to the Party or Parties forming the Government. In fact, this has been the reality seeing to the destiny of the nationally and locally elected HDP politicians, as well as the continuous closing down of pro-Kurdish political parties in Türkiye. In these cases, Article 78 of the Law on Political Parties forbidding political parties to undermine the integrity of the State, and Article 81 of the same law prohibiting political parties from claiming the existence of a national minority as well as using other languages than Turkish, have been used. Also, several provisions in the Criminal Code and Anti-Terror Law have been used for the same purposes, as is exemplified in chapter 5.3.3.

The Law on Political Parties and the Anti-Terror Law are noticeably formed in response to the Kurdish question, especially considering the social climate during the time of the adoptions of the legislations, where the Law on Political Parties can be linked to the awakening of the formation of pro-Kurdish parties, and the Anti-Terror Law to the ongoing armed conflict between PKK and the State. This was a crucial time period in recent history, as the traces from the climate of the time can be found in current actions, and of course, legislation. One example is that the both laws seem to be applied just as arbitrarily, and with the same goal, as when they were implemented, despite concerns and recommendations from different international organisations. They have predominantly been applied in relation to Kurdish parties and pro-Kurdish expressions of opinions, as stated in this chapter, and further exemplified in chapter 5.3.3, and they still are. Another similarity is the fact that they were adopted in a time where martial law, or a state of emergency was in force,

which was once again the case after the attempted coup 2016. Türkiye officially lifted the state of emergency fairly recently, and *de facto* lifted it, in accordance with Law No. 7145, even more so. One significant difference between now and the 1990s, is the fact that the SSC has been abolished. Thinking about the current authoritarian Government, and how Türkiye has backslid concerning rule of law, reinstating of State Security Courts would not feel completely implausible, had the AKP Government not been so apprehensive in regards to the military. Although, since the President holds the authority to select judges after his liking due to the 2017 amendments to the Constitution, this would probably not be a big obstacle.

It is remarkable that the switch from progressing democracy, rule of law and human rights, to authoritarianism and backsliding in said areas happened relatively quickly. More so when the switch was done by the very same party that was initially responsible for the biggest progress concerning those areas in general, and Kurdish rights in particular. The situation for Kurdish people is, with some exceptions, the same today as during the 1980 Military Coup, and even similar to the Kemalist era in the 1920s to 1940s. With constant backslidings in democracy, rule of law and human rights in regards to Kurdish people, it is hard to see an improvement without the entrance of a new government. However, as shown in this chapter, other parties have historically not been keen on bettering the situation of the Kurds.

To summarize, this chapter shows a history of systemic criminalisation of Kurdishness, and systematic application of law aimed to punish Kurdishness. It did look like progress was underway during the 2000s, but the legal and political development has since then deteriorated. In chapter 4, the main findings from this chapter are put in the context of international human rights law, where Türkiye's compliance of said law is examined and analysed.

# 3 The European Union and Türkiye's application

## 3.1 The Copenhagen Criteria

### 3.1.1 Background

Following the fall of the Berlin Wall in 1989, and the knowledge of the fact that the Soviet Union would soon come to an end, many Central and Eastern European countries were required to reorient themselves. The European Union existed to them as a possibility to build up a new economical free market, and to practice democracy. This would of course prove to be not only a possibility, but also a great challenge for all parties involved.[276] Numerous applications were received by the EU, sent from several Central and Eastern European countries, requiring the Union to set up guidelines for accession, as they had previously never accepted more than three Member states *en masse*.[277] These conditions for accession are those known as the Copenhagen criteria.[278]

### 3.1.2 On the Criteria

In order to become a Member state of the EU, a country needs to meet the conditions for membership according to the Copenhagen criteria[279] constituted by the EU at the Copenhagen European Council in 1993 and the Madrid European Council in 1995. These consist of:

> Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;

[276] Tanja Marktler, 'The Power of the Copenhagen Criteria' (2006) 2 Croatian Yearbook of European Law and Policy 343, 343.

[277] Ibid 344.

[278] Christophe Hillion (ed), *EU Enlargement - A Legal Approach* (Oxford Hart Publishing 2004) 2.

[279] European Council in Copenhagen 'Conclusions of the Presidency' [1993] SN 180/1/93 13.

> A functioning market economy and the ability to cope with competitive pressure and market forces within the EU;
>
> The ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the 'acquis'), and adherence to the aims of political, economic and monetary union.[280]

The Copenhagen criteria is not the only basis for becoming a Member state, as some legal requirements for accession are regulated in the Consolidated Version of the Treaty on European Union[281] (TEU), as established by the Treaty of Lisbon[282], replacing the previous Treaty on European Union[283] which was in force at the time of the declaration of Türkiye as a Candidate state in 1999.[284] In Article 49 of the TEU, the terms for eligibility are determined. The Article states that a state must be European in order to reach eligibility, and that it must respect the values proclaimed in Article 2 of the TEU. Moreover, the Article describes the procedure of application. Article 2 states that:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[285]

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[280] European Union, 'Accession Criteria' <https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accession-criteria_en> accessed 25 January 2024.

[281] Consolidated version of the Treaty on European Union (adopted 12 October 2012, changed 7 June 2016) OJ C202/1.

[282] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (adopted 17 December 2007, entered into force 1 December 2009) OJ C306/1.

[283] Treaty on European Union (adopted 7 February 1992, entered into force 1 November 1993) OJ C191/1.

[284] European Council in Helsinki 'Presidency Conclusions' (10-11 December 1999) § 12 <https://www.consilium.europa.eu/media/21046/helsinki-european-council-presidency-conclusions.pdf> accessed 23 April 2024.

[285] Article 2 of the Consolidated version of the Treaty on European Union.

The values in Article 2 of the TEU are, in essence, reflected in the Copenhagen criteria's first clause, also known as the Political criteria.[286] The difference being that Article 2 elaborates the significance of such rights in the common ideal society for the EU Member states. It can be said that the statement in Article 49 of the TEU, referencing to its Article 2, is ultimately a constitutionalising of the Copenhagen criteria.[287] Furthermore, Article 49 TEU provides merely prerequisites for an application, and technical instructions for the application procedure. The Copenhagen criteria includes a concrete policy that serves both as a measuring stock and workable tool for the EU in regards to Candidate states, and also as a guideline for the aspiring Member state, used to assess which areas to improve.[288]

### 3.1.3 Democracy and the rule of law

As mentioned, democracy and the rule of law are fundamental values of the EU, according to Article 2 of the TEU. Democracy and the rule of law are also stated as universal values in the Preamble of the Treaty of the European Constitution[289], as well as in the Constitution's Preamble in its Part II on the Charter of Fundamental Rights of the Union.[290]

The Constitution includes protection of democracy as to be upheld by the European Union's Member States. This includes, amongst others, the principle of democratic equality in Article 45, which obligates the EU to observe the principle of equality in relation to their citizens, the principle of representative democracy in Article 46 and the principle of participatory democracy in Article 47, including freedom of expression and the principle of transparency.

The Charter of Fundamental Rights includes protection of fundamental rights such as freedom of expression and information in Article 71, which includes freedom to hold opinions and the freedom and pluralism of the media,

[286] See for example Council of the European Union 'Council Conclusions on Enlargement' (12 December 2023) OJ ST 16707 § 2.
[287] Christophe Hillion (ed), *EU Enlargement - A Legal Approach* (Oxford Hart Publishing 2004) 3.
[288] Ibid 13 f.
[289] Treaty Establishing a Constitution for Europe [2004] OJ C 310/1.
[290] Preamble to PART II of the Treaty of the European Constitution.

equality before the law in Article 80, the right to vote and to stand as a candidate both to the European Parliament (Article 99) and at municipal elections (Article 100).

Furthermore, rights protecting the rule of law are stipulated both in the Constitutions Article 29, implementing the Court of Justice of the European Union and in the Charter of Fundamental Rights, such as the right to an effective remedy and to a fair trial in Article 107 and the presumption of innocence and right to defence as stated in Article 108. Moreover, Article 109 regulates the principles of legality as well as the principle of proportionality regarding criminal offences and penalties.

### 3.1.4 Human rights and respect for and protection of minorities

The Copenhagen political criteria marked a significant development regarding minority rights in an EU context. Before its implementation, no EU document has explicitly mentioned minority protection.[291] As stated, Article 2 of the TEU, which expresses the common values of the EU, mentions the protection of minorities as a value to respect as a Member State of the EU. Furthermore, the EU decided to call for all Candidate States to sign and ratify Protocol 12 to the ECHR[292] during the accession negotiations.[293] Protocol 12 further sets a general prohibition of discrimination, where association with a national minority is, amongst others, the subject of protection.[294]

In the TEU, it is proclaimed that the rights guaranteed by the ECHR are to be applied by the Member States of the EU.[295] Moreover, the Charter of Fundamental Rights includes individual human rights and protections, such as the right to non-discrimination in Article 81. The Article regulating non-

[291] Gwendolyn Sasse, 'EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy' (2005) RSCAS No. 2005/16 EUI Working Papers 1.

[292] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000) ETS 177.

[293] European Parliament, 'Resolution on the European Union's position at the World Conference Against Racism and the Current Situation in the Union' [2001] OJ C146/10 B5-0766/2000 § 27.

[294] Article 1 of Protocol no. 12 to the European Convention on Human Rights.

[295] Article 6(2 and 3) of the Treaty on European Union.

discrimination, explicitly includes membership of a national minority, as well as ethnic or social origin as grounds for discrimination which are prohibited.[296]

## 3.2 Türkiye and the European Union

### 3.2.1 Becoming a candidate state

Türkiye's wish to become a member state is not at all a recent development. A central objective in the advancement of the Turkish nation in the 1920's was the wish to become a westernised, secular and more European state.[297] This aim has been realised by the entering of several Western institutions and organisations such as the Council of Europe in 1949, the North Atlantic Treaty Organisation (NATO) in 1952 and the Organisation for Security and Cooperation in Europe (OSCE) in 1975.[298]

In 1959, Türkiye showcased its first wish for involvement in the European Economic Community by applying for membership, where the State would become an associate member in 1963.[299] Full membership in the Community required the country being a democratic state with a western military and western political alignment, including respect for human rights. Associated membership was given to countries that did not fulfil this, or if they could not be deemed economically ready for a full membership.[300] The European Community was continuously sceptical about a Turkish membership, questioning Türkiye's democracy, its military, its secular nature and its respect towards its ethnic minorities. The relationship between the Community and Türkiye was further strained as a result of the 1980 coup d'état, and remained so afterwards due to the political situation of the State.[301]

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[296] Article 81 of the Charter of Fundamental Rights.

[297] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 20.

[298] Ibid 21.

[299] Carl Dahlman, 'Turkey's Accession to the European Union: The Geopolitics of Enlargement' (2004) 45 Eurasian Geography and Economics 553, 555.

[300] Erik Faucompret and Jozef Konings, *Turkish Accession to the EU: Satisfying the Copenhagen Criteria* (Routledge 2008) 23 f.

[301] Ibid 29.

In 1987, the State issued an application for membership to the European Community.[302] However, a decision on the application was delayed due to two reasons. Firstly, Europe wanted to concentrate on deepening its common market. Secondly, some members of the European Community were opposed to accepting such a large and poor country as Türkiye was, especially with its substantial problems concerning civilian democratic governance and human rights, notably in regards to their treatment of the Kurdish minority.[303] Two years prior to Türkiye's new application, the European Parliament introduced five conditions for restoring its Community's relations with Türkiye.[304] These conditions are summarised as: abolishing the death penalty; putting an end to torture and prosecution of torturers; ending mass trials; granting Turkish citizens the right to petition to the ECtHR; removing all restrictions on the freedom of opinion.[305]

The European Community did have important reasons for accepting and encouraging a Turkish membership, for reasons such as further opening the Turkish market to European exports, as well as encouraging a pro-Western stance, which was deemed as important for European security.[306] Despite this, the Community decided against conducting accession negotiations, due to the political issues in Türkiye.[307] During the time of Türkiye's application, the armed conflict in the Kurdish regions was escalating, leading to the declaration of the State of Emergency in the Southeast the same year, which would have dire consequences for the Kurdish population.[308]

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[302] European Council 'EU Membership Application' in *Türkiye* (last reviewed 11 January 2024) <https://www.consilium.europa.eu/en/policies/enlargement/turkey/#membership> accessed 23 April 2024.

[303] Carl Dahlman, 'Turkey's Accession to the European Union: The Geopolitics of Enlargement' (2004) 45 Eurasian Geography and Economics 553, 555 f.

[304] European Parliament 'Resolution on the Human Rights Situation in Turkey' [1985] OJ C343/60.

[305] Erik Faucompret and Jozef Konings, *Turkish Accession to the EU: Satisfying the Copenhagen Criteria* (Routledge 2008) 30.

[306] Carl Dahlman, 'Turkey's Accession to the European Union: The Geopolitics of Enlargement' (2004) 45 Eurasian Geography and Economics 553, 556.

[307] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 21.

[308] Ibid 21 f.

In 1996, Türkiye was finally accepted to join a Customs Union with Europe. Some argue that this served as a means to further delay membership, without damaging good relations with pro-European parties in Türkiye, as there existed a fear that downright rejection could lead to increased support for Turkish Islamist parties.[309] During the negotiations regarding the acceptance of Türkiye to this Custom Union, the European Commission called for further improvement which were presented in the European Commission's Proposal for a Council Regulation regarding the acceptance of the Customs Union.[310] The Turkish government did implement various attempts for such reforms, in particular regarding the Kurdish people. Several warnings ensued, from both the commissioner of EU external affairs, as well as from the then sitting Turkish Prime Minister, in which they stated that failure to reach an agreement risked a 'severe backlash' in Türkiye, where, as mentioned Islamists were negatively positioned regarding closer links between Türkiye and Europe. Also, the Prime Minister proclaimed that Türkiye would only be able to enact such reforms with backing from Europe.[311]

Although some improvements were made by Türkiye, such as the amendment of the Turkish Constitution of 1982 and redrafting of the Turkish anti-terrorism law, improvements were not seen as to the human rights standard.[312] Within a year of acceptance of the Custom Union, the EU removed Türkiye from their "short-list" for enlargement with reference to problems with their macroeconomy, weak democratic governance, and, as mentioned, poor human rights standard. This put a strain between Türkiye and the EU.[313] What followed was two years of diplomatic rebuff from both parts, and Turkish

[309] Carl Dahlman, 'Turkey's Accession to the European Union: The Geopolitics of Enlargement' (2004) 45 Eurasian Geography and Economics 553, 556.

[310] European Commission 'Proposal for a Council Regulation (EC) Regarding the Implementation of a Special Financial Cooperation Measure for Turkey' [1995] OJ C271/06; see its Preamble.

[311] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 22; see also Human Rights Watch 'World Report 1996 – Turkey' (1 January 1996) <https://www.refworld.org/reference/annualreport/hrw/1996/en/23002> accessed 24 April 2024.

[312] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 22.

[313] Carl Dahlman, 'Turkey's Accession to the European Union: The Geopolitics of Enlargement' (2004) 45 Eurasian Geography and Economics 553, 556.

military attacks into for example Iraq. The military activity had a positive effect on the EU's view of Türkiye, especially as a result of their alliance with Israel, which served as proof of them not being Islamists. After the capturing of PKK's leader Abdullah Öcalan and taking relatively general control over the PKK rebellion, which led to a reduction of violence in the Kurdish regions, Türkiye was able to shift political priorities and to address Kurdish politics in a more satisfactory way, according to the EU.[314] This proved to be the footing in which Türkiye could proceed to candidature for the EU in 1999.[315]

## 3.2.2 After achieving Candidate Status

### *3.2.2.1 Becoming a Candidate State*

At the Helsinki European Council in 1999, Türkiye was accepted as a Candidate country for the EU, and should thus be evaluated on the same criteria as other Candidate States.[316] This meant that its compliance with the Copenhagen criteria would be the deciding factor for an entry to the EU.[317] The reasoning for the inclusion of them as Candidates were positive developments and Türkiye's ambitions to strive for reforms in accordance with the Copenhagen criteria.[318] Before proper accession negotiations could begin, Türkiye would need to satisfy the Copenhagen criteria. This would prove a challenge for Türkiye. For years, Türkiye trailed behind on even basic human rights standards.[319] Several cases in the ECtHR brought by the Kurdish Human Rights Project showcased that some of the most severe cases of human rights abuse occurred here.[320] As a result, the European Commission concluded in

[314] Carl Dahlman, 'Turkey's Accession to the European Union: The Geopolitics of Enlargement' (2004) 45 Eurasian Geography and Economics 553, 556

[315] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 23.

[316] Ibid.

[317] Erik Faucompret and Jozef Konings, *Turkish Accession to the EU: Satisfying the Copenhagen Criteria* (Routledge 2008) 38.

[318] European Council in Helsinki 'Presidency Conclusions' (10-11 December 1999) § 12.

[319] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 23.

[320] Ibid 23; see for example *Özgür Gündem v. Turkey*, no. 23144/93, ECHR 2000-III, and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, ECHR 2000-X.

2000 that 'the situation on the ground has hardly improved and Turkey[321] still does not meet the Copenhagen political criteria'.[322]

In 2001, Türkiye's Accession Partnership as concluded by the Helsinki European Council in 1999, was adopted by the European Council. This conducted aid during the pre-accession period, and harmonisation support. During this, a deadline was also set, for December 2004, until which the EU was tasked to decide if Türkiye had met the Copenhagen criteria and if the accession negotiations could commence.[323] Afterwards followed vast improvements in Turkish reforms as a result of the new Government led by AKP (see chapter 2.5). The new, pro-European leaders of Türkiye led to great developments regarding their path towards starting accession negotiations. The reforms were partly aided by the public support for accession to the EU.[324]

In October 2004, the European Commission acknowledged in their report of the progress regarding the Copenhagen political criteria. The conclusion was that the criteria were fulfilled at such a level that accession negotiations were recommended to be initiated.[325] This was, later in the year, also approved by the European Council, on the condition that some measures would be taken, such as that Türkiye would adopt six pieces of legislation, identified by the European Commission.[326] The legislations were: the Law on Associations; the new Penal Code; the Law on Intermediate Courts of Appeal; the decision on the Code of Criminal Procedure; the legislation establishing the judicial

[321] As it is a quote from the year of 2000, when Türkiye was still internationally named 'Turkey' I have left the name of the State as it was written in the report.

[322] European Commission 'Regular Report on Turkey's Progression towards Accession' [2000] COM/713 final 20 f.

[323] European Council, 'Decision on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with the Republic of Turkey' [2001] OJ L85.

[324] Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press in association with Kurdish Human Rights Project 2005) 23 f.

[325] Carl Dahlman, 'Turkey's Accession to the European Union: The Geopolitics of Enlargement' (2004) 45 Eurasian Geography and Economics 553, 559; see also European Commission, 'Recommendation of the European Commission on Turkey's Progress towards Accession [2004] COM/656 final.

[326] European Council, 'Brussels Presidency Conclusions' [2004] ST 16238 § 22.

police; the law on execution of punishments and measures.[327] This was resolved by Türkiye on 1 June 2005.[328]

#### *3.2.2.2 Accession Negotiations*

Even though accession negotiations were approved to commence with Türkiye, it was conditioned on the continuation of reform progress. The European Parliament stated that the framework of the negotiations should reflect the political priorities previously raised by organs of the EU regarding the fulfilling of the Copenhagen political criteria. Each session of the negotiations should therefore be followed by an assessment of said criteria in theory and practice. With this, permanent pressure would be put on Türkiye to continue progress in reforms.[329] Further, they urged suspension of negotiations in the occurrence of a 'serious and persistent breach in the principles of liberty, democracy, respect for human rights and fundamental freedoms, the rights of minorities and the rule of law' in their resolution on the opening of negotiations with Türkiye.[330]

In the yearly report on Türkiye published by the European Commission in 2005, statements of progressions and problem areas concerning the Copenhagen political criteria are presented. As for democracy and the rule of law, progress was made mainly through implementation of the six legal acts presented above. Also, Türkiye signed and ratified several international human rights instruments. As for the problem areas, notice was given to for example the justice system, where it was stated that prosecutors were closely entwined with judges, not satisfying the rule of law in the aspect of independent ruling.[331] Regarding human rights, it was noted that in the past year before the progress report, 129 final judgements were delivered by the ECtHR in cases against Türkiye, where 120 of them included violations of the ECHR. The

[327] European Commission, 'Recommendation of the European Commission on Turkey's Progress towards Accession [2004] COM/656 final 3.

[328] Erik Faucompret and Jozef Konings, *Turkish Accession to the EU: Satisfying the Copenhagen Criteria* (Routledge 2008) 46.

[329] European Parliament, 'Resolution on the opening of negotiations with Turkey' [2005] OJ C227 E/163 § 11.

[330] Ibid § 14.

[331] European Commission, 'Turkey 2005 Progress Report' [2005] COM 559 final and COM 561 final.

Commission noted a systematic breach in the right to a fair trial.[332] Another main problem related to the right to return to villages in South East Türkiye, meaning the Kurdish regions.[333] Further, it was concluded that no *de facto* progression could be shown in regards to the respect and protection of minorities.[334]

After 2005, the progress in reforms slowed noticeably, and thus also the accession progress.[335] This was confirmed by the EU in reports from 2006. The European Council expressed the need to maintain reforms in Türkiye, especially noting the freedom of expression as in need of improvement.[336] This was further articulated by the European Commission, who raised concerns for 'prosecutions and convictions for the expression of non-violent opinion', and proclaimed an existing risk of a climate of self-censorship in Türkiye. In particular, Article 301 of the Penal Code of 2004 (see chapter 2.5) was criticised.[337] Furthermore, the situation on Türkiye's approach towards rights and protections of minorities remained unchanged.[338] As for the rights of Kurdish people, several remarks were made by the Commission. Two broadcast channels in Kurdish were approved, albeit still restricted. The Commission also raised concerns on the lack of mother tongue education in Kurdish. As of 2006, there were no possibilities to learn Kurdish in private or public education. Also, languages other than Turkish were still prohibited in politics. A court case against the Rights and Freedoms Party (HAK-PAR) concerning a speech in Kurdish was criticised in the report (see chapter 5.3.5).[339]

In Türkiye, the public support of the EU slowly wavered, with increasing opinions that Türkiye had 'done their bit' in fulfilling the criteria for

[332] Ibid.

[333] See for example *Doğan and Others v. Turkey,* nos. 8803/02 and 14 others, ECHR 2004-VI (extracts).

[334] European Commission, 'Turkey 2005 Progress Report' [2005] COM 559 final and COM 561 final.

[335] Natalie Martin, *Security and the Turkey-EU Accession Process: Norms, Reforms and the Cyprus Issue* (Palgrave Macmillan 2015) 3.

[336] European Council, 'Brussels Presidency Conclusions' [2006] 10633/1 REV 1 § 54.

[337] European Commission, 'Turkey 2006 Progress Report' [2006] COM 649 final.

[338] Ibid.

[339] Ibid; see also *Semir Güzel v. Turkey*, no. 29483/09, 13 September 2016.

accession.[340] At the same time, the European Council agreed in 2006 to freeze eight chapters of the accession negotiation.[341] After this, the accession negotiations progressed very slowly. As of 2010, only 13 out of 35 chapters of negotiations were opened.[342]

In 2008, a revised accession partnership with Türkiye was adopted.[343] In this, several areas of priority were presented. Regarding the rule of law, Türkiye was encouraged to, amongst other, ensure that interpretation of law relating to human rights and fundamental freedoms complied with the ECHR and its case law, and with Article 90 of the Turkish Constitution, which states that international law is given precedence to Turkish law in case of conflict between ratified international law and Turkish law. Also, the State would ensure improvements regarding the independence of judges.[344] As for human rights and the protection of minorities, Türkiye was given requirements such as ratifying the Optional Protocol to the UN Convention against Torture[345], executing judgements of the ECtHR, ensuring that prosecutors conduct timely and effective investigations of alleged cases as to prevent impunity. Further, the agreement advocated revision of the legislation on freedom of expression and remedy the situation of those prosecuted for non-violent expressions, promoting respect and protection of minorities, and improvement of the situation for the Kurdish regions in Türkiye.[346]

However, 2008 marked the turning point for Turkish politics (see chapter 2.7). Additionally, there was growing scepticism towards Türkiye in the EU, from for example France and Germany as well as previous opponents such as

[340] Natalie Martin, *Security and the Turkey-EU Accession Process: Norms, Reforms and the Cyprus Issue* (Palgrave Macmillan 2015) 123.

[341] Ibid 124.

[342] Natalie Tocci, 'Turkey and the European Union' in Metin Heper and Sabri Sayarı (eds), *The Routledge Handbook of Modern Turkey* (Routledge 2012) 237, 239.

[343] European Council, 'Decision on the Principles, Priorities and Conditions Contained in the Accession Partnership with the Republic of Turkey and Repealing Decision 2006/35/EC' [2008] OJ L 51/4.

[344] Ibid 7.

[345] Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 9 January 2003) A/RES/57/199.

[346] European Council, 'Decision on the Principles, Priorities and Conditions Contained in the Accession Partnership with the Republic of Turkey and Repealing Decision 2006/35/EC' [2008] OJ L 51/7–9.

Cyprus. Due to the uncertainty regarding the EU's commitment to Türkiye's accession, Türkiye faced significant political risks in pursuing further reforms. This, as the government faced pressure from both CHP, AKP's biggest political rivals, and more overtly nationalists.[347] Analysist on Turkish Affairs Heinz Kramer notes that as a result, the Turkish AKP government shifted its focus from fulfilling the Copenhagen criteria, instead focusing on 'consolidating its power by establishing the full-scale control of all the autonomous agencies of the state'.[348] AKP thus did not deem themselves able to implement constitutional reforms without encouragement from the EU and promises of progress in the EU accession, as stated by Prime Minister Erdoğan.[349]

Confirming these obstacles and their effect on the reform progress towards fulfilling the Copenhagen criteria, the European Commission expressed in 2009 that little to no progress had been made concerning the problem areas of Türkiye concerning democracy, rule of law and human rights. even though symbolic process was made in some areas, it did not lead to concrete change.[350] Similar assessments can be seen in the Commission's progress report from the following year.[351] In conclusion, the progress made, such as amendments in the Turkish Constitutions, were overshadowed by concerns on the practical aspects of upholding democracy, rule of law, human rights and the respect and protection of minorities.[352]

In order to reenergise the accession negotiations, a 'Positive agenda' between the EU and Türkiye was launched in 2012. The purpose was to accumulate a new momentum for the accession after the in essence immobile period since

[347] Ersin Kalaycıoğlu, 'The Turkish–EU Odyssey and Political Regime Change in Turkey' (2011) 16 South European Society and Politics 265, 273 f.

[348] Heinz Kramer, 'Turkey's Accession Process to the EU: The Agenda behind the Agenda (2009) Stiftung Wissenschaft und Politik Comment No. 25 3.

[349] Tony Barber, 'Turkey hits at 'narrow minded' EU politicians' *Financial Times* (Brussels, 26 June 2009) <https://www.ft.com/content/442c9312-6248-11de-b1c9-00144feabdc0> accessed 17 May 2024.

[350] See for example European Commission, 'Turkey 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2009-2010' [2009] COM 533 final 8.

[351] European Commission, 'Turkey 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council – Enlargement Strategy and Main Challenges 2010-2011' [2010] COM 660 final.

[352] Ibid.

the year of 2005.[353] The positive agenda was formed around the idea of enhanced cooperation between the Union and Türkiye, where promotion of reforms was lifted as its method. Named areas needing reforms were for example alignment with EU law, political reforms and fundamental rights.[354] The revitalisation of accession negotiations was partly a result of the Arab Spring of 2011, and the migration crisis that ensued during and after the conflicts.[355] Apart from that, the EU also revamped the accession negotiations due to a fear of Türkiye's possible stance and actions as a result of the conflicts; the EU needed Türkiye as a diplomatic partner in relation to the governments in for example Egypt and Syria, and as a stable democratic State in the midst of political turmoil in the Middle East.[356] Following this, the migration issue has since then become the predominant topic concerning EU-Türkiye relations, even influencing the accession negotiations. This can be exemplified by the EU-Türkiye Statement released in 2016, in which a revival of the accession process for Türkiye was expressed, as a part of the agreements between the Union and Türkiye regarding the migration crisis.[357]

The latest accession conference between Türkiye and the EU was held in June 2016, two weeks before the attempted coup in Türkiye. The conference marked the opening of the 16th chapter of the accession negotiations.[358] The European Commission's annual report from that year showed that several central legislations were not satisfactory in the regards of the rule of law and fundamental rights.[359] The situation for Kurdish people in Türkiye was lifted

[353] European Commission, 'Positive EU-Turkey Agenda launched in Ankara' [2012] MEMO/12/359.

[354] Ibid.

[355] Nicolas Monceau, 'Turkey and Europe, an Ambivalent Relationship Since the Establishment of the Turkish Republic' in Bayram Balci and Nicolas Monceau (eds), *Turkey, a Century of Change in State and Society* (Springer International Publishing 2023) 163, 180 f.

[356] Natalie Martin, *Security and the Turkey-EU Accession Process: Norms, Reforms and the Cyprus Issue* (Palgrave Macmillan 2015) 151.

[357] European Council, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 27 April 2024.

[358] European Council 'Accession conference with Turkey: Talks opened on Chapter 33 - Financial and budgetary provisions' (30 June 2016)

[359] European Commission 'Turkey 2016 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2016 Communication on EU Enlargement Policy' [2016] COM 715 final 5.

as one of Türkiye's biggest challenges concerning human rights. Significant reports emerged of human rights abuses and excessive use of force being employed by security forces in the South-Eastern region. Numerous elected officials and municipal leaders in the Kurdish regions were suspended, removed of their responsibilities, or detained on charges related to terrorism, with some of them facing allegations based on emergency decrees issued following the coup attempt.[360] Moreover, the Commission raised a backsliding of the freedom of expression, where arbitrary application of the law was criticised. This especially concerned application of the Anti-Terror Law, where it was lifted that the human rights of Kurdish people were systematically violated by the State in the name of anti-terrorism.[361]

In 2018, the European Union officially declared a standstill on the accession negotiations with Türkiye.[362] This was largely due to the democratic backsliding of the country following the attempted coup and the disproportionate amounts of measures taken subsequent to the events.[363] The rule of law and fundamental rights were two areas subjected to regression. It was expressed that the 'deterioration of the independence and functioning of the judiciary cannot be condoned, nor can the on-going restrictions, detentions, imprisonments, and other measures targeting journalists, academics, members of political parties including parliamentarians, human rights defenders, social media users and others exercising their fundamental rights and freedoms'. Also, Türkiye was reprimanded for not addressing key recommendations and implementing judgements of the ECtHR in accordance with Article 46 of the ECHR.[364] The conclusion was that Türkiye was moving further away from

[360] European Commission, 'Turkey 2016 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – 2016 Communication on EU Enlargement Policy' [2016] COM 715 final 5 f.

[361] Ibid 7.

[362] European Council 'Council Conclusions on Enlargement and Stabilisation and Association Process' [2018] ST 10555/18 § 35.

[363] Ibid § 31.

[364] Ibid § 32.

the EU and that the accession negotiations thus had come to an indefinite standstill.[365]

### 3.2.3 The Current Situation between Türkiye and the European Union

Since the declared standstill regarding Türkiye's accession negotiations in 2018, the situation has not developed in a positive direction.

As per the most recent European Council Conclusion, Türkiye is still considered as a Candidate state to the European Union.[366] However, the State is not subject for ongoing negotiations regarding accession to the EU, as will be discussed in the following section (chapter 3.2). In the European Council's latest conclusion, from 12 December 2023, the Council raises serious concerns regarding continued backsliding in the areas of democracy, rule of law and fundamental rights. Further, they comment that the 'systemic lack of independence and undue pressure on the judiciary continue to be a source of serious concern, as well as the restrictions on media freedom and freedom of expression'.[367] Moreover, Türkiye is urged to improve its cooperation with the bodies and institutions of Council of Europe, to address their key recommendations and to fully apply the ECHR along with other international human rights instruments which have been ratified by Türkiye, as well as to execute all judgements of the ECtHR.[368] Due to Türkiye's continued failure to implement rulings of the ECtHR, the Council raises doubts on the State's 'commitment to the rule of law and respect for fundamental rights and to its

[365] European Council 'Council Conclusions on Enlargement and Stabilisation and Association Process' [2018] ST 10555/18 § 35.
[366] European Council 'Council Conclusions on Enlargement' (12 December 2023) ST 16707 § 4.
[367] European Council 'Council Conclusions on Enlargement' (12 December 2023) ST 16707 § 60.
[368] Ibid.

international obligations'.[369] The conclusion is that the accession negotiations with Türkiye are yet at a standstill.[370]

This is a result of the recent political developments in Türkiye, as previously discussed (see chapter 2.7). However, Türkiye is still an important partner to the EU, not least in regards to the migration agreements between EU and the State, accelerated during the migration crisis in 2015-2016.[371] Moreover, Türkiye and the EU are still committed to the Custom Union regulating trade between the entities. Thus, it is unlikely that Türkiye shall lose their status as a Candidate State.

## 3.3 Analysis

Although the Copenhagen criteria does not have the legal status of a treaty, it still holds an important stance in the European Union as to accession. As previously mentioned, it is both useful for the Union itself, as a tool to make sure the values of the EU are upheld and respected by aspiring Member States, as well as for Candidate States as a guideline on which areas to prioritise through reforms and applied policies. The criteria are not very elaborate in their formulation, albeit still expressive and comprehensive by providing concrete values and policies which must be accepted, fulfilled and prioritised by potential Members.

It is clear that the Copenhagen criteria has served as an important development in the stance regarding respect and protection of minorities. However, it is interesting to contemplate on the fact that this criterion was not explicitly valued in regards to accession of Member States which were accepted into the EU before the formulation of such criteria. One could argue that the previous stated values regarding respect for fundamental human rights provided a *de facto* protection for minorities, as respect and protection of minorities are included in international human rights law that were adopted earlier in time

[369] European Council 'Council Conclusions on Enlargement' (12 December 2023) ST 16707 § 60.

[370] Ibid § 64.

[371] European Council, 'EU-Turkey Statement' (Press Release 144/16, 18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 27 April 2024.

(see chapter 4.2). However, it is not unreasonable to assume that this value was less strictly evaluated in the accession negotiations with earlier joining members of the Union. One particular group that comes to mind are the Romani people which are minorities in most European states.

From the findings presented in this chapter, it stands clear that Türkiye's accession to the EU is hindered by the State not fulfilling the Copenhagen political criteria. All principles of the criteria, the rule of law, democracy, human rights and the respect and protection of minorities are proven to be problem areas for Türkiye, with all of them affecting Kurdish people. This is further exemplified through cases from the ECtHR (see chapter 5). The rule of law is lacking in the right to a fair trial through for example the lack of independence of judges and arbitrary application of laws. Moreover, Türkiye's failure to enforce rulings of the ECtHR is shown to be a systematic fault. Problems regarding democracy are both shown as concrete shortages, as well as an overlaying problematic system. Consequences of the attempted coup in 2016 have affected the democracy in Türkiye, such as growing authoritarianism and disproportional executions of power by for instance punishments of opponents of opinion and the removal of public workers.

Regarding human rights, several problem areas exist, such as restrictions on the freedom of expression, with the State continuously punishing non-violent expressions of opinion. Furthermore, several shortages in human rights are entwined with the lack of respect and protection of minorities, in this case, regarding Kurdish people. The long-lived prohibition of languages other than Turkish in the political context, as well as in broadcasting, publication and education serves as proof of human rights violations directly aimed at Kurds. The fact that Türkiye still does not recognise Kurdish people as minorities is another problem hindering Türkiye from significant improvements regarding their legal and political situation. The fact that the EU has recurrently lifted the treatment of Kurdish people as particularly problematic is proof that Türkiye's accession is partially dependent on improvement regarding the minority.

Regarding Türkiye's attempts of improvement through reforms in the areas of democracy and human rights, it can be said that, although such ambitions might have existed, the Human Rights Watch still reported severe remaining problems in Türkiye regarding those areas (see chapter 2.6). It can further be mentioned that, the fact that several of the progressive reforms were seemingly illusionary and not seen in practice, has impacted the validity of such reforms. The relationship between the EU and Türkiye is clearly a complex one. The image taken from the negotiations shows a relationship in which the EU does not want to promote Türkiye into becoming a Member State unless the State shows vast, concrete progress in reforms, whereas Türkiye do not want to implement vast, concrete progress in reforms unless the EU confirms that it will lead them to accession. At least, this image is relevant to the accession negotiations between 2005-2018, perhaps even before. Other than the continuous lack of human rights in respect of the Kurdish people, the public's scepticism towards the EU, growing opinions on religious conservatism and authoritarianism in AKP and the aftermath of the attempted coup in 2016 has put a big block on the road towards Turkish EU-accession, apparent from the latest Progress Report stating that accession negotiations are still at a standstill.

# 4 International Human Rights Law

This chapter begins with an examination of international fundamental human rights, by a brief presentation of UDHR. Following, is a review of conventions concerning several aspects of human rights, focusing on the Articles particularly relevant for the rights of Kurdish people in Türkiye. The chapter is structured as to first examine the areas of democracy, human rights and the rule of law, followed by an examination of human rights based on ethnicity and minority rights.

## 4.1 The United Nations and State Obligations

### 4.1.1 The Historic Context and effects of the United Nations

Following the Second World War there was a so called "constitutional moment" regarding the international society, which led to the creation of the United Nations and the work towards the foundation of an international catalogue of human rights, which is described below (see chapter 4.2.1).[372]

The founding document of the UN is the Charter of the United Nations (UN Charter), signed on 26 June 1945.[373] From the Preamble, the reasoning behind the Organisation is clearly motivated by the actions of the First and Second World War, as explicitly stated in its first clause. The need for a global instrument whose whole purpose is to maintain peace and security through international law, in order to promote human rights and fundamental freedoms, is stressed in the Preamble. This is further elaborated in Article 1 of the UN Charter, which explains the purposes of the United Nation. In Article 1(2) of the UN Charter, it is declared that one of the purposes of the United Nation is 'respect for the principles of equal rights and self-determination'.

[372] Maya Hertig Randall, 'The History of the Covenants – Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (First edition, Oxford University Press 2018) 7–30, 10.

[373] Preamble of the Charter of the United Nations (adopted 26 June 1945) 1 UNTS XVI.

In the historical context of which the UN was created, the principle of self-determination and sovereignty would become of great significance. At the time of the foundation of the United Nations, 750 million people lived under colonisation.[374] It was unclear then what part the UN would have regarding decolonialisation. Some delegations hoped that the UN could be used as a platform to lobby for independence of all territories fallen under colonial rule. For those with such hopes, the establishment of the United Nations represented a significant milestone in the history of human rights.[375]

Decolonisation had a great impact on the evolution of human rights. The universal reach of UN and international human rights law served as a tool to assert human rights in colonised territories, and subsequently as a way to gain self-determination.[376] An effect of decolonialisation and the newly independent States was furthermore a shift towards bigger focus on rights which concerned those countries, as opposed to the formerly leading colonial powers of the West, involving rights such as non-discrimination, anti-racism and, of course self-determination.[377] This led to the enactment of the International Convention on the Elimination of All Forms of Racial Discrimination[378] (ICERD) and the provisions stating the right to self-determination in both International Covenants.[379]

### 4.1.2 Vienna Convention on the Law of Treaties

[374] Jessica Lynne Pearson 'Introduction' in Nicole Eggers, Jessica Lynne Pearson and Aurora Alexandrina Vieira Almada e Santos (eds), *The United Nations and Decolonization* (Routledge, Taylor & Francis Group 2020) 1, 2.

[375] Ibid.

[376] Maya Hertig Randall, 'The History of the Covenants – Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (First edition, Oxford University Press 2018) 7, 11.

[377] Ibid.

[378] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

[379] Maya Hertig Randall, 'The History of the Covenants – Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (First edition, Oxford University Press 2018) 7, 11.

Rules and principles of international law are by vast majority embodied in treaties. The UN uses multilateral treaties as their main form of legal basis.[380] Regulations are therefore needed, in order to determine how to conclude a treaty, under what conditions and to what extent an agreement should be considered binding under international law, and under what conditions a treaty can be amended or broken. The International Law Commission adopted a set of 75 draft articles, in 1966, which subsequently served as a basis for the Vienna Convention on the Law of Treaties[381] (VCLT).[382] The Convention includes regulations concerning application and interpretations of treaties with rules on, amongst other things, interpretation of treaties, in its Articles 31–33.

In Article 2(d) of the VCLT, the term "reservation" is defined, as 'a unilateral statement […] made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'. A reservation is generally accepted, in accordance with Article 19, unless it falls under the exceptions under the Article, which state that a reservation is not allowed if it is prohibited by the treaty, if the treaty regulates which reservations that are allowed and the reservation is not included, and if the reservation serves against the 'object and purpose' of the treaty.[383]

The effect of a reservation is that it modifies the scope of the treaty which the reserving State is bound to. This is extended to the application for the State towards other State Parties, and for other State Parties towards the State, meaning that the reserving and objecting States do not apply the provisions of the reservation in relation to each other.[384] An objection does not hinder

[380] James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 353.

[381] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[382] James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 353.

[383] Article 19(a-c) of the VCLT.

[384] Article 21.3 of the VCLT.

the reserving State from entry into force of a treaty between the objecting and reserving State, if it is not explicitly stated by the objecting state.[385]

Türkiye is not a State party to the VCLT.[386] However, the VCLT is generally considered as a codification of customary international law, and has been treated as such in case law of the International Court of Justice in cases where one or both parts lacks ratification of VCLT.[387]

### 4.1.3 Articles on Responsibility of States for Internationally Wrongful Acts

A general principle in international law is that wrongfulness, consisting of a violation of international obligations, causes State responsibility.[388] In the *Spanish Zone of Morocco Claims*, judge Huber stated that '[r]esponsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. if the obligation in question is not met, responsibility entails the duty to make reparation'.[389] State responsibility is most commonly awakened by wrongful actions taken by the State organs, including for example its 'executive, legislature, judiciary and its bureaucracy'. This covers the actions of State leaders, law enforcement, security forces, the judiciary, administration officers and more, when they act in official roles, even if they overstep their scope of authority.[390] There are no legally binding treaties setting the framework for State obligations. However, the Articles on Responsibility of States for Internationally wrongful Acts[391]

[385] Article 20.1(b) of the VCLT

[386] United Nations, 'Vienna Convention on the Law of Treaties' *United Nations Treaty Collection* <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed 22 April 2024.

[387] See for example *Kasikili/Sedudu Island (Botswana/Namibia) (Judgment)* [1999] ICJ Rep 1045 § 18.

[388] Sarah Joseph and Sam Dipnall, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 110, 110.

[389] *Spanish Zone of Morocco Claims (Spain v. United Kingdom)* (1925) 2 Reports of International Arbitral Awards 615, 641.

[390] Sarah Joseph and Sam Dipnall, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 110, 114.

[391] Articles on Responsibility of States for Internationally Wrongful Acts (adopted 3 August 2001) A/RES/56/83.

(ARSIWA) have before being adopted in 2001, and even more so after, gained growing authority as a reflection of customary law on State responsibility.[392]

The above stated principle on State responsibility for wrongful acts is codified in Articles 1 and 2 of ARSIWA, where Article 1 states that wrongful acts entails State responsibility, and Article 2 defines the act as wrongful if it is an action or omission which 'is attributable to the State under international law' and that the action 'constitutes a breach of an international obligation of the State'. Further, Article 3 states that an act can be internationally wrongful even if it is lawful according to the domestic law of the State, which is strengthened by Article 32, which states that the State may not justify wrongful acts with their domestic law.

It is not only the State entity which is entitled to human rights. Individuals within a State's jurisdiction are also generally recognised as having human rights. This is exemplified by the International Covenant on Civil and Political Rights[393] and its Article 2(1), which obligates its State Parties to respect and ensure the human rights of all individuals of the State.

## 4.2 Democracy, Rule of Law and Human Rights

### 4.2.1 The United Nations Declaration of Human Rights

As a result of the events of the Second World War, and as prevention for future catastrophes of the calibre, an increased protection of human rights and fundamental freedoms was deemed necessary.[394] Different states had differing opinions on the concept of human rights and what would qualify as a fundamental freedom, due to ideological differences, which had an influence on the debates.[395] On 10 December 1948, the United Nations General

[392] James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 524.

[393] International Covenant on Civil and Political Rights (adopted 10 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[394] James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 610.

[395] Ibid.

Assembly adopted a Universal Declaration on Human Rights,[396] a historical landmark, seeing as it was the first time in history that an international organisation agreed on a shared statement on human rights.[397] Although it does not technically have the legal status as a binding treaty, it has a strong normative status as customary international law. Its content has had a significant legal effect on following legal instruments, both in the composition of international conventions, and as an aid to interpretation to, for example, the ECHR.[398]

The essence of the Declaration is captured in its Preamble. The Preamble of the UDHR contains explanations of the historical context in which the Declaration was made. It emphasises the need for protection of human rights, as the neglect thereof has resulted in 'barbarous acts which have outraged the conscience of mankind'.[399] Further, the Preamble accentuates the importance of international collaboration and a global unity.

Article 1 and 2 further set the baselines for the Declaration. Article 1 states that all persons 'are born free and equal in dignity and rights'.[400] Moreover, the second Article concludes that all persons are entitled to the rights and freedoms stated in the UDHR, without any distinction whatsoever.

Furthermore, the Declaration includes rights such as equality before the law without discrimination to equal protection of the law according to Article 7, the right to a fair trial by an independent and impartial tribunal in Article 10 and the presumption of innocence as well as the prohibition of punishment without law in accordance with Article 11 in the UDHR. The Declaration also includes the protection of the freedom of expression, as stated in Article 19.

Another Article of relevance in the Turkish context is Article 21, which constitutes the basis for a democratic government. The word "democracy" is

[396] Universal Declaration of Human Rights (adopted 10 December 1948) A/RES/3/217.

[397] Åshild Samnøy 'The Origins of the Universal Declaration of Human Rights' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achechievment* (Martinus Nijhoff 1999) 3, 3.

[398] James Crawford, *Brownlie's Principles of Public International Law* (Ninth edition, Oxford University Press 2019) 610.; see also for example *Golder v. the United Kingdom*, 21 February 1975, § 34, Series A no. 18.

[399] Preamble to the UDHR.

[400] Article 1 in the UDHR.

never mentioned in the Article. Nonetheless, by reading the content of the Article, the fundamental forms for a democratic government can be identified.[401] The text states the right to partake in the government of one's country either directly or through representatives.[402] However, there are some uncertainties to be noted. The right to political participation is not in itself a distinctive trait of a democratic state. Even authoritarian dictatorships permit, albeit often modified, political participation. What is unique, however, for a democratic society is its protection of political pluralism.[403] Furthermore, the Article states that the authority of government shall be based on the will of the people, expressed through recurring elections with universal and equal suffrage as well as by free voting.[404] Article 21(3), in which this is stated, 'holds forth the promise of extensive popular participation in an open political process'.[405] There are, however, no provided guidelines on the form of the electoral system. Also, there is no given statement specifying how a broad and fair election should be held, or even the access to such.[406]

The rights cited above have been further protected by subsequent international conventions which are discussed below, including the European Convention on Human Rights, which is examined in chapter 5.

### 4.2.2 The International Covenant on Civil and Political Rights

Even though the UDHR has a strong normative value, the UN saw a need for legally binding treaties ensuring human rights in a more detailed and practical form, and to give the possibility for individuals to claim violations of their

[401] Allan Rosas, 'Article 21' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achechievment* (Martinus Nijhoff 1999) 431, 431.

[402] Article 21(1) in the UDHR.

[403] Henry J Steiner, 'Political Participation as a Human Right' (1988) 1 Harvard Human Rights Yearbook 77, 97 f.

[404] Article 21(3) in the UDHR.

[405] Henry J Steiner, 'Political Participation as a Human Right' (1988) 1 Harvard Human Rights Yearbook 77, 108.

[406] Ibid.

rights.[407] After a challenging process continuing for 18 years, the result was two conventions, one of them being the ICCPR.[408] Although it was adopted in 1966, it did not come into force until 1976, once it reached the necessary numbers of ratifications needed in order for the Covenant to enter into force.[409]

The content of the ICCPR in many ways reflects the civil and political rights expressed in the UDHR.[410] These are, however, defined in greater detail in the Covenant. Apart from these rights and protections, the ICCPR includes the right to self-determination in its Article 1.[411] Additionally, the Covenant also constitutes the establishment of the Human Rights Committee and the framework for its mission, which is to monitor the State parties' upholding of the ICCPR.[412] The object and purpose of the ICCPR is to establish a legally binding standard for human rights, by outlining a legally binding framework with rights and freedoms which State Parties are obligated to respect and protect.[413]

Rather uniquely for the ICCPR is the fact that, while most rights and protections regulated by ICCPR are individual rights, Article 1, which expresses the right to self-determination, is a group right.[414] The right to self-determination has internationally significant impacts. As previously mentioned (see chapter

[407] Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee´s Monitoring of ICCPR Rights* (Cambridge University Press 2020) 1 f.

[408] Ibid.

[409] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press 2013) 5; see Article 49 in the ICCPR.

[410] David I Fisher, *Mänskliga rättigheter - en introduktion* (10th edition, Norstedts Juridik 2023) 23.

[411] Sarah Joseph 'Civil and Political Rights' in Mashood A. Baderin and Manisuli Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Pub 2010) 89, 89.

[412] Articles 40–42 in the ICCPR.

[413] Human Rights Committee, 'General Comment No. 24' (4 November 1994) HRI/GEN/1/Rev.9 § 7.

[414] Robert McCorquodale 'Group Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 344, 346.

2.2.1) the insurgence of self-determination in an international legal context took place in the beginnings of the 20th century.

As legally binding human rights instruments are effective only if they demand legal duties, or *state obligations*, it was of great importance to define such obligations under the Covenant. This, to 'provide for effective implementation on the domestic level'.[415] In the ICCPR, this is codified in Article 2(3)(a), which states that 'any person whose rights or freedoms as herein recognised are violated shall have an effective remedy'. Further, Article 2 states that the rights and protections stipulated by the ICCPR are effective immediately, meaning that the ratified states are given state obligations to respect, uphold, and fulfil the rights and protections in the ICCPR directly after ratifying it.[416]

In the ICCPR, a number of rights are set as core rights and can thus not be derogated from under any circumstances, even in times of public emergency.[417] These are presented in Article 4(2), and protect the rights in Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman, or degrading treatment or punishment), Article 8(1 and 2) (prohibition of slavery), Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Article 15 (prohibition of punishment without law), Article 16 (recognition of everyone as a person before the law) and Article 18 (freedom of thought, conscience, and religion). The Human Rights Committee has commented on Article 4, in its General Comment 29.[418] It is expressed that the listing of inviolable provisions in Article 4(2) is 'related to, but not identical with, the question whether certain human rights obligations bear the

[415] Maya Hertig Randall, 'The History of the Covenants – Looking Back Half a Century and Beyond' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (First edition, Oxford University Press 2018) 7, 17.

[416] Theo van Boven, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 135, 136; see Article 2 in the ICCPR.

[417] Theo van Boven, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 135, 142.

[418] Human Rights Committee 'General Comment No. 29' (31 August 2001) CCPR/C/21/Rev.1/Add.11.

nature of peremptory norms of international law' (*jus cogens*).[419] Further, it is stated that State parties are under no circumstances allowed to invoke Article 4 of the ICCPR as justification for acting in violation of humanitarian law or *jus cogens* by, for instance arbitrary deprivations of liberty or by straying from the right to a fair trial, including the presumption of innocence.[420]

As mentioned, the rights and protections constituted in the ICCPR mostly reflect the civil and political rights in the UDHR. For example, Article 14 in the ICCPR incorporates Articles 7 and 10 from the UDHR and elaborates them in a thoroughly composed Article on principles of rule of law and civil rights. The Article includes, but is not limited to, protection of the right to equality before the law and equal protection under the law, the right to a fair trial and the presumption of innocence. Further, ICCPR's Article 15 asserts prohibition of punishment without law. Additionally, Article 19 protects freedom of expression and the right to hold opinions without interference. Lastly, Article 25 in the ICCPR reflects the contents of Article 21 in UDHR, on the right to political participation.

Türkiye signed the ICCPR on 15 August 2000 and ratified it 23 September 2003.[421] Additionally, they signed the Optional Protocol to the ICCPR on 3 February 2004 and ratified it 24 November 2006.[422] Moreover, Türkiye signed the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, on 6 April 2004 and ratified it 2 March 2006.[423] The late

[419] Human Rights Committee 'General Comment No. 29' (31 August 2001) CCPR/C/21/Rev.1/Add.11 § 11.

[420] Ibid.

[421] United Nations, 'International Covenant on Civil and Political Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 17 April 2024.

[422] United Nations, 'Optional Protocol to the International Covenant on Civil and Political Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en> accessed 17 April 2024.

[423] United Nations, 'Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en> accessed 17 April 2024.

ratification of the Covenant is according to Başak Çali a part of the efforts towards an EU membership after becoming a candidate country.[424]

### 4.2.3 A New Vision for the Rule of Law

On 31 July 2023, the Secretary-General of the United Nations published the New Vision for the Rule of Law (New Visions) as to follow on the report "Our Common Agenda"[425]. The New Visions report is written partly due to experiences of a global decline in the aspect of rule of law, increased due to escalating conflicts and weakening national institutions.[426] Symptoms of the declining rule of law are stated, including 'political polarisation, corruption, disregard for international law, growing inequality, the instrumentalization of justice institutions, […] attacks on human rights and the shrinking of civic space', as well as decline of press freedom.[427] In the report, Member States are urged to fulfil their obligations as to promote respect for and protection of human rights and fundamental freedoms.[428] Furthermore, the Secretary-General urges the need for 'transparent, inclusive and responsive justice systems' and independent judiciaries, free from political interference. Further, it is stressed that groups facing systemic prejudice must be given fair treatment in criminal and civil justice systems.[429]

## 4.3 International Human Rights based on Ethnicity and Minority Rights

### 4.3.1 The United Nations Declaration of Human Rights

[424] Başak Çali, 'Influence of the ICCPR in the Middle East' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 124, 132.

[425] United Nations Secretary-General, 'Our Common Agenda' (5 August 2021) A/75/982.

[426] United Nations Secretary-General, 'New Vision for the Rule of Law' (31 July 2023) 2.

[427] Ibid.

[428] Ibid 2 f.

[429] Ibid 3.

The UDHR mainly consists of Articles protecting fundamental political rights and freedoms. However, some Articles are dedicated to protect rights of persons belonging to minority groups.

Article 2 in the UDHR proclaims that all rights and freedoms in the Declaration shall be given to all people, regardless of factors such as race, language, political or other opinion, and also regardless 'of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'.[430]

Furthermore, it can be argued that Article 7 serves as a protection from discrimination based on ethnicity. In reality, it is rather unclear what the Article actually protects, which is a matter of debate among scholars as to their differing opinions on the exact meanings of the concepts presented in the Article, such as "equality before the law", "equal protection of the law" and "protection against discrimination".[431] The reason for this ambiguity is that the Article itself brought controversies during the drafting of the Declaration, regarding if it should be included at all, the meaning of "equality" and how the content of the Article should be interpreted. This lack of clarity is also present in the *travaux préparatoires*.[432]

### 4.3.2 International Covenant on Civil and Political Rights

Apart from the rights and protections presented in chapter 4.2.2, the ICCPR also puts forward some rights and protections concerning minorities. For example, Article 26 of the ICCPR states that all persons are equal before the law and prohibits discrimination based on, for instance, race, language, political or other opinion, national or social origin, or other status. It stems from Article 7 of the UDHR, discussed above (see chapter 4.3.1), but is more concrete as it presents different bases of discrimination, which the UDHR lacked.[433] The

[430] Article 2 of the UDHR.

[431] Jakob Th. Möller, 'Article 7' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achechievment* (Martinus Nijhoff 1999) 153, 153.

[432] Ibid.

[433] See Article 26 of the ICCPR; cf. Article 7 of the UDHR.

prohibition of discrimination is also ascertained in Article 2(1) of the ICCPR, in which all State Parties are obliged to respect and ensure that all people are entitled to the rights and freedoms in the ICCPR without distinction of for example race, language, political or other opinion, national or social origin and other. Non-discrimination is a fundamental principle of the ICCPR, and is mentioned continuously in several other Articles of the instrument.[434] The ICCPR does not define the term 'discrimination' further than what is stated above, nor does it specify what constitutes as discrimination. In the Human Rights Committee's (HRC) General Comment 18, a reference is made to Article 1 of the ICERD, in which 'racial discrimination' include 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.[435] The HRC points out that the ICERD only covers racial discrimination, but that discrimination in ICCPR should be understood in the same way, with application on all grounds for discrimination covered by the Covenant.[436] Additionally, the HRC states that State Parties are required to take affirmative action to diminish or eliminate discrimination, due to the principle of equality. As an example, it is said that a State should act to improve conditions if there are shortcomings in the general conditions of a specific part of the population in regards to human rights.[437]

One difference between the UDHR and the ICCPR is seen in Article 27, which expresses protection of the rights of minorities. The Article states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy

[434] Human Rights Committee, 'General Comment No. 18: Non-discrimination' (10 November 1989) HRI/GEN/1/Rev.9 § 3.
[435] Ibid § 6; see also Article 1 of the ICERD.
[436] Human Rights Committee, 'General Comment No. 18: Non-discrimination' (10 November 1989) § 7.
[437] Ibid § 10.

> their own culture, to profess and practice their own religion, or to use their own language.[438]

In the HRC's General Comment 23, attention is drawn to the fact that some State parties claim to not discriminate on grounds such as ethnicity and language, and that minorities therefore do not exist.[439] It is further stated that the existence of a minority in a State party does not rely on a recognition by that State party, but is rather established by objective criteria.[440] The objective criteria is specified as a group who share a culture, a religion and/or a language in common.[441]

### 4.3.3 The International Covenant on Economic, Social and Cultural Rights

The other legally binding treaty stemming from the UDHR was the International Covenant on Economic, Social and Cultural Rights.[442] Unlike the ICCPR, which sets up a list of mostly individual rights, The ICESCR is more community-based. While the rights in the ICCPR are generally regarded as negative freedoms from State interference, the rights in the ICESCR mostly involve positive State obligations to take measures towards fulfilling the rights.[443]

Another difference between the Covenants is that while the ICCPR entails immediate obligation regarding respecting its content, the obligations set by the ICESCR are based on *progressive realisation* of its rights, as stated in Article 2(1) of the Covenant. This is due to an understanding of countries' limited resources to fulfil the ICESCR. Therefore, the Committee on Economic, Social and Cultural Rights (CESCR) accepts struggle to process in

[438] Article 27 in the ICCPR.

[439] Human Rights Committee 'General Comment No. 23' (8 April 1994) CCPR/C/21/Rev.1/Add.5 § 4.

[440] Ibid § 5.2.

[441] Ibid § 5.1.

[442] International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[443] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1.

times of economic recession.[444] There are some exceptions to the principle of progressive realisation, where some provisions are effective immediately. These Articles are presented in the CESCR's General Comment 3, and include rights such as the elimination of discrimination in Articles 2(2), and the liberty to establish and direct educational institutions abiding to certain minimum standards according to Article 13(4).[445]

The ICESCR includes an Article prohibiting discrimination in the application of the rights of the Covenant.[446] The grounds for discrimination in the ICESCR are the same as for discrimination according to the ICCPR (see chapter 4.3.2), but the CESCR notes that discrimination based on language is regularly closely linked with discrimination based on ethnicity. They further state that discrimination on the basis of language often restricts the enjoyment of several rights of the ICESCR.[447]

The prohibition of discrimination covers any 'distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing' the execution of the rights of the Covenant.[448] The CESCR notes in its General Comment 20 the existence of systematic discrimination, consisting of law, policies or prevalent cultural attitudes which create disadvantages for some groups.[449] These are not combated by legal prohibitions of discrimination or demands of formal equality, as such measures ignore the pre-existing and deep-rooted disadvantage of such groups. Formal equal treatment will most likely not solve the existing

[444] Theo van Boven, 'Categories of Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 135, 136.

[445] Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The Nature of States Parties' Obligations' (14 December 1990) E/1991/23 § 5.

[446] Article 2(2) of the ICESCR.

[447] Ibid § 21.

[448] Committee on Economic, Social and Cultural Rights, 'General Comment No. 20' (6 February 2006) E/C.12/GC/18 § 7.

[449] Committee on Economic, Social and Cultural Rights, 'General Comment No. 18' (2 July 2009) E/C.12/GC/20 § 12.

structures, and might even cement or intensify them.[450] Instead, the Committee states that an active approach must be taken towards the elimination of systematic discrimination, including implementing laws, policies and programmes. Greater resources to the group and particular attention to ensuring that legal and political actions are implemented by officials are other necessary measures to combat systematic discrimination.[451]

Discrimination concerning the right to education in Article 13 is largely related to discrimination against minority groups. This issue has been discussed repeatedly in the history of international law, and is currently protected in several human rights instruments.[452] For example, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) states in Article 5(c) of their Convention against Discrimination in Education that the right of national minorities to carry on their own educational activities is essential, including the right to use or teach their own language. However, this right to language is subordinate to provisions in domestic law.[453] Türkiye has furthermore neither signed nor ratified UNESCO's Convention.[454] The right to education includes the right to establish educational institutions, according to Article 13(4) of the ICESCR, and the right to access to education in general, as stated in Article 13(1), without discrimination. Regarding minorities, discrimination of this right often occurs in relation to language issues. Minorities' access to education may be restricted if there is no possibility to receive education in, or of, their language.[455]

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[450] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 184.

[451] Committee on Economic, Social and Cultural Rights, 'General Comment No. 18' (2 July 2009) § 39.

[452] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1128.

[453] Article 5(c) of the Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962) 429 UNTS 93.

[454] United Nations Educational, Scientific and Cultural Organization, 'Convention against Discrimination in Education' <https://www.unesco.org/en/legal-affairs/convention-against-discrimination-education#item-2> accessed 11 May 2024.

[455] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1133 f.

The cultural rights in the ICESCR are, as previously mentioned, set in Article 15. The right to partake in cultural life is also protected by Article 10 of the ECHR, as proclaimed by the ECtHR.[456] Moreover, it is protected by Article 27 of the ICCPR concerning the right of minorities to practice their culture. Explaining the scope of Article 15, the CESCR's definition of culture is not limited to isolated expressions, but rather as a way that individuals and communities 'give expression to the culture of humanity', including acts such as use of language, literature, ceremonies, clothing, customs and traditions.[457] The right to 'take part' in cultural life consists of three main components. Firstly, it includes the *right to participation*, meaning that all persons are free to choose their identity and to identify with a certain community, to participate in the political life of society, to engage in cultural practices and to express themselves in their language of choice. Secondly, the *right to access* includes the right to learn of one's culture and to follow a way of life by cultural means, such as language, as well as the right to benefit from their cultural heritage. Lastly, *contribution to cultural life* provides the right to involvement in creating expressions of the community, and to partake in the development of the cultural community through implementation of policies and decisions affecting the exercise of cultural rights.[458]

Article 15 contains both negative obligations of the State, to not interfere with the right to participate in cultural life, and positive obligations to take measures towards ensuring such participation.[459] Along with this is the obligation to preserve and promote cultural heritage, consisting of for example historical sites, art and literary works. The protection of cultural heritage is, according to the CESCR, especially important in regards to disadvantaged and marginalised groups.[460] One of the pointed-out groups is minorities. To

[456] See for example *Khurshid Mustafa and Tarzibachi v. Sweden*, no. 23883/06, § 44, 16 December 2008.

[457] Committee on Economic, Social and Cultural Rights, 'General Comment No. 21' (21 December 2009) E/C.12/GC/21 §§ 11-13.

[458] Ibid § 15.

[459] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1186.

[460] Committee on Economic, Social and Cultural Rights, 'General Comment No. 21' (21 December 2009) § 50.

this, the CESCR states that States are obligated to recognise, respect and protect the culture of minorities, and that minority groups have rights concerning for instance their culture, traditions, customs, languages and communication media. Further, all integration of minorities shall build upon 'inclusion, participation and non-discrimination, with a view to preserving the distinctive character of minority cultures' as to development in cultural life.[461] Minority groups' right to use their own language is a frequently discussed issue. For example, the CESCR raises concerns regarding possibilities of minority groups to use their language in public life and in education.[462]

In 2008, the Optional Protocol to the International Covenant of Economic, Social and Cultural Rights[463] was adopted. The Protocol opens up the possibility for individuals to claim violations of the rights set in the ICESCR.[464] Türkiye has neither signed, nor ratified the Protocol.[465]

## 4.4 Türkiye's Compliance of International Human Rights Law

### 4.4.1 Democracy, Rule of Law and Human Rights

The UNHRC noted in its report from 2019 on Türkiye's derogation from the ICCPR due to the failed coup in 2016 and the subsequent state of emergency. They raised the fact that the derogation provision in Article 4 of the ICCPR does not allow the ignorance of all obligations as the State is obligated to limit such measures as much as possible.[466] Several problem areas concerning the

[461] Committee on Economic, Social and Cultural Rights, 'General Comment No. 21' (21 December 2009) §§ 32-33.

[462] Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 1196 f.

[463] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) 2922 UNTS 29.

[464] Article 2 of the Optional Protocol to the ICESCR.

[465] United Nations, 'Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en> accessed 11 May 2024.

[466] Human Rights Council, 'Compilation on Turkey' (12 November 2019) A/HRC/WG.6/TUR/2 § 7.

areas of democracy, rule of law and human rights have been raised by various actors, including the UN and international organisations.

#### *4.4.1.1 Democracy*

Türkiye has had an increased number of shortcomings regarding human rights during the 21st century, largely due to its authoritarian and presidential government, led by Erdoğan.[467] In 2018, the country went from being a parliamentarism republic, to becoming an executive presidential republic.[468] One effect of this is that the President has the authority to issue Presidential Decrees in areas of executive power. According to the Constitution, such decrees may not contravene existing legislation or human rights. In short, the executive presidential system means that the presidential office has broad powers and the independence and discretion of the authorities is limited.[469] Even if Erdoğan was given the post through a national election, and the amendments of the Constitution were implemented by a referendum, it can be argued that Presidential decrees and the decrease in power for the people-chosen Parliament does not reflect the ideas of democracy, and political influence through the will of the people, as asserted in Article 21 in the UDHR and Article 25 in the ICCPR.

Another democratic shortcoming is the fact that, after the previous local elections, in 2019, a series of changes to laws and administrative regulations were introduced, that restrict power at the local level. Several elected mayors representing HDP were prevented from taking office or were replaced by government-appointed "trustees". Out of the 65 municipalities where the HDP won in local elections, the party was allowed to govern only six municipalities (see chapter 2.7.2). This constitutes direct breaches of Article 21 in the UDHR and Article 25 in the ICCPR, in several aspects. Firstly, this violates the rights of the elected politicians of HDP, to political participation, and the right to be

[467] Human Rights Watch 'Türkiye', <https://www.hrw.org/europe/central-asia/turkey> accessed 7 April 2024.

[468] The Swedish Ministry for Foreign Affairs, 'TURKIET – Mänskliga rättigheter, demokrati och rättsstatens principer' (2021) 5.

[469] Ibid.

elected, as the elected mayors were not allowed to govern.[470] Also, it violates the guarantee of the will of the people, mainly consisting of Kurdish voters, as the persons and parties they elected were not the ones becoming mayors.[471]

#### *4.4.1.2 Rule of Law*

In the Human Rights Council's (UNHRC) report on Türkiye from 2019 there were several remarks concerning the rule of law. The emergency decrees during the state of emergency bypassed the TCC's appeal procedure.[472] Concerns were expressed on the undermining of independence of the judiciary following the 2017 Constitutional referendum and its changes regarding the judicial system. They noted that such undermining had been underway since 2014, where the executive power had strengthened its control over the judiciary and prosecution institutions, including 'arrest, dismissal and arbitrary transfer of judges and prosecutors'.[473] Further, the arrest, dismissal and suspension of judges following the attempted coup in 2016 meant a backsliding in the rule of law.[474] The right to a fair trial and access to justice was weakened as a result of a noted pattern of prosecutions against lawyers representing persons accused of terrorism in which such lawyers faced similar charges.[475] The state of emergency after the attempted coup brought emergency decrees which bypassed parliamentary scrutiny and gave State authorities the power to derogate from human rights obligations without the possibility for judicial review and appeal.[476] Accordingly, these developments constitute several violations of Article 14 of the ICCPR.

#### *4.4.1.3 Human Rights*

The OHCHR has raised concerns regarding the Counter-terrorism Law implemented after the state of emergency was lifted and in force for three years, which included several provisions from the emergency decrees (see chapter

[470] See Article 21(1) in UDHR and Article 25(a and b) in the ICCPR.
[471] See Article 21(3) in UDHR and Article 25(b) in the ICCPR.
[472] Human Rights Council, 'Complation on Turkey' (12 November 2019) A/HRC/WG.6/TUR/2 §§ 8.
[473] Ibid §§ 7 and 24.
[474] Ibid § 25.
[475] Ibid § 26.
[476] Human Rights Council, 'Complation on Turkey' (12 November 2019) § 8.

2.7.2). According to the OHCHR, it was likely to continue the backsliding in human rights and fundamental freedoms made possible by the emergency decrees.[477] The Special Rapporteur on Torture has stated that the definition of terrorism in the Anti-Terror Law, and the law in general, is broad and vague.[478] UN experts have expressed concerns regarding terrorism charges being used to prosecute 'legitimate exercise of freedom of expression and freedom of association', which, as previously mentioned (see chapter 2.2-2.7) is prevalent.[479] Amnesty International's latest report published this year, raises several cases of terrorist crimes in response to pro-Kurdish expressions. One example is the conviction of Şebnem Korur Fincancı for making propaganda for a terrorist organisation, after 'calling out for an independent investigation into the alleged use of chemical weapons in the Kurdistan region of Iraq in 2022'.[480] The UNHRC's Special Rapporteur on freedom of expression has noted that opposition parties faced terrorism-related accusations, specifically HDP, and that Turkish legislation on defamation and counter-terrorism were not in par with international standards. The Anti-Terror Law has been deemed as incompatible with Article 19 of the ICCPR ensuring the freedom of expression and opinion, and Article 125(3) and 299 of the Criminal Code which prohibits defamation of public officials and the Turkish president was urged to be repealed.[481] The effect of the terrorist charges on legitimate expressions of opinion has been a considerably shrunken space for dissent in Türkiye.[482] Concerning the fact that the freedom of expression of Kurdish

[477] Office of the High Commissioner for Human Rights, 'Report on the Impact of the State of Emergency on Human Rights in Turkey, including an update on the South-East' (March 2018) § 43.

[478] Human Rights Council, 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Turkey' (18 December 2017) A/HRC/37/50/Add.1 § 68.

[479] United Nations Office of the Commissioner of Human Rights, 'Turkey: Drop terror charges against Amnesty chair Taner Kiliç, UN human rights experts urge' (Geneva 16 February 2018) <https://www.ohchr.org/en/press-releases/2018/02/turkey-drop-terror-charges-against-amnesty-chair-taner-kilic-un-human-rights?LangID=E&NewsID=22667> accessed 17 May 2024.

[480] Amnesty International (ed), *The State of the World's Human Rights* (Amnesty International Ltd 2024) 377.

[481] United Nation Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on his Mission to Turkey' (21 June 2017) A/HRC/35/22/Add.3 §§ 58 and 84-85.

[482] Office of the High Commissioner for Human Rights, 'High Commissioner Bachelet calls on States to take strong action against inequalities' (Geneva 6 March 2019) <https://www.ohchr.org/en/statements/2019/03/high-commissioner-bachelet-calls-states-

people and pro-Kurdish opinions has been restricted to such extent, especially through the Anti-Terror Law, it is not unreasonable to conclude a discriminatory application of said law and other provisions targeting Kurdish voices. Nonetheless, all that has been mentioned in this paragraph clearly constitute violations of the freedom of opinion and expression in Article 19 of the ICCPR.

The Committee against Torture (CAT) has raised concerns on State authorities' extrajudicial killings of civilians during counter-terrorism operations in the Kurdish regions in Türkiye, and recommended commencing adequate and effective investigations into allegations of such, and that the perpetrators would be held accountable.[483] Further, the CAT has raised serious concerns regarding numerous reports of torture and ill-treatment of detained persons suspected for PKK involvement, at the hands of law enforcement officials in South-Eastern Türkiye.[484] The killings and the lack of investigation following them constitute a violation of Article 6 of the ICCPR, which is, as mentioned, one of the absolute rights in the Covenant, and can therefore not be derogated from, even in a state of emergency. The prohibition of torture and ill-treatment in Article 4 of the ICCPR is also absolute. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) further regulates the prohibition of torture and ill-treatment. Türkiye is a State Party to the treaty, and is thus bound to the prohibition of torture by two international instruments.[485] It is thus particularly important to respect this right, and to take meaningful actions in order to prevent the execution of ill-treatment. Concerning the fact that these human rights violations have been targeting Kurdish people, it is reasonable to state that they have taken place *because* the victims were Kurdish, meaning that discrimination application should be contemplated in the context of such violations. This point is however not shared by the ECtHR (see chapter 5.3.1).

take-strong-action-against-inequalities?LangID=E&NewsID=24265> accessed 17 May 2024.

[483] Committee against Torture, 'Concluding Observations on the Fourth Periodic Reports' (2 June 2016) CAT/C/TUR/CO/4 §§ 13-14

[484] Ibid § 11.

[485] Three, counting with the ECHR.

### 4.4.2 Human Rights concerning Ethnicity and Minority Rights

#### *4.4.2.1 Reservations to the Covenants*

As mentioned, the ICCPR protects rights of minorities in its Article 27. When Türkiye signed and later ratified the Covenant, they did so with reservations. One of these were as follows:

> The Republic of Turkey reserves the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes.[486]

Türkiye's reservation is aimed to restrict both the definition and the extent of protection of minorities.[487] The Treaty of Lausanne did not explicitly recognise Kurdish people (or any others) as a minority group, other than recognising non-Muslims as minorities (see chapter 2.2.2). Moreover, as mentioned several times, Türkiye has never recognised Kurdish people as minorities. Therefore, the reservation, referring to Turkish national law and the Treaty of Lausanne, allows Türkiye to interpret the meaning of "minority" freely, whether a group is a *de facto* minority or not. A product of this free interpretation can be seen in Turkish law, and in official standpoints, as for example the following:

> The State system is based on the principle of constitutional/territorial nationalism. The concept of citizenship is defined in article 66 of the Constitution on the ground of legal bond without any reference to ethnic, linguistic or religious origin. According to

[486] United Nations, 'International Covenant on Civil and Political Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 17 April 2024.

[487] Başak Çali, 'Influence of the ICCPR in the Middle East' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press 2018) 124, 134.

> this article, 'everyone bound to the Turkish State through the bond of citizenship is a Turk'. The Constitution does not provide any definition of racial or ethnic connotation for being a 'Turk'. On the contrary, article 66 depicts a purely legal definition and does not provide for a kinship based on 'blood'. The term 'Turk' is the reflection of the national identity of all citizens in Turkey irrespective of their origins.[488]

Derya Bayır notes that, although claiming to be a civic state 'based on the principle of equality before the law and citizenship as the tie binding the people to the state', Türkiye does not officially recognise their ethnic minorities.[489] According to the state, ethno-cultural identities and expressions of such are a private matter, and viewed as an individual's choice. It is not considered at a state level.[490] In effect, Türkiye's reservation conveys in reality an exclusion from application on Kurdish people.[491]

In general, Türkiye's view on which groups that fall under the scope of minorities shall not be the deciding factor of which groups that are protected by the ICCPR, but rather objective criteria, as stated in General Comment 23 (see chapter 4.2.2). Türkiye's reservation on Article 27 has been objected by several Party States without precluding the Covenant's entry into force, including Sweden.[492] Sweden stated that Türkiye's reservation does not clarify the extent of the State's derogation from Article 27, and that it raises 'serious doubts' to Türkiye's commitment regarding the Covenant. Further, they note the former mentioned General Comment 23 and its assertion that the existence of a minority is established by objective criteria. The reservation is thus according to Sweden not in compliance with the object and purpose of the

[488] Committee on the Elimination of Racial Discrimination 'Combined First, Second and Third Reports by Turkey' (12 November 2007) CERD/TUR/3 § 17.

[489] Derya Bayır, *Minorities and Nationalism in Turkish Law* (Ashgate 2013) 144.

[490] Ibid.

[491] Rez Gardi, 'From Suppression to Secession: Kurds, Human Rights and the Right to Self-Determination in Turkey' (2017) 24 ILSA Journal of International & Comparative Law 61, 77.

[492] United Nations, 'International Covenant on Civil and Political Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 17 April 2024.

ICCPR.[493] Similar remarks were raised in the other States' objections to Türkiye's reservation. Finland expressed in its objection that it assumes that Türkiye will implement the minority rights in ICCPR and reform its national law towards compliance with the Covenant, which was also expressed by the objection from Portugal.[494] Germany stated that it interprets Türkiye's reservation as granting the rights in Article 27 to 'all minorities not mentioned in the provision and rules referred to in the reservation'.[495]

While the Kurdish question has been subject of discussion and reforms in Türkiye, mainly during the 1990-2000s (see for example chapter 3.2.2.2), they are still not recognised as a minority, which prevents Kurds from freely enjoying the rights ascertained by Article 27 of the ICCPR. The objective criteria on minorities are fulfilled concerning Kurdish people. They share a common culture and a common language (see chapter 2.1). Hence, Türkiye should be obliged to provide them the rights ordered by Article 27. The CESCR has urged Türkiye to recognise Kurds as a minority.[496] Further, the Turkish Human Rights Advisory Board has stated that Türkiye's definition of minorities is too restrictive and advises the State to broaden the recognition to communities that are ethnically and linguistically different.[497] However, Türkiye has indeed issued a reservation on the matter. A reservation does, as mentioned, constitute the right to derogate from the Articles of a legal instrument, if it is compatible with the object and purpose of the treaty (see chapter 4.1.1). The object and purpose of the ICCPR is quite vague in its definition (see chapter 4.2.3).[498] The Human Rights Committee has in their General Comments 24 defined the sort of reservations which are not acceptable in

[493] United Nations, 'International Covenant on Civil and Political Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 17 April 2024.

[494] Ibid.

[495] Ibid.

[496] Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Turkey' (12 July 2011) E/C.12/TUR/CO/1 § 10.

[497] The Human Rights Advisory Board, 'The Minority Rights and Cultural Rights Working Group Report' (1 October 2004) 3 ff.

[498] Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Fourth edition, Oxford University Press 2022) 86, 93.

regards to the object and purpose. Reservations deviating from peremptory norms and customary international law are examples of such. Further, the Human Rights Committee lists several rights on which reservations are not considered compatible with the Covenant's object and purpose, including the minority rights provided by Article 27.[499]

Consequently, if Türkiye had issued a reservation on Article 27 of the ICCPR as a whole, it would be deemed as incompatible with the object and purpose of the ICCPR, and thus not be accepted in accordance with Article 19(c) of the VCLT. This conclusion is more difficult to reach in this situation, as Türkiye does not derogate from the whole Article, but instead limits the scope of application. It is arguable if providing rights for some minorities, but not all, is in line with the object and purpose of the Covenant. Some of the objecting States think not, but at the same time, the reservation was accepted by the UN. According to Article 2(1), it is prohibited to discriminate certain people from the enjoyment of their rights set by the Covenant. In reality, this reservation does just that; the fact that some minorities are allowed to enjoy their minority rights, but others are not, could clearly be viewed as a discrimination.

Furthermore, Türkiye signed and ratified the ICESCR with a reservation, stating that the State reserves the right to interpret and apply Article 13(3-4) pursuant to Articles 3, 14 and 42 of the Turkish Constitution.[500] Article 3 of the Constitution states, as previously mentioned, that the language of the State is Turkish. Article 14 states that the rights and freedoms of the Constitution are not to be exercised with the aim of violating the 'indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic'. According to Article 42 of the Constitution, education shall be based on the principles of Atatürk, and other

[499] Human Rights Committee, 'General Comment No. 24' (4 November 1994) HRI/GEN/1/Rev.9 § 8.

[500] United Nations, 'International Covenant on Economic, Social and Cultural Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 11 May 2024.

languages than Turkish are prohibited to be taught as mother tongue to citizens of Türkiye.

Türkiye faced several objections to its reservation. For instance, Finland emphasised in its objection the importance of Article 13(3-4) of the ICESCR and states that the reservation does not clarify its content in regards to the provisions. Thus, Finland interpreted the reservation as that Türkiye will ensure the implementation of the rights asserted by the ICESCR, strive towards bringing its domestic law into being compatible with the ICESCR's obligations, and aim to withdraw its reservation. Portugal put forward that reservations containing limitation of its responsibilities under the ICESCR by invoking national law might raise doubts concerning the commitment of Türkiye to the object and purpose of the Covenant and cause undermining of the basis of international law. Sweden raised similar concerns as those raised by Finland and Portugal, and noted that the VCLT as well as customary international law asserts that reservations that are not compatible with the object and purpose of a treaty are not permissible.[501] Further, the CESCR has also raised concerns regarding Türkiye's reservations, and has recommended the State to withdraw the reservation.[502]

#### *4.4.2.2 Equality, Non-Discrimination and Minority Rights*

The most general shortcoming of Türkiye regarding human rights concerning ethnicity is the fact that Türkiye does not have laws prohibiting discrimination. The only provision in Turkish law related to discrimination is Article 216 of the Criminal Code, which prohibits incitement of racial hatred. This provision has not been applied to expressions targeting the Kurdish people.[503] It has rather been used to target Kurdish people for expressing pro-Kurdish

[501] United Nations, 'International Covenant on Economic, Social and Cultural Rights' *United Nations Treaty Collection* <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en> accessed 11 May 2024.

[502] Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Turkey' (12 July 2011) § 6.

[503] Kurdish Human Rights Project, 'Submission and List of Issues to be Taken Up in Connection with the Consideration of Turkey's Initial Report Concerning the Rights Covered by Articles 1-15 of the International Covenant on Economic, Social and Cultural Rights' (2010) § 12.

opinions (see for example chapter 5.3.3.1). The provision has been criticised for just this by the European Commission against Racism and Intolerance, being deemed as a discriminatory application.[504] The effect is that the only legal provision concerning non-discrimination is used to discriminate, which violates Article 2 and 26 of the ICCPR, and Article 2 of the ICESCR. Several UN bodies have called on Türkiye to implement legislation on non-discrimination.[505]

As mentioned in chapter 4.3.3, the CESCR has lifted that systematic discrimination cannot be combated by formal equality. Positive differentiation is often needed as an affirmative action in order to combat such discrimination. Article 10 of the Turkish Constitution asserts equality before the law, without distinction on any grounds, and that no privilege shall be given to any group. Derya Bakir notes that defining equality to this has serious impacts for minority rights and 'the accommodation of differences' in law and practice.[506] According to the TCC, the principle of equality provides an absolute prohibition, preventing preferential treatment.[507] Differentiation is only allowed if it can be 'reasonably justified' by the TCC, which has not been the case for ethnic, linguistic and other distinctions, compared to gender, health and economic situation, which are seen as reasonable justification for differentiation. According to the TCC, being a recognised minority would not justify differentiation in law due to the principle of equality.[508] The HRC states in its General Comment 18, that preferential treatment is legitimate under the ICCPR if it is necessary in order to correct discrimination, and that differentiation is not considered as a violation of Article 26, if it serves this purpose.[509] Seeing as

[504] European Commission against Racism and Intolerance, 'Third Report on Turkey' (25 June 2004) CRI(2005)5 § 14.

[505] Committe on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Turkey' (12 July 2011) § 9; United Nations Human Rights Council, 'Complation on Turkey' (12 November 2019) § 9; Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Turkey' (11 January 2016) CERD/C/TUR/CO/4-6 § 8.

[506] Derya Bayır, *Minorities and Nationalism in Turkish Law* (Ashgate 2013) 222.

[507] Turkish Constitutional Court (12 January 1989) E.1988/4, K.1989/3.

[508] This statement was said in regards to the recognised non-Muslim minorities set out by the Treaty of Lausanne, see *United Communist Party of Turkey and Others v. Turkey* [GC], 30 January 1998, § 10, Reports of *Judgments and Decisions* 1998-I.

[509] Human Rights Committee, 'General Comment No. 18: Non-discrimination' (10 November 1989) §§ 10 and 13.

preferential treatment does not entail a violation of equality under law in Article 26 of the ICCPR, on the contrary being encouraged, Türkiye's reasoning is non-conforming with the aim of human rights law.

The Committee on Elimination of Racial Discrimination (CERD) has expressed concerns regarding hate speech and discriminatory statements in Turkish public discourse, mainly directed at minority groups, as well as hate crimes targeting individuals on the basis of their ethnicity, including Kurds. Such instances did according to the CERD not always entail an adequate and effective investigation meaning that those responsible were not prosecuted.[510] The prohibition of discrimination in Article 26 of the ICCPR includes a positive obligation to provide effective protection against discrimination. Also, it prohibits discrimination in any field regulated by public authorities. Further, the obligations in Article 26 prohibits discriminatory application of law.[511] Accordingly, Türkiye's ineffective investigation and omission to prosecute those responsible for hate speech and hate crimes constitutes a breach of Article 26 of the ICCPR.

The CERD has furthermore raised concerns that some minority groups do not enjoy social, economic and cultural rights equal to the rest of the population.[512] The Law on Political Parties (see chapter 2.5.2) forbids use of language other than Turkish in political life. Related is also the fact that Kurdish people are not recognised as a minority, as discussed.

## 4.5 Analysis

Reading the UDHR, and then subsequent Conventions, including ECHR which is examined in the following chapter, it is easy to spot similarities to and downright repetition of its content. While it was written in response to the atrocities of the Second World War, the content of the Declaration is still relevant. Change takes time, especially moving from a history of colonialism

[510] Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Turkey' (11 January 2016) § 23.

[511] Human Rights Committee, 'General Comment No. 18: Non-discrimination' (10 November 1989) § 12.

[512] Committee on the Elimination of Racial Discrimination, 'Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Turkey' (11 January 2016) § 31.

which is to some extent still alive, but it is still remarkable that such fundamental values are continuously violated even in present-day.

Democracy and the rule of law continues to stand out with their backsliding. The recent development in Türkiye following the attempted coup and the 2017 referendum stand in clear contrast with the Secretary-General's calls in the New Vision for the Rule of Law. The judges are less independent, and the right to a fair trial is not a reality for Kurdish people. The right to political participation is restricted due to the dismissal, arrest and suspension of nationally elected Members of Parliament and locally elected mayors in South-Eastern Türkiye. Further, the restricted freedom of expression is deeply undemocratic.

Antiterrorism has become an excuse for violating fundamental rights and freedoms. The freedom of expression and opinion is severely restricted by the Anti-Terror Law and other similar legislation. As mentioned, dissenting opinions are punished in the name of antiterrorism. In particular, Kurdish people exercising their freedom of expression, or people voicing pro-Kurdish opinions have been targeted. This relates to not only freedom of expression but also the question concerning discriminatory application, as Kurdish people have been directly targeted by anti-terror legislation. The same can be said regarding the use of force in the South-East during counterterrorist operations. Killings and ill-treatment are occurring without a *de facto* right to remedy, as antiterrorism forces are essentially immune from prosecution. This constitutes both a human right violation in the aspect of the victims' rights, but also a clear derogation from the rule of law. The targets are evidently Kurdish people, which opens up for the thought on whether these instances serve as discriminatory applications.

Regarding the reservations on the Covenants, the conclusions that can be drawn are that the aim of the reservations can be traced to the exclusion of Kurdish people. If Türkiye was confident in the fact that Kurdish people are not a *de facto* minority group, on the basis of objective criteria, surely a reservation indirectly ensuring the non-recognition of them as such would not be

necessary. While Kurdish people are not explicitly mentioned in this context, it is clear that it is them Türkiye seeks to exclude, seeing as Kurdish people make up around 20 percent of the population in Türkiye.

# 5 The European Convention on Human Rights

This chapter examines European Convention on Human Rights, beginning with a brief background on the Convention, followed by presentation of some relevant Articles, as well as a brief presentation on the Framework Convention for the Protection of National Minorities (FCNM). Afterwards follows a presentation and examination of case-law concerning Kurdish people in Türkiye, which mainly deal with complaints on the presented articles. The findings of the chapter lastly culminate in an analysis.

## 5.1 Background to the ECHR

Similar to the foundation of the UN, as a product of World War II and in order to prevent a repetition of a similar occurrence, the Council of Europe was founded in 1949 with the purpose of promoting co-operation between European states.[513] Soon after, the drafting of the ECHR began. During the drafting of the Convention, the UDHR was used as a basis for the Convention, with the difference that the ECHR was to be a legal binding document.[514] The aspiration was to protect a minimum set of rights, which were already part of the member states' domestic laws. Thus, the intention was not to formulate new human rights, but rather to implement an international control mechanism making sure that member states adhered to the existing rights.[515] Also, the UDHR lacked provisions on international supervision, which the Council aspired to implement in the form of supervision by internal European bodies.[516] The purpose was that the countries consequently could be held

[513] Iain Cameron, *An Introduction to the European Convention on Human Rights* (9th edition, Iustus 2023) 39.
[514] Ibid 44.
[515] Ibid.
[516] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 17.

accountable for violations of human rights through a court.[517] ECHR was drafted quickly, and consequently adopted 1950.[518]

The supervision of the Convention is executed by the ECtHR. In the drafting of the ECHR, it was decided that State Parties to the Convention would be able to allege another State Party of a violation of the ECHR.[519] Further, the right of individual complaints was initially made possible by an optional clause.[520] The right to judicial proceeding and compulsory jurisdiction was also originally optional for the State Parties.[521] Türkiye did not recognise individuals' right to complaint until 1987. Further, the compulsory jurisdiction of the ECtHR was not recognised by Türkiye until 1990.[522] Eventually, all State Parties recognised the optional clauses, and ultimately, new Members to the Council of Europe were required to ratify the Conventions as well as the two mentioned clauses.[523]

When the Convention entered into force, applications concerning complaints of violations would be delivered to the European Commission of Human Rights (Commission), which would examine the complaint and issue a decision, with the possibility for the applicant or the Commission to refer the case to the ECtHR for a binding judgement.[524] In 1994, the Commission and ECtHR merged to one Court, and its jurisdiction, as well as the right to individual complaints became compulsory.[525]

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[517] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 3.

[518] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 5 ETS.

[519] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 17.

[520] Article 25 of the ECHR, amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby' (adopted 11 May 1994) 155 CETS.

[521] Article 46 of the ECHR, amended by Protocol No. 11 to the ECHR.

[522] Samuel I. Horowitz, 'The Kurds, Turkey and Strasbourg: Failure to Find and Remedy Discrimination Amid a Century-Old Mountain of Evidence' (2023) 38 Emery International Law Review Recent Developments 1, 6.

[523] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 20.

[524] See Articles 24, 25, 28, 31, 44, 45 and 48 of the ECHR, amended by Protocol No. 11.

[525] Protocol No 11 to the ECHR.

## 5.2 Relevant Articles of the Convention

### 5.2.1 Article 2 – Right to Life

The right to life has been described by the Human Rights Committee as 'the supreme right', as 'one of the most important rights' by the Commission, and as 'one of the rights which constitute the irreducible core of human rights' by the ICJ.[526] Article 2 of the ECHR is thus one of the most important principles of the Convention. Due to this, it must be strictly interpreted.[527] The Court has stated that it must be 'especially vigilant' in cases concerning the right to life.[528] The Article consists of two State obligations: to protect the right to life by law, and the prohibition of intentional deprivation of life, with some exceptions. Furthermore, it contains a procedural obligation to undertake effective investigations regarding alleged breaches of the mentioned obligations.[529] Moreover, the Article is in some circumstances applicable in cases where the person has not died, if the actions of the State has put the applicant's life at serious risk.[530]

#### *5.2.1.1 Protection of Life*

The protection of life entails both a negative obligation by prohibition of unlawful causing of death, and a positive obligation to take measures in order to protect the lives of people within the State's jurisdiction.[531] The positive obligations stems from the requirement of protection by law for the right to life, but is interpreted to include more extensive measures, including policy

[526] Human Rights Committee, 'General Comment No. 6' (1982) HRI/Gen/1/Rev.9 (Vol.1) 176 § 1; *Stewart v. the United Kingdom*, no. 10044/82, § 11, *Decisions and Reports* 1985 Vol. 39; Dissenting Opinion of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 506.

[527] European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life' (last updated 31 August 2022) § 2 <https://www.echr.coe.int/documents/d/echr/Guide_Art_2_ENG#:~:text=%E2%80%9C1.,2> accessed 16 May 2024; see also *McCann and others v. the United Kingdom*, 27 September 1997, § 147, Series A no. 324.

[528] *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 182, ECHR 2011 (extracts).

[529] European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life' (last updated 31 August 2022) § 3.

[530] See for example *Makaratzis v. Greece* [GC], no. 50385/99, § 55, ECHR 2004-XI.

[531] See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 130, ECHR 2014.

measures aimed to fulfil and respect the right to life.[532] However, the protection of life does not extend to an 'absolute level of security in any activity in which the right to life may be at stake', particularly where the individual bears some degree of responsibility in exposing themselves to danger in that situation.[533]

The right to life can in some cases be revoked when the lethal use of force is carried out by non-state actors. This, if the State authorities were, or should have been, aware of a 'real and immediate' risk to the individual's life from acts from a third party and omitted to take reasonable measures to avoid that risk.[534] The Court has emphasised that the obligation of such preventive measures relate to action, and not to the actual result. If the State performs preventive measures but still fails to prevent lethal force, the obligation can be considered as fulfilled.[535] The extend of obligated preventive measure depend on the 'nature and level of risk'. Thus, the Court performs an assessment of the severity of the risk compared to the sufficiency of the State's preventive measures.[536]

#### *5.2.1.2 Prohibition of Intentional Deprivation of Life*

As previously mentioned, the prohibition of intentional deprivation of life includes some exceptions. These are stipulated in Article 2(2) which sets the conditions for permitted deprivation of life as a result of use of force as 'no more than absolutely necessary'. Permitted use of force must be 'strictly proportionate to the achievement of the aims set out' in the exceptions.[537] Article 2(2)(b-c) are largely related to use of force by State agents.[538] in the assessment of the proportionality of the lethal use of force, the Court evaluates the

[532] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 126.

[533] European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life' (last updated 31 August 2022) § 14.

[534] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 127 f.

[535] European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life' (last updated 31 August 2022) § 20.

[536] See *Kurt v. Austria* [GC], no. 62903/15, § 160, 15 June 2021.

[537] *Giuliani and Gaggio v. Italy* § 176.

[538] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 147.

'nature of the offence' committed by the State agent and the threat they posed.[539] Also, the action must be authorised by domestic law with a secured 'system of adequate and effective safeguards against arbitrariness and abuse of force and even against avoidable accident', in order to be permitted.[540] In cases of large anti-terrorist operations, requiring specialised responses, States should have access on solutions suitable for the given circumstances. They are however still restricted to the strict rules of 'absolute necessity' as asserted by Article 2.[541] Although, the assessment of if the action is absolute necessary is applied with other standards, depending on the level of control of the situation among the authorities, and 'other relevant constraints inherent in operative decision-making in this sensitive sphere'.[542]

Forced disappearances may in some cases be considered as a violation of Article 2, if the State fails to provide a 'plausible explanation as to a detainee's fate in the absence of a body'. Depending on the circumstances of the case, especially the existence of adequate evidence based on concrete facts, the conclusion may be that the detainee must be presumed dead while in custody.[543] Relevant to this is the period of time passed since the detention. The more time gone by without news on the detained person's state, the greater probability that they have died. The Court has stated that such situations extends violations of Article 5, and instead constitute violations of Article 2.[544] Disappearance of a person in the scope of Article 2 implores the positive State obligation to take effective measures to protect that person's life.[545] To this respect, omission to act in response to such disappearances may entail a violation of the State's positive obligation, and consequently constitute a breach of Article 2.[546] The level of scrutiny adequate for the investigation depends on the circumstances of the case, where 'particularly stringent scrutiny' must

[539] *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 96, ECHR 2005-VII.
[540] *Makaratzis v. Greece* § 58.
[541] European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life' (last updated 31 August 2022) § 93.
[542] *Tagayeva and Others v. Russia*, nos. 26562/07 and 6 others, § 481, 13 April 2017.
[543] *Timurtaş v. Turkey*, 23531/94, § 82, ECHR 2000-VI.
[544] *Tanış and Others v. Turkey*, no. 65899/01, § 201, ECHR 2005–VIII.
[545] *Koku v. Turkey*, no. 27305/95, § 132, 31 May 2005.
[546] *Gongadze v. Ukraine*, no. 34056/02, § 170, ECHR 2005-XI.

be applied by the State authorities to the investigation when a suspicious death has been caused by a State agent.[547]

#### *5.2.1.3 Procedural Obligations*

Article 2 requires an effective investigation when a person's life has been taken as a result of a State's use of force.[548] The purpose of this obligation is to ensure effective implementation of national law concerning the right to life, and to ensure accountability for State actors responsible for the deaths.[549] Concerning disappearances, the procedural obligation shall continue on as long as the fate of the disappeared person is uncertain, even if death is presumed. Ongoing failure to resume the investigation is deemed as a continuing violation.[550]

### 5.2.2 Article 3 – Prohibition of Torture and Inhuman or Degrading Treatment

#### *5.2.2.1 General Considerations*

Along with Article 2, Article 3 of the ECHR 'enshrines one of the basic values of the democratic societies making up the Council of Europe'.[551] It is a value closely entwined with respect for human dignity.[552] The prohibition of torture is considered as customary international law and has become a *jus cogens* norm.[553] The provision is absolute and cannot be derogated from, in accordance with Article 15 of the ECHR, even in time of emergency or in severe circumstances, such as the battle against terrorism.[554] Moreover, the Article

[547] *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 234, 30 March 2016.
[548] *McCann and Others v. the United Kingdom* § 161.
[549] European Court of Human Rights, 'Guide on Article 2 of the Convention – Right to Life' (last updated 31 August 2022) § 145.
[550] *Varnava and Others v. Turkey* [GC], 16064/90 and 8 others, § 148, ECHR 2009.
[551] *Giuliani and Gaggio v. Italy* § 174.
[552] *Bouyid v. Belgium* [GC], 23380/09, § 81, ECHR 2009.
[553] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Judgement)* [2012] ICJ Rep 422 § 99.
[554] European Court of Human Rights, 'Guide on Article 3 of the Convention – Prohibition of Torture (last updated 31 August 2022) § 2 <https://www.echr.coe.int/documents/d/echr/Guide_Art_3_ENG> accessed 16 May 2024.

entails a procedural obligations for the State, based on the same principles as those presented concerning Article 2 (see chapter 5.2.1.3).

Article 3 has mostly been applied in cases of 'intentionally inflicted acts of State agents of public authorities' and may thus be generally described as a negative obligation on States to not inflict serious harm on people covered by their jurisdiction.[555] However, the Court has stated that State's bear positive obligations consisting of obligations to implement legislative and regulatory frameworks, take operational measures in specific situations to protect persons from risk of torture, and to undertake effective investigations into arguable claims of torture.[556] In order to fall within the scope of Article 3, the ill-treatment must reach a certain level of severity. Its assessment is relative and dependant on all the circumstances of the case, where some included factors are the duration of the treatment and its physical or mental effects.[557] Other considered factors are the purpose of the ill-treatment and its intention or motivation, the context of the ill-treatment, such as heightened tension or emotions, and whether the subject of ill-treatment is in a vulnerable situation.[558]

#### *5.2.2.2 The Two Forms of Ill-Treatment: Torture and Inhuman or Degrading Treatment or Punishment*

Torture and inhuman or degrading treatment or punishment are distinguished from one another, torture being the graver form of ill-treatment. It can be perceived as particularly serious if a State is found responsible for torture.[559] The purpose of the distinction is to attach a certain stigma to 'deliberate inhuman treatment causing very serious and cruel suffering'.[560] This interpretation is supported by Article 1(1) of the UNCAT. Another element distinguishing torture is intentional ill-treatment purposed to 'obtaining information or a

[555] *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 111, ECHR 2012 (extracts).

[556] *X and Others v. Bulgaria* [GC], no. 22457/16, § 178, 2 February 2021.

[557] European Court of Human Rights, 'Guide on Article 3 of the Convention – Prohibition of Torture (last updated 31 August 2022) § 5.

[558] *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 97, 15 December 2016.

[559] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 89.

[560] *Ireland v. the United Kingdom*, 18 January 1978, § 167, Series A no. 25.

confession, inflicting punishment or intimidation'.[561] Professor William Schabas notes that the Court seemed to put the severity of the ill-treatment as the core determinant of torture, but that it in its recent cases most often considers both the severity and the aim.[562]

The Court has found treatment or punishment as inhuman based on that it was 'premeditated, applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering'.[563] Treatment is seen as degrading when it 'humiliates or debases an individual, showing a lack of respect for, or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[564] For a punishment to be considered as humiliating, it must attain a certain level and depends on all the circumstances, particularly on the 'nature and context' of the punishment and on the 'manner and method of its execution'.[565]

### 5.2.3 Article 5 – Right to Liberty and Security

#### *5.2.3.1 Right to Liberty*

The fifth Article of the ECHR determines the right to liberty and security of the person, which is a right designated to protect against arbitrary or unjustified detention.[566] Thus, 'the right to liberty' is related to a person's physical liberty.[567] Under the interpretation of the ECHR, the right to liberty and security is of the highest importance.[568] Although it has some similarities, Article 5 does not cover restrictions on liberty of movement. Instead, it is regulated by Article 2 of Protocol No. 4 of the ECHR. The difference between a

[561] *Selmouni v. France* [GC], no. 25803/94, § 97, ECHR 1999-V.
[562] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 175 ff.
[563] *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV.
[564] European Court of Human Rights, 'Guide on Article 3 of the Convention – Prohibition of Torture (last updated 31 August 2022) § 19.
[565] *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.
[566] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 220.
[567] European Court of Human Rights, 'Guide on Article 5 of the Convention – Right to Liberty and Security' (last updated 31 August 2022) § 1 <https://www.echr.coe.int/documents/d/echr/guide_art_5_eng> accessed 3 May 2024.
[568] *Ladent v. Poland*, no. 11036/03, § 45, 18 March 2008.

restriction on movement and a deprivation of liberty is measured by the degree of intensity of the restriction, not on the nature or substance of the restriction.[569] Detention after arrest or conviction are not the only cases that can constitute a deprivation of liberty; it can take place in several forms.[570]

There are several criteria relevant for the determination of if the Article is applicable. The Court conducts an autonomous assessment of the situation in which a question on a deprivation of liberty has been raised, and does not bind themselves to conclusions made by domestic authorities on the matter. When determining if a deprivation of liberty has taken place, the starting point is the persons concrete situation. Further, other criteria are considered, such as 'the type, duration, effects and manner of implementation of the measure in question'.[571] The purpose of the confinement is not relevant in the evaluation of whether a deprivation of liberty has taken place. It is not considered until after a deprivation of liberty has been determined, when investigating if the deprivation is congruent with the exceptions in Article 5.1(a–f).[572] The deprivation of liberty has an objective and subjective aspect. The objective dimension is that a person is 'confined for a length of time that is not negligible', where factors such as 'the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts' are considered.[573] The subjective factor is that valid consent to such detention has not been given by the detained person.[574]

Unacknowledged deprivation of a person's liberty is seen as a most grave violation of Article 5. Especially in cases where persons are arrested and

[569] *De Tommaso v. Italy* [GC], no. 43395/09, § 80, 23 February 2017.

[570] *Guzzardi v. Italy*, no. 7367/76, § 95, 6 November 1980, Series A no. 39.

[571] European Court of Human Rights, 'Guide on Article 5 of the Convention – Right to Liberty and Security' (last updated 31 August 2022) §§ 4–5; see also *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010.

[572] European Court of Human Rights, 'Guide on Article 5 of the Convention – Right to Liberty and Security' (last updated 31 August 2022) § 9; see also *Rozhkov v. Russia (No. 2)*, no. 38898/04, § 74, 29 May 2017.

[573] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 227; see also *Guzzardi v. Italy* § 95.

[574] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 227.

detained, to disappear afterwards without the grounds for disappearance being disclosed.[575] A record with information such as the 'date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it' is obligatory for fulfilling the purpose of Article 5, and for fulfilling its requirement of lawfulness.[576] A deprivation of liberty is lawful if it falls under the exceptions in Article 5.1(a–f). Furthermore, it must be 'in accordance with a procedure prescribed by law'. Mainly, this refers to national law, although it can also imply other applicable law such as international law or European law.[577] Further, the law must meet a standard 'quality of the law' in which law that regulates deprivation of liberty must be 'sufficiently accessible, precise and foreseeable in its application. Legal provisions for order of, extension of, and time-limits of detention, as well as the possibility for effective remedy for breaches of the law, are factors assessed when examining the 'quality of the law'.[578]

Furthermore, those lawfully deprived of their liberty are entitled to some procedural safeguards, defined in paragraphs 2–5 of Article 5. Those consist of rights such as the right to knowledge of reasons for the detention, in Article 5(2), if suspicion of a crime, the right to be brought promptly before a judge to be charged or released within a reasonable time, in Article 5(3), the right for those deprived of their liberty to proceedings trying the lawfulness of the detention, in Article 5(4), and the right to compensation in case of violations of Article 5 of ECHR, in Article 5(5).

#### *5.2.3.2 Right to Security of Person*

In case law, the predominant focus lies on the term 'liberty' in Article 5, where no essential definition has been given to 'security of person'.[579] To the equivalent Article 9 of the ICCPR, it has been commented that the right to

[575] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 129.

[576] European Court of Human Rights, 'Guide on Article 5 of the Convention – Right to Liberty and Security' (last updated 31 August 2022) § 24.

[577] European Court of Human Rights, 'Guide on Article 5 of the Convention – Right to Liberty and Security' (last updated 31 August 2022) § 29.

[578] *J.N. v. the United Kingdom*, no. 37289/12, § 77, 19 May 2016.

[579] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 228.

security primarily constitutes State obligations to positive measure in order to protect the physical integrity of its citizen.[580] Furthermore, it was determined by the Human Rights Committee in the decision of *Delgado Páez v. Colombia* that the right to security is not only limited to situations with a formal deprivation of liberty by an authority. States cannot omit taking measures just because a person is not detained.[581] Hence, an independent meaning of 'security of person' was given, as well as the right being defined having horizontal effects. This definition has since been applied in a series of cases handling death threats, assassination attempts, harassment and intimidation.[582]

In praxis from the ECtHR, detention induced by private actors have been addressed, for instance in cases on human trafficking, as involving deprivation of liberty. The Court however applied this in regards to the right to liberty instead of covering this under 'security of person' as the Human Rights Committee's did in their description of the mirroring Article 9 of the ICCPR.[583] The positive obligations given to authorities to prevent private confinements, are albeit the same as to the UN's interpretation of the right to security of person, only instead still expressing it as a right to liberty.[584]

### 5.2.4 Article 6 – Right to a Fair Trial

The right to a fair trial is one of the most central Articles in the ECHR, both in itself, but also in relation to the assertion of the other rights regulated in the Convention.[585] It is impossible to ensure the 'rule of law', presented in the Preamble of ECHR as a central component in a democratic society, without the right to a fair trial.[586] Article 6 contains three paragraphs, with the first setting the general principles of a fair trial, the second ensuring the

[580] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd, rev. ed edn, Engel 2005) 214.

[581] Human Rights Committee, 'Delgado Páez v. Colombia' (adopted 12 July 1990) Communication No. 195/1985 CCPR/C/39/D/195/1985 IHRL 1701 § 5.5.

[582] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd, rev. ed edn, Engel 2005) 215.

[583] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 229.

[584] Ibid.

[585] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 265.

[586] Ibid; see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 67, ECHR 1999-1.

presumption of innocence, and the third providing minimum guarantees of a trial. No other Article of the Convention has been appealed, interpreted and implemented as much in the ECtHR as Article 6.[587] As the case-law presented in this chapter involve criminal procedures, this section will centre around the right to a fair criminal trial. Further, the Article covers many aspects of a trial, but the focus in this section lies on the areas covered by the presented case-law.

While Article 6 in the Convention contains procedural rights, aimed to guarantee the right to a fair trial, the Article does not seek to construct new material rights. In order for an appeal to fall under Article 6, it must include a claim on something that is, or could arguably be, a right according to domestic law.[588] Thus, the 'rights and obligations' in Article 6 are interpreted by the Court with reference to domestic law.[589] The term 'rights and obligations' in Article 6 shall however, in the same manner as other principles of the ECHR, be autonomously interpreted.[590]

Article 6 is applicable for all criminal proceedings. However, specific circumstances may be taken into consideration, such as the stake of the public interest in the particular offence.[591] For example, Article 6 should not be enforced in a way that disproportionately hinders police authorities from taking effective measures against terrorism or serious crimes, as this is essential for fulfilling their duty under Articles 2, 3, and 5 § 1 of the Convention to protect the right to life and security of the public. This can however not justify measures extinguishing an applicant's defence rights.[592] Furthermore, the

[587] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 181.

[588] Ibid 190.

[589] *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A.

[590] *Grzęda v. Poland* [GC], no. 43572/18, § 287, 15 March 2022.

[591] European Court of Human Rights, 'Guide to Article 6 – Right to a Fair Trial (Criminal Limb)' (last updated 29 February 2024) § 4 <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_criminal_eng> accessed 5 March 2024.

[592] *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 252, 13 September 2016.

Article is applicable during the entirety of the criminal proceedings, from the pre-trial stage to the sentencing.[593]

According to Article 6(1), all persons are entitled to a trial judged by an independent and impartial tribunal. This is fundamental to upholding the rule of law and, related to this, the separation of powers.[594] In order to conform with Article 6(1), the tribunal must be independent from the other branches of power, the executive and legislature, and from political parties.[595] The criteria for assessing independence include consideration on the manner of appointment of members, the existence of guarantees against outside pressures, and whether the body presents an appearance of independence.[596] A situation where independence can be questioned is trials where a civilian is judged by a court partially composed of members of the armed forces. The Court has maintained that this can invoke a legitimate fear that the court might be unjustifiably influenced by biased perspectives.[597]

Although Article 6(1) does not include rules on the admissibility of evidence, the Court does examine if the proceedings as a whole, including the methods to obtain evidence, were fair.[598] One example of an action which may constitute a violation of the right to a fair trial is police statements which have been obtained under a state of duress, by using coercive or oppressive measures.[599]

### 5.2.5 Article 10 – Freedom of Expression

#### *5.2.5.1 Freedom of Expression*

Freedom of expression is a cornerstone of a democratic society, representing a fundamental criterion for its advancement and the development of all people. Its scope extends beyond information and ideas that are well-received,

[593] European Court of Human Rights, 'Guide to Article 6 – Right to a Fair Trial (Criminal Limb)' (last updated 29 February 2024) §§ 52-53.
[594] *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, § 233, 1 December 2020.
[595] *Ninn-Hansen v. Denmark (dec.)*, no. 28972/95, ECHR 1999-V.
[596] *Findlay v. the United Kingdom*, 25 February 1997, § 73, *Reports of Judgments and Decisions* 1997-I.
[597] *Iprahim Ülger v. Turkey*, no. 57250/00, § 26, 29 July 2004.
[598] European Court of Human Rights, 'Guide to Article 6 – Right to a Fair Trial (Criminal Limb)' (last updated 29 February 2024) §§ 231-232.
[599] Ibid § 241.

deemed inoffensive, or considered as a matter of indifference. It also encompasses expressions that may 'offend, shock or disturb the State or any sector of the population'. These principles underscore the importance of pluralism, tolerance and broadmindedness 'without which there is no democratic society'.[600] From this follows that restriction of freedom of expression must be construed strictly and be based on legitimate reasons, in order to be deemed as compliant with the convention.[601] The Article is applicable to numerous forms of ideas and expressions, even artistic creation, particularly those of a political nature.[602] The dissemination of the expression is also protected by the Article, regardless of the extent of its spread. A song performed to a small gathering of people is protected on the same basis as a political speech seen by a whole nation on television.[603] Thus, Article 10 also protects the right to partake in cultural life (see chapter 4.3.3).

The extend of the freedom of expression is larger regarding criticism of Government that that of an individual, as a principle of democracy is that Government action is scrutinised by the public, as well as the legislative and judicial components of the State.[604] Freedom of expression is also particularly important for political parties and their members. Thus, interference with the freedom of expression calls for 'the closest scrutiny' from the Court in cases concerning politicians.[605] Furthermore, freedom of the press is an essential component of the freedom of expression and is thus especially protected by Article 10.[606] This, as press and other mass media are pivotal to the democratic society that the Convention seeks to uphold. Therefore, interventions

[600] *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24.

[601] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 555.

[602] *Ulusoy and Others v. Turkey*, no 54969/09, 25 June 2019.

[603] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 555.

[604] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 452.

[605] *United Communist Party of Turkey and Others v. Turkey*, § 46.

[606] European Court of Human Rights, 'Guide on Article 10 – Freedom of Expression' (last updated 31 August 2022) §§ 298-299 <https://rm.coe.int/guide-on-article-10-freedom-of-expression-eng/native/1680ad61d6> accessed 5 May 2024.

against journalists are often viewed as particularly severe, as they can result in a deterrent effect on other journalists.[607]

Freedom of expression first and foremost means that the State shall not interfere with or punish spreading of information and ideas. Thus, it is a negative obligation, an obligation not to act, that is imposed on the State. Censure of press or books is generally considered as a breach of Article 10.[608]

#### *5.2.5.2 Assessment of alleged violations*

The right to freedom of expression in Article 10 of the ECHR is not absolute and can thus be restricted. This, however, does not mean that the member states can limit the right at their discretion.[609] Thus, the Court has established a 'step-by-step' assessment, used to examine the permissibility of an interference with the freedom of expression.

In the first step, the Court examines if an interference with the freedom of expression has taken place, and if so, the forms of it. This is done by a case-by-case examination of the situation, where the Court does an assessment autonomous from the conclusion from the domestic courts.[610]

After ascertaining that an interference has taken place, the Court does an analysis based on the criteria in Article 10(2). This examination consists of three steps. It has to:

a) Be prescribed by law,

b) Have a legitimate aim, and

c) Be necessary in a democratic society

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[607] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 458.

[608] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 556.

[609] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 558.

[610] European Court of Human Rights, 'Guide on Article 10 – Freedom of Expression' (last updated 31 August 2022) §§ 54-58.

It is common for Parties of the Convention to claim their actions as prescribed by law. Though, the European Court of Human Rights demands clarity in said law. It must be formulated in a reasonably foreseeable way. One should be able to foresee, or at least suspect, that a certain act is prohibited. The level of clarity is however not very strict.[611]

As for legitimate aim, the purposes listed as exceptions to the right to freedom set in Article 10(2) are analysed, including aims such as interests of national security, territorial integrity and crime prevention. These are general and broad in content. When infringing the freedom of expression, it is generally not difficult to claim that the constraint was made in light of one of the purposes in the Article.[612]

The crucial factor in of the assessment is often whether a breach of Article 10 has occurred often centres on whether the State intervention could be deemed 'necessary in a democratic society'. In these matters, the Court implement a *principal of proportionality*. On one side, the interest of the individual's freedom of expression is considered, and on the other side, the interest of the society or the reason for the intervention. If the intervention is regarded as reasonable as a result of the consideration, the principal of proportionality is deemed as fulfilled.[613]

### 5.2.6 Article 11 – Freedom of Assembly and Association

The freedom of assembly and association is closely related to the political right concerning partaking and organisation.[614] It, like with the freedom of expression, is a pillar of the democratic society and should therefore not be interpreted restrictively.[615] The case-law examined in this chapter is related

[611] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 562.

[612] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 471.

[613] Hans Danelius, *Mänskliga rättigheter i europeisk praxis: en kommentar till Europakonventionen om de mänskliga rättigheterna* (6th edition, Norstedts Juridik 2023) 563, *Ahmet Yıldırım v. Turkey,* no. 3111/10, §§ 48–54, ECHR 2012.

[614] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 484.

[615] *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 91, ECHR 2015.

to freedom of association rather than freedom of assembly. Hence, only freedom of association is explained in this section.

The freedom of association applies to organisations such as political parties, concerning which the Court has referred to their central role in securing democracy and pluralism.[616] The fact that the Government considers the organisation to threaten the State's constitutional structures is not a valid ground for restricting their freedom of association.[617] Article 11 protects associations whose views 'offends, shock or disturb' society or the State.[618] However, the Article does not hinder States from taking measures for ensuring that an association does not implement policy aims in breach of the ECHR and contrary to democratic values.[619] Even if Article 11 only mentions trade unions in the right to formation of associations, the Court has maintained that the right to form associations is integral to the freedom of association.[620] Further, a State's refusal to grant legal entity to an association constitutes an interference with the freedom of association.[621]

The freedom of association is not absolute and can thus be subjected to restrictions according to Article 11(2). The Court's assessment consists of the same examinations as for Article 10 (see chapter 5.2.5), evaluating the interference's lawfulness, legitimate aim and if it is necessary in a democratic society.[622]

### 5.2.7 Article 14 – Prohibition of Discrimination

Article 14 of the ECHR contains a prohibition of discrimination. The Article states that:

[616] *United Communist Party of Turkey and Others v. Turkey*.
[617] *United Communist Party of Turkey and Others v. Turkey* § 27.
[618] *Redfearn v. the United Kingdom*, no. 47335/06, § 56, 6 November 2012.
[619] *Zehra Foundation and Others v. Turkey*, no. 51595/07, §§ 55-56, 10 July 2018.
[620] *Sidiropoulos and Others v. Greece*, 10 July 1998, § 40, Reports of Judgments and Decisions 1998-IV.
[621] *Koretskyy and Others v. Ukraine*, no. 40269/02, § 39, 3 April 2008.
[622] European Court of Human Rights, 'Guide on Article 11 – Freedom of Assembly and Association' (last updated 29 February 2024) §§ 148-174 <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_11_eng> accessed 8 May 2024.

> The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any grounds such as sex, colour, race, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or any other status.[623]

The ECtHR has determined that Article 14 is generally not applicable in itself, but in conjunction with other provisions of the Convention and its additional Protocols.[624] Hence, Article 14 does not convey prohibition of discrimination as such, but rather discrimination regarding the rights and freedoms given by the ECHR.[625] However, Article 14 can be applicable even when the substantive right in the connected Article is not deemed as violated.[626] Protocol 12 to the ECHR is in essential a supplement to Article 14. Its purpose is to further ensure equality, stating that the rights in the ECHR and its additional Protocols shall be provided without discrimination on the grounds set forth in Article 14, as well as prohibiting discrimination based on association with a national minority.[627] The Protocol is signed, but not ratified by Türkiye.[628]

ECtHR has been subject of criticism regarding its application of Article 14 for deciding on cases based on other Articles of the ECHR instead of Article 14, even if discrimination is central to the case.[629] Its scope of application is narrower than the prohibition of discrimination in ICCPR.[630] The fact that Article 14 is not applicable alone limits its potential use for human rights

[623] Article 14 of the ECHR.

[624] European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (updated 31 August 2022) § 2 <https://www.echr.coe.int/documents/d/echr/Guide_Art_14_Art_1_Protocol_12_ENG> accessed 10 May 2024; see also for example *Molla Sali v. Greece* [GC], no. 20452/14, § 47, 19 December 2018.

[625] European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (updated 31 August 2022) § 2.

[626] Ibid § 6.

[627] Protocol No. 12 to the ECHR.

[628] Treaty Office of the Council of Europe, 'Chart Signatures and Ratifications of Treaty 177' <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177> accessed 10 May 2024.

[629] Rez Gardi, 'From Suppression to Secession: Kurds, Human Rights and the Right to Self-Determination in Turkey' (2017) 24 ILSA Journal of International & Comparative Law 61, 80.

[630] Cf. Articles 2 and 26 of the ICCPR

violations, which could be used to combat systematic oppression.[631] In a dissenting judgement by ECtHR's judge Bonello in the case of *Anguelova v. Bulgaria*, criticism to this is explicitly expressed in regards to Kurdish people:

> Kurds […] and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence.[632]

William Schabas notes that the Court appears to require 'proof beyond a reasonable doubt' in order to assert discriminatory, specifically racist, motivation, making it 'extraordinarily difficult' to determine a violation of Article 14 in practice.[633]

### 5.2.8 The Framework Convention for the Protection of National Minorities

In February 1995, the Council of Europe opened the Framework Convention for the Protection of National Minorities (FCNM) for signature. This Convention is, similarly to the ECHR, open for member states of the Council of Europe, but also for other, non-member states, to sign under and implement.[634] It is the first legally binding multilateral instrument adhered to the protection of national minorities.[635]

The purpose of the Framework Convention is, as the name suggests, to protect the national minorities of Europe and the rights of persons of such minorities, as it is in accordance with European ideals. The Preamble explains that it is of utmost importance for a pluralistic and democratic society, to 'not only

[631] Rez Gardi, 'From Suppression to Secession: Kurds, Human Rights and the Right to Self-Determination in Turkey' (2017) 24 ILSA Journal of International & Comparative Law 61, 80.

[632] See the Partly Dissenting Opinion of Judge Bonello in *Anguelova v. Bulgaria*, no. 38361/97, § 3, ECHR 2002-IV.

[633] William Schabas, *The European Convention on Human Rights: A Commentary* (First edition, Oxford University Press 2015) 159.

[634] The Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report (1995) H (95) 10.

[635] Ibid 12.

respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity'.[636] Furthermore, it is stated in the preamble that cultural diversity should be treasured and sought-after, and that tolerance and dialogue is a necessary step towards it. The effective protection of national minorities according to the convention is, albeit, exert within the rule of law, with respect to territorial integrity and national sovereignty of the treaty states.[637]

The Articles of the Framework Convention cover fundamental rights, such as ensuring non-discriminatory treatment, for instance equality before the law and equal protection under the law, and protecting the freedom of expression, for persons belonging to national minorities.[638] The FCNM also acts as a safeguard for the right to cultural expression through for example religion, language and traditions specific to the national minority. It also forbids actions aimed to forcefully assimilate people of national minorities.[639] It shall be noted, however, that the existence of differences in language, culture and religions does not automatically lead to the creation of a national minority.[640]

Of all Member states of the Council of Europe, only four members have yet to sign and ratify the FCNM: Andorra, France, Monaco and *Türkiye*. There are also four Signatory states who have not ratified it: Belgium, Greece, Iceland and Luxembourg, three of them being Members of the EU.[641]

## 5.3 Case-law concerning Kurdish people in Türkiye

### 5.3.1 The Court on State Violence against Kurdish People as a Systematic Problem

[636] Preamble to the FCNM.
[637] Preamble to the FCNM.
[638] See for example Articles 4 and 9 in the FCNM.
[639] See for example Article 5 in the FCNM.
[640] The Council of Europe, 'Framework Convention for the Protection of National Minorities and Explanatory Report' (1995) 16.
[641] Treaty Office of the Council of Europe, 'State Parties to the Framework Convention for the Protection of National Minorities' https://www.coe.int/en/web/minorities/etats-partie accessed 10 April 2024.

Even though Kurdish people have repeatedly insisted in their cases on the existence of an administrative practice of violence against Kurdish people, the Court has for a long time been apprehensive in addressing such an issue.[642] This, even as other international organisations made statements on the matter, such as the CAT, who stated that 'the existence of systematic torture in Turkey cannot be ignored' in a report from 1993.[643] Even the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), another strand of the Council of Europe addressed the systematic ill-treatment of Kurdish people in Türkiye, stating that it would be misleading to disregard it as an 'unfortunate consequence' of terrorist actions in Türkiye during the 90s.[644] Yet, the Court was slow to address an administrative pattern, even when finding recurring violations of rights set by the ECHR. In the case of *Aydın v. Turkey*, the applicant was a Kurdish girl who had been blindfolded and detained by the Security forces, during which she was submitted to beatings, high-pressure sprayings of cold water, spun around in a car tyre, and raped.[645] the Court judged that a violation of Articles 3 and 13 had occurred, and addressed statements of the CPT, but found the observations of the report as insufficient to lead do the conclusion of administrative practice.[646]

Another judgement by the ECtHR, also serving as an example of the restrictive application of Article 14, was the case of *Kurt v. Turkey*, as described below (see chapter 5.3.2.2). The applicant raised that forced disappearances in Türkiye mainly affected Kurdish people, and referred to a report from UN's Working group on Enforced or Involuntary Disappearances, which showed that Türkiye was the country with most enforced disappearances in the world,

[642] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 249.

[643] United Nations General Assembly, 'Report of the Committee against Torture: Addendum, Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey' (14 November 1993) A/48/44/Add.1 § 38.

[644] Council of Europe, 'Report to The Turkish Government on the Visit to Turkey Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 16 to 28 October 1994' (11 January 2007) CPT/Inf (2007) 7 § 36.

[645] *Aydın v. Turkey* [GC], 25 September 1997, §§ 13, 18 and 20, *Reports of Judgements and Decisions* 1997-VI.

[646] *Aydın v. Turkey* §§ 87, 113, 121-124.

and that a majority of the disappeared were Kurdish people.[647] The Court still found that no evidence proved that her son's disappearance was deliberate and on the basis of his ethnic origin, and that there had therefore not been a violation of Article 14.[648]

By a few years later, the ECtHR found a so called 'victim profile' concerning Kurdish people, but still neglected to recognise an administrative practice of violence.[649] This can be exemplified by the case of *Akkoç v. Turkey*, concerning a teacher and former head of a regional branch of a union, as well as her husband. The applicant's husband, who was Kurdish, a teacher and a member of the same union, was shot dead on his way to work. No autopsy was carried out and the Security forces arriving at the scene made no attempt to find the perpetrator. Prior to the killing, the applicant had received numerous death threats over the telephone. She was detained in February 1994, where Security forced told her that they were responsible for her husband's death. The Public prosecutor issued an indictment against a student for the killing, who was released two years later due to lack of evidence.[650] The Court noted, concerning the death of the applicant's husband, the significant number of killings including prominent Kurdish persons, and stated that the applicant's husband, being Kurdish and involved in 'activities perceived by the authorities as unlawful and in opposition to their policies in the South-East' was at particular real and immediate risk of becoming the victim of an unlawful attack. Due to the lack of protection during the existence of such a threat, and to the Public prosecutor's omission to investigate the crime in general, and to question the Security forces after claims of their involvement in particular, the Court found that there had been a violation of Article 2 of the ECHR.[651]

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[647] United Nation Office of the Commission of Human Rights, 'Report of the Working Group on Enforced or Involuntary Disappearances' (30 December 1994) E/CN.4/1995/36 §§ 395 and 402.

[648] *Kurt v. Turkey*, 25 May 1998, §§ 143-147, *Reports of Judgements and Decisions* 1998-III.

[649] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 251.

[650] *Akkoç v. Turkey* §§ 17-21.

[651] *Akkoç v. Turkey* §§ 81-99.

One of the strongest addresses made by the Court in regards to systematic violence against Kurds was the case of *Seyfettin Acar and others v. Turkey*, judged in 2009, where a group of villagers from the Kurdish village of Çalpınar were killed by village guards when refusing to become village guards themselves. According to the Security forces, the PKK was responsible for the shooting leading to the killings.[652] The Court stated in their assessment that it was noteworthy that the Government, who had detained the village guards and sentenced some of them for murder, had considered the fact that the village guards lacked professional training. The Court's opinion on the matter were further strengthened by information from the Ministry of the Interior, stating that 4 938 village guards had committed crimes in the past 18 years prior to the proceedings before the ECtHR, 1 215 being against the person.[653] This judgement is significant due to two reasons. Firstly, the Court found a violation of Article 2, even as the village guards had already been charged, and in most cases, sentenced for the murders.[654] The violation consisted of the existing system in which civilians were heavily armed and used to counter terrorism. Secondly, the Court expresses awareness of that security forces used village guards as pawns to commit crimes, which is a recognition of systematic abuse, instead of regarding it as an isolated occurrence.[655]

### 5.3.2 Forced Disappearances

There are a number of cases judged by the ECtHR in which the applicants, of Kurdish origin, stand in behalf of their children who have disappeared in circumstances related to Turkish security forces. After Türkiye recognised the right of individual application to the ECtHR, a new category of cases reached the Court, namely cases dealing with an individual's disappearance after last being seen in State custody.[656]

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[652] *Seyfettin Acar and others v. Turkey*, no. 30742/03, §§ 6-11, 6 October 2009.

[653] Ibid §§ 28 and 34.

[654] Ibid § 38.

[655] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 254.

[656] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 254.

In the case of *Kurt v. Turkey*, the applicant stood before the Court in behalf of herself and her son Üzeyir Kurt, who had disappeared.[657] Between 23 and 25 November 1993, security forces carried out an operation in the Kurdish village in South-Eastern Türkiye. After being told of the applicant's son's whereabouts, soldiers took him into their custody. The day after, the applicant saw her son for the last time, surrounded by soldiers, looking beaten in the face. No evidence existed on his whereabouts afterwards.[658] Soon after, the applicant applied to the Public prosecutor to find her son, and received an answer from the Captain in charge of the operation that her son had been kidnapped by the PKK. Later, it was noted that Üzeyir Kurt had not been taken into custody. The applicant enlisted the help of the Diyarbakir Human Rights Association, and produced a statement regarding the disappearance. In 21 March 1994, the Public prosecutor issued a non-jurisdiction decision on the grounds that PKK were responsible for Mr. Kurt's disappearance.[659] After the applications and an application to the Commission, State authorities pressured her to withdraw the application concerning her son. Following this, she withdrew the applications, stating that they had been written by the PKK and were used for propaganda.[660] Türkiye denied involvement in the disappearance of the applicant's son, repeating that he was kidnapped by the PKK, and added that he otherwise left to join them. The State further denied that the applicant had been subjected to pressure as to not make complaints against the State, stating that she had been manipulated by the Diyarbakir Human Rights Association and her lawyer for propaganda purposes.[661] After assessing the evidence provided by the applicant and the Government, the Commission accepted the applicant's recounts of the events as the facts.[662] This was also accepted by the Court.[663]

In the case, the applicant maintained that the disappearance of her son was life-threatening and that there had been a breach of Article 2, referring to

[657] *Kurt v.* Turkey § 8.
[658] Ibid §§ 14-15.
[659] Ibid §§ 16-18.
[660] Ibid §§ 19-25.
[661] Ibid §§ 26-36.
[662] Ibid §§ 47-53.
[663] Ibid §§ 94-99.

documented high incidences of torture, deaths and disappearances in South-East Türkiye, and to case-law of the Court stating that if an individual has been taken into custody and found injured when released, the State is obligated to give plausible explanation for said injury[664], as to be interpreted *mutatis mutandis*. She also referred to case-law determining that the failure of the State to conduct a 'prompt, thorough and effective investigation' after a disappearance constitutes for a violation of Article 2.[665] The Court found that no concrete evidence proved that the applicant's son had been killed by the Security forces and that there thus was not a breach of Article 2. This was also said regarding Article 3, where no concrete evidence showed that her son had been tortured by the Security forces.[666]

The Court stated, in their assessment of a violation of Article 5, that Mr. Kurt was detained by Security forces and village guards in 25 November 1993, which was not registered. Further, there existed no trace of his following whereabouts. The Court found that as a most serious breach as it allowed those responsible for the deprivation of liberty to hide their participation in a crime, to evade detection, and to avoid being held accountable for the detainee's fate. The absence of details on the detention was considered incompatible with the purpose of Article 5. Further, the Court stated that the Public prosecutor should have commenced an effective investigation after the applicant's insistence of the detention of her son instead of accepting the military's assertion on that Mr. Kurt was not in custody, as well as the explanation regarding a kidnapping by the PKK, which the Court found to be without evidence. There was also no evidence to the other claim of Türkiye, concerning that he had left to join the PKK. In conclusion, the Court found that Türkiye provided no 'credible and substantiated' explanation as to Mr. Kurt's whereabouts after being detained in the village, and that no subsequent investigation was initiated after his disappearance, and accordingly found that there had been a 'particularly grave violation' of Article 5.[667]

[664] See *Tomasi v. France*, 27 August 1992, § 115, Series A no. 241-A.
[665] See *McCann and others v. the United Kingdom* § 213.
[666] *Kurt v. Turkey* §§ 108 and 116.
[667] Ibid §§ 125-129.

In the case of *Çakıcı v. Turkey*, the applicant stood on behalf of his brother who had disappeared in similar manners as in the case of *Kurt v. Turkey*.[668] He was from the Kurdish-populated village of Çilitbahçe, which was subject of an operation by Security forces. The difference was that his detaining was witnessed by several people, and that his death was a fact, even if the State explained it as a result of a clash between the PKK and the Security forces. This was disregarded by the Commission and the Court, as no proof could be provided by the State.[669] The Court, in their assessment, stated that the right to life in Article 2 extends to the prohibition of intentional killing as a result of a State authority's use of force, as well as positive obligations on the State to protect the right to life by law, which requires effective official investigation after death by use of force. The applicant's brother was presumed dead subsequent to an unacknowledged detention by the Security forces, and no explanation was provided by the State as to the events following his detention or concerning justifications for the lethal use of force by the State agents. Also, the lack of an effective investigation after the applicant's brother's disappearance and the alleged discovery of his body meant a failure to protect his right to life. Thus, the Court found that there had been a violation of Article 2 of the ECHR.[670]

As for the systematic nature of cases concerning forced disappearance, the Court stated in the case of *Osmanoğlu v. Turkey* that 'the manner of his abduction shows many similarities with the disappearance of persons prior to their being killed in South-East Turkey at around the relevant time which have been examined by the Court'. The Court stated that disappearances of persons in South-East Türkiye between 1992 and 1996 could be considered life-threatening.[671] It has been emphasised that this particularly applied to cases where the disappeared person was suspected by the State of involvement with the PKK.[672]

[668] *Çakıcı v. Turkey* [GC], no. 23657/94, § 8, ECHR 1999-IV.
[669] Ibid §§ 45-47 and 52.
[670] Ibid §§ 85-87.
[671] *Osmanoğlu v. Turkey*, no. 48804/99, § 57-58, 24 January 2008.
[672] *Enzile Özdemir v. Turkey*, no. 54169/00, § 45, 8 January 2008.

### 5.3.3 Cases revolving Political Participation

#### *5.3.3.1 Dissolution of Political Parties*

As previously mentioned (see chapter 2), there has been a history of dissolutions of pro-Kurdish political parties. Case-law concerning the matter is especially relevant due to the ongoing closure case against HDP. As will be shown, the most evident common foundation between the dissolutions apart from them all being pro-Kurdish, is the grounds for dissolution, being 'encouragement of separatism and the division of the Turkish nation'. Many of the shut-down parties had not yet engaged in any activities before being dissolved by the State, being dissolved very shortly after their foundation.[673]

In the case of *United Communist Party of Turkey and Others v. Turkey*, the United Communist Party was portioned to be dissolved only 10 days after its establishment.[674] The stated reasons for the eventual dissolvement was the inclusion of the word 'communist' as prohibited by Article 96(2) of the LPP, and encouragement of separatism, prohibited according to Article 78 of the Law on Political Parties. This referred to the Party's Constitution and programme, which referred to the existence of a Kurdish nation. The Turkish Constitutional Court further declared that the party programme with its statements on Kurdish people intended to create minorities, which was prohibited according to Article 81 of the same law.[675] The Court noted that, even though the programme referred to Kurdish people, nation and citizens, it did not describe them as a minority, or make any claim for them to given special rights or to separate from the rest of the Turkish population. Further, the Court underlined the principal importance of the possibility to resolve a country's problems by dialogue in a democratic society. Thus, the dissolvement could not be justified by the fact that it discussed the situation of a part of the

[673] Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020) 111.
[674] *United Communist Party of Turkey and Others v. Turkey*, §§ 8-9.
[675] *United Communist Party of Turkey and Others v. Turkey* § 10.

population of Türkiye, and to partake in the political life of the State. Accordingly, a violation of Article 11 was found.[676]

The grounds for dissolution in the case of *Socialist Party and Others v. Turkey* are similar as the previous case, except from the problems with the name of the Party, but not entirely the same. The Socialist Party was founded in 1988, and dissolved 1992. The justification for the dissolution was that the Party referred to the Kurdish nation and the Turkish nation, which encouraged separatism and the creation of a minority. Further, it 'incited a socially integrated community to fight for the creation of an independent federated State', as prohibited by Article 80 of the Law on Political Parties. The Turkish Constitutional Court also viewed it as incompatible with the 'most fundamental principle' of Türkiye – the nationalism of Atatürk, which is said by Article 2 of the Turkish Constitution.[677] The Court found that a Party advocating for federalism, adhering to democratic principles, and ensuring equal representation for both Turks and Kurds, while acknowledging the Kurds' right to self-determination, was not inherently undemocratic, despite being deemed incompatible with the foundational principles of the Turkish State.[678]

The case of *Yazar and Others v. Turkey* concerned the dissolution of HEP. The Party was founded in 1990 and disolved in 1993 on the grounds of undermining of the 'territorial integrity of the State' and the 'unity of the nation'. The Turkish Constitutional Court stated that HEP sought to divide Türkiye in two 'with the aim of setting up separate States' with one of them being Kurdish, and that HEP sought to 'destroy national and territorial integrity'.[679] The Court noted that the principles advocated by HEP, including the right to self-determination and language rights, were not inherently incompatible with the fundamental principles of democracy. It cautioned against equating support for these principles with endorsement of terrorism, warning that such an approach would hinder democratic discourse and allow armed movements to

[676] *United Communist Party of Turkey and Others v. Turkey* §§ 56-61.

[677] *Socialist Party and Others v. Turkey* [GC], 25 May 1998, §§ 8 and 15, *Reports of Judgements and Decisions* 1998-III.

[678] Ibid § 47.

[679] *Yazar and Others v. Turkey*, nos. 22723/93 and 2 others, §§ 10, 16 and 22-24, ECHR 2002-II.

monopolise support for legitimate principles. Moreover, the Court emphasised the importance of allowing political groups to introduce proposals rooted in these principles into public debate, even if they conflicted with Government policies or public opinion. It concluded that the Turkish Constitutional Court had failed to prove that HEP's policies aimed to undermine Türkiye's democratic system.[680]

#### *5.3.3.2 The Case of Selahattin Demirtaş v. Turkey (No.2)*

As a result of the actions taken in post-coup Türkiye, many cases have been submitted to the ECtHR, in which most include complaints based on long periods of detention in the wait of a trial. Tens of thousands of people have been detained on coup charges, where Türkiye has enforced long detentions, often without filing indictments.[681] There has also been a rise in complaints concerning restrictions on the freedom of expression.

The most known instance of this is the case of *Selahattin Demirtaş v. Turkey (No. 2)*.[682] He was not only detained for charges related to the events of the coup, as will be shown, but the events of the coup was related with his eventual detention. The circumstances around his detention have been presented in chapter 2.7.2. He was detained for suspicion of terrorist crimes following a series of statements made by him between 2011 and 2016. The deprivation of liberty was by the Magistrate's Court justified with reference to the nature of the suspected crimes in accordance with Article 103(3) of the Criminal Procedure Code (CCP), the factual evidence being sufficient for a strong suspicion in accordance with Article 100 of the CCP, and that the deprivation has been done within the scope of Article 5 of the ECHR and Article 19 of the Constitution.[683] After an objection on the detention, from the applicant,

[680] *Yazar and Others v. Turkey* §§ 57-60.

[681] Ercan Balgiouglu, 'Human Rights in Turkey: Past, Present and Future' in Hasan Aydın and Winston Langley (eds), *Human Rights in Turkey: Assaults on Human Dignity* (Springer 2021) 41.

[682] *Selahattin Demirtaş v. Turkey (No. 2)*.

[683] *Selahattin Demirtaş v. Turkey (No. 2)* § 74.

the 1st Magistrate's Court stated in its dismissal that Demirtaş was only detained for terrorist Membership.[684]

In 2017, the Public prosecutor filed an indictment charging the applicant with forming or leading an armed terrorist organisation (Article 314(1) of the Criminal Code), dissemination of propaganda favouring a terrorist organisation (Article 7(2) of the Anti-Terror Law), public incitement to commit an offence (Article 214(1) of the Criminal Code), praising crime and criminals (Article 215(1) of the Criminal Code), public incitement to hatred and hostility (Article 216(1) of the Criminal Code), incitement to disobey the law (Article 217(1) of the Criminal Code), organising and participating in unlawful meetings and demonstrations (Article 28(1) of the Meetings and Demonstrations Act[685]), and not complying with orders by the security forces for the dispersal of an unlawful demonstration (Article 32(1) of the Meetings and Demonstration Act). The requested sentence was between 43 and 142 years of imprisonment.[686]

The Court emphasised the importance of freedom of expressions for Members of Parliament.

In the Court's assessment on an alleged breach of Article 5 of the ECHR, they noted that the detention period is counted from when the person is arrested or remanded in custody until they are released and/or the charge is determined.[687] He was arrested 4 November 2016 with an ordered pre-trial detention the same day, which was extended until 2 September 2019. In 7 September, he was sentenced for dissemination of terrorist propaganda without order of detention. In 7 December 2018, he began serving this sentence. The Court stated that due to the sentence, the applicant had been deprived of his liberty in two separate sets of criminal proceedings.[688] Thus, the Court examined if

[684] *Selahattin Demirtaş v. Turkey (No. 2)* § 76.

[685] Law on Meetings and Demonstrations Marches, Law no. 2911 (adopted 6 October 1983).

[686] *Selahattin Demirtaş v. Turkey (No. 2)* § 78.

[687] *Selahattin Demirtaş v. Turkey (No. 2)* § 290; see for example *Tomasi v. France*, 27 August 1992, § 83, Series A no. 241-A and *Wemhoff v. Germany*, 27 June 1968, p. 23, § 9, Series A no. 7.

[688] *Selahattin Demirtaş v. Turkey (No. 2)* § 291.

Demirtaş was considered to have started serving his prison sentence while being in pre-trial detention, but decided against it, making the pre-trial detention period between 4 November 2016 to 7 December 2018.

The second evaluated question was the alleged lack of reasonable suspicion of crime. Three factors were assessed: the exhaustive nature of the exception, interpreted strictly, the repeated emphasis on the lawfulness of the detention requiring rigorous adherence to the rule of law, and the importance of effective or speedy required judicial proceedings.[689] For criminal proceedings, a person may only be detained for the purpose of be brought before legal authority on reasonable suspicion of a crime. The reasonableness is determined on facts and information which must 'satisfy an objective observer' that the detained person may have committed a crime.[690] Additionally, reasonable suspicion requires that the facts constitutes a crime at the time of the action.[691] Also, the action which the allegation is based on must not be related to the exercise of rights stipulated by the ECHR.[692] When a detention is prolonged, the suspicion of crime must remain reasonable throughout the confinement. The Court concluded that the gathering of evidence regarding a charge might reinforce suspicion of terrorist-linked offences which justifies detention, and that it does not relieve State authorities from the obligation to offer 'sufficient factual basis' justifying the person's initial detention. This, to prevent arbitrary and unjustified deprivation of liberty.[693]

The Court noted that the evidence presented by the 2nd Magistrate Court concerning the tweets about Kobanê and the encouragement of demonstrations was classified as political speech. It concluded that such expressions could not be interpreted as inciting violence and that the violence that did occur could not be directly attributed to the tweets. The statements of Demirtaş regarding the declaration of self-governance in several Kurdish regions and the

[689] See for example *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 73, 22 October 2018.
[690] See for example *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182.
[691] See for example *Kandzhov v. Bulgaria*, no. 68294/01, § 57, 6 November 2008.
[692] *Selahattin Demirtaş v. Turkey (No. 2)* § 318.
[693] Ibid § 321.

related uprisings could be deemed as harsh attacks on the Government's policy and as insulting the State. Nevertheless, the Court stated that they did not call for violence, and that they did not consist of support to terrorist acts or organisations. Thus, the expressions would not 'satisfy an objective observer' that crimes may have been committed by the applicant. Further, they noted that reasonable suspicion cannot be interpreted so lengthily as to restrict the freedom of expression under Article 10 of the ECHR. Demirtaş's presence in the Democratic Society Congress and the speech he held there could not either constitute reasonable suspicion of a crime, as it was claimed by the applicant as a peaceful gathering, which had not been contested by the Government. These actions were considered to fall under the freedom of expression in Article 10 and freedom of association in Article 11. Further, the detention was also justified by Türkiye with reference to ongoing criminal investigation concerning terrorism-related crimes, which the Court found as vague and general and thus insufficient. In conclusion, the facts and information did not justify the applicant's initial detention.[694]

Further the other grounds considered by the Turkish Constitutional Court were weighed. The statements concerning PKK and Öcalan were in the Court's opinion a part of the 'solution process' in which national authorities negotiated with the PKK in order to find a solution to the Kurdish question. They were not considered criminal at the time, and instead only brought up more than four years later as to justify pre-trial detention, neither were they inciting violence or glorifying terrorism, and were thus not justified according to the Court. Documents taken from the applicant's home which were used as evidence of being in charge of the KCK, were claimed by him as fabricated, which could not be disproven by the Government. Hence, these documents were considered as insufficient proof by the ECtHR. Telephone conversations were also brought forward as evidence, but were also claimed as inauthentic by the applicant, and could not be verified by Türkiye. The Court stated that judicial authority must be able to verify the authenticity of such evidence if it

[694] *Selahattin Demirtaş v. Turkey (No. 2)* § 327-331.

has been claimed as false.[695] The phone conversations were therefore disregarded by the Court.[696]

The Court expressed that the case of *Selahattin Demirtaş v. Turkey (No. 2)* showed that the Turkish courts had a tendency of determining a person's association with a terrorist organisation based upon very weak evidence. The acts under Article 314 of the Turkish Criminal Code, which could have justified the applicant's detention were so general that the provision, and its interpretation by the Turkish courts, did not sufficiently protect against arbitrary deprivation of liberty. The terrorism-related crimes were according to the Court not foreseeable, and did not constitute sufficient justification for reasonable suspicion of criminal offence. The evidence could not indicate a clear correlation between the actions of Demirtaş and the alleged crimes that led to his detention. In conclusion, the Court found that Türkiye did not meet the criterion of reasonable suspicion, as the facts could not prove criminal action according to Turkish law, and that the actions of Demirtaş were mostly consisted of exercise to rights of the ECHR. Consequently, there had been a violation of Article 5(1) of the Convention.[697] Regarding Article 5(3) of the ECHR, the Court once again mentioned the lack of specific facts which could cause reasonable suspicion of crime, and therefore found that there had been a violation of Article 5(3).[698]

### 5.3.4 The State Security Court

It is possible to identify some commonly occurring categories concerning the basis of violation of Article 6 in cases against Türkiye in which the applicant has anything to do with the Kurdish people. The vast majority of instances where Türkiye has been found with a violation of Article 6 in the ECtHR in a case involving the Kurdish issue, has been for breaching the right to independent and impartial judges, in the context of the SSC.

[695] See for example *Allan v. the United Kingdom*, no. 48539/99, § 43, ECHR 2002-IX.
[696] *Selahattin Demirtaş v. Turkey (No. 2)* § 332-336.
[697] Ibid § 337-340.
[698] Ibid § 353-356.

One example is the case of *Incal v. Turkey*. İbrahim Incal was a lawyer and member of the executive committee of the Izmir section of the pro-Kurdish party HEP, which was shut down by the TCC in 1993.[699] In 1992, the executive committee distributed a leaflet around Izmir named 'To all democratic patriots', criticising the local authorities. The content of the leaflet contained information about Izmir's local authorities campaign aimed against its Kurdish population, in which measures were taken to impose an 'economic blockage' on mainly Kurds. Further, the leaflet declared that the local authorities spread racist anti-Kurdish propaganda and that the measures connoted state terror against Turkish and Kurdish proletarians.[700] The security police of Izmir believed that the leaflet promoted separatist propaganda and asked the Principal public prosecutor of the Izmir State Security Court to state his opinion in the matter. The same day, a judge of the SSC issued an injunction mandating the confiscation of the leaflets and prohibiting their dissemination.[701] Afterwards, a criminal investigation against the local leaders of HEP was opened, including Incal. Following were criminal proceedings held by the SSC where the prosecutor accused the applicant of 'attempting to incite hatred and hostility through racist words'.[702] Incal was found guilty by the judges of the SSC, one of which was a member of the Military Legal Service. He was charged with crimes based on Article 312 of the Turkish Criminal Code of 1926.[703] Article 312(2) in the Criminal Code prohibits incitement that can lead people to hatred and enmity by pointing out racial differences. It has in large been used to prosecute people expressing opinions on the Kurdish question.[704]

In the case of *Incal v. Turkey*, the applicant argued that he had been subject of a violation of Article 6 in the ECHR. The reason for this being that the SSC

[699] *Incal v. Turkey* [GC], 9 June 1998, § 9, *Reports of Judgments and Decisions* 1998-IV.
[700] Ibid § 10.
[701] Ibid §§ 12–13.
[702] Ibid § 15.
[703] Ibid § 16.
[704] Human Rights Watch (ed), 'Domestic Law' in *Turkey: Violations of Free Expression in Turkey* (Human Rights Watch 1999).

did not fulfil the requirement of Article 6(1) stating the right to an 'independent and impartial tribunal', as one of the three judges was a military judge.[705]

In the Court's assessment, they expressed that two tests must be applied in the determination of 'impartiality'. The Court stated that 'the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect'.[706] The Court assessed that, while the independence and impartiality could be ascertained to a certain degree, as military judges undergo the same legal training as civilian judges and they are held up to similar standards, military judges are still members of the army, meaning that they take orders from authorities. Moreover, the Court drew attention to the fact that the applicant was a civilian, not a member of the army. Lastly, they took notice on the fact that the applicant had a legitimate fear of the fact that the military judge could be influenced by circumstances not relevant to the case. Therefore, the existence of a military judge in the SSC judging his case was determined as reason to believe that the judges were not impartial and independent. Thus, the Court asserted that there was a breach of Article 6.1 in the ECHR.[707]

A similar ruling was determined in the case of *Okçuoğlu v. Turkey*, where the applicant expressed that the trial by the SSC meant that he was denied of the right to a fair hearing due to the presence of a military judge.[708]

Ahmed Zeki Okçuoğlu is a Kurdish lawyer in Türkiye. In May 1991, the publication *Demokrat* published an article on a debate which Okçuoğlu had been a part of. In an article named 'The Past and Present of the Kurdish Problem', comments made by the applicant were recorded. He spoke about the historical and geopolitical complexities surrounding the Kurdish issue, emphasising the struggle of the Kurdish people for their national rights amidst the interference of international and regional powers. He also stated that while external factors

[705] *Incal v. Turkey* § 62.
[706] *Incal v. Turkey*, § 65.
[707] *Incal v. Turkey*, §§ 67–73.
[708] *Okçuoğlu v. Turkey* [GC], no. 24246/94, § 51, 8 July 1999.

have played a role, the Kurdish people themselves must take a more proactive stance in addressing their plight and engaging in efforts towards resolution.[709]

The Public Prosecutor of the Istanbul State Security Court accused Okçuoğlu of spreading propaganda against the 'indivisibility of the State'. After proceedings, the SSC, with three judges, one of them being a military judge, found Okçuoğlu guilty in accordance with Article 8(1) of the Anti-Terrorist Law, which prohibits expressed opinions 'aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation'.[710]

The applicant raised the fact that the military judges in the SSC are dependent on the executive power, since they are appointed by Ministers and approved by the President. Their professional assessment and promotion as well as their security of tenure are controlled by the executive and in turn the army. Such ties mean that independence and impartiality is not possible.[711]

The Turkish Government argued that the domestic rules concerning military judges in the SSC were formed to adequately fulfil and comply with Article 6(1) and the right to independent and impartial judges. It was an offence under the domestic Military Code for a member of the army to attempt influencing the ruling of a military judge. Further, Türkiye expressed that military judges are assessed on the same basis as civilian judges.[712] The Court referred to the case of *Incal v. Turkey* and came to the same conclusion: while military judges could guarantee some level of independence and impartiality, some aspects of their status made their impartiality uncertain.[713] The Court observed that their ongoing subjection to military discipline and their significant influence from administrative authorities and the army regarding their appointments were such circumstances that could influence their independence and impartiality.[714] Similarly to the *Incal* case, the applicant was a civilian,

[709] *Okçuoğlu v. Turkey* §§ 7–8.
[710] Ibid § 11; see also Article 8(1) of Law on Fight Against Terrorism No. 3713.
[711] Ibid, § 53.
[712] Ibid, § 54.
[713] Ibid, § 57, see also *Incal v. Turkey*, §§ 65-68.
[714] Ibid, 57.

who, according to the Court had legitimate reasons to fear a lack of impartiality and independence amongst the judges. Hence, the Court found that there had been a breach of Article 6(1).[715]

The two cases presented above are not extraordinary of their sort. There exist many more cases in which the ECtHR has found a breach in Article 6(1) regarding the right to independent and impartial judges in Türkiye due to the presence of a military judge in the trial.[716] As of now, the SSC no longer exists (see chapter 2.6).

### 5.3.5 Freedom of Expression

It has been noted that the majority of judgements against Türkiye in regards to Article 10 of the ECHR are directly or indirectly linked to Kurds, either evident from the expressions of opinion for which the complainants have been prosecuted for, or the background of the complainants themselves, either being Kurdish or being associated with Kurdish organisations.[717] The presented cases are relevant as they serve as examples of the Criminal Code, Anti-Terror Law and the Law on Political Parties as instruments used to target Kurdish or pro-Kurdish expressions.

In the case of *Incal v. Turkey* (see chapter 5.3.4), it was undisputed that there had been an interference, that is was prescribed by law, and that it pursued at least one of the legitimate aims in Article 10. What remained to be examined in the step-by-step assessment was is the interference was necessary in a democratic society (see chapter 5.2.5).[718] The SSC held that the applicant had knowingly incited the people to hatred and hostility by describing the State as terrorist, by 'drawing a distinction between citizens' and by criticising municipal measures. The Court noted that the leaflet addressed actual events in Izmir, criticizing administrative actions and describing them as terror against

[715] *Okçuoğlu v. Turkey* §§ 58 and 59.

[716] See for example *Sadak and Others v. Turkey (no. 1)*, nos. 29900/96 and 3 others, ECHR 2001-VIII; *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, 8 July 1999; *Karataş v. Turkey* [GC] no. 23168/94, ECHR 1999-IV.

[717] Commissioner for Human Rights of the Council of Europe, 'Freedom of Expression and Media Freedom in Turkey' (2011) CommDH 25 § 4.

[718] *Incal v. Turkey* §§ 40–42.

Kurds, urging citizens to oppose these measures.[719] The Court did not find these calls to be incitement to violence or hatred, as they did not indicate concrete action. It emphasised that freedom of political debate is essential and should not be disproportionately restricted by the State. The Government must generally tolerate a wider level of criticism than individuals.[720] The State argued that the argued that the leaflet incited ethnic insurrection and that suppressing such material was necessary to combat terrorism. However, the Court found no evidence linking the applicant to terrorism or justifying the severe measures taken against him. It concluded that the conviction was disproportionate and unnecessary in a democratic society, thus breaching Article 10.[721]

In the case of *Okçuoğlu v. Turkey*, the question at hand was also if the interference had been necessary in a democratic society. The Court noted that the freedom of expression is a cornerstone of a democratic society, applicable not only to agreeable ideas but also to those that offend or disturb. Exceptions to this freedom must be therefore be strictly construed[722]. Regarding press freedom, the Court emphasized the press's role in political democracy. While the press must respect state interests, such as national security, it is also crucial for conveying political ideas, including divisive ones, to the public.[723] In the case of Okçuoğlu, his language used during the low-circulation round-table debate was not considered as extreme or excessive, and his comments did not incite violence, even less armed resistance or an uprising, and did therefore not justify the severe penalties. The Court highlighted that the harsh penalty imposed, including imprisonment, was disproportionate. Thus, this constituted a violation of Article 10 due to its disproportionality and lack of necessity in a democratic society.[724]

The case of *Karataş v. Turkey* concerned a Kurdish man who published an anthology of poems entitled 'The song of a rebellion – Dersim'. The poems

[719] *Incal v. Turkey* §§ 49–50.
[720] Ibid §§ 51–54.
[721] Ibid §§ 55-59.
[722] *Okçuoğlu v. Turkey* § 43.
[723] *Lingens v. Austria*, 8 July 1986, §§ 41–42, Series A no. 103.
[724] *Okçuoğlu v. Turkey* §§ 45–50.

covered themes on Kurdistan, being Kurdish, and expressions on the Kurdish struggle.[725] He was later found guilty by the SSC for 'disseminating propaganda against the indivisible unity of the State' under Article 8 of the Anti-Terror Law, as the contested poems referred to a region of Turkey as 'Kurdistan' and glorified insurrectionary movements, linking them to the Kurdish fight for independence. The National Security Court deemed this praise as separatist propaganda, harmful to national unity and territorial integrity, thus justifying the applicant's conviction.[726] The Court stated in their assessment that the existence of an interference prescribed by law, and with a legitimate aim was undisputed; the remaining question was its necessity in a democratic society.[727] The poems in question called for self-sacrifice for Kurdistan and included aggressive language against Turkish authorities. While these could be seen as incitement to violence, they must be viewed in the context of artistic expressions, a form protected under Article 10. Artistic works contribute to public discourse, and the State must therefore not unduly encroach on this freedom.[728] The Court acknowledged the political nature of the poems, highlighting that political speech is subject to minimal restrictions. The Government should tolerate to be scrutinised by the public, and it must show restraint in criminal proceedings against such expressions. Despite the Turkish authorities' concerns about terrorism, the Court noted that the poems had limited impact due to their artistic nature and small audience. The Court found the conviction, which was more about disseminating separatist propaganda than incitement to violence, disproportionate. The severity of the sentence further underscored the excessive nature of the interference. In conclusion, the Court held that the applicant's conviction violated Article 10 of the Convention as it was not necessary in a democratic society.[729]

The case of *Semir Güzel v. Turkey* concerned the, at the time, vice-president of the pro-Kurdish Party Rights and Freedoms Party (HAK-PAR). The applicant, and 13 other members, were in 2005 indicted for violation of Article

[725] *Karataş v. Turkey* §§ 8–10.
[726] Ibid §§ 12–13.
[727] Ibid §§ 35–44.
[728] Ibid § 49; *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133.
[729] *Karataş v. Turkey* §§ 50–54.

81(c) of the Law on Political Parties during their congress, as there had been banners with Kurdish text, and most of the speeches were held in Kurdish. The applicant was later sentenced for these charges.[730] In the assessment of an alleged violation, the Court mentioned that the term 'prescribed by law' requires that the measure have a basis in domestic law, be accessible, foreseeable in its consequences, and compatible with the rule of law.[731] For a norm to be foreseeable, it must be precise enough for citizens to regulate their conduct and foresee the consequences of their actions, even if not with absolute certainty. The Court found that Law no. 2820, published in the Official Gazette, satisfied the accessibility condition. However, Article 81(c) of this law, which prohibited the use of any language other than Turkish by political parties, was vague and imprecise. The Government failed to provide examples of how the provisions were interpreted domestically.[732] Thus, Article 81(c) did not enable the applicant to foresee facing criminal proceedings for failing to intervene when delegates spoke in Kurdish. Consequently, the interference was not considered to be 'prescribed by law', and the Court did not need to assess the remaining steps in the standard examination. The Court concluded there was a violation of Article 10 of the Convention.[733]

## 5.4 Analysis

The case-law presented in this chapter confirms what have been stated regarding the treatment of Kurdish people in Türkiye. The cases concerning State violence on Kurds display the different ways in which Kurdish people have been, and are, subjects to State violence. Although the prevalence of similar cases is distinct for the Kurdish regions, and several international organisations have done statements on the matter, the ECtHR have, as mentioned, been reluctant to recognise the systematic use of State violence, and has still not declared it as administrative practice. The CPT's statement concerning this was lifted as an argument for recognising the pattern. Nevertheless, even if the ECtHR can receive information from these sources, it is still important

[730] *Semir Güzel v. Turkey* §§ 4–10.
[731] *Karataş v. Turkey* § 33.
[732] Ibid §§ 34–38.
[733] Ibid §§ 39–41.

that the Court make their own assessment on the problem. The Court is a branch of the Council of Europe, but the independence of the judiciary is a fundamental principle of the rule of law and must be respected. Notwithstanding, the apprehension to recognise the systematic violence is notable. So is the hesitation to conclude a violation of Article 14 of the ECHR. Even when acknowledging the existence of a systematic use of violence towards Kurdish people, the Court refuses to link the use of violence against Kurds to the conclusion that the reason for being subjected to such violence is the fact that they are, or were, Kurdish.

As for the cases concerning forced disappearance, the ECtHR underlined the systematic use of such by State agents in South-Eastern Türkiye, especially concerning people who had been suspected of involvement with the PKK. This links the prevalence of similar cases with the Kurdish regions in Türkiye, showing a pattern concerning forced disappearance affecting Kurdish people. Especially considering the systemic criminalisation of Kurdish people by claiming suspicion of PKK involvement and thus applying the Anti-Terror Law, forced disappearance has been ascertained as a practice directly targeting Kurdish people. With this in mind, the point raised previously, concerning the apprehension to apply Article 14 in the Kurdish context is remarkably peculiar.

Another relevant point is the fact that Türkiye has not signed and ratified the Framework Convention for the Protection of National Minorities. Its legal status as a binding convention would undoubtedly have some impact on Türkiye's treatment towards the Kurdish minority in the country. As mentioned above, the Framework Convention ensures equality before the law and equal protection under the law. Although Türkiye do not expressively discriminate Kurds in their laws, they are in fact, as pointed out in the chapter, fall victim of discrimination regarding the implementation of the law. The cases presented above show clear breaches of Kurdish people's human rights through for example limitations on their right to a fair trial, freedom of expression and right to not be punished for an act that is not prohibited according to the law. Even though the ECHR somewhat prohibit discrimination based on, amongst

other, association with a national minority, in accordance with Article 14, the FCNM would most likely give Kurdish people a stronger protection.

Additionally, the act itself, of signing and ratifying the Framework Convention, would send a clear signal about Türkiye's will to ensure the rights of its minorities. It would presumably not satisfy the EU to the point of fulfilling the Copenhagen Criteria concerning the respect for and protection of minorities, but it would perhaps be enough to demonstrate the EU that Türkiye has the ambition of taking the matter more seriously.

# 6 Discussion

In this closing chapter of the thesis, a discussion is held on the findings presented in the preceding chapters, drawing concluding remarks on the research questions. First, Türkiye's shortcomings in regards to human rights of Kurdish people are discussed, based on the presented information on the situation in Türkiye regarding Kurdish people as found in previous chapters, such as in case law and the historical overview. These findings are discussed in relation to the international human rights instruments examined in the thesis, in order to identify breaches in said instruments.

Secondly, a discussion is held on Türkiye's accession to the EU. Failings in the previous accession negotiations and the Copenhagen criteria are discussed, as is the possibility of a future Membership. The discussion includes contemplations of what Türkiye would need to improve in regards to Kurdish rights in order to make a Membership possible. Lastly, thoughts are expressed on the thinkable effects on Kurdish people, if Türkiye would be granted Membership without improving in areas concerning Kurds.

## 6.1 Türkiye's treatment towards its Kurdish minority

Türkiye's treatment towards the Kurdish people today is a result of a complicated affair, far from concluded. The history of the relations between Kurds and Turks is a long one, beginning long before the creation of modern Türkiye. It is clear from examining the Treaty of Sèvres, and the Treaty of Lausanne, along with their consequences, that the formation of Turkish law is in many ways affected by the existence of minorities in general, and Kurds in particular. If the Kurdish people did not cover around 20 percent of the Turkish population, and stand out with their language, culture, and inclination towards local governing, it is unsure if Türkiye would devote such big attention to enacting strict laws restricting the use of language and expressions of culture. One must also wonder if the centralisation of the State would be as high on the agenda, had the Kemalists not feared Kurdish autonomy so much. Nonetheless, the fear of Kurdish autonomy caused abhorrent treatment

towards the people, from the Turkish Government, as can be exemplified with the forced displacement initiative, leading to the Dersim massacre. Fortunately, the rights of Kurdish people have become improved since, but still, serious issues remain. The systematic use of State violence against Kurdish people, as presented in the case-law of the ECtHR (see chapter 5.3.1 and 5.3.2) constitutes particularly serious violations of human rights. The right to life, as asserted by Article 6 of the ICCPR and Article 2 of the ECHR, and the prohibition of torture in Article 7 of the ICCPR and Article 3 of the ECHR, are some of the most vital rights that a human being is entitled to. It is remarkable that these cases were brought to light at the same time that the EU gave Türkiye the status of a Candidate State. Even if the State implemented legal reforms during the 90s, State violence during that time was largely used to oppress the Kurdish people. As previously mentioned, the civil war between the armed forces and PKK lasted until 1999. It is hard to believe that Türkiye would have become considerably better at respecting human rights law the last year of the war.

Another form of restricting the rights of Kurdish people is the application of the Anti-Terror Law and certain provisions in the Criminal Code. By drawing conclusions of expressions of pro-Kurdish opinions as expressions of terrorist values or incitement of hatred, the freedom of expression is continuously restricted. As mentioned, this has been considered as discriminatory application by several international organisations, and a breach of Article 2 and 26 of the ICCPR, a violation of Article 19 of the same instrument, as well as Article 10 of the ECHR.

Türkiye's attitude towards the existence of minorities, and consequently the non-recognition of Kurdish people as a minority group, has been raised as a concern by international organisations, as well as by other states through objections to Türkiye's reservation of the minority rights in Article 27 of the ICCPR. As stated by the Human Rights Committee, minorities shall be recognised as such not with reference to national law, in this case the Treaty of Lausanne, but by objective criteria. As previously noted, the Kurds fulfil these criteria and must therefore be considered as a minority group and accordingly

be entitled to the enjoyments of minority rights. A reservation of Article 27, made to avoid providing such rights to Kurdish people, can therefore be considered as incompatible with the object and purpose of the Treaty, and thus invalid in accordance with Article 19(c) of the VCLT. Another fact supporting the claim that Türkiye does not want to provide minority rights to Kurdish people, is that the State has not signed, nor ratified the FCNM.

In conclusion, there are many failing in regards to human rights of Kurdish people. As the situation looks now, An EU membership is not a possibility any time soon.

## 6.2 On the Possibility to Become a Member State of the European Union

Notwithstanding the circumstances around the acceptance of Türkiye as a Member State, i.e. the occurring civil war and related human rights violations in its Kurdish regions, Türkiye was accepted as a Candidate State. More than that, it showed progress for several years, before once again backsliding. It is interesting to contemplate on whether Türkiye would have been a Member State by now, had it not chosen the path towards authoritarianism. I believe so. It is hard to remember now, but Türkiye did better the conditions of human rights in general for that period. Also, it spoke about Kurdish people and of finding a solution to the problems, which is much more than what can be said with previous Turkish Governments and leaders, with the exception of the beginnings of the DP Government. I am talking of the recent developments as if Türkiye has only recently fallen under authoritarianism, when in reality, it has almost always been so.

With that in mind, it is also interesting to contemplate if the 2000s were an abnormality in the history of Türkiye, or if the rise of authoritarianism was so. Considering the history of Türkiye, in particular in regards to the treatment of the Kurdish people, I am inclined to think the latter. It is however not difficult to answer the research question regarding what measures that are necessary to open up the possibility for a Turkish EU membership. If Türkiye would return to its state before the authoritarian shift, a big step towards EU

would be underway. This is due to the simple fact that Türkiye was close to becoming a Member State before this. The standstills begun around the time that the State slowly entered the path towards authoritarianism, including backslidings in the areas of democracy, rule of law and human rights. The rise of human rights violations against Kurds went hand in hand with this shift. In fact, looking back at history, the periods where Türkiye has been more authoritarian, have been the periods where Kurdish people have been particularly subjected to human rights violations.

As for concrete measures, my recommendations are that Türkiye repeal the 2017 referendum, meaning that it returns to a parliamentary executive power instead of a presidential one. This referendum brought with serious backslidings in the areas of democracy and rule of law. As for human rights, my recommendations are that the Anti-Terror Law and other laws applied to target Kurdish people are either repealed, or seriously amended to ensure that such targeting cannot happen. Another recommendation is that Türkiye recognises Kurdish people as a minority group, to ensure that Kurds can enjoy minority rights.

## 6.3 Conclusion

If Türkiye has genuine aspirations concerning reaching Member status in the EU, improvements must be made in several areas. Not only does this require a thorough revision of Turkish legislation, but it also requires a change in the systematic application of legislation to be employed by all State authorities, especially the judiciary, the law enforcement and the executive power. In addition, Türkiye must adhere to international law and rights provided by international treaties and the ECHR. Furthermore, the Kurdish question is such an integral part of the systemic faults of Türkiye, that an EU membership is dependent on the improvement of the rights of Kurdish people.

Realistically, this is unlikely. After the attempted coup in 2016, backsliding in these areas have only increased. That is why I believe the only way to ensure that Kurdish people are entitled to their rights, is if Kurdistan becomes an independent state. That would however be my opinion regardless. If Kurds

want independence, they should be allowed to attain it. When I travelled to the self-governing Kurdish region in Iraq to observe the 2017 referendum, independence felt closer than ever. My opinion is that countries, especially those with a history of oppression, should respect the will of the Kurdish people, and thus recognise Kurdistan as an independent state.

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