

JURISTRAS

State of the Art Report

Strasbourg Court Jurisprudence and Human Rights in Turkey: An Overview of Litigation, Implementation and Domestic Reform

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TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	THE PROTECTION OF HUMAN RIGHTS IN TURKEY	3
	A. NATIONAL LEGAL FRAMEWORK AND ECHR	4
	a. The Status of ECHR under Domestic Law	4
	b. Domestic Legal Framework on Human Rights	6
	B. JUDICIAL AND NON-JUDICIAL CONTROL MECHANISMS.....	8
	a. Judicial Review of the Protection of Human Rights.....	8
	b. Non-Judicial Human Rights Mechanisms.....	9
III.	LITIGATING STRASBOURG: CASE LAW, ACTORS, IMPLEMENTATION, IMPACT	11
	A. ECtHR CASE LAW	12
	1. Freedom of Expression	14
	2. Cases Brought by Minorities under Articles 3, 5 and 6.....	15
	3. Property Rights	16
	4. Freedom of Association.....	18
	5. Respect for Home, Private and Family Life.....	18
	6. Freedom of Religion	19
	B. NATIONAL AND INTERNATIONAL ACTORS ADVOCATING MINORITY RIGHTS	20
	C. STRATEGIC LITIGATION	21
	D. DOMESTIC EXECUTION OF JUDGEMENTS.....	22
IV.	LITERATURE REVIEW	26
	A. LITERATURE REVIEW ON THE EU ACCESSION PROCESS AND THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW.....	26
	B. THE IMPLEMENTATION OF THE EU ACCESSION CRITERIA AND THE EUROPEAN COURT OF HUMAN RIGHTS' JUDGEMENTS.....	29
V.	CONCLUSION	32
	BIBLIOGRAPHY.....	35
	COUNCIL OF EUROPE CASES AND RESOLUTIONS.....	41
	<u>ANNEX I</u> : SHORT VERSION OF THE STATE OF THE ART REPORT INTENDED FOR POLICY USERS.....	47
	<u>ANNEX II</u> : MAPPING OF RESEARCH COMPETENCES REPORT.....	58
	<u>ANNEX III</u> : TABLE OF CASES	(separately attached)

I. Introduction

Turkey is a founding member of the Council of Europe, having become a member in 1949, the same year the organization was founded.¹ Turkey ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Protocol No. 1 in 1954.² While the convention did not arouse much interest among minorities and rights advocates initially, litigating in Strasbourg has become a commonly sought political and legal strategy after 1987. Three major developments took place in that year: the Turkish Government accepted the right to individually petition the European Court of Human Rights (ECtHR), made a formal application for membership to the European Union (EU), and declared a state of emergency in eastern and southeastern regions of the country. The significance of the first development does not bear elaboration. The second one is worth stressing because many commentators drew a link between the first two developments by arguing that Turkey's acceptance of the individual petition mechanism was a strategic move aimed at facilitating its membership to the EU. Lastly, the rights violations committed by security forces during the state of emergency which formally lasted until 2002 caused a rapid increase in the number of petitions filed with the ECtHR.

The central research question this report addresses is whether and if so to what extent the ECHR and the ECtHR case law served to enhance the protection in Turkey of human rights in general and minority rights in particular. In doing so, the critical role the EU accession process has played in this regard by exerting external political pressure on the Turkish Government will be evaluated as a major positive variable.

The report assesses the nature of claims raised by minorities and minority rights advocates. It seeks to offer an initial analysis of the efforts by authorities to implement the ECtHR case law through general and individual measures. The rest of the report is organized as follows: Part II provides a brief analysis of the national legal framework pertaining to the protection of human rights and an overview of judicial and non-judicial monitoring mechanisms. Particular attention is given to the constitutional and legislative human rights reforms enacted in recent years during the the EU accession process. Part III offers an analysis of the nature of cases and controversies and the identity and litigation strategy of actors in applications lodged with the ECtHR. The execution of the ECtHR judgments through legislative and executive measures at domestic level is also discussed in this section. Part IV provides a brief introduction to the literature on the EU accession process and the ECtHR case law on Turkey. Part V offers preliminary conclusions on the impact generated by the ECHR protection system on Turkey's framework and practice on human rights.

II. The Protection of Human Rights in Turkey

Turkey is a party to the major international human rights conventions³ and some of the human rights instruments under the auspices of the Council of Europe.⁴ Turkey's

¹ Turkey has ratified the statute of the Council of Europe on 12 December 1949 through Law No. 5456, which put into effect Turkey's retrospective membership in the organization as of 8 August 1949.

² Law No. 6366, 10 March 1954, Official Gazette No. 8662, 19 March 1954.

³ Among the major human rights instruments of the United Nations that Turkey has ratified, there are International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, and Convention on the Elimination of All Forms of Racial Discrimination.

foreign policy with respect to human rights treaties is based on ratification with reservations with respect to those provisions which grant additional rights to individuals belonging to minorities.⁵ With respect to conventions that are specifically on minority rights, Turkey's policy is one of non-signature, as in the case of the Council of Europe's Framework Convention for the Protection of National Minorities. The purpose of this foreign policy is to ensure that with the exception of non-Muslims, who are granted minority status under the 1923 Treaty of Lausanne, no minorities in Turkey are given *de jure* legal protection.

The 1982 Constitution has a framework for the protection of civil and political rights. However, the letter and spirit of the constitution remains restrictive even after the series of reforms undertaken by the Turkish Government towards fulfilling the EU's accession conditionality. Drafted in 1982, only two years after the military *coup d'état*, at the behest of the military junta, the main preoccupation of the constitution is to protect the state vis-à-vis individuals. Towards that end, the constitution subjugates the exercise of the rights and freedoms that it grants to a doctrinal hierarchy, whereby the principles of laicism on one hand and national and territorial unity on the other seek to keep the expression of political dissent under control.

A. National Legal Framework and ECHR

Turkey has become a party to the ECHR and the Protocol No. 1 in 1954. Over time, Turkey has also ratified the Protocols No. 6 and 13. It has yet to ratify the Protocol No. 12, which has for the first time granted individuals a self-standing right to be free from discrimination, the exercise of which, unlike Article 14, is not conditional on the violation of a substantive provision of the ECHR. Turkey has also not yet ratified the Protocols No. 4 and 7. A recent constitutional amendment established the supremacy of international law, giving direct effect to the ECHR. Yet, the ECtHR's relationship with the constitution remains the same: the judgments of the ECtHR are not binding on the Constitutional Court. They have persuasive authority. The reform process also sought to establish a framework for non-judicial protection of human rights. However, the various human rights institutions set up at the national and provincial levels are being criticized for their lack of independence from the executive.

a. The Status of ECHR under Domestic Law

For a long time, the status of international conventions in general and the ECHR in particular within the hierarchy of Turkish legal system has been a matter of contention among scholars in Turkey.⁶ Prior to its amendment on 22 May 2004, Article 90 of the

⁴ In addition to the ECHR, Turkey is a party to the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. On 27 September 2006, it ratified the revised European Social Charter with reservations.

⁵ This is the case for Article 27 of the ICCPR; Articles 17, 29 and 30 of the Convention on the Rights of the Child; Article 13(3) and (4) of the ICESCR; as well as various instruments of the Organization for Security and Cooperation in Europe pertaining to the protection of minorities. For more on Turkey's foreign policy on international instruments relating to minority rights, see Dilek Kurban, "Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union," *Columbia Human Rights Law Review*, Vol: 35 (2003), 180-188.

⁶ Fazıl Sağlam, "Avrupa İnsan Hakları Mahkemesi'nin Türkiye'de Kapatılan Partilere İlişkin Kararlarının Partiler Hukukuna Etkisi," *Anayasa Yargısı*, No: 16 (1999), 261-271. (stating that the place of international conventions within the hierarchy of national laws is a matter of contention, particularly with respect to the ECHR); Zühtü Arslan, "Avrupa İnsan Hakları Sözleşmesi ve Türk

Turkish Constitution read: “International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional.”⁷ While there have been instances where courts stressed the supremacy of the ECHR over domestic laws, and even the constitution,⁸ there was no uniform view nor a uniform judicial practice with regards to which body of law should prevail in case of a conflict between the provisions of international treaties and national laws.⁹ This debate has been resolved in 2004 in favor of the monist view with the addition¹⁰ of the following clause to Article 90: “In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.” Pursuant to this amendment which gives direct effect to the ECHR, courts of general jurisdiction are now required to enforce the supremacy of the Convention over domestic laws. While the Court of Cassation and the Council of State referred in some of their judgments to specific provisions of the ECHR,¹¹ it is not possible to speak about a uniform, consistent and principled judicial approach to the direct effect of the ECtHR judgments.

The ECHR’s supremacy over national laws does not extend to the constitution. Pursuant to the jurisprudential tradition, the Constitutional Court is not formally bound by the ECHR. Instead, the court attributes to ECtHR judgments a persuasive authority of interpretation. That the Constitutional Court does not attribute the ECHR a supra-constitutional norm quality and almost never cites the ECtHR judgments¹² would not necessarily be problematic from a human rights point of view had there not been significant points of tension between the constitution and the case law of the Constitutional Court on the one hand and the ECHR and the ECtHR jurisprudence on the other. However, as will be discussed below, notwithstanding unprecedented legal reforms undertaken in recent years towards aligning national and international law,

Anayasa Yargısı: Uyum Sorunu ve Öneriler,” *Anayasa Yargısı*, No: 17 (2000), 279 (noting that there is no consensus on the resolution of a conflict between domestic law and the ECHR and calling on the legislature to intervene through a constitutional amendment which would establish the supremacy of international conventions).

⁷ Turkish Constitution, 1982.

⁸ See e.g. a decision of the 5th Chamber of the Council of State on freedom of expression. Judgment dated 22 May 1991. E. 1986/1723, K. 1991/933 (ruling that states are under an obligation to extend to their citizens the rights and liberties guaranteed under international conventions they have ratified and to undertake the necessary arrangements in their domestic legal systems towards that end. Stating in dictum that Article 90 of the Constitution requires the execution of international conventions duly put into effect even where they are in conflict with the constitution.)

⁹ For a brief discussion of the three different approaches to the implications of the phrase “having the force of law” for the resolution of a potential conflict between international conventions and domestic law, see Tülay Tuğcu, President of the Constitutional Court, “Opening Address on the Occasion of the New Judicial Year of the European Court of Human Rights,” Strasbourg, 20 January 2006, 4.

¹⁰ Law on the Amendment of Various Provisions of the Constitution of the Turkish Republic, No. 5170, adopted on 7 May 2004, entered into force on 22 May 2004.

¹¹ Tuğcu, 5, citing the following decisions: judgment of 25.5.2005 of Civil Plenary of the Court of Cassation E: 2005/9-320, K: 2005/355; judgment of 13.7.2004 of 9th Penal Chamber of the Court of Cassation E: 2004/3780, K: 2004/3879; judgment of 24.5.2005 of Penal Plenary of the Court of Cassation E: 2005/7-24, K: 2005/56; judgment of 08.02.2005 of 13th Chamber of the Council of State E: 2005/588, K: 2005/692; judgment of 29.09.2004 of 5th Chamber of the Council of State E: 2004/291, K: 2004/3370.

¹² Arslan, 274. This conclusion is supported by the President of the Turkish Constitutional Court herself, who stated that, as of January 2006, the Constitutional Court has merely cited four ECtHR judgments. Of these four decisions, one was cited in a 1999 judgment concerning a regulatory taking and three in a 2003 judgment on expropriation. Tuğcu, 6.

both the overall state-biased spirit of the Turkish Constitution as well as the restrictive interpretation it receives from courts fall far short of the ECHR standards. It is evident that the harmonization of Turkey's legal framework with the ECHR will not be possible unless a new constitution is drafted which contains a civic notion of citizenship and a rights-based approach to the state-citizen relationship.

b. Domestic Legal Framework on Human Rights

The 1982 Constitution contains provisions extending a general protection for human rights. Article 2 enumerates respect for human rights as a fundamental characteristic of the republic. Article 5 lists the removal of obstacles restricting fundamental rights and liberties as a "fundamental aim and duty of the state." The principle of equality is protected under Article 10(1): "[a]ll individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations." Article 10(4) requires administrative institutions and authorities to comply with this principle.

The constitution contains specific provisions on the protection of the rights and liberties studied in JURISTRAS. With the amendments of 17 October 2001 generated by the EU accession process,¹³ this protection has expanded considerably. The constitution protects personal liberty and security;¹⁴ the privacy of individual life;¹⁵ the inviolability of the domicile;¹⁶ freedom of communication;¹⁷ freedom of religion and conscience;¹⁸ freedom of thought and opinion;¹⁹ freedom of expression and dissemination of thought;²⁰ freedom of press;²¹ freedom of association;²² freedom to hold meetings and demonstration marches;²³ and the right to property.²⁴

The 2001 constitutional amendments considerably narrowed the scope of restrictions brought on human rights under Article 13. The stated legislative purpose of these amendments was to bring the constitution in line with the jurisprudence of the ECtHR.²⁵ The amendments introduced the constitutional principle of proportionality, bringing the constitution in line with the case law of the ECtHR and the Constitutional Court.²⁶ The reforms replaced the general restrictions embodied in Article 13, which

¹³ Law on the Amendment of Certain Provisions of the Constitution of the Turkish Republic, No. 4709, adopted on 3 October 2001, entered into force on 17 October 2001.

¹⁴ Article 19.

¹⁵ Article 20(1).

¹⁶ Article 21(1).

¹⁷ Article 22(1).

¹⁸ Article 24(1).

¹⁹ Article 25.

²⁰ Article 26(1).

²¹ Article 29(1).

²² Article 33(1).

²³ Article 34(1).

²⁴ Article 35.

²⁵ İsmet Giritli, "2001 Anayasa Değişikliklerinin Temel Hak ve Özgürlüklere Yansıması," *Anayasa Yargısı*, No: 19 (2002), 88-103.

²⁶ Law No. 4709, Article 2, amending Article 13 of the Constitution. The reforms thus brought the constitution in conformity with the post-1991 case law of the Turkish Constitutional Court, which had ruled that the restrictions brought upon fundamental rights should "not exceed reasonable criteria." Giritli, 98. The Court required that such restrictions conform with the principle of proportionality, which it had defined in a 1991 judgment as follows: "That the means resorted for the restriction or the prevention of the exercise of fundamental rights and liberties are sufficient and necessary to realize the aim, and that the means and the end are proportional to each other." Judgment dated 10.01.1991, E. 1990/25, K. 1991/1.

had allowed the categorical limitation of rights and liberties on the basis a standard list of enumerated grounds,²⁷ with a “differentiated and gradual restriction system”²⁸ based on right-specific restrictions enumerated in corresponding provisions.²⁹ Another amendment made with the stated purpose of aligning the constitution with Article 17 of the ECHR was in Article 14, which prohibits the abuse of rights and freedoms. As opposed to the previous text which entailed an ambiguous purpose-based ban, the new Article 14 now contains an act-based prohibition.³⁰

Notwithstanding these groundbreaking amendments, the constitution preserves its restrictive character which is fundamentally at odds with the ECHR. Towards protecting the state against the individual, the Constitution substantially restricts the exercise of rights and freedoms on the basis of the principles of territorial unity and laicism. This demarcation cuts across the letter and spirit of the constitution and is immediately observed in the Preamble, which prohibits activities contrary to territorial unity and laicism,³¹ principles listed among the “characteristics of the Republic” under Article 2. The over-inclusive reading of these principles by Turkish prosecutors and judges in the past has resulted in the dissolution of political parties and associations, the prosecution and conviction of human rights activists, journalists and intellectuals,³² and continues to do so.

In addition to the umbrella clause of Article 14, a number of other provisions impose similar restrictions on the exercise of rights and liberties, such as Article 26(2) in the case of freedom of expression and Article 28(3) in the case of freedom of press. The letter and spirit of the Constitution reveals a hierarchy among the fundamental principles of the Republic, wherein laicism and territorial unity hang like Democles’ sword over the exercise of fundamental rights. This is evident in the Preamble which, despite its unconditional endorsement of the principles of laicism and territorial unity,³³ conspicuously fails to pronounce the word “democracy” until the very end where it depicts the Constitution as a trust to “the Turkish nation to the patriotism and nationalism of its democracy-loving sons and daughters.”³⁴

The constitutional subjugation of rights and liberties to the ‘higher principles’ of territorial unity and laicism makes the establishment of a rule of law based on human rights prohibitively difficult. Reminiscent of the socio-psychology of the founding years of the Turkish Republic in 1920s, the fear of Kurdish separatism and political

²⁷ The former text of Article 13 allowed the restriction of rights and liberties on the grounds, *inter alia*, of “safeguarding the indivisible integrity of the state with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health.”

²⁸ Ozan Erözden, Sibel İnceoğlu, Fazıl Sağlam, Sultan Tahmazoğlu, Oktay Uygun (in collaboration with Mesut Gülmez, Fikret İlkiz, Ayşe Kollu, Ece Öztan, Nihan Yancı), “National Report: Turkey,” Union of Turkish Bar Associations (2004), 8.

²⁹ For a critique of the amendments for unnecessarily introducing restriction grounds for various rights and freedoms, such as the freedom of thought and opinion and the right to fair trial, which are guaranteed absolute protection under the ECHR, *see Id.*, 9.

³⁰ Law No. 4709, Article 3.

³¹ Turkish Constitution, Preamble, para. 5.

³² On territorial integrity, *see e.g.* ECtHR, *Özgür Gündem v. Turkey*, Application No: 23144/93, 16 March 2000; ECtHR, *Dicle v. Turkey*, Application No. 46733/99, 10 November 2004; ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Application No. 133/1996/752/951, 1998; ECtHR, *Socialist Party and Others v. Turkey*, Application No. 20/1997/804/1007, 1998. On laicism, *see e.g.* ECtHR, *Refah Partisi (The Welfare Party) and others v. Turkey*, Application No. 41340/98, 2003; ECtHR, *Leyla Şahin v. Turkey*, Application No.44774/98, 2005.

³³ *See* Turkish Constitution, Preamble para. 5.

³⁴ Turkish Constitution, Preamble para. 8.

Islam as two fundamental potential threats to the very existence of the nation state has shaped the ideological underpinnings of constitutional philosophy, as evident in the 1982 Constitution. What is most remarkable in the Turkish case is that, the object of protection against these imaginary enemies has not been the democratic order, but the state itself. So much so that, “in Turkey it is easy to swap the perception of ‘militant democracy’ for the perception of ‘militant state’.”³⁵

B. Judicial and non-Judicial Control Mechanisms

The judiciary is the principal institution enforcing the protection of human rights, on the basis of a separation of powers between the Constitutional Court and administrative courts. However, due to a number of factors including the heavy case load of courts, the tendency of the judiciary to prioritize the interests of the state over human rights and the lack of a right to petition the Constitutional Court, the judicial mechanism proves inadequate to safeguard fundamental rights. As part of the EU accession process, various non-judicial institutions have been set up to complement the judicial protection mechanism. However, their lack of independence from the executive undermines their legitimacy in the eyes of civil society, rendering them practically ineffective. The efforts of non-governmental organizations to establish an independent national human rights institution have not yet produced a positive result. A law enacted in 2006 to establish an independent ombudsperson’s office has not yet entered into force due to a presidential veto.

a. Judicial Review of the Protection of Human Rights

Article 40 of the Constitution grants everyone whose rights have been violated the right to apply to the “competent authorities” and to receive compensation where the subject of unlawful treatment is public officials. While “competent authorities” are primarily judicial, the constitutional and legal framework also provides administrative and political mechanisms of protection. Article 40(2) requires courts to review human rights cases which fall under their jurisdiction and mandate.

Administrative courts, courts of justice and the Constitutional Court share the competence to review human rights cases. Administrative courts have jurisdiction over allegations of human rights violations committed by civilian administrative authorities.³⁶ The review of complaints against military authorities or relating to military service, even if the alleged violations stem from the acts and actions carried out by civilian authorities, falls under the exclusive jurisdiction of the High Military Administrative Court of Appeals.³⁷ The blanket immunity provided for the acts of the President on his/her competence,³⁸ the decisions and orders signed by the President on his/her initiative,³⁹ the decisions of the Supreme Council of Judges and Public

³⁵ Erözden *et al.*, 2.

³⁶ Article 125, as amended on 13 August 1999, grants, in paragraph 1, the right to “judicial review against all actions and acts of administration.”

³⁷ Article 157(1).

³⁸ Article 125(2).

³⁹ Article 105(2).

Prosecutors⁴⁰ and the Supreme Council of Judges and Public Prosecutors⁴¹ is cited as a shortcoming from the point of view of rule of law.⁴²

Pursuant to its duty to review the constitutionality of laws and decrees having the force of law,⁴³ the Constitutional Court is required to ensure that constitutional rights and liberties are not violated.⁴⁴ However, it lacks the power to “review the constitutionality of national laws vis-à-vis the European Convention.”⁴⁵ It is entrusted with the annulment of laws upon the application of the President, parliamentary groups of the ruling and main opposition parties or one-fifth of the members of the parliament.⁴⁶ The Constitutional Court’s power to review constitutional amendments, however, is merely procedural.⁴⁷ Also vested in the court is the exclusive power to dissolve political parties, upon the application of the Chief Public Prosecutor.⁴⁸

A fundamental shortcoming of the Turkish constitutional system is that it does not vest on individuals the right to petition the Constitutional Court to contest human rights violations committed by public agents and institutions. While the issue does not rank high on public agenda, relevant bodies have developed proposals for the institution of an individual petition mechanism in order to enhance the protection of human rights, ease the work load of courts, and reduce the number of petitions filed in Strasbourg. Most notably, the Union of Turkish Bars⁴⁹ and the Constitutional Court⁵⁰ advocate the granting of individuals the right to petition the highest court in Turkey.

b. Non-Judicial Human Rights Mechanisms

The Constitution grants individuals the right to petition competent authorities and the parliament with “requests and complaints concerning themselves or the public.”⁵¹ In June 2006, the parliament enacted a law establishing an Ombudsperson to receive complaints from natural and legal persons with regards to administrative acts.⁵² However, the law has not entered into force due to the President’s veto on the ground that the establishment of an institution under the auspices of the parliament which would monitor all acts of the administration is contrary to the constitution.⁵³

In addition, there are various recently established administrative bodies which monitor administrative practices from a human rights point of view: the Human

⁴⁰ Article 159(4).

⁴¹ Article 125(2).

⁴² Başbakanlık İnsan Hakları Başkanlığı, *İnsan Hakları: Temel Bilgiler, Koruma Mekanizmaları, İl ve İlçe İnsan Hakları Kurulları* (Matus Basımevi, 2006), 114.

⁴³ Article 148(1).

⁴⁴ *Id.*

⁴⁵ Tuğcu, 5.

⁴⁶ *Id.*, Article 148 (2).

⁴⁷ *Id.* “Constitutional amendments shall be examined and verified only with regard to their form.”

⁴⁸ Article 69(4): “The dissolution of political parties shall be decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic.”

⁴⁹ The text of the draft constitution proposed by the Union of Turkish Bars on 12 September 2001 provides, among others, the institution of an individual petition mechanism. Özdemir Özok, “President of the Union of Turkish Bars, Opening Address on the Occasion of the Judicial Year of 2005-2006,” Ankara, September 2005, 6.

⁵⁰ Tuğcu, 2.

⁵¹ Article 74(1).

⁵² Kamu Denetçiliği Kanunu (Law on Public Auditing Institution), No. 5521, adopted on 15 June 2006.

⁵³ For the reasoning of the presidential veto issued on 1 July 2006, see the Presidency’s website at http://www.cankaya.gov.tr/tr_html/ACIKLAMALAR/01.07.2006-3512.html.

Rights Presidency,⁵⁴ the Supreme Council of Human Rights,⁵⁵ the Human Rights Advisory Council,⁵⁶ province and district based human rights boards,⁵⁷ the Ministry of Interior's Investigation Office⁵⁸ and the *gendarmérie's* Human Rights Violations Investigation and Assessment Centre.⁵⁹ Issues of lack of transparency and expertise of these bodies as well the overlap in their mandates aside, these institutions fail to constitute effective and legitimate human rights protection mechanisms due to their lack of independence from the executive.⁶⁰ They are extremely under-utilized by human rights groups and individuals for lack of faith in their impartiality, independence and expertise. A very high profile public dispute that has occurred between the Human Rights Presidency and the Human Rights Advisory Council over a critical report on minority rights issued by the latter on its own motion served to further discredit these bodies. The report's recommendation for the adoption of a new notion of citizenship embracing ethnic and religious differences generated high public attention, resulting in the government disowning the report, renouncing its validity and launching a criminal investigation against its author and the president of the advisory council.⁶¹

The intimidation and prosecution of a member and the president of the Human Rights Advisory Council proved the need for an independent national human rights institution which should be completely independent from the executive in accordance with the Paris Principles of the United Nations.⁶² However, recent efforts to this end

⁵⁴ The mandate of the Presidency, which operates under the auspices of the Prime Ministry, is to coordinate the works of various human rights bodies, to monitor the implementation of the legal framework on human rights, offer recommendations towards harmonizing domestic legal framework with international human rights instruments Turkey has ratified, monitor and coordinate the training programs of public bodies, review human rights complaints and coordinate efforts for the prevention of further violations. Başbakanlık İnsan Hakları Başkanlığı, *İnsan Hakları...*, 116.

⁵⁵ Established in 2001 also under the auspices of the Prime Minister's office, this body is presided by a cabinet minister appointed by the Prime Minister and is made up of undersecretaries belonging to various ministries. Its mandate is to draft legal and administrative measures for the protection of human rights, make recommendations for the harmonization of the domestic legal framework with international law, coordinate efforts for the protection and development of human rights in accordance with international standards and monitor the implementation of professional training programs on human rights. *Id.*, 116-17.

⁵⁶ Established under the auspices of a cabinet ministry, this body provides consultation on human rights protection. Its principal task is to issue reports containing recommendations towards that end. Its members primarily consist of representatives of human rights organizations, trade unions and professional organizations as well as academics. *Id.*, 117.

⁵⁷ These bodies receive human rights complaints from individuals.

⁵⁸ Established in February 2004, the office receives individual complaints of human rights abuses. Ministry of Interior inspectors evaluate and follow up on the applications with relevant authorities. As of the end of 2005, only one complaint has resulted in disciplinary action. European Commission 2005 Regular Report on Turkey's Progress Towards Accession, 21.

⁵⁹ Established in 2003, the centre, as of the end of 2005, has received 162 complaints most of which relate to allegations of ill-treatment or unjust detention. As of the same date, disciplinary action has been taken in 3 cases. *Id.*

⁶⁰ In its latest progress report, the European Commission stated that "the Human Rights Presidency lacks independence from the government, is understaffed and has a limited budget... The Human Rights Advisory Board under the Office of the Prime Minister has not been operating since the publication of a report on minority rights in Turkey in October 2004." European Commission, 2006 Regular Report on Turkey's Progress Towards Accession, 12.

⁶¹ For more on these developments, see Baskın Oran, "Azınlık Hakları ve Kültürel Haklar Raporu'nun Bütün Öyküsü," *Birikim*, N: 188 (2004), 17-25.

⁶² United Nations Commission on Human Rights, Resolution 1992/54, "Principles Relating to the Status of National Institutions," 3 March 1992.

failed to produce concrete results due to the insistence of the government to control both the process of the establishment of such an institution and the end result.

The Turkish Parliament's Human Rights Investigation Commission provides a political mechanism for the protection of human rights. Established in 1990, it is the only parliamentary commission established pursuant to a law.⁶³ The Commission has the power to set its own agenda and the mandate to conduct human rights monitoring on its own initiative, undertake fact-finding missions to locations it deems necessary, make unannounced visits to places of detention, interview official and non-official individuals and issue non-binding reports based on its missions. Notwithstanding this broad mandate, the Commission lacks enforcement power and is not consulted on the drafting of human rights legislation. Nonetheless, it plays an active role in receiving petitions on human rights violations and undertaking fact-finding missions around the country. Between October 2005 and June 2006, the Commission received 864 applications. In 2006, it conducted several investigations and issued three reports.⁶⁴

III. Litigating Strasbourg: Case Law, Actors, Implementation, Impact

Turkey is among the state parties most complained against in Strasbourg. With 20,141 applications lodged between 1 November 1998 and 2006, Turkey ranked sixth among the 46 member states following Russia, Poland, Romania, Italy and France.⁶⁵ In 2006 alone, 2,280 new applications were lodged against Turkey.⁶⁶ Of the 1,560 judgments that the ECtHR handed down in 2006, the highest number (334) concerned Turkey.⁶⁷ As of August 2006, in 196 of these judgments, the Court found Turkey in violation of the ECHR.⁶⁸ As of 1 January 2007, 10% (9,000) of the total number of cases (89,900) pending before the ECtHR are those filed against Turkey.⁶⁹

Initially, the ECHR's ratification did not capture much attention in Turkey. During the first three decades when the convention was in force, the case law of the court consisted mainly of petitions lodged by Cyprus against Turkey's military intervention in and subsequent occupation of the island. There were also cases lodged by various European states against the policies and practices of the military junta that ruled Turkey between 1980 and 1983. It was only in 1987 when the Turkish Government accepted the right of individual petition that the ECHR generated a high interest among the public and the media. 1987 carries a further significance for the European integration project since that was the year when Turkey put forth a formal application for membership to the EU. Since then, thousands of applications have been filed in Strasbourg and the ECtHR case law has been a source of both political controversy and legal change in Turkey.

The Kurdish question featured predominantly in the ECtHR's jurisprudence on Turkey. Majority of applications stemmed from atrocities committed by security forces during the state of emergency. Others concerned the dissolution of political parties and prosecution of individuals advocating a democratic solution to the Kurdish

⁶³ Sema Pişkinsüt, *Türkiye'de İnsan Hakları ve Demokrasi*, Türkiye Bilimler Akademisi, Akademi Forumu No: 4 (2002), 9.

⁶⁴ European Commission, 2006 Regular Report on Turkey's Progress Towards Accession, 12.

⁶⁵ European Court of Human Rights, "Survey of Activities 2006," Registry of the European Court of Human Rights Strasbourg (2007), 43-44.

⁶⁶ *Id.*, 40.

⁶⁷ *Id.*, 3.

⁶⁸ European Commission, 2006 Regular Report on Turkey's Progress Towards Accession, 11.

⁶⁹ *Id.*, 51.

question. The constitutional principle of “territorial unity,” or its interpretation by courts in Turkey, had provided the doctrinal justification for the infringement of rights and freedoms in these cases. The legal and political activism of Kurdish lawyers in early 1990s also played a critical role in the high number of petitions. Central to this process was the assistance that Kurdish lawyers have received from human rights lawyers and organizations in the United Kingdom.

Another norm that played a key role in the restriction of rights and liberties in Turkey is “laicism.” Restrictively interpreting this principle, the Constitutional Court dissolved political parties and upheld a headscarf ban in universities. These cases were brought to Strasbourg on grounds, among others, of Articles 9 and 11 of the ECHR. However, in contrast to its stand vis-à-vis the interpretation of the principle of territorial unity, the ECtHR deferred to the Constitutional Court when it came to laicism and issued two controversial rulings in *Refah Partisi* and *Leyla Şahin*.

Until recently, Kurds were the only minority group engaged in international human rights litigation. However, in doing so, Kurds did not self-identify as a “national minority.” While Kurds have in many cases claimed violation of Article 14, they alleged that they had been discriminated against on the basis of their ethnic origin, not as a national minority *per se*. This can be explained by the resistance of the Kurdish political movement to bear the “minority” tag⁷⁰ for fear of being associated with non-Muslims, the only group granted minority status in Turkey, and thus be perceived as lesser citizens.⁷¹ At any rate, in scores of Article 14 claims made by Kurds, the ECtHR has never found ethnic discrimination.⁷² Even in applications concerning village evictions, where applicants claimed the presence of a systematic policy of displacement against the Kurds, the result did not change.⁷³ While the ECtHR reviewed Article 14 claims -- and found no violation -- in most cases, it declined review in others.⁷⁴ It has never elaborated why it subjects Article 14 claims to such differential treatment.

A. ECtHR Case Law

An analysis of the ECtHR jurisprudence on Turkey shows that the legal grounds of applications clustered around Article 2 (right to life), Article 3 (prohibition of ill treatment, degrading and inhuman punishment and treatment), Article 5 (right to

⁷⁰ The first public reaction by Kurds to being named as a minority came with the release in October 2004 of the European Commission’s progress report on Turkey’s accession. The EU’s reference to Kurds -- and Alevis -- as a minority was vehemently condemned in various occasions by Kurdish and Alevi representatives, who argued instead that Kurds are a “founding people.” European Commission, 2004 Regular Report on Turkey’s Progress Towards Accession, 44 and 48.

⁷¹ For a discussion of the historical and political reasons behind Kurds and other ethnic minorities’ reluctance to self-identify as minorities and the discrimination and persecution suffered by non-Muslim minorities, see Dilek Kurban, “Unravelling a Trade-off: Reconciling Minority Rights and Full Citizenship in Turkey,” *European Yearbook of Minority Issues*, Vol. 4, 2004/5 (2006), 341-371.

⁷² The reluctance to review Article 14 applications is not limited to Turkey. ECtHR’s jurisprudence on anti-discrimination reveals a general preference, with a few exceptions, to avoid judicial review where possible, and to find no violation in rare cases where it conducts such review. For an analysis of the court’s jurisprudence on Article 14, see Sia Spiliopoulou Åkermark, “The Limits of Pluralism- Recent Jurisprudence of the European Court of Human Rights: Does the Prohibition of Discrimination Add Anything?,” *Journal on Ethnopolitics and Minority Issues in Europe*, Vol. 3 (2002).

⁷³ See e.g. ECtHR, *Akdivar and Others v. Turkey*, Application No. 99/1995/605/693, 30 August 1996; ECtHR, *Menteş and Others v. Turkey*, Application No. 23186/94, 28 November 1997; ECtHR, *Hasan İlhan v. Turkey*, Application No. 22494/93, 9 November 2004.

⁷⁴ ECtHR, *Orhan v. Turkey*, Application No. 25656/94, 18 June 2002.

liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), 10 (freedom of expression), 11 (freedom of association), 14 (prohibition of discrimination) and Article 1 of the Protocol No. 1 (right to property). Very few cases were brought to Strasbourg on the basis of a violation of Article 9 (freedom of religion). Notwithstanding the high number of cases where applicants alleged breach of Article 14, the ECtHR found violation in only one case concerning gender discrimination.⁷⁵

The largest number of petitions and judgments that fall within the scope of JURISTRAS concerns the restriction of freedom of expression and the criminalization of political dissent. Out of 63 petitions filed with the court, 58 resulted in the finding of a violation and four in friendly settlements. In only one case, the seminal case of *Zana*, did the court not find a violation of Article 10.⁷⁶ The vast majority of cases concern the prosecution of journalists, human rights advocates and intellectuals for expressing dissenting views on the Kurdish question, while a few concerned the criminalization of speech criticizing state's policies on laicism. While some petitions raised Article 10 only, most of them raised Article 6 as well.

The second highest number of petitions and judgments relates to rights violations committed by Turkish security forces, particularly in East and Southeast Turkey. The articles raised in these cases are Articles 3, 5 and 6. Out of 60 petitions, 43 resulted in a judgment against Turkey whereas 13 in friendly settlements. While the court found no violation in three cases, one petition was declared inadmissible. It is important to note here that these petitions are not exhaustive of all applications filed in Strasbourg under Articles 3, 5 and 6. Rather, in line with the research methodology of JURISTRAS, only the petitions lodged by minorities (in this case, Kurds) are reviewed. The identification is based either on explicit information on the ethnic origin of the applicants provided in the judgments or on circumstantial inference such as the nature of the organization the applicants were accused of being affiliated with (in this case, the PKK). Inevitably, this selection may be under-inclusive both because the judgments do not uniformly mention the ethnic origin of the petitioners and because applicants who were prosecuted for being affiliated with other illegal organizations (such as left-wing groupings) may also have been Kurdish.

The third largest group of cases concerns property rights claims, the vast majority of which were filed by Kurds who had been evicted from their villages by security forces or were obliged to leave their homes at the height of the armed conflict between the PKK and the army. Out of 31 petitions raising property rights abuses, 27 were filed by Kurdish IDPs whereas the rest were expropriation⁷⁷ and environmental⁷⁸ disputes. The court issued 18 judgments against Turkey and one in favor, while it

⁷⁵ See Section A-5 titled "Respect for Home, Private and Family Life" below.

⁷⁶ ECtHR, *Zana v. Turkey*, Application No. 69/1996/688/880, 25 November 1997.

⁷⁷ ECtHR, *Aka v. Turkey*, Application No. 107/1997/891/1103, 23 September 1998 (concerning the non-payment of the full amount of compensation awarded by authorities to the applicant in return for the expropriation of his land for the construction of a dam); ECtHR, *Mutlu v. Turkey*, Application No. 8006/02, 20 October 2006 (concerning the non-payment of the full amount of compensation awarded by authorities to the applicant in return for the expropriation of his land for the construction of a dam); ECtHR, *Hasan Kaya v. Turkey*, Application No. 33696/02, 21 December 2006 (concerning the payment of insufficient interest to the applicant who had been awarded compensation in return for the expropriation of his land).

⁷⁸ ECtHR, *Öneryıldız v. Turkey*, Application No. 48939/99, 18 June 2002 (the applicant claimed compensation for the non-payment of damages he had been awarded upon the destruction of his house and the ensuing death of his family members in an explosion caused by negligent waste disposal by authorities).

found two applications inadmissible. In 10 cases, all filed by Kurdish IDPs, friendly settlements were reached between the parties. While the ECtHR's judgments in expropriation and environmental cases rested solely on Article 1 of the Protocol No. 1, those concerning internal displacement were based also on Articles 8 and 3.

The fourth largest group concerns cases regarding the dissolution and prosecution of associations and political parties. Out of 11 cases, the court found a violation of Article 11 in nine cases, including three cases relating to the dissolution of pro-Kurdish political parties, whereas it found no violation in the dissolution of a pro-Islamic party in *Refah*.⁷⁹

As stated above, Article 8 was raised in nearly all cases concerning village evictions. However, since the primary legal ground relied upon in these cases is Article 1 of the Protocol No. 1, they are analyzed under the heading "property rights." In the section under the heading "respect for home, private and family life," cases where applicants relied primarily or solely on Article 8 are reviewed.

Lastly, the smallest number of cases concerns freedom of religion, which has a very low profile in the ECtHR jurisprudence on Turkey. Only two petitions were lodged in Strasbourg on the basis primarily of Article 9, and in both cases the ECtHR found no violation.⁸⁰ While the provision was also raised in some cases concerning freedom of association, it was not the primary legal ground the applicants relied on.⁸¹ At any rate, the ECtHR declined review under Article 9 in these cases.

1. Freedom of Expression

In nearly all decisions concerning freedom of expression in Turkey, the controversy is based on the criminalization of dissenting opinions on the Kurdish question. While two judgments concern the prosecution of individuals with Islamic backgrounds who expressed critical views on state policies on religion,⁸² one concerns the prosecution of a journalist who published a book criticizing Islam,⁸³ one concerns the conviction of a journalist who distributed leaflets about a conscientious objector,⁸⁴ and two concern the suppression of dissenting views by the left through printing a party poster containing a slogan against the IMF⁸⁵ and publishing the bibliography of the founder of an extreme left-wing group,⁸⁶ the rest concerns the prosecution of individuals who published materials critical of Turkey's policies towards the Kurds⁸⁷ or expressed dissenting views on the issue.⁸⁸ The charges were brought under former Article 312 of

⁷⁹ ECtHR, *Refah Partisi (The Welfare Party) and others v. Turkey*, ECtHR (Grand Chamber).

⁸⁰ ECtHR, *Kalaç v. Turkey* (61/1996/680/870), 23 June 1997; ECtHR, *Leyla Şahin v. Turkey* (44774/98), 29 June 2004.

⁸¹ See e.g., ECtHR, *United Communist Party of Turkey and Others v. Turkey* (133/1996/752/951), 30 January 1998; ECtHR, *Refah Partisi (The Welfare Party) and others v. Turkey* (41340/98), 13 July 2001.

⁸² ECtHR, *Erbakan v. Turkey* (59405/00), 6 July 2006; ECtHR, *Yarar v. Turkey* (57258/00), 19 December 2006.

⁸³ ECtHR, *Aydın Tatlav v. Turkey* (50692/99), 2 May 2006.

⁸⁴ ECtHR, *Düzgören v. Turkey* (56827/00), 9 November 2006.

⁸⁵ ECtHR, *Tüzel v. Turkey* (no. 2) (71459/01), 31 October 2006.

⁸⁶ ECtHR, *Öztürk v. Turkey* (22479/93), 28 September 1999.

⁸⁷ See e.g. ECtHR, *Sürek v. Turkey* (24122/94), 8 July 1999; ECtHR, *Sürek and Özdemir v. Turkey* (23927/94), 8 July 1999; ECtHR, *Erdoğan and İnce v. Turkey* (25067/94), 8 July 1999; ECtHR, *Erdoğan v. Turkey* (25723/94), 15 June 2000; ECtHR, *Şener v. Turkey* (26680/95), 18 June 2000.

⁸⁸ See e.g. ECtHR, *Polat v. Turkey*, Application No. 23500/94, 8 June 1999; ECtHR, *Karataş v. Turkey*, Application No. 23168/94, 8 June 1999; ECtHR, *Gerger v. Turkey*, Application No. 24919/94, 8 June 1999; ECtHR, *Ceylan v. Turkey*, Application No. 23556/94, 8 June 1999; ECtHR, *Okçuoğlu v.*

the Penal Code and former Article 8 of the anti-terror law, which criminalized separatist propaganda against the unity and integrity of the state as well as incitement to hatred and hostility on the basis of race, social class or region.

In its judgments, the court stressed the essential role that political parties and the media play in the proper functioning of democracy, the indispensability of the freedom of expression, even where the ideas offend, shock or disturb, the severity of bringing the weight of criminal law on opinions, and the incompatibility of state security courts whose bench included a military judge with the right to fair trial. The only case where the ECtHR did not find a violation of Article 10 is the *Zana* judgment issued by the Grand Chamber.⁸⁹ In this standard-setting decision, the ECtHR drew the boundaries of freedom of expression. The case concerned the conviction of Mehdi Zana, a Kurdish politician who was the former mayor of Diyarbakır, the largest province populated predominantly by the Kurds. Zana was prosecuted for statements he had made during a press interview he gave while he was in prison, where he said he supported the “PKK national liberation movement” and that the PKK killed women and children “by mistake.” The ECtHR underscored the special circumstances of the case owing to the fact that the applicant was a highly influential politician, the statements were made at the height of murderous attacks carried out by the PKK on civilians in southeast Turkey and the interview was published in a major national daily paper. The court regarded the statements as likely to exacerbate an already explosive security situation in the region and therefore concluded that the conviction of the applicant answered a pressing social need.

In eight cases, the government reached friendly settlement with the applicants. The government admitted in its declarations that “Turkish law and practice urgently need to be brought into line with the Convention’s requirements under Article 10” and committed itself to undertake the necessary legislative reforms, as outlined in Turkey’s national program on accession to the EU.⁹⁰

2. Cases Brought by Minorities under Articles 3, 5 and 6

The cases analyzed in this section are selected on the basis of the petitions filed by minorities under Articles 3, 5 and 6. The vast majority of the petitions were filed by Kurds on grounds of human rights abuses committed by security officers during the state of emergency. Petitioners had been held in detention for lengthy periods without prompt judicial review;⁹¹ exposed to ill treatment,⁹² inhuman and degrading treatment and punishment⁹³ or torture;⁹⁴ or held in unacknowledged detention.⁹⁵ In many cases,

Turkey, Application No. 24246/94, 8 July 1999; ECtHR, *Incal v. Turkey*, Application No. 41/1997/825/1031, 8 July 1999.

⁸⁹ ECtHR, *Zana v. Turkey*, Application No. 69/1996/688/880, 25 November 1997.

⁹⁰ See e.g. ECtHR, *Özler v. Turkey*, Application No. 25753/94, 11 July 2002.

⁹¹ See e.g. ECtHR, *Aksoy v. Turkey*, Application No. 21987/93, 18 December 1996.

⁹² See e.g. ECtHR, *Mehmet Emin Yüksel v. Turkey*, Application No. 40154/98, 20 October 2004; ECtHR, *Çelik and İmret v. Turkey*, Application No. 44093/98, 26 October 2004.

⁹³ See e.g. ECtHR, *Timurtaş v. Turkey*, Application No. 23531/94, 13 June 2000; ECtHR, *Taş v. Turkey*, Application no. 24396/94, 14 November 2000.

⁹⁴ See e.g. ECtHR, *Salman v. Turkey*, Application No. 21986/93, 27 June 2000; ECtHR, *İlhan v. Turkey*, Application No. 22277/93, 27 June 2000; ECtHR, *Akkoç v. Turkey*, Application No. 22947/93, 22948/93, 10 October 2000.

⁹⁵ See e.g. ECtHR, *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998; ECtHR, *Çakıcı v. Turkey*, Application No. 23657/94, 8 July 1999; ECtHR, *Timurtaş v. Turkey*, Application No. 23531/94, 13 June 2000; ECtHR, *Taş v. Turkey*, Application No. 24396/94, 14 November 2000; ECtHR, *Çiçek v. Turkey*, Application No. 25704/94, 27 February 2001.

the applicants were also convicted by state security courts, whose benches at the time included a military judge along with two civilian judges.⁹⁶ While petitioners raised Article 14 in some cases,⁹⁷ the Court did not examine these claims in most instances and found no violation in rare cases where it did.⁹⁸

The court established standards on the safeguards that need to be followed during detention and trial. In *Kurt*, it held that the unacknowledged detention of an individual is a complete negation of the guarantees under Article 3 and a violation of Article 5.⁹⁹ *Öcalan* concerned the abduction of Abdullah Öcalan, the PKK leader, in Kenya and his trial in Turkey which resulted in his sentencing to death penalty by a state security court. In this case, the ECtHR held that the applicant's trial and conviction by a court lacking independence and impartiality, lack of legal assistance for seven days, inability to communicate with his counsel in confidence and lack of appropriate access to the case file, as well as the restriction on the number and length of meetings he had with his lawyers violated his rights under Article 6.

In 13 cases, the parties reached friendly settlement. In its declarations of friendly settlement, the government expressed regret about "the occurrence of individual cases" of ill treatment and torture, expressed a firm commitment to issue appropriate instructions and adopt all necessary measures to ensure that effective investigations are carried out, and noted that new legal and administrative measures had been adopted towards that end.¹⁰⁰

3. Property Rights

A state of emergency was declared in 1987 in Kurdish-populated East and Southeast Turkey, granting extra-legal powers to administrative and military authorities in the region.¹⁰¹ Human rights abuses committed by security forces in late 1980s and early 1990s led to a rapid increase in the number of petitions filed in Strasbourg. According to the Ministry of Foreign Affairs, of the nearly 3,000 applications filed as of August 2003,¹⁰² 1,500 related to allegations of forced eviction and property destruction.

Instrumental in the high number of petitions has been the exception made by the ECtHR in *Akdivar and Others* to the principle of the exhaustion of domestic remedies in applications originating from the region.¹⁰³ The case concerned allegations by Kurdish civilians that they had been evicted from their homes by security forces in violation, *inter alia*, of their rights to property. The ECtHR developed the following exceptions to the general rule of exhaustion of domestic legal remedies under Article 26: 1) the insufficiency or inefficiency of remedies available in member country's domestic legislation; or 2) the demonstration of the existence of an administrative practice condoned by official authorities, where actions in violation of the ECHR recur continuously, rendering domestic remedies ineffective or

⁹⁶ See e.g. ECtHR, *Algür v. Turkey*, Application No. 32574/96, 22 October 2002; ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 March 2003.

⁹⁷ See e.g. ECtHR, *Öcalan v. Turkey*, Application No. 46221/99, 12 March 2003.

⁹⁸ See e.g. ECtHR, *İpek v. Turkey*, Application No. 25760/94, 17 February 2004.

⁹⁹ ECtHR, *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998.

¹⁰⁰ See e.g. ECtHR, *Yakar v. Turkey*, Application No. 36189/97, 26 November 2002.

¹⁰¹ Originally in force in a few provinces, the state of emergency was progressively expanded to cover 12 provinces. It was gradually abolished after 1999 and came to a complete end in 2002.

¹⁰² Durmuş Tezcan, Mustafa Ruhan Erdem, Oğuz Sancakdar, *Avrupa İnsan Hakları Sözleşmesi Işığında Türkiye'nin İnsan Hakları Sorunu* (2004), 168, citing the Ministry of Foreign Affairs Deputy General Directorate on Council of Europe and Human Rights.

¹⁰³ ECtHR, *Akdivar and Others v. Turkey*, Application No. 99/1995/605/693 (1996).

insufficient. Implementing this principle in the context of Turkey, ECtHR pointed out that despite the gravity of village destructions and the multitude of claims of intentional destruction of property by security forces, the government had not been able to provide a domestic legal remedy to compensate villagers for damages arising from these violations or to hold the security forces accountable.

27 applications were lodged against property destruction and forced eviction. Petitioners based their claims primarily on Articles 3 and 8 of the Convention, and Article 1 of the Protocol No. 1. Initially, ECtHR did not deem it necessary to review claims under Article 3.¹⁰⁴ However, in subsequent cases, it held that the intentional burning of property before the eyes of the IDPs constituted inhuman treatment.¹⁰⁵ The applicants also alleged that the state had a discriminatory policy of forced displacement targeting the Kurdish population. However, the court held that Article 14 was not violated.¹⁰⁶ In rare cases it declined review altogether.¹⁰⁷

Until *Doğan and Others*,¹⁰⁸ the court had limited its ruling to the individual case before it. In this case, the ECtHR identified a structural problem of internal displacement and called on the government to design policies towards its solution.¹⁰⁹ Plaintiffs claimed that they were not permitted to return to their village and access their property even after 1999, when the government's "Return to Village and Rehabilitation Project" (RVRP) had entered into force. The ECtHR held that the government's return policy has failed, the measures it has taken to improve the conditions of IDPs were insufficient and ineffective, and that "effective legal remedy" requires not only the payment of compensation, but also the identification and punishment of perpetrators. The government pointed out that a draft law on compensation was being deliberated at the Turkish Parliament, but the ECtHR declined to take into account a law that had not yet come into force. In *İçyer* judgment of 12 February 2006, the court held that the Compensation Law, which had entered into force on October 2004,¹¹⁰ was an effective remedy for IDPs and ruled the application inadmissible.

One recent decision worth mentioning here is the case of *Fener Rum Lisesi Vakfı*.¹¹¹ The first judgment ever in a case brought by a non-Muslim minority in Turkey, the case concerns the confiscation by the state of a property belonging to a Rum Orthodox foundation on the basis of a discriminatory policy dating back to 1960s. In this precedent-setting judgment where the ECtHR for the first time ruled on Turkey's policies on the property rights of non-Muslim foundations, the court found a violation of Article 1 of the Protocol No. 1 and gave the government three months to either return the property or pay just compensation.

¹⁰⁴ ECtHR, *Akdivar and Others v. Turkey*, Application No. 99/1995/605/693, 30 August 1996; ECtHR, *Menteş and Others v. Turkey*, Application No. 23186/94, 28 November 1997.

¹⁰⁵ See e.g. ECtHR, *Selçuk and Asker v. Turkey*, Application No. 12/1997/796/998-999, 24 April 1998.

¹⁰⁶ See e.g. ECtHR, *Akdivar and Others v. Turkey*, Application No. 99/1995/605/693, 30 August 1996; ECtHR, *Selçuk and Asker v. Turkey*, Application No. 12/1997/796/998-999, 24 April 1998.

¹⁰⁷ See e.g. ECtHR, *Orhan v. Turkey*, Application No. 25656/94, 18 June 2002.

¹⁰⁸ ECtHR, *Doğan and Others v. Turkey* Application Nos. 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004.

¹⁰⁹ This change in heart is mainly due to the new mandate granted by the Committee of Ministers of the Council of Europe. In a decision on 12 May 2004, the Committee of Ministers authorized ECtHR to issue pilot judgments where it identifies a structural problem in a member state. The main reason for the new strategy was to ease the case load of the court. Decision No. 2004/3.

¹¹⁰ Terör ve Terörle Mücadeleden Doğan Zararların Karşılanması Hakkında Kanun [Law on Compensation for Losses Resulting from Terrorism and the Fight against Terrorism], No. 5233, 17 July 2004, Official Gazette No. 25535, 27 July 2004 ("Compensation Law").

¹¹¹ ECtHR, *Fener Rum Lisesi Vakfı v. Turkey*, Application No. 34478/97, 9 January 2007.

4. Freedom of Association

The most important group of cases here is the decisions concerning political party dissolutions,¹¹² four of which resulted in a finding of violation whereas in *Refah Partisi* the ECtHR ruled in favour of the government. While the earlier cases concerned the dissolution of pro-Kurdish parties in the name of national unity and territorial integrity, *Refah Partisi* concerned the closure of a pro-Islamist party in the name of laicism.

In *Socialist Party* and *United Communist Party of Turkey*, the ECtHR established important standards on freedom of association: The dissolution of a party solely on the basis of its program, before it had any chance to engage in activities, infringes on Article 11;¹¹³ a party's choice of name cannot justify a measure as drastic as dissolution;¹¹⁴ that the program of a party seeks to achieve goals, such as the establishment of a federal regime, which are considered to be incompatible with constitutional principles does not make it incompatible with democracy. A party can advocate any political goal which does not harm democracy itself.¹¹⁵

In *Refah Partisi*, the ECtHR drew the boundaries of freedom of association. It concluded that the party constituted a serious threat to the secular regime in Turkey, justifying its dissolution in the name of protection of democracy. Thus, the ECtHR gave a very rare judgment in its overall jurisprudence, upholding the dissolution of an entire political party that had been a part of the political system for 15 and the government for two years. It is notable that, unlike in previous dissolution decisions by the Turkish Constitutional Court, the basis of this infringement was not the program or the acts of the party itself, but various statements made by its chairman and members over the course of years. The ECtHR ruled that, the aspirations expressed by these individuals for a plurality of legal systems and a government based on Islamic law, the achievement of which were possible in light of Turkey's history, were incompatible with democracy. In doing so, the ECtHR contradicted with its own judgment in *United Communist Party* where it had ruled that the dissolution of a party on the basis of its program and in the absence of any specific *acts* aimed at overthrowing the democratic regime was contrary to freedom of association.

5. Respect for Home, Private and Family Life

There are six ECtHR decisions concerning privacy rights, where petitioners relied solely on Article 8, concerning forced gynecological examination,¹¹⁶ the inability of married women to use their maiden names,¹¹⁷ operation of gold mines on residential

¹¹² ECtHR, *Socialist Party and Others v. Turkey*, Application No. 20/1997/804/1007, 25 May 1998; ECtHR, *United Communist Party of Turkey and Others v. Turkey*, Application No. 133/1996/752/951, 30 January 1998; ECtHR, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, Application No. 23885/94, 12 August 1999; ECtHR, *Refah Partisi (The Welfare Party) and others v. Turkey* (Grand Chamber), Application No. 41340/98, 13 February 2003; ECtHR, *Emek Partisi and Şenol v. Turkey*, Application No. 39434/98, 31 May 2005.

¹¹³ ECtHR, *United Communist Party of Turkey and Others v. Turkey*, para. 58.

¹¹⁴ *Id.*

¹¹⁵ ECtHR, *Socialist Party and Others v. Turkey*, 47.

¹¹⁶ ECtHR, *Y.F. v. Turkey*, Application No. 24209/94, 22 July 2003 (concerning the forced gynaecological examination of a female detainee of Kurdish origin who was accused of aiding and abetting PKK)

¹¹⁷ ECtHR, *Ünal Tekeli v. Turkey*, Application No. 29865/96, 16 November 2004.

areas,¹¹⁸ incommunicado detention without notification of families,¹¹⁹ unlawful search and seizure,¹²⁰ and paternity dispute.¹²¹ The earliest judgment is dated July 2003.

Ünal Tekeli is the only judgment in the ECtHR's jurisprudence on Turkey where the court found a violation of Article 14. The case was lodged by a female lawyer who challenged a domestic law requiring married women to use both their maiden name and their husband's last name on official documents. She sought release to use only her maiden name on the ground that she was known by the latter in her professional life. Noting that Turkey is the only country within the Council of Europe which imposes the husband's name as the couple's surname, even where the couple prefers an alternative arrangement, the ECtHR found the differential treatment of married men and married women to constitute gender discrimination.

6. Freedom of Religion

To this date, the ECtHR issued judgment in only two cases where applicants relied primarily on Article 9. *Kalaç* concerned the compulsory retirement of a military judge pursuant to the order of the Supreme Military Council on the ground that his religious activities showed lack of loyalty to the principle of secularism.¹²² In *Leyla Şahin*, the issue was the compatibility of an administrative ban on the wearing of headscarf at universities, which caused the applicant who refused to take off her headscarf to be expelled from medical school. In both cases, the ECtHR did not find a violation.¹²³ In *Kalaç*, the court reasoned that the system of military discipline, to which the applicant voluntarily subjected himself, implied restrictions incapable of being imposed on civilians. The Supreme Military Council's order was a disciplinary measure which was not based on the applicant's beliefs. In *Leyla Şahin*, the court based its decision on the rights of female university students who chose not to wear the scarf but could feel intimidated by the presence on campus of women wearing headscarves. The ECtHR also found that the ban was justified by the legitimate concern to maintain public order in a secular country which is subject to the threat of Islamic fundamentalism.

The fact that freedom of religion is an under-litigated area in the ECtHR's case law on Turkey is due to the fact that minorities have until recently been reluctant to take their claims to Strasbourg.¹²⁴ However, this has started to change very recently

¹¹⁸ ECtHR, *Taşkın and Others v. Turkey*, Application No. 46117/99, 30 March 2005 (concerning a petition by a group of villagers contesting the authorities' granting of permits to international gold companies to operate mines on their lands).

¹¹⁹ ECtHR, *Sarı and Çolak v. Turkey*, Application No. 42596/98 and 42603/98, 14 March 2006 (concerning the incommunicado detention of applicants for seven days during which time they were not allowed to contact their families).

¹²⁰ ECtHR, *Taner Kılıç v. Turkey*, Application No. 70845/01, 24 October 2006 (concerning the unlawful search of the house of a human rights defender and the seizure of his belongings).

¹²¹ ECtHR, *Tavl v. Turkey*, Application No. 11449/02, 9 November 2006 (concerning the application by a man who contested his paternity of a child born in wedlock).

¹²² ECtHR, *Kalaç v. Turkey*, Application No. 61/1996/680/870, 23 June 1997.

¹²³ ECtHR, *Leyla Şahin v. Turkey*, Application No. 44774/98, 29 June 2004.

¹²⁴ For a discussion of the reasons of the reluctance of Alevi in this regard, see Aykan Erdemir, *Incorporating Alevi: The Transformation of Governance and Faith-Based Collective Action in Turkey*, thesis presented in the subject of Anthropology and Middle Eastern Studies, Harvard University (April 2004), 214-221.

with various religious minorities filing cases with the ECtHR. Currently, applications lodged by Alevi¹²⁵ and Protestant¹²⁶ minorities are pending before the court.

On the other hand, the disillusionment caused by the ECtHR's ruling in the case of *Leyla Şahin*, where the court showed an unquestionable deference to the Turkish Constitutional Court's interpretation of secularism, may discourage members of the Sunni Muslim majority from petitioning Strasbourg. The lack of faith in the ECtHR may be among the reasons for the Fazilet Party's withdrawal of its application, where it had challenged its dissolution on the ground of Article 11.¹²⁷

B. National and International Actors Advocating Minority Rights

Kurdish lawyers and activists played an instrumental role in the construction of the ECtHR jurisprudence on Turkey. When national remedies were *de facto* inaccessible under the state of emergency regime, Kurdish lawyers sought justice in Strasbourg. Lawyers associated with the bar associations of Diyarbakır and Istanbul, the Istanbul-based Foundation on Social and Legal Studies (Toplumsal ve Hukuk Araştırmaları Vakfı-TOHAV), Human Rights Association and the Human Rights Foundation of Turkey became the pioneers of litigating in Strasbourg and developed an expertise in this regard. In this process, they developed a close cooperation with lawyers in Europe, particularly those affiliated with the Human Rights Centre at University of Essex and the Kurdish Human Rights Project, both in the United Kingdom. British lawyers associated with these organizations filed scores of petitions, alone or in cooperation with Kurdish lawyers.

Turkey's EU accession process has been instrumental in not only strengthening the impact of the ECtHR jurisprudence on minority protection, but also encouraging new minority groups to litigate for the protection of their religious rights and the right to be free from discrimination. With recent reforms, both the nature of claims and the identity of applicants have started to diversify: minorities now seek relief against discrimination in education and for effective political participation, the protection of religious freedoms and the right to education. This is evident, for example, in the petitions filed by Armenian and Rum Orthodox minorities for the return of their properties or the payment of just compensation, by Protestants and Presbyterians for the recognition of their religion and the granting of authorization for registry of their churches, and by Alevis for the abolishment of compulsory religion classes in schools.¹²⁸ National and international external actors assisting minority groups in Turkey in their litigation efforts have started to diversify as well. Noteworthy in this regard are religious associations such as the Alevi "Pir Sultan Abdal Culture Association" in Turkey and the Europe based "Confederation of the

¹²⁵ In a petition filed in January 2004, an Alevi parent challenged the compatibility of the compulsory religious instruction in primary and secondary schools on the ground that it was based on the Sunni interpretation of Islam, did not reflect Alevis' perception of this religion and was thus discriminatory, and in violation of Alevis' freedom of religion. Erdemir, *Incorporating Alevis...*, 202-204.

¹²⁶ In March 2001, two Protestants who were arrested for publishing and distributing books about Christianity lodged a complaint with the ECtHR under, among others, Article 9. ECtHR, *Şengül Aydın v. Turkey*. In another case filed in December 2002, applicants are Turkish citizens of Protestant faith, who contested the rejection of their application to register their church on the ground that this violated their freedom of religion. ECtHR, *Özbek and Others v. Turkey*.

¹²⁷ ECtHR, *Fazilet Partisi and Kutan v. Turkey*, Application No. 1444/02, 27 April 2006.

¹²⁸ While religion classes are mandatory for all students in primary and secondary education, non-Muslim students are granted leave in practice. Alevis are not allowed to benefit from this exception.

European Alevi Unions” which have been instrumental in an Alevi parent’s application regarding compulsory religious instruction.

Since early 1990s, various international actors have been actively involved in non-litigation based human rights advocacy on behalf of the Kurds. Most notably, Human Rights Watch, Amnesty International, Lawyers Committee for Human Rights, the US Committee for Refugees, the European Parliament and European governments have been critical in bringing the Kurdish question to the attention of the international community. In the last decade, the EU accession process has brought to the fore a new international actor: the European Commission in Brussels and its delegation office in Ankara. The annual progress reports of the European Commission have become the principal assessment tool for the advancement of human rights protection in Turkey. At the national level, various human rights groups such as those named above have played a critical role in documenting human rights abuses committed during the state of emergency and raising awareness on the plight of the Kurds. Today, these groups work in close cooperation with the European Commission through providing the latter with information for its annual progress reports.

C. Strategic Litigation

One of the key research questions of JURISTRAS is whether applicants petitioning the ECtHR do so merely to gain an individual remedy or whether they are also motivated by the larger goal of pressuring the authorities to take remedial measures of a general nature. In other words, does the ECtHR have a central place in the domestic efforts to bring political change through litigation?

In the Turkish case, the number of isolated petitions which vary based on the special circumstances of the applicant is quite marginal. With the exception of a few number of case concerning land expropriation,¹²⁹ environmental issues,¹³⁰ paternity dispute¹³¹ and gender equality¹³² where applicants sought individual remedy, the vast majority of petitions were brought by Kurds or parties advocating their rights. The combination of various factors -- the coinciding of Turkey’s acceptance of the right to individual petition with the declaration of state of emergency, the unwillingness of domestic courts to exercise jurisdiction over allegations of human rights abuses committed under this regime, the ECtHR’s development of the “*Akdivar* exception” to the rule of exhaustion of domestic remedies -- resulted in a massive flow of petitions filed by Kurds in Strasbourg. Consequently, the ECtHR has become associated in the minds of both the state and the society with the Kurdish question. One question that JURISTRAS may find worth exploring is to what extent the ECtHR is perceived by the public opinion in Turkey to be a political rather than a legal body and whether it is seen as an independent and impartial institution.

Although the Kurds have been engaged in strategic litigation since early 1990s, their claims clustered around rights to property, liberty, fair trial and the right to be free from torture rather than challenging Turkey’s minority policy. However, as previously stated, both the identity of applicants and the nature of claims have started to diversify in recent years. New minority groups -- such as Alevis, Protestants,

¹²⁹ See e.g. ECtHR, *Aka v. Turkey*, Application No. 107/1997/891/1103, 23 September 1998; ECtHR, *Mutlu v. Turkey*, Application No. 8006/02, 20 December 2006.

¹³⁰ ECtHR, *Taşkın and Others v. Turkey*, Application No. 46117/99, 30 March 2005; ECtHR, *Öneryıldız v. Turkey*, Application No. 48939/99, 18 June 2002.

¹³¹ ECtHR, *Tavlı v. Turkey*, Application No. 11449/02, 9 November 2006.

¹³² ECtHR, *Ünal Tekeli v. Turkey*, Application No. 29865/96, 16 November 2004.

Armenians and Rums – have started to bring their claims to Strasbourg. What is contested in these applications is effectively Turkey’s exclusive citizenship concept and discriminatory policies against minorities. The controversy at issue in the pending case concerning the petition of an Alevi parent against compulsory religious classes in primary and secondary schools is the non-secular nature of state-religion relationship in Turkey. What is at stake in the recently issued judgment concerning the return of its confiscated properties to a Rum Orthodox foundation is Turkey’s discriminatory policies against non-Muslims.¹³³ These cases bear a high significance for the research question of JURISTRAS in that they signify the first time that an Alevi and a Rum citizen has petitioned the ECtHR. They point to an increasing resort by various minority groups to Strasbourg when prior domestic political and legal efforts to change the discriminatory aspects of the national legal framework have failed.

As new minority groups seek political change through litigation, however, the Kurds and the Muslims are losing faith in the reliability of the ECtHR as an external actor in their political struggle in Turkey. The *İçyer*,¹³⁴ *Refah*¹³⁵ and *Şahin*¹³⁶ judgments have cost the ECtHR considerable legitimacy in the eyes of the Kurds and the Muslims, who voice their frustration and disillusionment with what they increasingly perceive to be a political court. To what extent this perception may influence these groups’ future efforts to litigate in Strasbourg may be a question worth exploring in the later stages of JURISTRAS.

D. Domestic Execution of Judgments

As a state party to the ECHR, Turkey is under an obligation to secure everyone within its jurisdiction the rights and freedoms defined in the ECHR¹³⁷ and “to abide by the final judgment of the Court.”¹³⁸ This confers on judicial, political and executive authorities the responsibility to execute ECtHR’s judgments through means they deem to be appropriate. Article 13 guarantees the availability of a national remedy to enforce the rights and freedoms granted under the ECHR. While Turkey, as all other states parties, has some discretion as to the manner in which it conforms to its Article 13 obligations, the remedy must be “effective” in practice as well as in law.¹³⁹

In its judgments in the village eviction and property destruction cases, the ECtHR has noted that the nature and gravity of violations had implications for Article 13.¹⁴⁰ In *Menteş and Others*, the Court stressed that “where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation

¹³³ ECtHR, *Fener Rum Lisesi Vakfı v. Turkey*, Application No. 34478/97, 9 January 2007.

¹³⁴ For critical reflections of the *İçyer* judgment in Kurdish media, see e.g. Hasip Kaplan, “Pis Kokular,” *Gündem*, 5 October 2006.

¹³⁵ For critical reflections of the *Refah* judgment in pro-Islamic media, see e.g. “Türkiye’ye Özgü Karar,” *Yeni Şafak*, 1 August 2001; “Yolumuza Devam Ederiz,” *Yeni Şafak*, 1 August 2001; Cengiz Çandar, “AIHM’nin Refah Kararını Nasıl Okumalı?,” *Yeni Şafak*, 1 August 2001; “Erdoğan da Tepkili,” *Zaman*, 1 August 2001; Erhan Başyurt, “AIHM’den Şüpheli Karar,” *Zaman*, 1 August 2001.

¹³⁶ For critical reflections of the *Şahin* judgment in pro-Islamic media, see e.g. “AIHM İhlali,” *Yeni Şafak*, 11 November 2005; Fehmi Koru, “Kararın Anlamı” *Yeni Şafak*, 11 November 2005; “AIHM İhlali,” *Yeni Şafak*, 11 November 2005; Ahmet Kekeç, “AIHM Sınıfta Kaldı!” *Yeni Şafak*, 11 November 2005.

¹³⁷ European Convention for the Protection of Human Rights, Article 1.

¹³⁸ Article 46.

¹³⁹ ECtHR, *Menteş and Others v. Turkey*, Application No. 23186/94, 28 November 1997, para. 89.

¹⁴⁰ ECtHR, *Selçuk and Asker v. Turkey*, Application No. 12/1997/796/998-999, 24 April 1998, para. 96.

capable of leading to the identification and punishment of those responsible.”¹⁴¹ In *Selçuk and Asker*, the Court also noted that “a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*).”¹⁴² However, added the Court, “if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.”¹⁴³ Thereby, in this and all other similar cases, the ECtHR declined the applicants’ request for declaratory judgment, deferring instead to the Committee of Ministers’ authority to supervise compliance.

Since 1999, the Committee of Ministers has closely supervised Turkey’s execution of the ECtHR’s judgments. Such supervision particularly focused on judgments where security forces were found to have committed torture, inhuman treatment, destruction of property, illegal killings and disappearances. Towards executing these judgments, the Turkish Government took a series of general measures, which served not only to comply with Turkey’s legal duties under Article 46 of the ECHR but also to fulfill its political commitments to the EU. These measures concentrated on four main areas, as called upon by the Committee of Ministers: 1) education and training of members of the security forces; 2) reform of the criminal justice system; 3) compensating victims; and 4) training of prosecutors and judges.¹⁴⁴ The government undertook, *inter alia*, the following legislative measures: giving direct effect to the ECHR, lifting the state of emergency, abolishing state security courts, introducing procedural safeguards for persons held in police custody (such as granting detainees the rights to see a lawyer of their own choosing from the outset of detention, to free legal assistance, to a medical examination without the presence of security forces; and authorizing prosecutors to control detention premises and have access to custody records), establishing the Turkish Academy of Justice for the education of judges and prosecutors; establishing a Staff Education and Training Unit to deal with the training of staff in prisons and detention centers, enhancing the accountability of security forces (through introducing minimum prison sentences for crimes of ill treatment and torture which may not be converted to fines or suspended, abolishing the requirement of administrative authorization for criminal investigations against security forces accused of these crimes).¹⁴⁵

Legal reforms alone, no matter how groundbreaking they are, fail to guarantee the effective protection of human rights. The unprecedented efforts by the legislative and executive in Turkey to adopt constitutional and legislative reforms have been undermined by a resilient bureaucracy who significantly curtailed the rights and freedoms granted under new laws. To overcome this bureaucratic resistance, the government adopted a series of executive measures under the supervision of the Committee of Ministers. To ensure that administrative and judicial authorities comply with the ECtHR judgments, these measures took the form of executive circulars

¹⁴¹ ECtHR, *Menteş and Others v. Turkey*, Application No. 23186/94, 28 November 1997, para. 89.

¹⁴² ECtHR, *Selçuk and Asker v. Turkey*, Application No. 12/1997/796/998-999, 24 April 1998, para. 125

¹⁴³ *Id.*

¹⁴⁴ Committee of Ministers, Interim Resolution Res DH(99)434 concerning general measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of the security forces, 9 June 1999.

¹⁴⁵ See generally the interim resolutions of the Committee of Ministers.

addressed to prosecutors and judges,¹⁴⁶ law enforcement officers and provincial governors;¹⁴⁷ and human rights training for educators,¹⁴⁸ police and *gendarmérie*,¹⁴⁹ judges, prosecutors and lawyers.¹⁵⁰ The Council of Europe and the EU have been actively involved in the human rights training programs.

The Committee of Ministers has closely monitored the execution of judgments on fair trial, where the government took both individual and general measures. In *Sadak, Zana, Dicle and Doğan*, a new law that entered into force on 4 February 2003 allowed the applicants' retrial and release pending trial.¹⁵¹ In *Öcalan*, the applicant was paid just satisfaction and his request for a retrial was examined on the merits. However, the request was rejected by a court on the grounds that the nature of the crime and the evidence would lead to the same outcome, i.e. sentencing to life imprisonment.¹⁵² A series of general measures were also adopted to prevent similar violations in the future. Death penalty in peacetime was abolished on 9 August 2002. An amendment to the penal code which came into effect on 1 June 2005 provides detainees the right to see a judge within 24 hours of their detention in regular cases and three days in exceptional cases, the right to a lawyer in cases with a minimum of 5 years and the right to correspond with a lawyer in confidentiality and without time

¹⁴⁶ See e.g. The Circulars of the Ministry of Justice to law enforcement officers, 28 May and 22 August 2002; The Circular of the Ministry of Justice to public prosecutors, 20 October 2003; The Circular of the Ministry of Justice to judges and prosecutors, 1 June 2005; The Circular of the Ministry of Justice to judges and prosecutors, January 2006 (instructing them to take into consideration the ECHR's standards on freedom of expression). See generally the interim resolutions of the Committee of Ministers.

¹⁴⁷ See e.g. The Circular of the Ministry of Interior to the police and *gendarmérie*, 20 December 1999; the Circular of the Minister of Interior to all security personnel, 24 July 2001; the Circular of the Minister of Interior to all provincial governors and the *gendarmérie*, 16 January 2003; the Circular of the Minister of Interior to local authorities, 18 October 2004. See generally the interim resolutions of the Committee of Ministers.

¹⁴⁸ The Human Rights Education Program of Turkey initiated by the Ministry of Education in 1998 introduced human rights education into the curricula of primary and secondary education. Batuhan Aydagül, "The Impact of the ECHR on Rights In and To Education in Turkey," in Jan De Groof and Gracienne Lauwers (eds.), *No Person Shall Be Denied The Right to Education: The Influence of the European Convention on Human Rights on The Rights To Education and Rights In Education* (Wolf Legal Publishers, 2004), 532.

¹⁴⁹ The Turkish Government participated in the Council of Europe project called "Police and Human Rights 1997-2000, which aimed at reorganising the content of the basic and in-service training of the police. Committee of Ministers, Interim Resolution ResDH (2002)98, concerning general measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of the security forces, 10 July 2002.

¹⁵⁰ Within the framework of "Council of Europe/European Commission Joint Initiative," practice-based human rights training was given to prosecutors, judges and lawyers on the ECHR and the application of the ECtHR's case law. Committee of Ministers, Interim Resolution ResDH (2005)43, concerning general measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of members of the security forces, 7 June 2005. The Ministry of Justice also organized regular training activities within the context of "Human Rights Education in Turkey Program 1998-2007" for in-service training of judges and prosecutors. Committee of Ministers, Interim Resolution ResDH (2006)966, concerning general measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of the security forces, 6-7 June 2006.

¹⁵¹ Committee of Ministers, Final Resolution ResDH (2004)86 concerning the judgment of the European Court of Human Rights of 17 July 2001 in the case of *Sadak, Zana, Dicle and Doğan* against Turkey, 9 December 2004.

¹⁵² Committee of Ministers, Resolution ResDH (2007)1 concerning execution of the judgment of the European Court of Human Rights in the case of *Öcalan* against Turkey of 12 May 2005, 14 February 2007.

restrictions.¹⁵³ A further general measure aimed at executing these, as well as several other, judgments is the replacement in 1999 of the military judge in state security courts by a civil judge and the abolishment of state security courts in 2004.¹⁵⁴

The August 2002¹⁵⁵ and January 2003¹⁵⁶ reform packages granted individuals whose Article 6 rights had been violated the right of retrial. On the basis of Law no. 4793 amending the Civil Procedures Act and Criminal Procedures Act, they were now allowed to seek the re-opening of domestic proceedings in all cases which had been decided by the ECtHR and in all new cases which would be brought before the Strasbourg court after the law's date of entry.¹⁵⁷ Law No. 4928 extended this right to the final judgments of administrative courts.¹⁵⁸

Pursuant to this general measure, one of the most high-profile cases where the ECtHR had found a violation of Article 6 in the conviction and imprisonment of former Kurdish members of the parliament was reopened.¹⁵⁹ On 28 February 2003, the state security court accepted the applicants' request for retrial, but upheld their initial conviction on 21 April 2004. In response to the pressure exerted by the Committee of Ministers¹⁶⁰ and the European Commission, Turkish authorities took one of the most significant individual measures in executing the ECtHR judgments. In a decision on 9 June 2004, the Court of Cassation quashed the judgment of the state security court on the basis of the ECtHR's judgment, suspending the execution of the sentence and ordering the release of the applicants. The Committee of Ministers declared that Turkey has exercised its functions under Article 46.¹⁶¹

Freedom of expression is another area where general measures were adopted. A law dated 6 February 2002 amended Article 312 of the Penal Code, introducing the criterion of "incitement in a manner which is explicitly dangerous to public order" for prosecution of speech. In the friendly settlement reached in *Tanyan*, the government undertook to "ensure that the amended Article 312 will be applied in accordance with the requirements of Article 10 of the Convention as interpreted in the Court's case-law."¹⁶² An amendment to Article 159 of the Penal Code on 3 August 2002 lifted penalties for the expression of thoughts that are merely critical in nature. A law dated 19 July 2003 repealed Article 8 of the anti-terror law, which had prohibited propaganda, assemblies and demonstrations aimed at undermining territorial integrity.

¹⁵³ *Id.*

¹⁵⁴ *Id.* See also Committee of Ministers, Final Resolution ResDH (2004)86 concerning the judgment of the European Court of Human Rights of 17 July 2001 in the case of Sadak, Zana, Dicle and Doğan against Turkey, 9 December 2004.

¹⁵⁵ Law on the Amendment of Various Laws, No. 4771, adopted on 3 August 2002, entered into force on 9 August 2002.

¹⁵⁶ Law on the Amendment of Various Laws, No. 4793, adopted on 23 January 2003, entered into force on 4 February 2003.

¹⁵⁷ Law No. 4793, Article 1.

¹⁵⁸ Law on the Amendment of Various Laws, No. 4928, adopted on 15 July 2003, entered into force on 19 July 2003.

¹⁵⁹ ECtHR, *Sadak and Others v. Turkey*, 6 November 2002.

¹⁶⁰ Committee of Ministers, Interim Resolution ResDH (2004)31 concerning the judgment of the European Court of Human Rights of 17 July 2001 in the case of Sadak, Zana, Dicle and Doğan against Turkey, 6 April 2004 ("deplor[ing] the fact that, notwithstanding the re-opening of the impugned proceedings, the applicants continue to serve their original sentences and thus remain in detention almost three years after the Court's finding of a violation of the Convention").

¹⁶¹ Committee of Ministers, Final Resolution ResDH (2004)86 concerning the judgment of the European Court of Human Rights of 17 July 2001 in the case of Sadak, Zana, Dicle and Doğan against Turkey, 9 December 2004.

¹⁶² ECtHR, *Tanyan v. Turkey* (29910/96), 17 March 2005.

The Law on Associations was amended on 2 January 2003, limiting the requirement that associations use only Turkish in their official correspondence.¹⁶³

While Turkey has made significant progress in executing the ECtHR case law, as of 2006, cases against Turkey still represented 14.4% of the judgments pending before the Committee of Ministers.¹⁶⁴ Of these, 93 relate to effective remedies against abuses by security forces and 115 to freedom of expression.¹⁶⁵

IV. Literature Review

The European Commission's emphasis in its reports on Turkey's execution of the ECtHR judgments¹⁶⁶ as well as the Turkish Parliament's reference to both fulfilling the EU accession conditionality and executing the ECtHR case law in justifying the legislative purposes of some reform laws¹⁶⁷ show that the EU accession process and the ECtHR case law play an interdependent role in facilitating the harmonization of national law with European norms. And yet, the literature on these two phenomena has so far developed independently of each other. There is no literature on the relevance of the EU accession process for the alignment of Turkey's legal framework with the ECtHR jurisprudence.

A. Literature Review on the EU Accession Process and the ECtHR Case Law

There is ample domestic academic literature in Turkey on the protection of human rights under the ECHR¹⁶⁸ and on the ECtHR jurisprudence.¹⁶⁹ There are also studies focusing on the protection of selected rights and liberties under the ECHR, such as freedom of expression, freedom of association and religious freedom.¹⁷⁰ More specifically, the relationship between the ECHR and the Turkish legal order¹⁷¹ and the ECtHR's case law on Turkey has been the object of academic research, particularly in

¹⁶³ Committee of Ministers, Interim Resolution ResDH (2004)38, "Freedom of Expression cases concerning Turkey: General Measures," 2 June 2004.

¹⁶⁴ European Commission, 2006 Regular Report on Turkey's Progress Towards Accession, 11.

¹⁶⁵ *Id.*, 11-12.

¹⁶⁶ The European Commission gives considerable space in its reports to the progress Turkey has made in executing the ECtHR judgments, identifies outstanding issues and makes recommendations on the measures that need to be adopted. The Commission explicitly refers to the resolutions of the Council of Europe's Committee of Ministers and the judgments of the ECtHR. *See e.g.* European Commission, 2005 Regular Report on Turkey's Progress Towards Accession, 19-20.

¹⁶⁷ This was the case, for example, in Compensation Law. *Supra* note 110.

¹⁶⁸ *See e.g.* Şeref Gözübüyük ve Feyyaz Gölçüklü, "Avrupa İnsan Hakları Sözleşmesi ve Uygulaması: Avrupa İnsan Hakları Mahkemesi İnceleme ve Yargılama Yöntemi," Turhan Kitabevi, Ankara (2005).

¹⁶⁹ Gilles Duterte, *Avrupa İnsan Hakları Mahkemesi İçtihatlarından Altıntılar*, Avrupa Konseyi/Avrupa Komisyonu (2005); Osman Doğru (ed.), "İnsan Hakları Kararlar Derlemesi," Cilt: 3, İstanbul Barosu Yayınları, İstanbul (2000); Osman Doğru (ed.), "İnsan Hakları Avrupa Mahkemesi Kararlar Rehberi (1960-1994)," İstanbul Barosu Yayınları, İstanbul (1999);

¹⁷⁰ *See e.g.* Güney Dinç, "Avrupa İnsan Hakları Sözleşmesi'ne Göre İnanç, Anlatım ve Örgütlenme Özgürlükleri," İzmir Barosu Yayınları, İzmir (2005); Bekir Berat Özipek (der.), "Teorik ve Pratik Boyutlarıyla İfade Hürriyeti," Liberal Düşünce Topluluğu, Ankara (2003); T. Ayhan Beydoğan, "Avrupa İnsan Hakları Sözleşmesi Işığında Türk Hukukunda Siyasî İfade Hürriyeti," Liberal Düşünce Topluluğu, Ankara (2003).

¹⁷¹ Tezcan *et. al.*, *Avrupa İnsan Hakları...*; Bakır Çağlar, "İnsan Hakları Avrupa Sözleşmesi Hukukunda Türkiye," Türkiye Bilimler Akademisi, Akademi Forumu No: 6 (2002); Zühtü Arslan, "Avrupa İnsan Hakları Sözleşmesi ve Türk Anayasa Yargısı: Uyum Sorunu ve Öneriler," Anayasa Yargısı, No: 17 (2000).

legal literature.¹⁷² Some studies are limited to the listing and brief summary of judgments;¹⁷³ others offer analyses of decisions and their execution.¹⁷⁴ Generally, the overall purpose of the literature on the ECtHR's case law on Turkey is to provide a practitioner's guide for lawyers, judges and prosecutors who do not speak English and/or do not follow the jurisprudence of the ECtHR. At the same time, there are also studies assessing to what extent recent reforms achieve the alignment of national law with European standards and point out the outstanding issues that need to be tackled by lawmakers.¹⁷⁵ The overall consensus in the literature is that notwithstanding the significant legal reforms undertaken in recent years, the domestic legal order falls far short of European standards.

Some ECtHR judgments have been widely commented on in the international literature. The controversial judgments in *Refah Partisi*¹⁷⁶ and *Leyla Şahin*¹⁷⁷ where the ECtHR deferred to the Constitutional Court's subjugation of rights and liberties to Turkey's idiosyncratic principle of secularism have faced fierce criticism by European scholars. One common point of criticism is that the ECtHR deviated from and indeed conflicted with its earlier jurisprudence on party dissolutions in Turkey. In contrast, domestic scholars have been conspicuously silent on the issue. The few studies that mention or analyze the *Refah* judgment display an implicit deference to Strasbourg without discussing the compatibility of these two judgments with European standards on human rights.¹⁷⁸

There is very limited academic literature on the impact of the ECtHR case law on national law and practice. The court's recent judgment in *İçyer* is a notable exception. The decision has been criticized by both academic and policy studies for being premature, unjust and political. The ECtHR has been held responsible for the deterioration of the implementation of the law on compensation. Seemingly motivated by the desire to ease its workload,¹⁷⁹ the court has been charged with giving a

¹⁷² Naz Çavuşoğlu, "İnsan Hakları Avrupa Mahkemesi: Kararların Uygulanması; Türkiye Kararları: 1995-Haziran 2003, Tazminat Tutarları," Su Yayınları, İstanbul (2003); Hasan Karakuş, "Avrupa İnsan Hakları Mahkemesi Kararları ve Karşıoylarında Türkiye," İstanbul Barosu Yayınları, İstanbul (2001); Osman Doğru and Atilla Nalbant, *İnsan Hakları Avrupa Mahkemesi ve Türkiye Karar Özetleri: 1995-2000* (İstanbul Barosu Yayınları, 2001).

¹⁷³ See e.g. Doğru and Nalbant, *İnsan Hakları...*; Doğru (ed.) *İnsan Hakları ...* (2000); Doğru (ed.) *İnsan Hakları ...* (1999).

¹⁷⁴ See e.g. Çağlar, *İnsan Hakları...*; Arslan, *Avrupa İnsan Hakları...*; Çavuşoğlu, *İnsan Hakları...*

¹⁷⁵ Fazıl Sağlam, "Siyasi Partiler Kanunu'nda Uluslararası Standartlara Uygunluk Sağlamak için Yapılması Gereken Değişiklikler," Anayasa Yargısı, No: 17 (2000); Şeref Ünal, "Avrupa İnsan Hakları Mahkemesi Kararlarının Türk İç Hukukuna Etkileri," Anayasa Yargısı, No: 17 (2000); Sağlam, "Avrupa İnsan Hakları...";

¹⁷⁶ Chris Rumford, *Failing the EU Test? Turkey's National Programme, EU Candidature and the Complexities of Democratic Reform*, Mediterranean Politics, Vol. 7, No. 1, (Spring 2002), 51; Kevin Boyle, *Human Rights, Religion and Democracy: The Refah Party Case*, Essex Human Rights Review Vol. 1 No. 1 (July 2004); Chris Rumford, "Failing the EU Test? Turkey's National Programme, EU Candidature and the Complexities of Democratic Reform," *Mediterranean Politics*, Vol. 7, No. 1, (Spring 2002), 51; Christian Moe, "Strasbourg's Construction of Islam: A Critique of the *Refah* Judgment," paper presented at the Conference of Experts "The Turkish Welfare Party Case: Implications for Human Rights in Europe," Central European University, Budapest, 2-3 June 2002.

¹⁷⁷ Case analysis, D. Christopher Decker and Marnie Lloyd, "Leyla Şahin v. Turkey," *European Human Rights Law Review*, No. 6 (2004), 672-678.

¹⁷⁸ See e.g. Yusuf Şevki Hakyemez and Birol Akgün, "Limitations on the Freedom of Political Parties in Turkey and the Jurisdiction of the European Court of Human Rights," *Mediterranean Politics*, Vol.7, No. 2, (2002).

¹⁷⁹ The court actually does refer to the 1,500 pending IDP claims and its heavy case load.

premature judgment solely on the basis of selected sample decisions presented by the government and leaving the IDPs at the mercy of the authorities.¹⁸⁰

Missing in the academic literature on the ECtHR-Turkey relationship is an analysis of the identities, strategies, purposes and coalitions of applicants.¹⁸¹ There is no study on recourse to Strasbourg by minority groups nor on the impact of the ECtHR case law on Turkey's minority policies. As a result of the absence of research on the actors of litigation, the recent trend towards ethnic and religious diversification in the identity of individuals petitioning Strasbourg falls outside of research interest.

The EU's minority protection conditionality for accession has obliged Turkey to reluctantly undertake a series of legal reforms with the purpose of fulfilling the Copenhagen political criteria. This has led to the re-entry to the public debate of the long forgotten concept of minority rights. As a result, an ample amount of academic literature has emerged looking into specific periods in near history when minorities -- particularly non-Muslims -- have been persecuted, discriminated and expelled.¹⁸² Others analyzed the impact of the EU accession on Turkey's minority regime,¹⁸³ and more specifically the substance and implementation of laws governing minorities.¹⁸⁴ The increasing interest in the relationship between the EU's accession conditionality and minority rights was also shared by various national and international human rights organizations which released reports evaluating the progress achieved by Turkey and underlining the outstanding issues.¹⁸⁵ The number of academic studies¹⁸⁶ and policy

¹⁸⁰ Toplum ve Hukuk Araştırmalar Vakfı (TOHAV), *The Problem of Turkey's Displaced Persons: An Action Plan for Their Return and Compensation* (2006); Human Rights Watch, *Unjust, Restrictive and Inconsistent: The Impact of Turkey's Compensation Law with Respect to Internally Displaced People* (2006); Dilek Kurban, Deniz Yüksek, Ayşe Betül Çelik, Turgay Ünal and A. Tamer Aker, *'Zorunlu Göç' ile Yüzleşmek: Türkiye'de Yerinden Edilme Sonrası Vatandaşlığın İnşası* (TESEV, 2006); Ahmet Tamer Aker, Ayşe Betül Çelik, Dilek Kurban, Turgay Ünal and Hatice Deniz Yüksek, *The Problem of Internal Displacement in Turkey: Assessment and Policy Proposals*, (TESEV, 2005).

¹⁸¹ The literature on the impact of the EU accession conditionality on the protection of human rights in Turkey similarly lacks studies on the role played in this process by the policy and litigation efforts of minority organizations. Instead, pro-EU forces among the civil society is considered to be a single actor that has been positively influential in the domestic reform process. See e.g. Paul Kubicek, "The European Union and Democratization 'From Below' in Turkey," paper presented for the European Union Studies Association, Austin TX, 31 March-2 April 2005.

¹⁸² On the 1923 population exchange of Muslims and Rums between Greece and Turkey, see Mehmet Ali Gökaçtı, *Nüfus Mübadelesi: Kayıp Bir Kuşağın Hikayesi* (İletişim, 2005); on the expulsion of Jews from Eastern Thrace, see Rifat Bali, *Devletin Yahudileri ve 'Öteki' Yahudi* (İletişim, 2004), Ayhan Aktar, *Varlık Vergisi ve 'Türkleştirme' Politikaları* (İletişim, 2000); on the mob campaign against Rums, Armenians and Jews in Istanbul 6-7 September 1955, see Dilek Güven, *Cumhuriyet Dönemi Azınlık Stratejileri ve Politikaları Bağlamında 6-7 Eylül Olayları* (İletişim, 2006), Ali Tuna Kuyucu, "Ethno-religious 'Unmixing' of 'Turkey': 6-7 September as a Case in Turkish Nationalism", *Nations and Nationalism* (2005), 361-380; on the levy of a discriminatory wealth tax on non-Muslims in 1942, see Rifat Bali, *Bir Türkleştirme Serüveni: 1923-1945* (İletişim, 2005), Aktar, *Varlık Vergisi...*; on the deportation of Rums in 1964, see Hülya Demir and Rıdvan Aktar, *İstanbul'un Son Sürgünleri* (İletişim, 2004); on the confiscation of properties belonging to non-Muslims, see Baskın Oran, *Türkiye'de Azınlıklar: Kavramlar- Teori- Lozan- İç Mevzuat- Uygulama* (İletişim, 2005), Kurban, "Unravelling..."; on the nationalization of the economy through the transfer of wealth from non-Muslims to Muslims, see Ayhan Aktar, *Türk Milliyetçiliği, Gayrimüslimler ve Ekonomik Dönüşüm* (İletişim, 2006).

¹⁸³ Ahmet İçduygu and B. Ali Soner, "Turkish Minority Rights Regime: Between Difference and Equality," *Middle Eastern Studies*, Vol. 42, No. 3 (May 2006), 447-468.

¹⁸⁴ Kurban, "Unravelling..."; Kurban, "Confronting..."; Oran, *Türkiye'de...*

¹⁸⁵ International Helsinki Federation for Human Rights, *Turkey: A Minority Policy of Systematic Negation* (October 2006); Nurcan Kaya and Clive Baldwin, *Minorities in Turkey: Submission to the European Union and the Government of Turkey*, Minority Rights Group International (2004);

reports¹⁸⁷ on the impact of the EU process on the protection of civil and political rights has also increased. Inter-governmental organizations such as the European Commission,¹⁸⁸ the European Parliament, and the OSCE¹⁸⁹ released reports and resolutions on Turkey's performance in fulfilling the EU's human and minority rights conditionality.

One common theme in the literature is the nearly systematic bureaucratic resistance to the implementation of laws enacted by the legislative and the executive branches. The tension between the elected and appointed officials is perceived as an indicator of the democratic deficit in the political regime in Turkey. The general conclusion in these studies is that while Turkey has come a long way in comparative terms towards consolidating democracy and protecting human rights, there is still a long way to go both in terms of legislation and implementation.

B. The Implementation of the EU Accession Criteria and the ECtHR Judgments

Since Turkey's declaration as an official candidate for the EU accession, a series of constitutional and legislative reforms have been adopted to comply with the EU conditionality. Notwithstanding the removal of some of the restrictions on rights and freedoms, the laws fall short of fulfilling the Copenhagen political criteria. Significant problems remain in laws governing political parties, associations and freedom of expression. Arguably, the remaining draconian provisions in domestic law should not necessarily impede the free exercise of rights and freedoms in light of the direct effect of the ECHR under the new Article 90 of the constitution. However, the Turkish courts continue to resist implementing the case law of the ECtHR in their judgments.

In the area of freedom of expression, the constitutional amendments removed from Articles 26 and 28 the restriction on the use of any "language prohibited by law" in the expression of thought and in broadcasting, respectively. However, they left untouched the restrictions attached to the exercise of these rights for the purposes of, *inter alia*, safeguarding "the indivisible integrity of the State with its territory and nation." Legislative reforms bolstered the constitutional amendments. Yet, in some cases the legislature effectively re-enacted the draconian provisions of the code under new names. For example, Articles 301 and 216 effectively replaced Articles 159 and 312, respectively. Prosecutors have a strong tendency to use the new restrictive provisions in bringing charges against individuals advocating the rights of minorities.

While considerable progress had been made in lifting some of the restrictions in the anti-terror law, the June 2006 amendments constitute a serious setback.¹⁹⁰ The new law retains the over-inclusive and purpose-based definition of terrorism of the

¹⁸⁶ Piotr Zalewski, *Sticks, Carrots and Great Expectations: Human Rights Conditionality and Turkey's Path Towards Membership of the European Union*, Center for International Relations, Reports and Analyses (December 2004); Şaban Kardaş, "Human Rights and Democracy Promotion: The Case of Turkey-EU Relations," *Turkish Journal of International Relations*, Vol. 1, No. 3 (Fall 2002);

¹⁸⁷ See e.g. Human Rights Watch, *World Report/Turkey 2006*; Amnesty International, *2006 Report/Turkey*.

¹⁸⁸ See generally European Commission Regular Reports on Turkey's Progress towards Accession.

¹⁸⁹ For a review of the implications of the new Penal Code on freedom of press in Turkey, see OSCE Representative on Freedom of the Media, Miklos Haraszti, *Review of the Draft Turkish Penal Code: Freedom of Media Concerns*, May 2005, http://www.osce.org/documents/rfm/2005/03/14223_en.pdf.

¹⁹⁰ Terörle Mücadele Kanununda Değişiklik Yapılmasına Dair Kanun [Law on the Amendment of the Law on the Fight Against Terrorism], No. 5532, 29 June 2006, Official Gazette No. 26232, 18 July 2006.

1991 law, and introduces a wide and long list of “terrorist offences”¹⁹¹ and “offences committed for terrorist purposes.”¹⁹² It introduces new restrictions on free speech,¹⁹³ creates new expression offences such as carrying the emblem or signs of a “terrorist organisation” or chanting slogans deemed to support such organization,¹⁹⁴ criminalizes “praise of terrorist offences and offenders or making the propaganda of the terrorist organization”¹⁹⁵ and imposes severe sanctions on the media such as heavy fines for owners and editors of media organs¹⁹⁶ and prison sentences for journalists.¹⁹⁷ Most disconcertingly, the law reintroduces the temporary closures of publications without a formal hearing and even at times upon the order of a prosecutor.¹⁹⁸

The ECtHR’s *Doğan* judgment prompted the Turkish Government to intensify its efforts to enact a compensation law for IDPs, which was eventually passed on 17 July 2004.¹⁹⁹ The stated purposes of the law included the fulfilment of commitments made to the EU and non-payment of high compensation in Strasbourg. These efforts paid off: In January 2006, only three months after the law came into effect,²⁰⁰ the ECtHR ruled in *İçyer*²⁰¹ that the law provides an effective domestic remedy.²⁰²

The amendments to the Law on Associations lifted many of the restrictions on freedom of association.²⁰³ The establishment of associations is no longer subject to prior authorization.²⁰⁴ The reforms also created more space for the establishment of associations by minorities or for advocating minority rights. Associations are allowed to use minority languages in non-official correspondence.²⁰⁵ However, the ban on the establishment of associations for purposes prohibited in the constitution remains.²⁰⁶ More specifically, the regulation²⁰⁷ bans the establishment of associations that engage in “prohibited activities”²⁰⁸ and are “in contravention of law and morality.”²⁰⁹ Neither the law nor the regulation defines the “prohibited purposes” or “prohibited activities.” However, one might suspect that they aim to protect the constitutional principles of territorial unity and national security. The over-inclusive reading of these principles by Turkish prosecutors and judges in the past have resulted in the inclusion among prohibited purposes, *inter alia*, of the advocacy of peaceful solutions to the Kurdish problem,²¹⁰ including the granting of minority status to the Kurds.²¹¹

¹⁹¹ *Id.* art. 2.

¹⁹² *Id.* art. 3.

¹⁹³ *Id.* art. 5.

¹⁹⁴ *Id.* art. 6.

¹⁹⁵ *Id.* art. 5.

¹⁹⁶ *Id.* art. 5.

¹⁹⁷ *Id.* art. 6.

¹⁹⁸ *Id.* art. 5.

¹⁹⁹ *Supra* note 110.

²⁰⁰ Terör ve Terörle Mücadeleden Doğan Zararların Karşılanması Hakkında Yönetmelik [Implementing Regulation on Compensation for Losses Resulting from Terrorism and the Fight against Terrorism], Decision no. 2004/7955, 4 October 2004, Official Gazette No. 25619, 20 October 2004.

²⁰¹ ECtHR, *Aydın İçyer v. Turkey*, 12 January 2006.

²⁰² Thus, the *Akdivar* exception was effectively nullified.

²⁰³ Dernekler Kanunu [Law on Associations], No. 5253, 4 November 2004, Official Gazette No. 25649, 23 November 2004.

²⁰⁴ *Id.*, Article 3(1).

²⁰⁵ *Id.*, Article 31 (requiring associations to use Turkish in their correspondence with official bodies).

²⁰⁶ *Id.*, Article 30(b).

²⁰⁷ Dernekler Yönetmeliği [Regulation on Associations], implementing Law No. 5253, Official Gazette No. 25772, 31 March 2005.

²⁰⁸ *Id.*, Article 30.

²⁰⁹ *Id.*, Article 56.

²¹⁰ For example, the Turkish Constitutional Court dissolved the Socialist Party on the ground, *inter alia*,

The domestic framework governing political parties is one area that needs further reforms to achieve harmonization with the ECtHR's jurisprudence. On the one hand, the constitutional amendments achieved significant progress by substantially increasing the threshold for the dissolution of a political party. Pursuant to Article 69, the "permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Article 68."²¹² The Constitutional Court may not make such a judgment unless it concludes that the party has become "the centre of activities"²¹³ contrary to the principles laid out in Article 68. Article 69(6) introduced a two-part test in determining this threshold: The actions must be "carried out intensively by the members of that party" and be shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board in the parliament.

Notwithstanding this significant general measure, in defiance of the principle of the hierarchy of laws, the Law on Political Parties (LPP) continues to contain several restrictions which contradict the letter and spirit of the relevant constitutional provisions as well as the standards established by the ECtHR. Article 96(3) prohibits the use of the word "communist" in the name of a political party, notwithstanding the ECtHR's unequivocal ruling in *United Communist Party*. Another problematic provision of the LPP is Article 81, which bans political parties from "arguing" that minorities exist in Turkey, promoting minority languages and cultures, and using minority languages in their written materials, activities and statements.

Aspiring for EU membership, Turkey found itself having to fulfil the minority protection conditionality, notwithstanding the challenge the latter posed to its official policies. Turkey's minority policy dates back to the 1923 Treaty of Lausanne, when the newly founded republic was practically compelled by Western powers to grant minority status to its non-Muslim population.²¹⁴ Since then, minority rights have been associated with foreign interference in internal affairs, and portrayed in the official discourse as a once and for all granting of special treatment limited to non-Muslim citizens.²¹⁵ The *de jure* protection granted to all non-Muslims under Lausanne was *de facto* restricted to Armenians, Rums and Jews, unlawfully excluding others such as the Assyrians. It was against this historical background that Turkey found itself having to fulfill the EU's minority protection conditionality.

that its activities aimed at a peaceful solution to the Kurdish problem encouraged separatism and threatened national unity and territorial integrity.

²¹¹ In another case, the Constitutional Court dissolved a political party which advocated in its program the acknowledgment in the Turkish Constitution of "the existence of the Kurds," on the basis that the party was "likely to undermine the territorial integrity of the State and the unity of the nation."

²¹² Article 68(4): "The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime."

²¹³ Article 69(6).

²¹⁴ For a discussion of Turkey's minority policies and their historical evolution, see Oran, *Türkiye'de Azınlıklar...*; Kurban, *Unravelling...*

²¹⁵ That Turkey perceives the question of minority rights as settled by the Treaty of Lausanne is evident in, for example, the Ministry of Foreign Affairs describing the official minority policy: "The status of minorities has been internationally certified by the 1923 Treaty of Lausanne, according to which there are only non-Muslim minorities in Turkey. It is wrong, according to this definition, to refer to our citizens of Kurdish descent as a 'Kurdish minority.'" Republic of Turkey Ministry of Foreign Affairs, Frequently Asked Questions, at <http://www.mfa.gov.tr/grupa/ac/acl/faq.htm>.

Towards that end, Turkey undertook a number of constitutional and legislative reforms in the last few years. The new laws granted ethnic minorities a limited and conditional right to broadcasting in national public and private television and radio stations, the right to teach and learn their languages in private courses and removed some of the restrictions on the property rights of non-Muslims.²¹⁶ The reforms were limited to granting limited and conditional language and property rights. Various ethnic minorities' demands for public education in mother tongue have not been met; broadcasting is limited to five selected minority languages, subject to time and content restrictions and prohibitive red tape requirements; and no legal framework has been adopted to allow the return of confiscated properties or the payment of just compensation to non-Muslim community foundations. Though the progress achieved is significant, particularly in relative terms, the legislature carefully avoided any explicit reference in the letter and spirit of the reform laws that could suggest the reformulation of the official policy on minorities. It also made minorities' exercise of their limited rights prohibitively difficult by attaching restrictive conditions to them and by conferring on bureaucrats a virtually unchecked authority in implementing the laws through executive regulations.

The EU's accession conditionality has confronted Turkey with the challenge to re-construct its discriminatory citizenship definition and practices. Not only various minorities, but also a significant segment of the majority feels excluded by the ethnic and religious based citizenship in Turkey. Enacting legal reforms has proved to be a necessary but insufficient condition of bringing real and meaningful change in social and official attitudes towards minorities. The internalization of reform laws requires a radical transformation of the prevalent mentality of both the state and the society.

V. Conclusion

An analysis of the impact of the ECtHR jurisprudence on the protection of human and minority rights in Turkey would be incomplete without the simultaneous study of the EU accession process as an equally significant external factor. This is most evident in the fact that, notwithstanding the high number of judgments the ECtHR has issued against Turkey over the years, their execution has started only after the initiation of the EU reform process and accelerated after the JDP came to power in 2002. Since the declaration of Turkey as an official candidate for accession in 1999, the EU has played a central role in monitoring the Turkish Government's execution of the ECtHR case law, documenting the progress achieved in that regard and the outstanding issues, and providing training to key judicial and administrative authorities in tandem with the Council of Europe.

The ways in which the Strasbourg jurisprudence has made a difference in the Turkish case seems to depend on various factors, such as the type of violation in question, the commitment of the government to executing the judgment concerned, the political nature of the issue, the number of judgments and the amount of compensation Turkey was required to pay. While the government has come a long way in executing the ECtHR's judgments on Article 3, for example, the same cannot be argued for the execution of case law concerning Article 10. The relative success in the execution of Article 3 judgments can be explained by a combination of various factors: the *jus cogens* nature of the prohibition of torture under customary

²¹⁶ For an analysis of the substance and implementation of the reform laws relating to minority rights, see Kaya and Baldwin, *Minorities in Turkey...*; Kurban, *Unravelling...*

international law, the absolute prohibition of torture under the ECHR and the non-derogable nature of the duty not to torture, the political will demonstrated by the JDP government in its campaign on “zero tolerance to torture,” and the relative ease in creating strong public support against torture and ill treatment. In contrast, freedom of expression is not a *jus cogens* principle, its protection under the ECHR is not absolute but is subject to certain restrictions, the JDP government’s commitment to freedom of expression is highly questionable in view especially of the draconian provisions introduced to the Penal Code and the anti-terror law, the highly political nature of Article 10 cases, most of which are linked to the Kurdish question, and the lack of public support for the absolute protection of freedom speech, particularly when such speech concerns the expression of alternative views on the Kurdish question and laicism.

To gain a complete and comprehensive picture of the effect of the ECtHR case law on the protection of fundamental rights and liberties in Turkey, a comparative analysis of the execution of judgments concerning different rights violations (torture, protection of property, freedom of religion, freedom of expression) is suggested. Such analysis should take into account the political issues concerned as well as the specific social and political context in which the execution of the judgments is being deliberated. This report has sought to cover much of the secondary literature on the impact of the ECtHR jurisprudence on the domestic legal order as well as that of the EU accession process on the protection of human and minority rights in Turkey. This analysis could be developed further through a study of the primary sources as well as interviewing the primary actors. Some suggestions towards that end are:

- Resolutions issued by the Committee of Ministers
- Memoranda issued by the Committee of Ministers’ deputies
- The European Commission’s annual progress reports on Turkey’s accession
- Minutes of the debates in the Turkish parliament pertaining to legislation governing human and minority rights that are drafted with the purpose of executing the ECtHR case law and fulfilling the EU accession conditionality. Particular attention should be paid to the deliberations during the soon-to-be-reenacted law on foundations.
- All recently enacted new laws towards complying with the EU conditionality and executing the ECtHR’s judgments. Particular attention should be given to the legislative reasoning of the reform laws.
- The grounds stated in presidential vetoes, particularly with respect to the Law on Foundations.
- Press coverage- particularly news in minority media.
- Decisions of national courts in implementing the EU reform laws or executing the ECtHR judgments.
- Interviews with domestic actors involved in litigating in Strasbourg and implementing the ECtHR’s case law. Among such actors are: 1) lawyers, particularly lawyers representing minorities (who, almost in all cases, belong to the same identity as their clients); 2) civil society organizations advocating human and minority rights; 3) representatives of non-Muslim communities (the Rum and Armenian Patriarchates, the office of the Rabbi); 4) minority organizations; 5) judges and prosecutors; 6) government officials from the following institutions: Ministry of Foreign Affairs; Ministry of Justice; Ministry of Interior, Ministry on EU Affairs; Directorate General of Foundations; Directorate of Religious Affairs.

- Interviews with international actors: 1) members of the Turkish Delegation to the Council of Europe; 2) members of the Turkish Delegation to the EU; 3) lawyers working at the Turkey desk of the European Court of Human Rights; 4) lawyers working at the Committee of Ministers; 5) EU officials working at the enlargement office of the European Commission; 6) officials working at the European Commission delegation to Turkey.

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ANNEX I: SHORT VERSION OF THE STATE OF THE ART REPORT **INTENDED FOR POLICY USERS**

I. Introduction

Turkey joined the Council of Europe in 1949. It ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on 19 March 1954. After 1987, when the government granted its citizens the right to petition the European Court of Human Rights (ECtHR), applied for membership to the European Union (EU), and declared a state of emergency in eastern and southeastern parts of the country, there has been a drastic increase in the number of applications. Turkey found itself having to undertake drastic legal and political measures to align its legal framework with the ECHR. Since 1999, the year when the EU declared Turkey as an official candidate for membership, the process of executing the ECtHR judgments overlapped with that of fulfilling the political criteria for accession to the EU.

This short version of the state of the art report aims to understand the impact that the ECtHR jurisprudence has had on domestic law in Turkey, particularly with regards to the protection of minority rights. Doing so, it considers as another critical independent variable the EU which has played a significant role in pressuring Turkey to align its legal order with Council of Europe human rights standards. The rest of this paper is organized as follows: Part II provides a brief analysis of the national legal framework on human rights and an overview of judicial and non-judicial monitoring mechanisms. Particular attention is given to human rights reforms enacted during the EU accession process. Part III offers an analysis of the cases and controversies before the ECtHR as well as the identity and litigation strategy of petitioners. The domestic execution of ECtHR judgments is also discussed here. Part IV provides an introduction to literature pertaining to the implementation of the ECtHR judgments in Turkey. Part V offers preliminary conclusions on ECtHR's impact on human rights protection in Turkey.

II. The Protection of Human Rights in Turkey

The Turkish Constitution contains provisions extending a general protection for human rights. In addition, Turkey is a party to the major international human rights conventions and some of the human rights instruments under the auspices of the Council of Europe, including the ECHR. Article 90(5), a recent addition to the constitution, stipulates that in case of a conflict, international treaties that Turkey is a party to have supremacy over national law. Pursuant to this amendment which gives self-executing power and direct effect to the ECHR, Turkish courts are required to enforce the supremacy of the Convention over domestic laws. However, this supremacy does not extend to the constitution. The Constitutional Court is not formally bound by the ECHR, but attributes a persuasive authority to the judgments of the ECtHR.

As a member to the Council of Europe, Turkey is obliged to abide by the terms of the ECtHR and effectively protect and enforce the rights and freedoms guaranteed by the convention. Since 1987, Turkish citizens have the right to petition the ECtHR. While the prerequisite for applying to Strasbourg is the exhaustion of domestic legal remedies, the ECtHR has exempted certain applications from that requirement in the past.

The judiciary is the principal institution enforcing the protection of human rights. Article 40 of the Constitution grants everyone whose rights have been violated the right to apply to the “competent authorities,” where the subject of unlawful treatment is public officials, and requires administrative courts, courts of justice and the Constitutional Court to review human rights cases falling under their jurisdiction and mandate. Due to the duality of the Turkish legal order, military courts have exclusive jurisdiction over cases against military authorities or relating to military service. The constitution does not grant individuals the right to petition the Constitutional Court to contest human rights violations committed by public agents and institutions.

III. Litigating Strasbourg: Case Law, Actors, Implementation, Impact

Turkey is among the state parties most complained against in Strasbourg. With 20,141 applications lodged between 1 November 1998 and 2006, Turkey ranked sixth among the 46 member states following Russia, Poland, Romania, Italy and France. In 2006 alone, 2,280 new applications were lodged against Turkey. Of the 1,560 judgments that the ECtHR handed down in 2006, the highest number (334) concerned Turkey. As of August 2006, in 196 of these judgments, the Court found Turkey in violation of the ECHR. As of 1 January 2007, 10% (9,000) of the total number of cases (89,900) pending before the ECtHR are those filed against Turkey.

Initially, the ratification of the ECHR did not capture much attention. It was only in 1987 when the Turkish Government accepted the right of individual petition that the ECHR generated a high interest among the public and the media. 1987 carries a further significance for the European integration project since that was the year when Turkey put forth a formal application for membership to the EU. Lastly, the declaration of the state of emergency in the Kurdish populated eastern and southeastern regions of Turkey is another factor which made 1987 a turning point in the ECtHR’s case law.

An analysis of the ECtHR jurisprudence on Turkey shows that the legal grounds of applications clustered around Article 2 (right to life), Article 3 (prohibition of ill treatment, degrading and inhuman punishment and treatment), Article 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), 10 (freedom of expression), 11 (freedom of association), 14 (prohibition of discrimination) and Article 1 of the Protocol No. 1 (right to property). Very few cases were brought to Strasbourg on the basis of a violation of Article 9 (freedom of religion). Notwithstanding the high number of cases where applicants alleged breach of Article 14, the ECtHR found violation in only one case concerning gender discrimination.

A. ECtHR Case Law

The Kurdish question featured predominantly in the ECtHR’s case law on Turkey. Majority of the applications relates to acts such as torture, ill treatment, summary executions, disappearances, village evictions and property destruction committed by the security forces in the state of emergency region. Others concern the dissolution of political parties and the prosecution of individuals advocating a democratic solution to the Kurdish question. Petitions filed by Kurds were found admissible, with a few exceptions, and led to judgments where the ECtHR found Turkey to have violated Articles 3, 5, 6, 8, 10, 11 and Article 1 of Protocol 1. In addition, cases were also

brought by individuals who were prosecuted for expressing views differing from the official policies on headscarf, Islam and laicism as well as parties that were dissolved on the ground that their activities challenged the secular order.

1. Freedom of Expression

The largest number of petitions and judgments that fall within the scope of JURISTRAS concerns the restriction of freedom of expression and the criminalization of political dissent. Out of 63 petitions filed with the court, 58 resulted in the finding of a violation and four in friendly settlements. In only one case, the seminal case of *Zana*, did the court not find a violation of Article 10. The vast majority of cases concern the prosecution of journalists, human rights advocates and intellectuals for expressing dissenting views on the Kurdish question, while a few concerned the prosecution of individuals with Islamic backgrounds who expressed critical views on state policies on religion. In addition, there are a marginal number of cases concerning the prosecution of the advocacy of conscientious objection and the protest of the IMF. The charges in these cases were brought under former Article 312 of the Penal Code and former Article 8 of the anti-terror law, which criminalized separatist propaganda against the unity and integrity of the state as well as incitement to hatred and hostility on the basis of race, social class or region. The applicants relied on Articles 3, 6, 9, 10, 11, 14 and Article 1 of Protocol 1, whereas the ECtHR found breaches of Articles 6(1) and 10.

2. Cases Brought by Minorities under Articles 3, 5 and 6

The second highest number of petitions against Turkey concerns petitions filed under Articles 3, 5 and 6. The cases analyzed in this section of the report have been selected on the basis of the applications lodged by minorities under these articles. Out of 60 petitions, 43 resulted in a judgment against Turkey and 13 in friendly settlements. While the court found no violation in three cases, one petition was declared inadmissible. The vast majority of the petitions were filed by Kurds on grounds of human rights abuses (such as incommunicado detention, torture, ill treatment, arbitrary deprivation of liberty) committed by security officers in the state of emergency region. In many cases, the applicants were also convicted by state security courts, whose benches at the time included a military judge along with two civilian judges. In these cases, petitioners raised Articles 3, 5, 6 and 14, whereas the ECtHR found breaches of Articles 3, 5 and 6.

3. Property Rights

The third largest group of cases concerns property rights claims, the vast majority of which were filed by Kurds who had been evicted from their villages by security forces or were obliged to leave their homes at the height of the armed conflict between the PKK and the army. According to the Ministry of Foreign Affairs, of the nearly 3,000 applications filed as of August 2003, 1,500 related to allegations of forced eviction and property destruction. Instrumental in the high number of petitions has been the exception made by the ECtHR in *Akdivar and Others* to the principle of the exhaustion of domestic remedies in applications originating from the region. Out of 31 petitions raising property rights abuses, 27 were filed by Kurdish internally displaced persons (IDPs) whereas the rest were expropriation cases and environmental

disputes. The court issued 18 judgments against Turkey and one in favor, while it found two applications inadmissible. In 10 cases, all filed by Kurdish IDPs, friendly settlements were reached between the parties. Petitioners raised Articles 3, 8, 13, 14 and Article 1 of Protocol 1. The ECtHR found breaches of Articles 3, 8 and Article 1 of Protocol 1. For the first time in *Doğan and Others*, the ECtHR identified a structural problem of internal displacement in Turkey and called on the government to design policies towards its solution. Two years later, in 2006, the court held in its *İçyer* judgment that the Compensation Law, which had entered into force on October 2004, was an effective remedy for IDPs. It thereby ruled the *İçyer* and all other 1500 pending applications inadmissible. In *Fener Rum Lisesi Vakfı*, the first judgment ever in a case brought by a non-Muslim minority in Turkey, the ECtHR ruled for the first time on Turkey's policies towards the property rights of non-Muslim foundations and held that the confiscation of the properties belonging to these foundations violated Article 1 of the Protocol No. 1.

4. Freedom of Association

The fourth largest group of cases against Turkey concerns those regarding the dissolution and prosecution of associations and political parties. Out of 11 cases, the court found a violation of Article 11 in nine cases. The most important group of cases is the decisions concerning political party dissolutions, four of which resulted in a finding of violation whereas in *Refah Partisi* the ECtHR ruled in favour of the government. While the earlier cases concerned the dissolution of pro-Kurdish parties in the name of national unity and territorial integrity, *Refah Partisi* concerned the closure of a pro-Islamist party in the name of laicism. In *United Communist Party of Turkey*, the ECtHR held that the dissolution of a party solely on the basis of its program, before it had any chance to engage in activities, infringes on Article 11. The ECtHR ruled in the case of *Socialist Party* that a party's advocacy of goals, such as the establishment of a federal regime, which are considered to be incompatible with constitutional principles does not make it incompatible with democracy. In *Refah Partisi*, where the ECtHR found the party to constitute a serious threat to the secular regime in Turkey, the court gave a very rare judgment in its overall jurisprudence, upholding the dissolution of a political party.

5. Respect for Home, Private and Family Life

There are six ECtHR decisions concerning privacy rights, where petitioners relied *solely* on Article 8, concerning forced gynecological examination, the inability of married women to use their maiden names, operation of gold mines on residential areas, incommunicado detention without notification of families, unlawful search and seizure, and paternity dispute. The earliest judgment is dated July 2003. *Ünal Tekeli* is the only judgment in the ECtHR's jurisprudence on Turkey where the court found a violation of Article 14. The case was lodged by a female lawyer who challenged a domestic law requiring married women to use both their maiden name and their husband's last name on official documents. The ECtHR found the differential treatment of married men and married women to constitute gender discrimination.

6. Freedom of Religion

To this date, the ECtHR issued judgment in only two cases where applicants relied primarily on Article 9. *Kalaç* concerned the compulsory retirement of a military judge pursuant to the order of the Supreme Military Council on the ground that his religious activities showed lack of loyalty to the principle of secularism. In *Leyla Şahin*, the issue was the compatibility of an administrative ban on the wearing of headscarf at universities, which caused the applicant who refused to take off her headscarf to be expelled from medical school. In both cases, the ECtHR did not find a violation. In *Leyla Şahin*, the ECtHR held that the ban was justified by the legitimate interest to protect secularism. Minorities have until recently been reluctant to take their freedom of religion claims to Strasbourg. However, this has started to change very recently with various religious minorities filing cases with the ECtHR. Currently, applications lodged by Alevi and Protestant minorities are pending before the court. On the other hand, the disillusionment caused by the ECtHR's ruling in the case of *Leyla Şahin* may discourage members of the Sunni Muslim majority from petitioning Strasbourg in the future.

B. National and International Actors Advocating Minority Rights

Kurdish lawyers and activists played an instrumental role in the construction of the ECtHR jurisprudence on Turkey. Lawyers associated with the bar associations of Diyarbakır and Istanbul, the Istanbul-based Foundation on Social and Legal Studies (Toplumsal ve Hukuk Araştırmaları Vakfı-TOHAV), Human Rights Association and the Human Rights Foundation of Turkey became the pioneers of litigating in Strasbourg and developed an expertise in this regard. In this process, they closely cooperated with lawyers in Europe, particularly those affiliated with the Human Rights Centre at University of Essex and the Kurdish Human Rights Project, both in the United Kingdom. British lawyers associated with these organizations filed scores of petitions, alone or in cooperation with Kurdish lawyers.

Turkey's EU accession process has been instrumental in encouraging new minority groups to lodge petitions in Strasbourg. The nature of claims and the identity of applicants have started to diversify: minorities now seek relief against discrimination in education and for effective political participation, the protection of religious freedoms and the right to education. This is evident, for example, in the petitions filed by Armenians, Rum Orthodox Christians, Protestants and Alevis. The EU accession process has also brought to the fore a new international actor: the European Commission in Brussels and its delegation office in Ankara. The annual progress reports of the European Commission have become the principal assessment tool for the advancement of human rights protection in Turkey. At the national level, various human rights groups such as those named above have played a critical role in documenting human rights abuses committed during the state of emergency and raising awareness on the plight of the Kurds. Today, these groups work in close cooperation with the European Commission through providing the latter with information for its annual reports.

C. Strategic Litigation

In the Turkish case, the number of isolated petitions which vary based on the circumstances of the applicant is quite marginal. With the exception of a few number

of case concerning land expropriation, environmental issues, paternity dispute and gender equality where applicants sought individual remedy, the vast majority of petitions were brought by Kurds or parties advocating their rights. Although the Kurds have been engaged in strategic litigation since early 1990s, their claims clustered around rights to property, liberty, fair trial and the right to be free from torture rather than challenging Turkey's minority policy. However, both the identity of applicants and the nature of claims have started to diversify in recent years. New minority groups have started to bring their claims to Strasbourg. What is contested in these applications is effectively Turkey's exclusive citizenship concept and discriminatory policies against minorities. These cases point to an increasing resort by various minority groups to Strasbourg when prior domestic political and legal efforts to change the discriminatory aspects of the national legal framework have failed. As new minority groups seek change through litigation, however, the Kurds and the Muslims are losing faith in the reliability of the ECtHR as an external actor in their political struggle in Turkey. The *İçyer*, *Refah* and *Şahin* judgments have cost the ECtHR legitimacy in the eyes of the Kurds and the Muslims, who voice their frustration and disillusionment with what they increasingly perceive to be a political court.

D. Domestic Execution of Judgments

As a state party to the ECHR, Turkey is under an obligation to secure everyone within its jurisdiction the rights and freedoms defined in the ECHR and to abide by the final judgments of the Court. This confers on judicial, political and executive authorities the responsibility to execute the ECtHR's judgments. Article 13 guarantees the availability of a national remedy to enforce the rights and freedoms granted under the ECHR. While Turkey, as all other states parties, has some discretion as to the manner in which it conforms to its Article 13 obligations, the remedy must be "effective" in practice as well as in law.

In its judgments in the village eviction and property destruction cases, the ECtHR stressed that 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of perpetrators. It also expressed its preference for the restoration as far as possible the situation existing before the breach (*restitutio in integrum*). However, it added that if *restitutio in integrum* is in practice impossible, the states are free to choose the means to comply with a judgment. Thereby, in all cases concerning the eviction of Kurds from their villages, the ECtHR declined applicants' requests for declaratory judgment.

The Committee of Ministers has supervised Turkey's execution of the ECtHR's judgments, particularly focusing on those where security forces were found to have committed acts of torture, inhuman treatment, destruction of property, illegal killings and disappearances. Turkey took a series of general measures, which served to comply with its legal duties under Article 46 of the ECHR and to fulfill its political commitments to the EU. These measures concentrated on four main areas, as called upon by the Committee of Ministers: 1) education and training of members of the security forces; 2) reform of the criminal justice system; 3) compensating victims; and 4) training of prosecutors and judges.

The government's efforts have been undermined by a resilient bureaucracy who curtailed the rights and freedoms granted under new laws. To overcome this resistance, the government, under the supervision of the Committee of Ministers and

with a view to ensure that authorities comply with the ECtHR judgments, issued executive circulars addressed to judicial and administrative authorities and undertook human rights training for educators, police and *gendarmérie*, judges, prosecutors and lawyers. The Council of Europe and the EU have been actively involved in the human rights training programs.

The Committee of Ministers has closely monitored the execution of judgments on fair trial, where the government took both individual and general measures. In *Sadak, Zana, Dicle and Doğan*, a law dated 2003 allowed the applicants' retrial and release pending trial. In *Öcalan*, the applicant was paid just satisfaction and his request for a retrial was examined on the merits. However, the request was rejected by a court on the grounds that the nature of the crime and the evidence would lead to the same outcome. A series of general measures were also adopted to prevent similar violations in the future: the abolishment of death penalty; and the provision of detainees the right to see a judge within 24 hours of detention in regular cases and three days in exceptional cases, the right to a lawyer in cases with a minimum of 5 years and the right to correspond with a lawyer in confidentiality and without time restrictions; the replacement of the military judge in state security courts by a civil judge; and the abolishment of state security courts.

The following general measures were adopted in the area of freedom of expression: the introduction into the penal code of the criterion of "incitement in a manner which is explicitly dangerous to public order" for prosecution of speech; the lifting of penalties for the expression of thoughts that are merely critical; the repeal of Article 8 of the anti-terror law.

While Turkey has made significant progress in executing the ECtHR case law, as of 2006, cases against Turkey still represented 14.4% of the judgments pending before the Committee of Ministers. Of these, 93 relate to effective remedies against abuses by security forces and 115 to freedom of expression.

IV. Literature Review

The European Commission's emphasis in its reports on Turkey's execution of the ECtHR judgments as well as the Turkish Parliament's reference to both fulfilling the EU accession conditionality and executing the ECtHR case law in justifying the legislative purposes of some reform laws show that the EU accession process and the ECtHR case law play an interdependent role in facilitating the harmonization of national law with European norms. And yet, the literature on these two phenomena has so far developed independently of each other. There is no literature on the relevance of the EU accession process for the alignment of Turkey's legal framework with the ECtHR jurisprudence.

A. Literature Review on the EU Accession Process and the ECtHR Case Law

There is ample domestic academic literature in Turkey on the protection of human rights under the ECHR and on the ECtHR jurisprudence. There are also studies focusing on the protection of selected rights and liberties, such as freedom of expression, freedom of association and religious freedom. More specifically, the relationship between the ECHR and the Turkish legal order and the ECtHR's case law on Turkey has been the object of academic research. Some studies are limited to the listing and brief summary of judgments; others offer analyses of decisions and their execution. Generally, the purpose of the literature is to provide a practitioner's guide

for lawyers, judges and prosecutors who do not speak English and/or do not follow the jurisprudence of the ECtHR. At the same time, there are also studies assessing to what extent recent reforms achieve the alignment of national law with European standards and point out the outstanding issues that need to be tackled by lawmakers. The overall consensus in the literature is that notwithstanding the significant legal reforms undertaken in recent years, the domestic legal order falls far short of European standards.

Some ECtHR judgments have been widely commented on in the international literature. The controversial judgments in *Refah Partisi* and *Leyla Şahin* have faced fierce criticism by European scholars. One common point of criticism is that the ECtHR deviated from and indeed conflicted with its earlier jurisprudence on party dissolutions in Turkey. In contrast, domestic scholars have been conspicuously silent on the issue. The few studies that mention or analyze the *Refah* judgment display an implicit deference to Strasbourg without discussing the compatibility of these two judgments with European standards.

There is very limited academic literature on the impact of the ECtHR case law on national law and practice. The court's recent judgment in *İçyer* is a notable exception. The decision has been criticized by both academic and policy studies for being premature, unjust and political. The ECtHR has been held responsible for the deterioration in implementation. Seemingly motivated by the desire to ease its workload, the court has been charged with giving a premature judgment solely on the basis of selected sample decisions presented by the government and leaving the IDPs at the mercy of the authorities.

Missing in the academic literature on the ECtHR-Turkey relationship is an analysis of the identities, strategies, purposes and coalitions of applicants. There is no study on recourse to Strasbourg by minority groups nor on the impact of the ECtHR case law on Turkey's minority policies. As a result of the absence of research on the actors of litigation, the recent trend towards ethnic and religious diversification in the identity of individuals petitioning Strasbourg falls outside of research interest.

The EU's minority protection conditionality for accession has obliged Turkey to reluctantly undertake a series of legal reforms with the purpose of fulfilling the Copenhagen political criteria. Ample amount of academic literature has emerged looking into specific periods in near history when minorities -- particularly non-Muslims -- have been persecuted, discriminated and expelled. Others analyzed the impact of the EU accession on Turkey's minority regime, and more specifically the substance and implementation of laws governing minorities. Various national and international human rights organizations released reports evaluating the progress achieved by Turkey and underlining the outstanding issues. The number of academic studies and policy reports on the impact of the EU process on the protection of human rights has also increased. Inter-governmental organizations released reports and resolutions on Turkey's performance in fulfilling the EU conditionality.

One common theme in the literature is the nearly systematic bureaucratic resistance to the implementation of laws enacted by the legislative and the executive branches. The tension between the elected and appointed officials is perceived as an indicator of the democratic deficit in the political regime in Turkey. The general conclusion is that while Turkey has come a long way in comparative terms towards consolidating democracy and protecting human rights, there is still a long way to go both in terms of legislation and implementation.

B. The Implementation of the EU Accession Criteria and the ECtHR Judgments

Since Turkey's declaration as a candidate for the EU accession, a series of legal reforms have been adopted to comply with the EU conditionality. Notwithstanding the removal of some of the restrictions on rights and freedoms, the laws fall short of fulfilling the EU's criteria for accession. Significant problems remain in laws governing political parties, associations and freedom of expression.

In the area of freedom of expression, constitutional restrictions on the use of minority languages in the expression of thought and broadcasting were removed. However, restrictions attached to the exercise of these rights in the name of protecting territorial unity remained. While legislative reforms bolstered the constitutional amendments, in some cases draconian provisions of the penal code were reenacted under new names. Prosecutors have a strong tendency to use the new provisions in bringing charges against minorities and their advocates.

While considerable progress had been made in lifting some of the restrictions in the anti-terror law, the June 2006 amendments constitute a serious setback. The new law has an over-inclusive and purpose-based definition of terrorism, and introduces a wide and long list of "terrorist offences," brings new restrictions on free speech and imposes severe sanctions on the media, including prison sentences for journalists. It also reintroduces the temporary closures of publications without a formal hearing.

The ECtHR's *Doğan* judgment prompted Turkey to enact a compensation law for IDPs in July 2004. The stated purposes of the law were the fulfilment of commitments made to the EU and non-payment of high compensation in Strasbourg. These efforts paid off: In January 2006, only three months after the law came into effect, the ECtHR ruled in *İçyer* that the law provides an effective domestic remedy.

With recent amendments to the Law on Associations, the establishment of associations is no longer subject to prior authorization and there is more space for the establishment of associations by minorities or for advocating minority rights. Associations are allowed to use minority languages in their non-official correspondence. However, the establishment of associations engaging in "prohibited activities" is prohibited. While "prohibited activities" are not defined, one might suspect that the restriction aims to protect the constitutional principles of territorial unity and national security. The over-inclusive reading of these principles by Turkish prosecutors and judges in the past have resulted in the inclusion among prohibited purposes, *inter alia*, of the advocacy of peaceful solutions to the Kurdish problem, including the granting of minority status to the Kurds.

The domestic framework governing political parties is one area that needs further reforms to achieve harmonization with the ECtHR's jurisprudence. While the threshold for the dissolution of a political party has been increased under Article 69 of the Constitution, the Law on Political Parties (LPP) still contains several restrictions which contradict the letter and spirit of the relevant constitutional provisions as well as the standards established by the ECtHR. Article 96(3) prohibits the use of the word "communist" in the name of a political party, notwithstanding the ECtHR's unequivocal ruling in *United Communist Party*. Another problematic provision of the LPP is Article 81, which bans political parties from "arguing" that minorities exist in Turkey, promoting minority languages and cultures, and using minority languages in their written materials, activities and statements.

With the EU process, Turkey found itself having to fulfil the minority protection conditionality, notwithstanding the challenge the latter posed to its official

policies under the 1923 Treaty of Lausanne. Since Lausanne, when the newly founded republic was compelled by Western powers to grant minority status to its non-Muslim population, minority rights have been associated with foreign interference in internal affairs, and portrayed in the official discourse as a once and for all granting of special treatment limited to non-Muslims. The *de jure* protection granted to all non-Muslims under Lausanne was *de facto* restricted to Armenians, Rums and Jews, unlawfully excluding others such as the Assyrians.

It was against this historical background that Turkey found itself having to fulfill the EU's minority protection conditionality. A number of constitutional and legislative reforms were undertaken in the last few years, granting minorities limited and conditional rights to broadcasting in national public and private television and radio stations, the right to teach and learn their languages in private courses and removing some of the restrictions on the property rights of non-Muslims. However, various minorities' demands for public education in mother tongue have not been met; broadcasting is limited to five selected minority languages, subject to time and content restrictions and prohibitive red tape requirements; and no legal framework has been adopted to allow the return of confiscated properties or the payment of compensation to non-Muslim foundations; the legislature carefully avoided any explicit reference in the letter and spirit of the reform laws that could suggest the reformulation of the official policy on minorities and made minorities' exercise of their limited rights prohibitively difficult by attaching restrictive conditions and conferring on bureaucrats a virtually unchecked authority in implementing the laws through executive regulations.

The EU's accession conditionality has confronted Turkey with the challenge to re-construct its discriminatory citizenship definition and practices. Not only various minorities, but also a significant segment of the majority feels excluded by the ethnic and religious based citizenship in Turkey. Enacting legal reforms has proved to be a necessary but insufficient condition of bringing real and meaningful change in social and official attitudes towards minorities. The internalization of reforms requires a radical transformation of the prevalent mentality of both the state and the society.

V. Conclusion

An analysis of the impact of the ECtHR jurisprudence on the protection of human and minority rights in Turkey would be incomplete without the simultaneous study of the EU accession process as an equally significant external factor. This is most evident in the fact that, notwithstanding the high number of judgments the ECtHR has issued against Turkey over the years, their execution has started only after the initiation of the EU reform process and accelerated after the JDP came to power in 2002. Since the declaration of Turkey as an official candidate for accession in 1999, the EU has played a central role in monitoring the Turkish Government's execution of the ECtHR case law, documenting the progress achieved in that regard and the outstanding issues, and providing training to key judicial and administrative authorities in tandem with the Council of Europe.

The ways in which the Strasbourg jurisprudence has made a difference in the Turkish case seems to depend on various factors, such as the type of violation in question, the commitment of the government to executing the judgment concerned, the political nature of the issue, the number of judgments and the amount of compensation Turkey was required to pay. While the government has come a long way in executing the ECtHR's judgments on Article 3, for example, the same cannot

be argued for the execution of case law concerning Article 10. The relative success in the execution of Article 3 judgments can be explained by a combination of various factors: the *jus cogens* nature of the prohibition of torture under customary international law, the absolute prohibition of torture under the ECHR and the non-derogable nature of the duty not to torture, the political will demonstrated by the JDP government in its campaign on “zero tolerance to torture,” and the relative ease in creating strong public support against torture and ill treatment. In contrast, freedom of expression is not a *jus cogens* principle, its protection under the ECHR is not absolute but is subject to certain restrictions, the JDP government’s commitment to freedom of expression is highly questionable in view especially of the draconian provisions introduced to the Penal Code and the anti-terror law, the highly political nature of Article 10 cases, most of which are linked to the Kurdish question, and the lack of public support for the absolute protection of freedom speech, particularly when such speech concerns the expression of alternative views on the Kurdish question and laicism.

ANNEX II: MAPPING OF RESEARCH COMPETENCES REPORT

Research Institution 1: İstanbul Bilgi University Human Rights Law Research Center

The Human Rights Law Research Centre at İstanbul Bilgi University was established in December 2000. Since that time, the Centre has been active in the pursuit of raising the awareness of, protecting and developing human rights law and humanitarian law both domestically and internationally. In addition to organising conferences, symposiums, seminars and round table discussions, both at home and abroad, the Centre is also working in unison with a number of national and international organisations, both public and private, on various projects in the subject of human rights. The Centre monitors all national and international judicial decisions regarding human rights and humanitarian law. Through its unique website, the Centre presents and publicises the ratification of related conventions and their subsequent implementation by Turkey. The reports and decisions of United Nations, International Labour Organisation, the Council of Europe and the European Court of Human Rights regarding human rights in Turkey can be viewed at this site. The Centre's web site is currently the only source that provides information on human rights in Turkey along with related news and documents presented in Turkish with detailed summaries in English for the international audience.

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Research Institution 2: Marmara University Human Rights Research and Application Centre

Marmara University Human Rights Research and Application Centre aims to follow the national and international developments in the area of human rights and to contribute to such developments via scientific research aimed at practical results. The Centre also aims to initiate efforts to develop a culture of human rights in Turkey as well as contribute to such already existing efforts. Towards these aims, the Centre publishes scientific material on the issue of human rights, organizes panels, seminars and conferences, carries out academic programs and provides consulting services.

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Leading experts: Prof. Dr. Feridun Yenisey, Prof. Dr. Nuri Centel, Doç. Dr. Turan Yıldırım, Doç. Dr. Abdullah Dinçkol

Research Institution 3: İstanbul University Centre for Research and Practice in Human Rights Law

Centre for Research and Practice in Human Rights Law was founded in 1997. The Centre is located in the Faculty of Law, University of Istanbul. The aim of the Centre is to carry out research and activities in theoretical and practical areas regarding the recognition, protection and fostering of human rights by using scientific techniques within interdisciplinary approach. The Centre carries organizes and participates in seminars, conferences and similar activities related to human rights law both on the national and international level, establishes the necessary archives and libraries, opens regular, scientific, occupational and specialization courses and seminars in order to train the personnel of the related institutions and associations, to monitor the implementation of the Human Rights Conventions, especially European Convention on Human Rights in order to reach its aim. In recent activities of the Centre, special attention was given to the democratization efforts in Turkey through a series of lectures and reports. The Centre has also provided human rights training to public servants who are from different public agencies and supported student researches on human rights.

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Website: <http://www.istanbul.edu.tr/merkezler/ihhaum/english.htm>

Email: webihha@istanbul.edu.tr

Leading experts: Prof. Dr. Rona Serozan, Prof. Dr. Berin Ergin, Prof. Dr. Füsün Sokullu Akıncı, Prof.. Dr. Naz Çavuşoğlu, Doç. Dr. Oktay Uygun

Research Institution 4: TODİAE Human Rights Research and Documentation Center

TODAİE Human Rights Research and Documentation Center was established in 1975. The center's administrative regulation was published in official gazette on 1st of June, 1975. The aim of the center is to develop the idea of human rights in Turkey and to fulfill the needs of public sector on the subject. The activities of the center are to collect national and foreign material on human rights, to gather academic meetings, to conduct research and publish relevant materials, to get in touch and cooperate with national and international institutions that work for human rights. Since 1975, the center has been publishing two periodicals titled Annual of Human Rights and Turkish Yearbook of Human Rights.

Address:

1 Numaralı Cadde No:8 Yüce-tepe 01600 Ankara

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Fax: (90) 312 232 52 96

Website: <http://www.todaie.gov.tr/IHADM/>

Email: ihadm@todaie.gov.tr

Leading experts: The director of the center is Dr. Filiz Kartal. Mesut Gülmez, İbrahim Kabaoğlu, Oktay Uygun.

Research Institution 5: CES – Boğaziçi University Center for European Studies

The Center was established in 1991, with the objective of conducting interdisciplinary research in European studies, emphasizing the cultural dimension of Turco-European relations in a comparative framework. In May 2000, the University Senate decided to broaden the scope of the studies conducted at the Center to cover all major areas in social sciences. The Center for European Studies (CES) aims at providing an academic and intellectual forum on multiple aspects of the European integration process with an emphasis on the accession of Turkey and other candidates. CES promotes academic research by assisting university staff in project formulation and search for funding. CES also functions as a focal point for debate on EU-Turkey relations and a think-tank comprising academics and practitioners from the public and private sectors. CES organizes conferences, seminars and lectures open to the public, as well as workshops for experts. This gives an opportunity for officials and members of non-governmental organizations to interact and develop networks with their counterparts in Europe.

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Fax: + (90) 212-358 15 91

Website: <http://www.ces.boun.edu.tr/>

Email: ces@boun.edu.tr

Leading experts: Prof. Der. Kemal Kirişçi, Prof. Dr. Refik Erzan, Prof. Dr. Çağlar Keyder, Prof. Dr. Binnaz Toprak, Prof. Dr. Şevket Pamuk, Prof. Dr. Mehmet Kaytaz,

Prof. Dr. Fikret Adaman, Prof. Dr. Mine Eder, Prof. Dr. Hakan Yılmaz, Associate Prof. Bilge Ataca, Associate Prof. Duygu Köksal, Associate Prof. Gül Sosay

Research Institution 6: ALT – Association for Liberal Thinking

Association for Liberal Thinking was established informally by a few like-minded people in 26 December 1992. It gained official status as an Association on 1 April 1994. The objectives of ALT as a non-profit, non-governmental organization are to introduce to Turkish public the richness of the intellectual tradition that lay at the heart of the liberal democratic civilization; to engage in activities that promote understanding and acceptance of values like liberty, justice, peace, human rights, the rule of law, tolerance; to encourage development of academic researches on liberal themes; and to contribute to finding effective solutions to Turkey's political and economic problems within the liberal thought. ALT does not involve in day-to-day politics and have no direct links with any political party or movement. Instead, as an independent intellectual grouping, it aims to set and influence broader political debates so as to contribute to the liberalization of Turkey in economic and political fields. ALT brings together like-minded people whose belief in and commitment to liberty, free market economy, human rights and liberal democracy have been proved by their intellectual and professional work. It publishes reports, books and journals; holds national and international symposia; develops and carries out educational programs.

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Website: <http://www.liberal-dt.org.tr/>

Email: info@liberal-dt.org.tr

Leading experts: Since ALT is not a research center in the traditional sense, it does not regularly employ experts but rather works with select experts on project-based contracts. Experts that work more regularly with ALT are Prof. Dr. İhsan Dağı, Dr. Murat Yılmaz and Prof. Dr. Atilla Yayla.

Research Institution 7: ATAUM – Ankara University European Societies Research and Application Centre

ATAUM has been established with the aim of providing trainings to public officials and private sector members on multiple aspects of EU integration, including the rights defined in the European Convention of Human Rights. For this purpose, ATAUM carries out research independently or in conjunction with other universities in Turkey and abroad, organizes national and international conferences and seminars and undertakes studies concerning the EU commissioned by other institutions.

Address:

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Leading experts: Erçin Çiğnel Cengiz, Deniz Senemoğlu, Ceren Arslan, Erhan Akdemir, Kaya Uysal