



2023

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Recommended Citation

Samuel I. Horowitz, *The Kurds, Turkey, and Strasbourg: Failure to Find and Remedy Discrimination Amid a Century-Old Mountain of Evidence*, 38 *Emory International Law Review Recent Developments* 1 (2023).
Available at: <https://scholarlycommons.law.emory.edu/eilr-recent-developments/37>

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THE KURDS, TURKEY, AND STRASBOURG: FAILURE TO FIND AND REMEDY DISCRIMINATION AMID A CENTURY-OLD MOUNTAIN OF EVIDENCE

*Samuel I. Horowitz**

INTRODUCTION

The Kurdish question is the largely de-contextualized and de-politicized term referring to the Kurdish struggle for recognition and autonomy throughout the Middle East but especially in Turkey.¹ Since the end of WWI and the founding of the Turkish state, the Kurds have been denied not only a nation-state but the fundamental right to perpetuate their language and culture—the clearest markers of Kurdishness. Given Turkey’s unparalleled record of violations and historical policies of discrimination, it is strange that the European Court of Human Rights continues to strictly adhere to its admissibility requirements and afford Turkey any margin of appreciation. Section I of this paper provides a brief overview of the history of the Turkish state in relation to its Kurdish minority, in particular the ideology upon which it was founded, and who the Kurds are. Section II identifies and shortly examines some of the (in)famous and emblematic cases brought by Kurds against the Turkish state. Section III analyzes two of the Strasbourg court’s rules and doctrines that have proved fatal or detrimental to potentially meritorious applications by Kurds against Turkey. The paper concludes by recommending that the Court loosen or do away with the identified requirements² for members of Turkey’s Kurdish minority bringing claims against the state.

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¹ See generally Mesut Yeğen, *The Kurdish Question in Turkish State Discourse*, 34 J. CONTEMP. HIST. 555 (1999); Ferhat Gurini, *Turkey’s Persistent Kurdish Question*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Apr. 19, 2018), <https://carnegieendowment.org/sada/76128> (last visited Dec. 1, 2019); Ruwayda Mustafah Rabar, *What Is the Kurdish Question?*, OPEN DEMOCRACY (Sept. 23, 2011), <https://www.opendemocracy.net/en/what-is-kurdish-question/> (last visited Dec. 1, 2019).

² This would certainly be unpalatable to member states as an infringement on their sovereignty and the principle of subsidiarity upon which the Court was founded and would doubtless result in a vast increase in the Court’s backlog. However, what must be weighed against these factors is the inherent dignity of the individual, the pursuit of justice, and the importance of upholding and enforcing the fundamental freedoms set out in the ECHR to those ends.

I. BACKGROUND

A. *The Turkish State*

Founded in 1923, modern-day Turkey was the result of a number of treaties and agreements that partitioned the Ottoman Empire following the end of WWI.³ The Treaty of Lausanne established the borders of Turkey, provided for the movement of people between Greece and Turkey, and “repudiated Turkey’s previous commitment to recognize an independent Armenia and . . . an independent Kurdistan.”⁴ Additionally, the Treaty “required Turkey to respect certain minority rights of non-Muslim minority communities within its territory...”⁵

However, perhaps because the majority of Kurds are Muslim, Turkey interpreted this provision of the Treaty “as not requiring it to recognize any minority rights for its Kurdish population.”⁶ With this interpretation of the Treaty and its Constitution, the government of Turkey had established a legal basis upon which to base its non-recognition and discrimination of its Kurdish minority. The Turkish state has further avoided adopting international regulations that give people the right to self-determination and which “reaffirm the rights of minorities as a distinct legal category.”⁷

Turkey’s first president, Mustafa Kemal Atatürk, based the country’s policies on six principles, the most important of which for the Kurdish population were nationalism and populism.⁸ The government placed great emphasis on the unity and indivisibility of the Turkish nation and its people

³ *Turkey*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Turkey/History> (last visited Dec. 1, 2019).

⁴ Patrick Macklem, *Minority Rights in International Law*, 6 INT’L J. CONST. L. 531, 531–532 (2008); Graham E. Fuller, *The Fate of the Kurds*, 72 FOREIGN AFF. 108, 109 (1993).

⁵ Macklem, *supra* note 4, at 547.

⁶ *Id.*

⁷ Derya Bayir, *Turkey, the Kurds, and the Legal Contours of Self-Determination*, 1 KURDISH STUD. 5, 13 (2013); *see also* Macklem, *supra* note 4, at 542–543, 547; *State Parties to the Framework Convention for the Protection of National Minorities*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/minorities/etats-partie> (last visited Dec. 1, 2019) (showing that Turkey is one of only four countries that have neither signed nor ratified the Framework Convention); *Chart of Signatures and Ratifications of Treaty 148: European Charter for Regional or Minority Languages*, COUNCIL OF EUROPE, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures?p_auth=scqP7EDO (last visited Dec. 1, 2019) (showing that Turkey has neither signed nor ratified the treaty).

⁸ H. Ayla Kiliç, *Democratization, Human Rights, and Ethnic Policies in Turkey*, 18 J. MUSLIM MINORITY AFF. 91, 96; *Turkey*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Turkey/Kemalist-policies> (Dec. 1, 2019).

which has persisted to the present day.⁹ Through a process of “denial and assimilation,”¹⁰ the Turkish state sought to erase ethnic minorities in its quest for “territorial integrity and national unity.”¹¹ The Turkish government went to such repressive lengths as designating the Kurds as “Mountain Turks;” banning the use of the Kurdish language in schools, broadcasting, and print; and banning Kurdish traditional dress.¹² The government additionally withheld development funds from the Kurdish south-east, resettled Turks into Kurdish areas and Kurds into the western metropolitan areas, began banning Kurdish political parties and arresting their members as they sprang up, and committed numerous massacres.¹³

These practices did not begin to attract international attention until the 1980s with Turkey’s military coup in 1980, the rise of the Kurdistan Worker’s Party (PKK) in 1978 and its subsequent uprising in 1984.¹⁴ Since then, the Turkish government has gone to great lengths to frame the Kurdish question as an issue of terrorism and national security as opposed to human rights.¹⁵ Turkey’s policies towards its Kurdish population did not really begin to improve until it became a candidate for membership in the EU in 1999.¹⁶ Following the “coup” attempt in 2016, Turkey’s government instituted a widespread crackdown on dissent.¹⁷ The government’s crackdown has included enormous purges of the public sector including civil service, schools, the media, the judiciary, and the military and vast expanses of executive powers.¹⁸

Additionally, tens of thousands of people have been charged with crimes such as attempt to overthrow the government and spreading terrorist

⁹ See Marlies Casier, *Contesting the ‘Truth’ of Turkey’s Human Rights Situation: State-Association Interactions in and outside the Southeast*, 10 EUR. J. TURKISH STUD., 2009, at 1, 4, 8; Kiliç, *supra* note 8, at 93, 95, 99, 101–105; Güneş Murat Tezcür, *Kurdish Nationalism and Identity in Turkey: A Conceptual Reinterpretation*, 10 EUR. J. TURKISH STUD., 2009, at 1, 4.

¹⁰ Sinan Esim, *NATO’s Ethnic Cleansing: The Kurdish Question*, 51 MONTHLY REV., June 1999, at 20, 22.

¹¹ Dilek Kurban & Haldun Gülalp, *A Complicated Affair: Turkey’s Kurds and the European Court of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTING STRASBOURG’S JUDGMENTS ON DOMESTIC POLICY 166, 175 (Dia Anagnostou ed., 2013).

¹² Esim, *supra* note 10, at 22; Kiliç, *supra* note 8, at 97; Tezcür, *supra* note 9, at 2–4; *Kurd*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Kurd> (last visited Dec. 1, 2019).

¹³ Kiliç, *supra* note 8, at 97–99.

¹⁴ Casier, *supra* note 9, at 3, 5; Fuller, *supra* note 4, at 112.

¹⁵ See Kurban & Gülalp, *supra* note 11, at 166; Fuller, *supra* note 4, at 116–117; Casier, *supra* note 9, at 3.

¹⁶ Kurban & Gülalp, *supra* note 11, at 170.

¹⁷ See generally Mine Eder, *Turkey*, in THE MIDDLE EAST 695 (Ellen Lust ed., 15th ed. 2020) (detailing throughout the extent of the Turkish government’s response to the failed coup attempt in 2016).

¹⁸ *Id.* at 698, 702–705, 713. (stating that “an estimated 160,000 judges, prosecutors, high- and low-level soldiers, police officials, teachers, academics, and civil servants were suspended or dismissed.”) *Id.* at 703.

propaganda.¹⁹ The crackdown has been especially problematic for Kurds as the government used the failed coup as an opportunity to jail hundreds of Kurdish politicians including the main Kurdish party's presidential candidate, Selahattin Demirtaş.²⁰

According to the World Justice Project's Rule of Law Index, Turkey ranks 123rd out of 126 countries ranked globally for constraints on government powers.²¹ In the Fundamental Rights category—which scores areas germane to the Convention such as discrimination, freedom of expression and association, and due process rights—Turkey ranks 122nd out of 126.²² Additionally, though ranking 85th out of 126 in the Criminal Justice category, Turkey's score for no improper government influence in the criminal system was 0.06 out of 1,²³ which is far lower than Zimbabwe's²⁴ and Afghanistan's²⁵ score in this subcategory and just slightly above that of Venezuela.²⁶

B. *The Kurds*

The Kurds are an ethno-linguistic community—albeit lacking a standardized dialect—without a nation-state.²⁷ Estimates place the total number of Kurds at between thirty and forty million.²⁸ Though the Kurdish population is spread throughout five countries in the Middle East and includes a sizeable diaspora in Europe, North America, and former USSR countries, Turkey is “home” to more Kurds than any other country accounting for nearly half the total global Kurdish

¹⁹ *Id.*

²⁰ *Id.* at 704–705; Özgür H. Çınar & Tolga Şirin, *Turkey's Human Rights Agenda*, 2 RES. & POL'Y ON TURK. 133, 133–135 (2017).

²¹ *Turkey*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#/groups/TUR> (last visited Dec. 1, 2019).

²² *Id.*

²³ *Id.*

²⁴ *See Zimbabwe*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#/groups/ZWE> (last visited Dec. 1, 2019).

²⁵ *See Afghanistan*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#/groups/AFG> (last visited Dec. 1, 2019).

²⁶ *See Venezuela*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#/groups/VEN> (last visited Dec. 1, 2019).

²⁷ *See Who Are the Kurds?*, BBC, (Oct. 15, 2019), <https://www.bbc.com/news/world-middle-east-29702440> (last visited Dec. 1, 2019).

²⁸ Esim, *supra* note 10, at 22; Fuller, *supra* note 4, at 109–111; *Who Are the Kurds?*, *supra* note 27.

population.²⁹ Kurds make up about nineteen percent of Turkey's population.³⁰ All of the states in which the majority of Kurds live—Iran, Iraq, Syria, and Turkey—have subjected them to varying degrees of oppression.³¹ However, Turkey—though arguably the most democratic of these states³²—has been the most culturally oppressive of its Kurdish population.³³

Three major Kurdish revolts—in 1925, 1930, and 1937—occurred in Turkey during the presidency of Mustafa Kemal but were “suppressed vigorously.”³⁴ Since 1984, the violent side of the Kurdish struggle for independence and autonomy in Turkey has been borne by the PKK³⁵ while the HDP currently serves as the political branch of the Kurdish minority.³⁶ Hundreds of thousands if not over a million Kurds have been forcibly displaced during the decades-long conflict between the Turkish government and the PKK, mostly by the government.³⁷ It is estimated that forty thousand people have died as a result of the conflict.³⁸ The economic impact of the conflict has also been gigantic—estimated at one and a half trillion dollars.³⁹ The conflict became self-reinforcing as Turkey's oppression of its Kurdish population resulted in violent responses by the PKK and subsequent widespread human rights violations by the Turkish authorities under the guise of counterterrorism.⁴⁰

²⁹ See *Kurdish Diaspora*, THE KURDISH PROJECT, <https://thekurdishproject.org/kurdistan-map/kurdish-diaspora/> (last visited Dec. 1, 2019) (showing estimates of the total Kurdish population and the countries in which Kurdish people live). Adding up all the estimates for countries other than Turkey results in a total of approximately 16.47 million Kurds and 14.7 million are estimated to live in Turkey. See also *Who Are the Kurds?*, *supra* note 27 (providing a map showing the distribution of Kurds in Middle Eastern countries).

³⁰ Eder, *supra* note 17, at 703.

³¹ Esim, *supra* note 10, at 22; *Who Are the Kurds?*, *supra* note 27.

³² Fuller, *supra* note 4, at 110–111.

³³ Esim, *supra* note 10, at 22–23; Fuller, *supra* note 4, at 110–111 (specifying that Turkey has been the most culturally oppressive of its Kurdish population but declaring that life for Kurds in Turkey is better than in Iran or Iraq).

³⁴ *Turkey*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Turkey/Declaration-of-the-Turkish-republic> (last visited Dec. 1, 2019; see also *Who Are the Kurds?*, *supra* note 27; Kiliç, *supra* note 8, at 96–97 (stating that there were 27 Kurdish revolts in the first two decades of Turkey's statehood).

³⁵ Eder, *supra* note 17, at 703.

³⁶ *Id.* at 704.

³⁷ Kurban & Gülalp, *supra* note 11, at 174.

³⁸ Eder, *supra* note 17, at 703–704.

³⁹ Çınar & Şirin, *supra* note 20, at 138.

⁴⁰ Kurban & Gülalp, *supra* note 11, at 166.

C. Turkey and the Court: Emblematic Kurdish Cases

Though Turkey joined the Council of Europe in 1950⁴¹ and the European Convention on Human Rights (ECHR)⁴² entered into force there in 1954,⁴³ it did not recognize the individual right of application under Article 25 of the ECHR until 1987⁴⁴ or the compulsory jurisdiction of the European Court of Human Rights (ECtHR) under Article 46 until 1990.⁴⁵ After Turkey took these steps the ECtHR was inundated with complaints against the government, many originating from Turkey's Kurdish population.⁴⁶ Since 1959, the Court in Strasbourg has issued 3,532 judgments in cases against Turkey finding violations of at least one article of the ECHR in 3,128 cases and no violations in only 81.⁴⁷ This represents more judgments and more findings of violations committed by Turkey than any other country in the Council of Europe.⁴⁸ Despite these judgments, applications from Turkey continue to pour into the Court's docket, many thousands of which—for one of its requirements of admissibility or another—the Court deems inadmissible.⁴⁹

1. Öcalan v. Turkey

*Öcalan v. Turkey*⁵⁰ is perhaps the most well-known ECtHR case concerning a Kurdish person against the government of Turkey. The case was brought by Abdullah Öcalan—the founder and leader of the PKK—following his arrest in Kenya, solitary imprisonment on an island, and sentence of death by a Turkish court.⁵¹ He raised a number of claims including violations of Articles 2, 3, 5, 6, 7, 8, 9, 13, 14, 18, and 34.⁵² Because his sentence was commuted from death to

⁴¹ *Turkey*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/portal/turkey> (last visited Dec. 1, 2019).

⁴² European Convention on Human Rights, Nov. 4, 1950, 87 U.N.T.S. 103 [hereinafter ECHR].

⁴³ *Impact of the European Convention on Human Rights, Turkey*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/impact-convention-human-rights/turkey> (last visited Dec. 1, 2019).

⁴⁴ Kurban & Güllalp, *supra* note 11, at 166.

⁴⁵ *Human Rights*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.tr/%C4%B0nsan-haklar%C4%B1.en.mfa> (last visited Dec. 1, 2019).

⁴⁶ Kurban & Güllalp, *supra* note 11, at 166 (Stating that a “flood” of applications to the ECtHR came during the state of emergency declared in Turkey's south-east from 1987–2002).

⁴⁷ *Violations by Article and by State*, EUROPEAN COURT OF HUMAN RIGHTS, https://www.echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf (last visited Dec. 1, 2019).

⁴⁸ *See id.* (the nearest two highest countries are Russia and Italy but Turkey's judgments surpass these countries by close to one-third).

⁴⁹ *Turkey Press Country Profile*, EUROPEAN COURT OF HUMAN RIGHTS, https://echr.coe.int/Documents/CP_Turkey_ENG.pdf (last visited Dec. 1, 2019).

⁵⁰ 2005-IV Eur. Ct. H.R. 131.

⁵¹ *Id.*; *see also* Kurban & Güllalp, *supra* note 11, at 167.

⁵² 2005-IV Eur. Ct. H.R. 131, 197. Article 2 of the ECHR protects the right to life; Article 3 prohibits torture; Article 5 provides for the right to liberty and security; Article 6 guarantees the right to a fair trial; Article 7 provides the

life imprisonment, the Court did not entertain his claims of a violation of Article 2 itself.⁵³ However, the Court in Strasbourg did find violations of Articles 3, 5(3)–(4), and 6(1)–(3).⁵⁴ The Court further ruled that merely finding that the violations had occurred was sufficient just satisfaction.⁵⁵ Additionally, the Court awarded only one tenth of the attorneys’ fees and costs claimed by the applicant.⁵⁶

2. Halis v. Turkey

*Halis v. Turkey*⁵⁷ was a case concerning the arrest of a journalist whom the Turkish government accused and found guilty of disseminating propaganda about an illegal separatist terrorist organization.⁵⁸ Halis had written a review of four books for his newspaper, including one written by Abdullah Öcalan—the leader of the PKK.⁵⁹ However, the newspapers were confiscated by the Turkish authorities the day they were published.⁶⁰ Halis complained to the ECtHR that the Turkish government violated Articles 6(1) and 10 of the ECHR.⁶¹ He was tried and convicted by one of Turkey’s State Security Court’s upon which a military judge sat and his conviction was upheld by the Court of Cassation.⁶² The Strasbourg Court has found that these courts violate Article 6(1) of the Convention in other cases and also did so here.⁶³ Despite finding two violations of fundamental rights, the Court awarded only two thousand pounds less the legal aid given to the applicant.⁶⁴

principle of no punishment without law; Article 8 provides for the right to respect for family and private life; Article 9 guarantees the right to freedom of thought, conscience, and religion; Article 13 provides for the right to an effective remedy; Article 14 prohibits discrimination; Article 18 limits the purposes for which a state may restrict the rights in the Convention to what the articles of the Convention prescribe; and Article 34 establishes the right of people, non-governmental organizations, and groups of individuals claiming to be the victims of violations of the Convention to apply to the ECtHR and prohibits states from hindering this right. ECHR arts. 2, 3, 5, 6, 7, 8, 9, 13, 14, 18, 34.

⁵³ *Id.* at 151–152, 181–183.

⁵⁴ *Id.* at 200–202. The Court found a violation of Article 3 not based on Öcalan’s treatment while in custody but on the imposition of a death sentence following a manifestly unfair proceeding. *Id.* at 189.

⁵⁵ *Id.*

⁵⁶ *See id.* at 199–200 (showing that the Court awarded only 120,000 euros of the almost 1.2 million euros claimed by the applicant as attorneys’ fees and costs).

⁵⁷ App. No. 30007/96 HUDOC Apr. 11, 2005, <http://hudoc.echr.coe.int/eng?i=001-67917> (last visited Dec. 1, 2019).

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 2–3.

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 4, 8.

⁶² *Id.* at 3, 8.

⁶³ *Id.*; *see also* 2005-IV Eur. Ct. H.R.

⁶⁴ App. No. 30007/96 HUDOC at 9. One of the judges dissented on the grounds of the low damage award and wrote that he would have awarded the applicant around nine thousand pounds, more than four times what the Court actually awarded. *Id.* at 11–12.

3. Albayrak v. Turkey

*Albayrak v. Turkey*⁶⁵ concerned a judge who had been disciplined by being moved to a lower level of court and passed over for promotion for allegedly engaging in conduct unbecoming of a member of the judiciary.⁶⁶ However, most of the specific conduct that formed the basis of this allegation was using the Kurdish language with Kurdish people, reading a Kurdish publication, and watching a Kurdish television broadcast.⁶⁷ In his application to the ECtHR, he complained of violations of Articles 10 and 14.⁶⁸ He alleged that a judge of Turkish descent would not have been sanctioned as he was for watching the same program or reading the same publication.⁶⁹ The Court found that Turkey had violated Article 10 in part because “the authorities attached a considerable weight to the fact that the applicant followed or attempted to follow PKK-associated media,” but not Article 14.⁷⁰ The Court awarded him only six thousand euros⁷¹ despite the fact that the Turkish government had violated a fundamental right, demoted him, and effectively caused the end of his career as a member of the judiciary.⁷²

4. Aksoy v. Turkey

*Aksoy v. Turkey*⁷³ was the first case in which the Court found that the “measures taken by a state pursuant to a “public emergency” were not “strictly required by the exigencies of the situation.”⁷⁴ The applicant alleged that he had been taken into custody by the Turkish police, tortured, and interrogated for fourteen days without being presented before a judicial official on suspicion of aiding and abetting the PKK, being a member of the PKK, and distributing PKK propaganda.⁷⁵ Turkey defended the length of the applicant’s detention without

⁶⁵ App. No. 38406/97, HUDOC Jan. 31, 2008, <http://hudoc.echr.coe.int/eng?i=001-84828> (last visited Dec. 1, 2019).

⁶⁶ *Id.* at 4–5.

⁶⁷ *Id.* at 2–4.

⁶⁸ *Id.* at 6, 10.

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 9–10.

⁷¹ *Id.* at 11.

⁷² *Id.* at 3–5, 7.

⁷³ App. No. 21987/93, HUDOC Dec. 18, 1996, <http://hudoc.echr.coe.int/eng?i=001-58003> (last visited Dec. 1, 2019).

⁷⁴ D.J. HARRIS, M. O’BOYLE, E.P. BATES & C.M. BUCKLEY, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 823 (4th ed. 2018).

⁷⁵ *Supra*, note 72, at 20.

judicial review as a legitimate exercise of its derogation owing to the state of emergency in the south-east.⁷⁶

Mr. Aksoy was killed while his application to Strasbourg institutions was pending and his representatives alleged that he had been threatened with death so that he would withdraw his application only two days prior.⁷⁷ The Court, however, did not find evidence so ruled there was no violation of Article 25.⁷⁸ Despite reports of how widespread violations of Articles 3, 5, 6, 13, and 25 were in Turkey, the Court did not find that the violations were owing to an administrative practice.⁷⁹ In the end, the Court found violations of only Articles 3, 5, and 13 but awarded the applicant—rather his father given that the applicant had been killed—the full amount he requested and all attorneys' fees.⁸⁰

5. Akdivar and Others v. Turkey

*Akdivar and Others v. Turkey*⁸¹ dealt with residents of a Kurdish village seeking compensation for the destruction of their homes at the hands of the Turkish security forces and their forced displacement.⁸² This was another case in which the Turkish authorities greatly delayed in conducting insufficient investigations of the incidents and appeared to try to frame the PKK for the destruction of the village as they had previously conducted operations there.⁸³ As always, the Turkish government defended itself by claiming that the applicants had failed to exhaust domestic remedies.⁸⁴ Despite conceding that domestic remedies existed on paper, the Court found them to be ineffective given the particular circumstances of the applicants and the country at the time.⁸⁵ The Court found that Turkey had violated Articles 8 and 25 and Article 1 of Protocol No. 1 but either did not examine or found no violations of Articles 3, 5, 6, 13, 14, and 18.⁸⁶ The Court further awarded damages—the amount of which to be determined at a later proceeding—and attorneys' fees to the applicants.⁸⁷

⁷⁶ *Id.* at 21–22.

⁷⁷ *Id.* at 26.

⁷⁸ *Id.*

⁷⁹ *Id.* at 28.

⁸⁰ *Id.* at 28–30.

⁸¹ App. No. 21893/93, HUDOC (Sept. 16, 1996), <http://hudoc.echr.coe.int/eng?i=001-58062> (last visited Dec. 1, 2019).

⁸² *Id.* at 4–5.

⁸³ *Id.* at 5–7.

⁸⁴ *Id.* at 10.

⁸⁵ *Id.* at 15–19.

⁸⁶ *Id.* at 26–27.

⁸⁷ *Id.* at 27.

II. EXHAUSTION AND MARGIN OF APPRECIATION

A. Exhaustion

Under Article 35(1) of the Convention, “[t]he Court may only deal with the matter after all domestic remedies have been exhausted...”⁸⁸ One of the purposes of the requirement of exhaustion “is to codify the presumption that there is an effective remedy available in respect of the alleged breach in the domestic system.”⁸⁹ The rule requires that the complaint “have been made: (i) at least in substance; (ii) to the appropriate domestic body; (iii) and in compliance with the formal requirements and time limits laid down in domestic law.”⁹⁰ Generally, applicants are required to appeal their cases to the highest domestic court of appeal.⁹¹ Most importantly for Kurdish applicants to the Court, the ECtHR examines the effectiveness of domestic legal remedies.⁹²

The Turkish Constitutional Court—like most of the Turkish government—maintains a conservative and authoritarian mentality.⁹³ It has interpreted the concept of self-determination as unchanging and solely in its “external dimension.”⁹⁴ Through this interpretation, the Court has shut down numerous Kurdish political parties that have been accused of secessionism for “claiming the exercise of the right to self-determination.”⁹⁵ While it should serve as a bulwark against abuses, the Turkish judiciary has instead been the “principal obstacle to human rights reforms.”⁹⁶

Turkey’s highest courts appear to present the greatest resistance to reform in the judiciary.⁹⁷ The ideology of the Turkish judiciary is perhaps nowhere more apparent than in the ubiquitous dissenting opinions of the Turkish judge on the Strasbourg Court when it has found Turkey committed violations of the Convention.⁹⁸ The dissenting opinions read as recitations of the Turkish government’s defenses and talking points and rely almost exclusively on the fact

⁸⁸ ECHR art. 35(1).

⁸⁹ HARRIS ET AL., *supra* note 74, at 50.

⁹⁰ *Id.* (citing *Cardot v. France*, 200 Eur. Ct. H.R. (ser. A) at 16 (1991)).

⁹¹ *Id.* at 58.

⁹² *Id.* at 52–55.

⁹³ Kurban & Gülalp, *supra* note 11, at 175.

⁹⁴ Bayir, *supra* note 7, at 5.

⁹⁵ *Id.* at 10.

⁹⁶ Kurban & Gülalp, *supra* note 11, at 175.

⁹⁷ *Id.*; Tezcür, *supra* note 9, at 9 (stating that lower courts may still punish direct acts of oppression and human rights violations by security forces when “civil society activists mobilize the legal system, public opinion, and international linkages”).

⁹⁸ See dissenting opinions of cases cited in Section II.

that there is a public emergency caused by terrorism in the south-east and on an applicant's failure to exhaust domestic remedies.⁹⁹

The Court may be flexible and not unduly formalistic in applying the rule on exhaustion.¹⁰⁰ It has considered both the existence of legal remedies and their application in practice as well as “the personal circumstances of the applicant.”¹⁰¹ The Court typically does this where there has been a breakdown in the rule of law or where administrative measures impose barriers to domestic remedies.¹⁰²

In *Akdivar v. Turkey*, the ECtHR “made an exception to the principle of the exhaustion of domestic remedies” because “domestic remedies were de facto unavailable at the time.”¹⁰³ Though the Court stressed that this exception was based on the “particular circumstances” of the case and “did not absolve future applicants from the obligation to exhaust domestic remedies” it nonetheless found thousands of other applications displayed similar circumstances and warranted direct review.¹⁰⁴ In that case, though finding that Turkey violated Article 8 of the Convention and Article 1 of Protocol 1, the Court did not reach complainants allegations of the systemic nature of security force violations in Turkey.¹⁰⁵ Despite the Court's lenience in some situations, thousands of the cases brought against Turkey have been dismissed without the Court conducting its own analysis as to whether a remedy put forward by the state is in fact effective.¹⁰⁶

B. Margin of Appreciation

Margin of appreciation “means that the state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, administrative, or judicial action bearing on a Convention right.”¹⁰⁷ However,

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing *Cardot v. France*, 200 Eur. Ct. H.R. (ser. A) at 16 (1991)).

¹⁰¹ *Id.* (citing *Kozacıoğlu v. Turkey*, App. No. 2334/03, HUDOC at 11 (2009)).

¹⁰² *Id.*; *Kurban & Gülalp*, *supra* note 11, at 167 (stating that the Court acknowledged the plight of the applicants in *Akdivar and Others v. Turkey*, App. No. 21893/93, HUDOC).

¹⁰³ *Kurban & Gülalp*, *supra* note 11, at 167.

¹⁰⁴ *Id.* at 167–168.

¹⁰⁵ *Id.*

¹⁰⁶ *See İcyer v. Turkey*, 2006-I Eur. Ct. H.R. 297, 314–319 (declaring inadmissible for failure to exhaust domestic remedies the applicants claims because Turkey had passed a compensation law and established commissions under it); *Kurban & Gülalp*, *supra* note 11, at 168 (stating that the Court's ruling that an effective domestic remedy was available was premature given the facts on the grounds).

¹⁰⁷ *HARRIS ET AL.*, *supra* note 73, at 15.

the doctrine does not provide states with an “unlimited power of appreciation.”¹⁰⁸ The ECtHR has the power “to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with the right protected by the ECHR.”¹⁰⁹ The Court has applied the doctrine to a state’s interference with the rights enshrined in Articles 2, 5, 6, 8–11, and 14 as well as a state’s decision to derogate under Article 15.¹¹⁰ Margin of appreciation was designed to give deference to national authorities based on “their local knowledge and the principle of subsidiarity.”¹¹¹ Ostensibly, the Court bases the amount of leeway it affords to a state is contextually dependent.¹¹² For example, the Court gives a state greater discretion when there is a public emergency under Article 15 and in some situations dealing with national security.¹¹³ However, the Court limits the doctrine of margin of appreciation “[w]here a particularly important facet of an individual’s identity or existence is at stake...”¹¹⁴

In applying the doctrine of margin of appreciation, the Court assumes that “the legislative, executive, and judicial organs of a state party to the Convention basically operate in conformity with the rule of law and human rights and their assessment and presentation of the national situation in cases that go to Strasbourg can be relied upon.”¹¹⁵ In the case of Turkey, this assumption—upon which the doctrine is based—would be absolutely laughable if its consequences were not so dire for so many people.¹¹⁶

As could be expected given Turkey’s framing of the Kurdish question and its response to Kurdish opposition,¹¹⁷ a number of ECtHR cases have dealt with derogations under Article 15 and margin of appreciation.¹¹⁸ Article 15 of the ECHR allows states to derogate from certain of their obligations under the

¹⁰⁸ *Id.* (quoting *Handyside v. UK*, 24 Eur. Ct. H.R. (ser. A) at 18 (1976)).

¹⁰⁹ *Handyside v. UK*, 24 Eur. Ct. H.R. (ser. A) at 18 (1976).

¹¹⁰ *Id.* at 15–16.

¹¹¹ *Id.* at 16.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* (quoting *Evans v. UK*, 2007-I Eur. Ct. H.R. 382).

¹¹⁵ *Id.* at 17.

¹¹⁶ *See, e.g., Benzer and Others v. Turkey*, App. No. 23502/06, HUDOC (2014) (detailing the Turkish government’s attempt to cover-up the 1994 aerial bombing of a Kurdish village by blaming it on the PKK, delaying investigations, claiming records of flight logs did not exist, and alleging that the litigation was spawned by the PKK to discredit the Turkish government).

¹¹⁷ *See Kurban & Güllalp, supra note 11, at 166; Fuller, supra note 4, at 116–117; Casier, supra note 9, at 3.*

¹¹⁸ *See, e.g., Yüksel Yalçinkaya v. Turkey*, App. No. 156690/20, HUDOC (2023); *Abdullah Kiliç v. Turkey*, App. No. 42979/17, HUDOC (2023); *Vedat Şorli v. Turkey*, App. No. 42048/19, HUDOC (2021); *Pişkin v. Turkey*, App. No. 33399/18, HUDOC (2020); *Baş v. Turkey*, App. No. 66448/17, HUDOC (2020); *Alparslan Altan v. Turkey*, App. No. 12778/17, HUDOC (2019); *Nuray Sen v. Turkey*, App. No. 41478/98, HUDOC (2003) (all dealing with derogations by Turkey under Article 15 of the ECHR).

Convention “[i]n time of war or other public emergency threatening the life of the nation...”¹¹⁹ A state’s ability to derogate under Article 15 is however limited “to the extent strictly required by the exigencies of the situation.”¹²⁰ Furthermore, states are precluded from derogating from their obligations under Articles 2 (“except in respect of deaths resulting from lawful acts of war”), 3, 4 and 7.¹²¹ The Article also includes a notice requirement under which states must identify the derogations, the reasons for taking them, and when the derogations cease and the normal obligations are again applicable.¹²²

The limits imposed by Article 15 are crucial to protect vulnerable individuals from authoritarian state action, but the Court can only ensure the limits are being respected when it receives an application.¹²³ Additionally, if the Court finds that the requirement of necessity have been met, “it becomes difficult to control abusive recourse to the power of suspending rights that the provision permits.”¹²⁴ Moreover, in situations where a state may be abusing Article 15, its national avenues for redress are likely compromised and may therefore be ineffective.¹²⁵ For these reasons, the Court should be diligent in analyzing a state’s decision to derogate when an application comes before it.¹²⁶ However, the Court’s case law demonstrates that it gives states a “generous margin of appreciation” to state’s claiming the existence of a “public emergency.”¹²⁷ In fact, the Court itself has never found a “public emergency” not to exist when a state asserts that it does.¹²⁸

Turkey has frequently derogated from its obligations in response to the Kurdish uprising in the south-east and again made derogations following the attempted “coup” in 2016.¹²⁹ Turkey’s extensive derogations have been widely criticized by international bodies.¹³⁰ As far as the notice requirement of Article 15, the Court has not found insufficient notice based on Turkey’s practice of confining the territorial scope of its derogations to the south-east of the

¹¹⁹ ECHR art. 15.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ HARRIS ET AL., *supra* note 74, at 805–806.

¹²⁴ *Id.* at 806.

¹²⁵ *See id.*

¹²⁶ *See id.* (stating that in these situations “the national judicial means of redress will often have been undermined, so the responsibility of international institutions is more compelling”).

¹²⁷ *Id.* at 814.

¹²⁸ *Id.* (“Only in one instance . . . has a Strasbourg institution . . . disagreed with a respondent state as to the very existence of a ‘public emergency.’”).

¹²⁹ *Id.* at 806–807.

¹³⁰ *Id.* at 806, n.7.

country.¹³¹ Because Turkey—along with other states including the United States and UK—has designated the PKK as a terrorist organization, it is able to both take advantage of the extra lenience given by the Court to states dealing with terrorist situations¹³² and declare a “public emergency” to invoke Article 15. By merely alleging an individual or group’s connection to the PKK, the Turkish government has been allowed to accomplish all manner of discrimination against its Kurdish population under the color of law. When the very existence of democracy in a state has been called into serious question,¹³³ the Court should be especially lenient with the requirement of exhaustion and especially sparing in its application of the doctrine of margin of appreciation.

CONCLUSION

Despite what obviously appears to the outside observer to be the most severe discrimination¹³⁴—if not outright genocide—the ECtHR has rarely if ever found the Turkish government’s violations against Kurds to amount to discrimination in violation of Article 14 of the ECHR.¹³⁵ The Court’s adherence to formalism and refusal to take into account historical discrimination in the cases brought before it have resulted in a culture of impunity as far as the Turkish

¹³¹ *Id.* at 818 (citing *Aksoy v. Turkey*, 1996-IV Eur. Ct. H.R. 553).

¹³² *Id.* at 807–808.

¹³³ See Eder, *supra* note 17, at 695, 698, 702–706; KEMAL KIRIŞCI & AMANDA SLOAT, THE RISE AND FALL OF LIBERAL DEMOCRACY IN TURKEY: IMPLICATIONS FOR THE WEST, BROOKINGS INST. (Feb. 2019), https://www.brookings.edu/wp-content/uploads/2019/02/FP_20190226_turkey_kirisci_sloat.pdf; Steven A. Cook, *Turkish Democracy Can’t Die, Because It Never Lived*, FOREIGN POL’Y (May 13, 2019, 2:14 PM), <https://foreignpolicy.com/2019/05/13/turkish-democracy-cant-die-because-it-never-lived/>; Arlene Getz, Commentary, *Commentary Five Questions: ‘Turkey Is No Longer a Democracy*, REUTERS (June 25, 2018, 4:18 PM), <https://www.reuters.com/article/us-getz-turkey-commentary/commentary-five-questions-turkey-is-no-longer-a-democracy-idUSKBN1JL2SN>; Marc Lowen, *Is Turkey Still a Democracy?*, BBC (Nov. 5, 2016), <https://www.bbc.com/news/world-europe-37883006>; Diego Cupolo, *Turks Have Voted Away Their Democracy*, THE ATLANTIC (June 25, 2018), <https://www.theatlantic.com/international/archive/2018/06/erdogan-turkey-election-democracy/563669/>.

¹³⁴ Discrimination is used here in its ordinary sense as opposed to the legal sense under the jurisprudence of the ECtHR. However, it is certainly worth noting how far apart the ordinary and legal concepts of discrimination appear to be in this context.

¹³⁵ See *Violations by Article and by State*, *supra* note 46 (showing that the ECtHR has only found 19 violations of Article 14 in cases brought against Turkey); *Turkey Press Country Profile*, *supra* note 48 (failing to list a single case wherein the state was found to have discriminated against a Kurd as such under the subheading “Cases on prohibition of discrimination (Article 14)” despite listing numerous other cases in which violations of other rights were found for punishment of Kurds for using the Kurdish language in one context or another or for association with a pro-Kurdish party); *Country Factsheet Turkey*, DEPARTMENT FOR THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS, <https://rm.coe.int/tur-eng-fs4/1680709767> (last updated Sept. 27, 2019) (listing a case concerning a blind child’s denial of admission to a music academy after passing an entrance exam as the only discrimination case under ongoing supervision by the Committee of Ministers).

government's ability to directly and indirectly discriminate against a marginalized and vulnerable ethnic minority.¹³⁶ By adhering to the requirement of exhaustion without a thorough analysis of the practical effectiveness of domestic remedies in every case and by continuing to afford the Turkish government a margin of appreciation just because it claims national emergency the Court has abdicated its duties to the very body responsible for the violations and discrimination in the first place. Regardless of the consequences to its docket or credibility, the Court must loosen its admissibility requirements and apply stricter review of cases brought against illiberal "democracies" like the Turkish regime that have exhibited such a clear disregard for fundamental human rights.

¹³⁶ See Kurban & Güllalp, *supra* note 11, at 170–181 (identifying Turkey's general recalcitrance to rectify violations and the "cosmetic" legislative changes made to comply with the ECtHR's judgments).