

JUDICIALIZATION AND IMPLEMENTATION OF RELIGIOUS MINORITY RIGHTS IN  
TURKEY: CASE STUDIES FROM THE EUROPEAN COURT OF HUMAN RIGHTS

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## **Abstract**

The role of courts in shaping public policy has undoubtedly increased over at least the last two decades. Several factors have contributed to this trend, including the rise of democracy around the globe as previously authoritarian regimes open up and shift toward rule of law and democratic processes. Individuals and groups that have found themselves in a position to be discriminated against by the government and/or society, often due to their religious, ethnic, or cultural identity, have more frequently begun to take their grievances to domestic and international courts, as opposed to trying to grapple with solutions in the political realm. This process is known as judicialization.

While this trend of applying to international courts is on the rise by individuals and groups, the question arises about the efficiency and effectiveness of judicial processes in achieving hoped-for rights recognition. This is a reflection of state responses (specifically, implementation, execution, or compliance) to obligations as high contracting parties to such international human rights tribunals. This study examines 19 adverse judgments against Turkey in the European Court of Human Rights (1996-2016) that were brought forward by applicants that do not adhere to the majority religious identity in Turkey (Hanefi Sunni) to better understand what institutional factors have caused these cases to emerge and the elements that have helped or hindered full implementation in the post-judgment stage.

This examination demonstrates that identity construction, both self-produced and externally imposed, is inextricably linked to the formation of domestic policies towards non-majoritarian religious groups in Turkey. Furthermore, it argues that institutional configuration

and path dependence have interfered with comprehensive changes towards a pluralistic and just domestic human rights regime, as envisioned and mandated by the Council of Europe.

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## List of Acronyms

AKP	<i>Adalet ve Kalkınma Partisi</i> , Justice and Development Party
ANAP	<i>Anavatan Partisi</i> , Motherland Party
AP	<i>Adalet Partisi</i> , Justice Party
BDP	<i>Barış ve Demokrasi Partisi</i> , Peace and Democracy Party
BP	<i>Birlik Partisi</i> , Unity Party
CHP	<i>Cumhuriyet Halk Partisi</i> , Republican People's Party
COE	Council of Europe
CoM	Committee of Ministers
DP	<i>Demokrat Partisi</i> , Democrat Party
DSP	<i>Demokratik Sol Partisi</i> , Democratic Left Party
DTP	<i>Demokratik Toplum Partisi</i> , Democratic Society Party
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FP	<i>Fazilet Partisi</i> , Virtue Party
HDP	<i>Halkların Demokratik Partisi</i> , People's Democratic Party
HEPAR	<i>Hak ve Eşitlik Partisi</i> , Law and Equity Party
IACtHR	Inter-American Court of Human Rights
INGO	International Non-governmental Organization
MHP	<i>Milliyetçi Hareket Partisi</i> , Nationalist Action Party
MNP	<i>Milli Nizam Partisi</i> , National Order Party

MSP	<i>Milli Selamet Partisi</i> , National Salvation Party
MÜSİAD	<i>Müstakil Sanayici ve İşadamları Derneği</i> , Association of Independent Industrialists and Businessmen
NGO	Non-governmental Organization
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PKK	<i>Partiya Karkerên Kurdistanê</i> , Kurdistan Worker's Party
RP	<i>Refah Partisi</i> , Welfare Party
SP	<i>Saadet Partisi</i> , Felicity Party
TBMM	<i>Türkiye Büyük Millet Meclisi</i> , Turkish Grand National Assembly
TDV	<i>Türk Diyanet Vakfı</i> , Turkish Diyanet Foundation
VGM	<i>Vakıflar Genel Müdürlüğü</i> , General Directorate of Foundations
UN	United Nations
<u>YÖK</u>	<u><i>Yüksek Öğretim Kurumu</i></u> , Council of Higher Education

## CHAPTER 1: Introduction

Eylem Zengin was in the 7th grade in Istanbul in 2001. Much of her public-school education to date had included a mandatory course called “Religion, Culture, and Ethics.” The course was instituted in 1982, following the 1980 coup in Turkey that brought the military to power. The military believed that the educational system offered an opportunity to repair the political and social rifts that had been the source of the coup. They sought to accomplish this by combining two previously separate courses—an optional course in religion and a mandatory course in civics—into one compulsory course. With time, it became clear that the content of the curriculum had an increasingly Sunni Muslim slant, obliging students to recite Muslim prayers and memorize *suras* (verses) of the Koran, while only granting passing attention to other faiths. Many viewed the course as more of an indoctrination of religion rather than a neutral education about religions.

Until 1990, no exemptions were allowed from the course; after that date, a decree was issued permitting Jews and Armenian and Greek Orthodox Christians to be exempt, subject to the provision of proof of their religious identity. On the surface, this seemed to accommodate the desires of non-Sunni students and parents to opt out of the course. However, the exemption ignored a significant segment of Turkish society—citizens other than Armenian and Greek Orthodox Christians and Jews who also do not adhere to Sunni Islam. This group includes a number of other belief systems, such as Christians, Jehovah’s Witnesses, atheists, agnostics, and the most populous group, the Alevi, with which Eylem Zengin and her parents identify.

In 2001, Hasan Zengin applied to the Provincial Directorate of National Education at the Istanbul Governor’s Office for an exemption to the mandatory religion, culture, and ethics

courses for his daughter, Eylem, but the request was denied. Mr. Zengin applied to the Istanbul Administrative Court for judicial review, but the request was also dismissed. Once again, Mr. Zengin appealed to the Supreme Administrative Court, which decided to uphold the judgment of the court of first instance. In 2004, three years after the initial application and having exhausted all domestic remedies, Hasan and Eylem applied to the European Court of Human Rights (ECtHR), located in Strasbourg, France. The case against Turkey related to infringement on the applicant's rights as guaranteed by Turkey's ratification of the European Convention on Human Rights (ECHR) and membership in the Council of Europe (COE).

Cases like the Zengins' exemplify the experience of non-Hanefi Sunni Muslims<sup>1</sup> (which constitute a significant majority of the population) in Turkey. That is to say, a significant majority of the Turkish population who do not adhere to Hanefi Sunni Islam face challenges to their identity and identity recognition in various aspects of their professional, social, personal, and political lives. Often, when domestic political and judicial recourse fails these individuals and groups, they seek rights recognition outside of Turkey at the ECtHR. This study has selected 19 cases against Turkey (including the Zengin case) to examine the domestic institutional circumstances that have led to the judicialization of non-majoritarian belief rights recognition at the ECtHR, as well as the domestic institutional factors that determine Turkey's compliance with adverse ECtHR judgments.

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<sup>1</sup> The Hanefi School of Islam is the most widely followed of the four schools of Sunni Islamic jurisprudence.



## **1.1 International Courts and Religious Minorities in Turkey**

The role of courts in shaping public policy has undoubtedly increased over at least the last two decades. Several factors have contributed to this trend, including the rise of democracy around the world as previously authoritarian regimes open up and shift toward rule of law and democratic processes. In other countries, increasing greater distrust of government officials, especially in comparison to trust in the courts, has encouraged recourse to tribunals (Tate and Vallinder 1995, 3). This is evident in the emergence of numerous international human rights courts in the post-WWII era and the increase in applications that such courts receive, particularly the ECtHR (“ECHR Overview: 1959-2017” 2018).

International human rights tribunals are charged with the adjudication of inalienable and fundamental conditions granted to humanity by virtue of being human. Quite often, these rights are intrinsically linked to identity. Identity construction, whether imposed externally or self-selected, and its manifestation shape social norms, rules/laws, and the organizations through which humans act and interact. As such, identity and human rights substantially impact one another, with identity giving shape to how rights are formed, and with human rights delineating how identity is manifest. Religious identity is one of the most sensitive identity categories because it involves concepts relating to deeply held beliefs as well as understandings or assumptions about individual or group placement in the world and in relation to others. It is also a sensitive category because it can be cause for and a result of practices linked to exclusion, discrimination, and denial of basic human rights.

As a result, individuals and groups that have found themselves in a position to be discriminated against by government and/or society due to their religious, ethnic, or cultural

identities are increasingly taking their grievances to domestic and international courts, as opposed to trying to grapple with solutions in the political realm. This trend has been most salient within the scope of human rights because international courts such as the Inter-American Court of Human Rights (IACtHR) and the ECtHR govern the vertical relationship between states and constituents, in contrast to the horizontal state-to-state relationships in the domain of international trade or security (Hillebrecht 2014, 3). The increased function of the courts as policy makers is part of the process known as judicialization. Judicialization is simply defined as the transfer of power from representative institutions to the judiciary at both the domestic and supranational levels (Hirschl 2013, 21).

Since its founding in 1959, and especially since the establishment of a single, full-time court in 1998, the ECtHR has been part of the trend of international judicialization. Yet the ECtHR's tendency to defer to high contracting states' capacities to determine the most appropriate resolutions to adverse rulings through the principle of subsidiarity and the margin of appreciation has caused serious concerns about states' full compliance in terms of their obligation to the ECHR. Though studies have shown that the ECtHR has a high compliance rate (49 percent) compared, for example to the IACtHR's compliance rate of 34 percent (Hillebrecht 2014, 11), questions still arise about the congruence between the expectations of the judgment and concrete implementation.

There are also concerns about efficiency. The Parliamentary Assembly of the Council of Europe (PACE) reports that there are nearly 10,000 cases waiting in the Committee of Ministers (CoM), the decision making and execution body of the COE, and the number of leading cases (those identified as exhibiting specific and common structural issues) "awaiting execution for

more than five years has increased” (Committee on Legal Affairs and Human Rights 2017, 3). As well, the average time to close a case generally exceeds four years (Muižnieks 2016). Looking at this more closely, in 2016, the average length of execution for leading cases closed was 4.7 years (4.2 years for cases under standard supervision; 7.2 years for cases under enhanced supervision). Significantly, this average has increased over the last two years (Committee on Legal Affairs and Human Rights 2017, 13). Returning to the issue of implementation, while 2016 saw a record number of cases closed (2,066 total cases; 237 of which were leading cases and 45 of which were cases under enhanced supervision), the CoM’s annual report indicated that there are still a number of issues related to implementation (Council of Europe, Committee of Ministers 2018). In fact, approximately 74 percent of the Court’s judgments are not implemented (Karakas 2017).

Turkey is no exception. The Committee on Legal Affairs and Human Rights of PACE’s 2017 report on implementation of the ECtHR’s judgments highlighted the serious structural problems that have existed for more than a decade in ten member states with the highest number of non-implemented judgments against them (in order: Italy, the Russian Federation, Turkey, Ukraine, Romania, Hungary, Greece, Bulgaria, the Republic of Moldova, and Poland) (Committee on Legal Affairs and Human Rights 2017). The main issues identified in PACE’s 2015 report for Turkey include: “failure to re-open unfair criminal proceedings; repeated imprisonment for conscientious objection to military service; violations of the right to freedom of expression and freedom of assembly; excessive length of detention on remand; actions of security forces; and issues concerning the northern part of Cyprus” (Committee on Legal Affairs and Human Rights 2015, 9).

Indeed, the Council of Europe and its bodies recognize that it can legitimately take time to implement reforms, particularly when the states are tasked with the design of often politically or culturally sensitive amendments. They also recognize that the nature of the required reforms can be quite complicated and complex and involve a number of institutions (various ministries, the courts, regulatory agencies, etc.). However, Turkey has the highest number of judgments in the history of the COE (3,386 of 20,637 judgments from 1959 to 2017) and has the greatest number of cases finding at least one violation (2,988 of 17,307 cases) (European Court of Human Rights 2017). And as mentioned above, Turkey is among the top three countries with the highest number of non-implemented judgments against it.

## **1.2 Research Questions and Theoretical Basis**

This study examines the European Court of Human Rights' adverse rulings against Turkey. More specifically, the cases involve individual or group claims that the Turkish government has infringed on citizens' freedom of thought, conscience, or religion (whether or not a belief is recognized by the Turkish government). The case selection was not limited to Article 9 of the ECHR (freedom of belief) violations, but instead included a wide variety of violations that directly and indirectly, regardless of the violation, relate to freedom of belief. Still, the contents of Article 9 provided the framework that guided case selection. Neither Article 9 nor ECtHR case law defines religion; this is a difficult task that would require flexibility to consider the historically constructed nature and multifaceted use of the category worldwide, but also demand specificity in its application to individual cases (Council of Europe, European Court of Human Rights 2015, 7). As such, established ECtHR case law has shaped the positive and negative obligations states hold to protect freedom of thought or belief. The negative aspect of this

obligation entails the right *not* to practice or reveal one's beliefs and conscientious objection (the right not to act contrary to one's conscience and convictions) (Council of Europe, European Court of Human Rights 2015, 18-21). A state's positive obligations include permitting the "freedom to 'manifest [one's] religion' alone and in private or in community with others, in public and within the circle of those whose faith one shares" (Council of Europe, European Court of Human Rights 2015, 22) and the broad applications thereof, including, but not limited to, education, family life, apparel, and houses of worship. Therefore, while there may have been a direct or indirect violation related to these positive and negative obligations, the Court may have chosen not to rule on Article 9, yet still consider non-majoritarian beliefs to have played a key role in the facts of each case. This is why the cases in this study are not limited to Article 9 violations.

The 19 cases that fit the selection criteria (listed in the methodology section) were analyzed to understand the following research questions: What are the similarities and differences in the cases brought to the ECtHR by non-Hanefi Sunni groups that have been ruled to be violations regarding religious freedom in Turkey and what are the explanations for these variations or similarities? What mechanisms have contributed to Turkey's implementation/non-implementation of these rulings (political reasons, nature of the reforms required, budgetary reasons, public opinion, judgment language/margin of appreciation, interference with obligations from other institutions)? Which types of cases have come closest to implementation? Which measures (if any) were selected to implement the judgement (general measures, individual

measures, just satisfaction, costs and expenses)?<sup>2</sup> The cases are analyzed not only in reference to the language of the judgments, but also to Turkish domestic institutional arrangements during the relevant time frames, Turkish history, the activities of civil society organizations, the statements and actions of domestic political figures and parties, interviews with COE officials, and the reports of the COE's CoM.

These data were analyzed in light of the literature on a variety of theoretical concepts. The literature on identity provided a framework to explore identity formation, the intersection of identity and politics and the rights that do or do not emerge from them, and the role that identity plays in the nation-building process. In relation to nation building, the literature on institutionalism helped guide this research in defining what institutions are, how they are created and sustained, and how institutional structures (single institutions and a network of institutions) determine policy makers' behavior and decision-making practices. Institutional arrangements determine the policy process. For this reason, institutional change was also taken as a theoretical lens through which to examine the manner in which policy changes occur and the mechanisms that impact the nature and pace of change. Because this study focuses heavily on the courts, the concept of judicialization was also taken as a framework to assess the impact of the international court system on domestic policy choices. Additionally, the question of compliance<sup>3</sup> with

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<sup>2</sup> All cases but one in this dataset were still pending in the Committee of Ministers at the time of the cutoff date of the study, which was July 15, 2016.

<sup>3</sup> Though some studies have been quite particular about the use of terminology to indicate that a state has acted in accordance with a judgment from an international tribunal, the current study opted to employ the words compliance, implementation, and execution interchangeably to signal that a state has taken concrete and acceptable measures to fulfill its obligations that stem from an international court ruling.

judgments weighed heavily on the examination of the data and, therefore, academic work on the subject of implementation of international rights tribunals was included to aid in addressing what compliance has meant in its practical application, the latent and overt causes of implementation and non-implementation, and the measurement of compliance.

This study has six substantive chapters. Chapter 2 provides an extensive overview of the literature that guides the theoretical structure of the cases examined. Chapter 3 discusses the history and development of the Council of Europe and its institutions. The chapter concludes with a section on religious freedom case law in the ECtHR, with a specific focus on Turkey and its relationship with the ECtHR. Chapter 4 provides the reader with some historical context in which to understand the study. It includes information on the history of religion in the Ottoman Empire, the predecessor of the Turkish Republic; a general political history of the Turkish Republic from its founding to the present; and an explanation of religious classification in the Turkish Republic. Chapter 5 explains the analytical framework for this study, describing the methodology and methods for case selection and analysis. Chapter 6 reports the results of the analysis of the collected data. The collected cases are thematically categorized into six groups. These categories are not based on the article of the ECHR that was violated, but are instead organized according to the common issues addressed in the judgments. These categories are: domestic laws concerning the registration of faith-based non-governmental organizations (associational laws); property rights; places of worship and the public provision of religious services; identity cards; education; and conscientious objection. Each section of Chapter 6 begins with an overview of the domestic legislative, judicial, political, and civil contexts of the theme at hand. This is followed by a description of the domestic proceedings for each case prior to its

hearing by the ECtHR and the final judgment and obligations stemming from the ruling. Each section concludes with an analysis of the group of cases, including an examination of what actions have been taken by Turkey to execute the judgments and a review of the factors that influenced the implementation or non-implementation of the judgments. The study concludes with Chapter 7, which provides an overview of the key findings, the contributions to the literature, the limitations of the study, policy recommendations, and potential areas for future research.



## **CHAPTER 2. Literature Review**

This chapter begins with a survey of one of the most widely explored subjects where politics and sociology overlap: identity. The section on identity looks specifically at identity construction, identity politics, and, quite pertinent to this study, national and religious identities. The chapter continues with an examination of the literature on institutionalism, including how institutions are variously defined and how they shape and are shaped by other institutions and actors. This is followed by a review of theories surrounding the patterns and mechanisms of institutional change.

The theoretical framework to examine cases that have come before an international human rights court inevitably touched on law and compliance (or non-compliance) with relevant laws. While there has been a wealth of published works on the intersection of religion, law, and politics, the focus of this study is an observable trend that has occurred over the past few decades: judicialization. Judicialization, commonly defined as a shift in policy making and decision-making authority to the judiciary, has received a fair amount of academic attention. Yet a common framework or definition has yet to be settled on. Still, the scope of these works have largely been centered on domestic judicialization. Additionally, there has been little attention paid to the judicialization of religious issues. Even more rare is the intersection of these two areas: the international judicialization of religious rights. This section presents an overview of the current literature on judicialization and carves out an initial niche for further exploration of said intersection. In relation to judicialization, the chapter concludes with a review of compliance or, as it is referred to in the European Court of Human Rights (ECtHR), the execution of judgments.

## 2.1 What Is Identity?

Studying the ECtHR necessarily involves the examination of basic rights recognition in terms of collective and individual rights. More often than not, rights issues are tied up in questions of identity. A significant number of articles and protocols in the European Convention on Human Rights (ECHR) address one aspect or another of individual or collective identity. Some examples include private and family life (Article 8); expression (Article 10); association (Article 11); discrimination (Article 14); and of course, thought, conscience, and religion (Article 9). This section provides an overview of the academic literature on how identity is defined, how identity is constructed, the differences between individual and group identities, and identity politics. The section concludes with a subsection that addresses two categories of identity that are pertinent to this study: national and religious identity.

Identity is a pervasive aspect of our individual and social lives. It is an abstruse term, akin to the response of United States Supreme Court Associate Justice Stewart when compelled to define “obscenity”: “I know it when I see it” (*Jacobellis v. Ohio*, 378 U.S. 184 [1964]). Fearon’s definition of identity (1999, ii, cited in Béland 2017, 3) will be used here. Identity refers to two separate and/or simultaneous meanings: “(a) a social category, defined by membership rules and (alleged) characteristic attributes or expected behaviors, or (b) socially distinguishing features that a person takes a special pride in or views as unchangeable but socially consequential (or (a) and (b) at once).” As Fearon (1999, ii) argues, such a definition facilitates both explanations of political behavior and assertions that identities are socially constructed.

The present examination of identity is less a review of identity theory and is more about the construction and sources of identities (individual and group), identity manifestations, and

how identity shapes and is shaped by politics. Rather than using an essentialist approach alone, where identity is taken for granted quintessence, a constructionist approach will be taken under the assumption that identity is “made” and “done” iteratively over time. This is not to claim that essentialist notions of identity are not deliberately deployed in or forced upon various identity movements. However, at the core of constructionist epistemology is the recognition of the presence of variations in (internally and/or externally) essentialized identities.

### **2.1.1 Essentialist vs. Socially Constructed Identity**

There are significant questions that citizens and policy makers alike face when examining identity. Recently, debates surrounding identity and identity politics are either, on one side, dismissed as superfluous expressions by an individual or group demanding “special treatment” while renouncing any binding universal (i.e., the way the Black Lives Matter movement is perceived by some) or, on the other side, a critical means to achieve equality, justice, and rule of law. Without engaging in a debate on how different societies have arrived at this point or the merits of which side is “right,” an examination of the sources of identity formation and the impact of said formation is in order.

Traditionally, essentialism refers to categorization based on one’s innate, inherent, or unchanging “essence.” Employing essentialist classifications facilitates the use of heuristics, or cognitive shortcuts (see Kahneman 2011) by grouping (what is perceived as) like with like. By accepting that an individual or a group has an axiomatic essence (however imagined), one can delineate categories within which to discern them. Occasionally, essentializing an identity can mean little more than it being reliably fixed over time and relatively difficult to change or resistant to change. Essentialism becomes problematic, though, when taken to extremes, such as

in the creation of stereotypes, the reification of stereotypical characteristics, homogenization, or identity policing (Phillips 2010).

The social constructivist approach to identity, which is often seen as the antithesis of essentialism, regards social and political life as “embedded in a web of social meanings produced and reproduced through discursive practices” (Fischer 2003, 13). These discourses synthesize and fuse to create narratives from which identity is derived. This represents a shift from representational (essentialist) narratives to ontological (socially constructed) narratives (Somers and Gibson 1994, 38). Stories and narratives are ubiquitous in the policy realm and are deployed as a means to define and contest a policy problem and its players (Stone 2012). Considering the plethora of narrative sources, individuals and groups possess (unwittingly or not) multiple identities—both imposed and sanctioned. Thus, the social constructivist approach acknowledges that an individual (or a group) possesses and expresses multiple identities devised and proliferated through social stories and must navigate through and with them, placing greater emphasis or salience on one or more under different circumstances.

In this approach, narratives, ideas, and ideologies, thus, shape the “subjective mental constructs” that determine how individuals perceive the world and make choices. Narratives, ideas, and ideologies are, in turn, influenced by institutions (North 1990); this is discussed in greater detail in later chapters. These institutions (defined broadly as norms, rules, and organizations) can influence how target populations’ identities are constructed. For example, policy makers construct a positive or negative character of a group or individual and “distribute benefits and burdens so as to reflect and perpetuate these constructions” (Ingram, Schneider, and DeLeon 2007, 93). As such, these identities become embedded (especially through legal means)

and are difficult to change (Ingram, Schneider, and Deleon 2007, 111). Occasionally, however, some groups that agree upon their collective identity can navigate the opportunity structures of policy designs and influence their socially constructed identity (Ingram, Schneider, and Deleon 2007, 111).

Based on Fearon's definition of identity, one can conclude that identity can either be externally or internally (self-)imposed and include identified essentialist elements as well as socially constructed elements. This is not to say that essentialist and constructed identity theories are perfect; however, identity can be formed in both ways and the two need not be at odds. Indeed, identity formation can be both essentialist and constructivist and Calhoun prudently asserts that deconstructing and claiming identities exist in tension, but that each one requires and informs the other (Calhoun 1994, 22).

### **2.1.2 Individual and Group Identity in Politics**

Individual and group identities can conflict, much in the same way that an individual must place primacy of one aspect of his or her identity above another in different contexts. This is particularly true in cases where groups attempt to create a categorical identity, revealing the inextricable linkages between the politics of personal identity and politics of collective identity (Calhoun 1994, 28). This manifests when politicians attempt to emphasize commonality within a group and differences between groups (Mols 2012, 331) to voice claims related to identity. In cases like this, identities are "deployed strategically as a form of collective action to change institutions" (Bernstein 2005, 62). The success of the narrative employed determines whether a claim or grievance is acknowledged (Fischer 2003, 54).

As Bernstein (2005, 50) notes, Taylor (1989), Young (1990), and Kymlicka (1995) demonstrate that acknowledging the social construction of group identities does not hinder collective organization; instead it “justifies demands for group-differentiated citizenship rights and challenges to negative representations.” This is the intersection of identity, politics, and policy. Identity politics refers to when institutions constrain and enable actors and their ideas, conferring or denying rights or privileges based on sanctioned or proscribed identities.

### **2.1.3 Identity Politics and Rights Recognition**

The term “identity politics” has gained momentum in various scholarly fields since the term was first used in 1979 (Bernstein 2005, 47) to explain the collective political organization of individuals who advocate for issues related to a particular “identity”—be it an ideology, gender, religion, or a nation. By its very definition, “identity politics” emphasizes the inextricable relationship between identity, on the one hand, and politics and policy, on the other.

The classic liberal view of questions of identity centered on toleration<sup>4</sup> by arguing that society should “tolerate” minority beliefs through the creation of a political realm that does not interfere with personal (namely, religious) practices. This would lead to the creation of a peaceful community of diverse identities. In his argument that the idea of liberal toleration was insufficient in theorizing about identity politics, Taylor claimed that a shift from toleration to a “politics of recognition” occurred in the late 18th century as a result of inevitable shifts: 1) the collapse of social hierarchies that were formerly the basis of “honor” (which was replaced by

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<sup>4</sup> See John Locke’s “A Letter Concerning Toleration” and John Rawls’ “A Theory of Justice.”

“dignity”) and 2) the emergence of “individualized identity” and the “ideal of authenticity” (Taylor 1994, 26-31). Essentially, “What has come about with the modern age is not the need for recognition, but the conditions in which the attempt to be recognized can fail” (Taylor 1994, 35). Thus, recognition (and its antitheses, non-recognition or misrecognition) determines the discursive formation of social identities. Crucially, the “affirmative acknowledgment”—the *recognition*—of minority identities advances “people’s well-being, if it protects a collective identity they experience as deeply constitutive of their personal identities” (Hayward and Watson 2010, 12). Taken together, these authors affirm that the state should be committed to neutrality and to protecting individual rights. Thus, a neutral state, and even a hyper-neutral state, is one in which even the rights of citizens with an identity differing from the majority (or state-endorsed) identity are protected and these identities acknowledged.

Taylor’s *strong multiculturalist* perspective is in contrast to liberal theories related to existing and thriving in a multicultural society. In *Multicultural Citizenship* (1995), Kymlicka argues that a liberal conceptualization demands that minority rights be acknowledged in concert with one’s culture, either as a polyethnic or immigrant group, or as a national minority. These “group-specific rights” are allocated as: self-government rights (“devolving political power to a political unit substantially controlled by the members of the national minority, and substantially corresponding to their historical homeland or territory”); polyethnic rights (rights that “help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society”); or special representation rights (a form of political “affirmative action”) (Kymlicka 1995, 26-33). Critical to acknowledging individual and collective rights for minorities are “internal

restrictions” and “external protections.” Internal restrictions protect the group from internal dissent while external protections protect the claims of the group from society at large. From a liberal perspective, however, the former are rarely justified for they circumscribe personal autonomy.

In sum, identity politics movements are both individual and collective, public and private, and externally imposed and internally imagined. These aspects make rights-related pursuits political because they “involve refusing, diminishing, or displacing identities others wish to recognize in individuals” (Calhoun 1994, 21). As such, tension is created by individuals’ and groups’ constant negotiation for recognition and can be exploited by political actors to frame policy choices as “us vs. them” (Mols 2012, 331). This strategy has frequently been used in nation-building processes to foster a common national identity and can include the exertion of a specific religious identity to bolster unity.

#### **2.1.4 National and Religious Identities**

Among the various categories under which identity is examined, two of the most prominent (and the two most critical for this study) are national identity and religious identity. Though each is a distinct discipline in its own right, national and religious identities are on occasion evaluated concurrently due to the number of nation-states that employ or have employed religion historically, either explicitly or implicitly, as a way to delineate national identity.

A nation has traditionally been defined in legal terms as: 1) a group of people; 2) sharing a common, well-delineated territory; 3) under a shared set of rules or laws (government). In his influential book *Imagined Communities*, Anderson argues that a nation is an “imagined political community—and imagined as both inherently limited and sovereign” (2006, 5). He claims that a



nation is a social construction of the imagination because short of face-to-face contact, very few members will ever know each other, “yet in the minds of each lives the image of their communion” (Anderson 2006, 6).

The origins and definition of the concept of “nation” and “nationalism” have been debated from various perspectives (Gellner 2006; Hayes 1951, 1960; Hobsbawm 1992; Kohn 1965, 1967). The approach that has the widest applicability for this research is Calhoun’s features of a “rhetoric nation.” Calhoun argues that ideas and discourse around social solidarity, collective identity, and political legitimacy are critical in terms of the development of a “national” understandings of self and others (Calhoun 1997). He presents ten characteristics by which a nation may claim to define itself and create a collective identity (Calhoun 1997, 4-5):

1. Boundaries, of territory, population or both.
2. Indivisibility—the notion that the nation is an integral unit.
3. Sovereignty, or at least the aspiration to sovereignty, and thus formal equity with other nations, usually as an autonomous and putative self-sufficient state.
4. An “ascending” notion of legitimacy—i.e. the idea that government is just only when supported by popular will or at least when it serves the interests of “the people” or “the nation.”
5. Popular participation in collective affairs—a population mobilized on the basis of national membership (whether for war or civic activities).
6. Direct membership, in which each individual is understood to be immediately a part of the nation and in that respect categorically equivalent to other members.
7. Culture, including some combination of language, shared beliefs and values, habitual practices.
8. Temporal depth—a notion of the nation as such existing through time, including past and future generations, and having a history.
9. Common descent or racial characteristics.
10. Special historical or even sacred relations to a certain territory.

With this list, Calhoun seeks not to define a nation, but rather to assist in the conceptualization of a nation through various combinations of these characteristics. It is also

worth noting that the concept of nation, as taken to mean the amalgamation of multiple aspects of the above list, implies that even within a single national identity, individuals may very well interpret these characteristics variously, placing greater import on one above another, or construing one or more characteristics as personal (private/individual) rather than collective (for a discussion, see Appiah 1994). Thus “national identity” becomes variegated and the concept of a “minority” emerges—namely in instances where national identity is either imposed from above or when individuals do not prescribe to an explicit or implicit national identity. There is currently no international treaty that clearly defines “nation” or “national minority,” making it difficult for courts to adjudicate when such issues arise<sup>5</sup>. This is particularly salient when the category of religion is deployed to promote national unity, consequently producing religious minorities, occasionally forcing courts to decide on what religion is, what a religious minority is, and if the said minority’s rights have been abridged.

Apostolov’s characterization of religious minorities will be used for this study: “religious minorities are defined as social groups which are numerically inferior and non-dominant in the state they live in” (2001, 10). Apostolov acknowledges the challenges of defining “minorities” due to the subjective and objective criteria that can be assigned, as well as the different

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<sup>5</sup> See *Gorzelik et al. v. Poland* ([Application No: 44158/98], ECtHR, 2004) for a discussion on how international treaties, particularly the Framework Convention for the Protection of National Minorities of the Council of Europe, attempt to protect the rights of ‘national minorities,’ while simultaneously not providing a clear definition of how a ‘national minority’ is defined.

approaches of sociology, law, and political science, each of which prioritizes or minimizes the importance of institutions, power, decision making, social organization, and rules and laws, according to their respective approach (2001, 10-13). As mentioned above, problems arise when religious identity becomes an opportunity for action by savvy politicians to pursue their own agendas (Apostolov 2001, 13). These “identity entrepreneurs” exercise great social influence to “redefine the audience’s collective self-understanding” (Mols 2012, 332).

This raises the questions: What is religion? How is religion defined? Who creates these definitions? An emerging field, known as “critical religion,” explores such questions. Fitzgerald, a preeminent scholar of critical religion, describes the discipline as follows: “‘Critical religion’ is shorthand for the critical historical deconstruction of ‘religion’ *and related categories* [emphasis in original]. The category ‘religion’...acts in binary opposition to the ‘secular’ in its various forms” (Fitzgerald 2015, 303-304). The Critical Religion Association (with which Fitzgerald is an associated scholar) approaches critical religion from a positive critical standpoint and emphasizes five meanings of the term critical: “crucial; exercising careful observation and judgment; discerning the limits; of the nature of a crisis; and critical mass—a point at which some action, property or condition passes over into another” (Critical Religion Association n.d.). Under this umbrella, religion is critically *deconstructed* as a “power category” alongside “politics,” “science,” or “nature,” bringing into question the heretofore *essentialized* definitions of religion and secularism. It holds that these the concepts of “religious” and “secular,” as we

know them today, emerged as a symbiotic dichotomy in the 17th century alongside modern thought about the aforementioned power categories.<sup>6</sup>

Similar to identity itself, the categorization of what qualifies as religion or not is both essentialized *and* contested and negotiated over time in the liberal secular nation-state (Fitzgerald 2015, 314). It is essentialized because modern society (necessarily, secular liberal societies) distills the secular as modern and scientific and characterized by pure market economics (temporal), whereas the realm of the religious is cast as traditional and formed of irrational religious myths and communitarian values (ecclesiastical) (Fitzgerald 2015). However, the qualification “religious” is also constructed; it is dynamic, reflective, and iteratively imagined (however slowly) for both the collective and individual subjects. Accordingly, religion and secularism become tools of authorized experts and officials to frame positions and identities and implement specific policy objectives.

Yet religion (or secularism) is experienced differently by those who develop and propagate information about religion as it relates to policy (expert religion); by those who practice religion as they interact with rituals, texts, and authorities and explore their meaning and place in the world (lived religion); and by those who hold positions of political or religious power (governed religion) (Shakman Hurd 2015, 8-15). This research is concerned with this third category—making religion a privileged political and legal category. In doing so, political

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<sup>6</sup> For a comprehensive discussion on the history of religion as a category, see (Nongbri 2013). Throughout this study, while acknowledging the history of the category of religion and its literature, the word “religion” is taken as interpreted in Article 9 of the ECHR. Thus, it is a personal or collective set of beliefs, practices, or convictions that have attained “a certain level of cogency, seriousness, cohesion, and importance.” (Council of Europe 1950).

and legal authorities are empowered to answer what religions are deemed legitimate, which versions of which religions are recognized, who is allowed to represent these bodies, and, by default, who and what are suppressed (Shakman Hurd 2015, 18, 38–40).

Returning to the earlier discussion about essentialized versus constructed identities, if religion becomes a privileged and legal category, such as when it constitutes a core aspect of national identity or is embodied in law, it becomes externally essentialized. External actors (experts or governance authorities) impose the *essence* (historicity, sanctioned practices, sincerely held beliefs, etc.) of religion on society—including those who embrace a lived religion and those who do not. It contributes to a narrative of national identity that hardens and becomes more fixed over time as the narrative is infused in national legal systems, organizations, and social norms—it becomes institutionalized. As will be demonstrated in subsequent sections, once an identity (or a narrative) becomes institutionalized, it is very difficult to change.

## **2.2 Institutionalism**

Though experts may argue that globalization has become a ubiquitous force, the structure of the nation-state still holds great value—this includes not only the nation-state as an entity or idea in itself, but also the institutions that comprise it. National institutions remain important because they provide the framework through which nation-states interact in a globalized world (Campbell 2004). Examples of institutions vary as widely as the US Congress, marriage, and driving on the right-hand side of the road. Institutions can include organizations, such as political bodies, economic bodies, social bodies, and educational bodies (North 1990). Institutions are ubiquitous—we produce them and they shape society and our behaviors.

The challenge in analyzing and studying institutions lies in scholars' disagreement about how to define them, the fact that institutions are invisible, and that rules (institutions) are complex and multifaceted (Ostrom 1990, 22-23).

According to North, "institutions are the rules of the game in a society or the humanly devised constraints that shape human interaction" (North 1990, 3). Institutions can also be described as the "sets of working rules that are used to determine who is eligible to make decisions in some arena, what actions are allowed and constrained, what aggregation rules will be used, what procedures must be followed, what information must or must not be provided, and what payoffs will be assigned to individuals dependent on their actions" (Ostrom 1990, 51). Institutional rules may be imposed by authority, or may be part of a code of socially acceptable and learned behavior (March and Olsen 1989, 38). Finally, according to March and Olsen, "an institution is the intermeshing of three systems: the institutions, the individual, and the collection of institutions" (1989, 57).

It is generally accepted that the study of political science is rooted in the study of institutions. This "old institutionalism" focused on "formal rules and organizations rather than informal conventions; and upon official structures of government rather than broader institutional constraints on governance" (Lowndes and Roberts 2013, 24). But in the 1980s, scholars began to recognize the challenge of studying institutions, as well as the substantial impact they have on political decision making. March and Olsen (1984), who are often credited with coining the term "new institutionalism," again asserted that institutions determine behavior; can be historically inefficient; and underscored the "importance of symbolic action" within these institutions. They recognized that their framework was an ambitious attempt to construct a theory

of “new institutionalism,” while also acknowledging that the framework was based on empirical evidence. This new approach explored how institutions (as rules, norms, and structures) constrain and enable actors who make choices and the range of choices available to them (Campbell 2004).

This study follows new institutionalism as Campbell (2004) outlined. For Campbell, new institutionalism is a combination of the three main strands of institutionalism: rational choice institutionalism, sociological institutionalism, and historical institutionalism. Rational choice institutionalism assumes that actors are strategic and goal oriented (North 1990), and that institutional change depends on “conflict, struggle, and bargaining as configured by the distribution of resources among the actors” (Campbell 2004, 183). It is rooted in neo-classical economics, where individuals attempt to maximize utility and behavior is determined by strategic interactions. It views institutions as mechanisms that exist to reduce transaction costs. Rational choice institutionalism examines how individuals calculate their behavior to achieve an optimal outcome within the “rules of the game in a society” (North 1990) or an incentive structure. These rules of the game are created to achieve stability and reliable outcomes.

In contrast, sociological institutionalism presents institutions not based on rationality or efficiency, but as socially constructed norms, rules, and structures. Sociological institutionalism explains how institutions create meaning. Individuals behave based on a “logic of appropriateness” (March and Olsen 1989; Campbell 2004), which is “a sense of rights and obligations derived from an identity and membership in a political community and the ethos, practices, and expectations of its institutions” (March and Olsen 2013, 162-163). Actors adhere to a logic of appropriateness because such behavior is viewed as legitimate and expected (March

and Olsen 2004, 3). Furthermore, institutions are pervasive throughout society, providing an unspoken understanding of a society's "cultural infrastructure" (Lowndes and Roberts 2013, 31-32).

Historical institutionalism is a hybrid between sociological and rational choice institutionalism in that it considers competition and rationality, while also taking society and culture into account by examining institutions over time. Thus, as the name implies, it is concerned with the historical and long-term context of actor agency (Lowndes and Roberts 2013, 32). Historical institutionalism views politics on a grand geographical scale, while fully considering a country's complete institutional structure. The locus of analysis is the historical context in which institutions have emerged and evolved, with much attention paid to path dependence (Pierson 2000).

Each of these three new institutionalisms share the perspective that a nation's institutions both constrain and enable policy entrepreneurs (Campbell 2004; March and Olsen 1989; North 1990; Ostrom 1990). Elected leaders design and choose institutional forms to achieve political goals most effectively and efficiently (March and Olsen 1989, 115). Institutions influence political actors by structuring the way in which political and social problems are perceived and by tightly controlling potential policy solutions (Fischer 2003, 28), thus benefiting those with bargaining power (North 1990).

The new institutionalist approach demonstrates how institutions structure power, which can often be invisible, to benefit some groups, often at the expense of others (Fischer 2003, 29). In this sense, power is exercised through institutions by defining identities, whether individual or group, and "what it means to belong to a specific collective" (March and Olsen 1989, 17). Thus,



in the new institutionalist approach, institutions constrain and enable through rules, norms, identities, ideas, and narratives “which are socially constructed, publicly known, anticipated, and accepted” (March and Olsen 2013, 5) as the “instruments of stability and arenas of change” (March and Olsen 2013, 8).

### **2.3 Patterns and Mechanisms of Institutional Change**

As Campbell (2004) explains early on in his book, *Institutional Change and Globalization*, bridging the three streams of neo-institutionalism (rational choice institutionalism, sociological institutionalism, and historical institutionalism) can provide a new perspective on institutional change. Most (contemporary) scholars of policy change agree that there are primarily three patterns of change: stasis, evolutionary, and revolutionary. Different terminology has been used to describe these patterns, including Hall’s (1993) “orders of change” and Campbell’s (2004) basic patterns of change: continuous (evolutionary); punctuated equilibrium (discontinuous/revolutionary); and punctuated evolution (discontinuous/evolutionary). This study employs a framework that is inspired by these two configurations: stability/stasis, continuous/evolutionary/incremental change, and revolutionary/punctuated change.

In institutional analysis, policy stability is emphasized as the norm, implying insignificantly small or unrecognizably slow change, if any change takes place at all. As a result, policy change is regarded as exceptional. As will be explored below, there are a number of reasons why policy stasis or change can be interpreted as either normal or exceptional, such as the time frame and the institutional dimensions that are under scrutiny.

If the time frame of analysis is quite narrow, change may be perceived as stasis, whereas if the scope of analysis is widened, policy change may be characterized in a way that allows for

greater change. In contrast, “events that seem important in the short run may have only minor consequences in the long run” (Campbell 2004, 43). The causes and consequence of each of these policies/institutions vary, depending on the context in which the change took place, the time frame within which it is analyzed, and the dimensions of the institutions that are examined. The selection of specific dimensions (which institutions, which levels of institutions [state vs. national; individual vs. group; etc.], and time frame [months, years, decades, etc.]) may indicate that there has indeed been policy change.

If a longer time frame of evaluation is taken, policy change may be perceived as slow or incremental. Such gradual changes can be a result of the manner in which decision making occurs. Lindblom is credited with developing the theory of incrementalism in “The Science of ‘Muddling Through’” (1959). He argued that policy actors will choose to make incremental changes to policies. This is the case because rational-comprehensive decision making is unattainable, in that it requires complete knowledge (value assessment, knowledge of the alternatives, and costs and benefits) to be able to enact a policy change. Even before Lindblom (1959) introduced the concept of incrementalism, Simon, in his book *Administrative Behavior* (1947), coined the term “satisficing,” a neologism that combined the words satisfy and suffice. Like incrementalism, satisficing is critical of rational choice decision making and claims that decision makers either do not have access to complete information or that too much information is required to be computed (bounded rationality). Because decision makers cannot possibly do either, change occurs at the margins and policy change moves along at a much slower pace.

However, the theory of incrementalism has been partially discredited because of the assumption that the information used to make small adjustments at the margins was processed

proportionally, which in reality it is not. Bounded rationality precipitates disproportionate information processing, which can lead to punctuated changes in policy (B. D. Jones and Baumgartner 2005, 17). Punctuated-equilibrium theory aims to explain how stasis and incrementalism are fairly widespread in most policy areas, yet there can occasionally be “large-scale departures from the past” (True, Jones, and Baumgartner 2007, 155). The theory highlights the critical role of political institutions and boundedly rational decision making, while emphasizing issue definition and agenda setting as two related components of the policy process (True, Jones, and Baumgartner 2007, 156).

Another lens through which to examine punctuations in policy change is that of punctuated evolution. This theory views the periods of equilibrium between punctuated changes as evolutionary rather than static (Campbell 2004, 34). This evolution is reflected in slight and gradual adjustments to institutions within the constraints of the institution’s practices, rules, routines, and cognitive schema (Campbell 2004, 34). However, as mentioned above, this school of thought demands that institutional dimensions, time frame, and the order of change dictate whether or not the change is evolutionary or revolutionary (Campbell 2004, 35).

In sum, experts would agree that policy change is generally an incremental process, punctuated by occasional yet drastic departures from the past. According to Campbell, change is evolutionary and not revolutionary because “innovations rarely start from scratch (they involve at least some recombination of already existing elements) but also because they are tailored to blend with local institutions, rather than replace them entirely” (2004, 87). To be sure, institutional arrangements can affect the magnitude of punctuations (True, Jones, and Baumgartner 2007, 163). Change is less likely when an institution is highly integrated into the

institutional environment and when change would require changes to other institutions (March and Olsen 1989, 106).

Over time, socially constructed policy designs become institutionalized and “feed back” or “feed forward”, reinforcing and solidifying the social constructions of certain groups, power structures, and institutional settings through a mechanism known as path dependence (Ingram, Schneider, and DeLeon 2007, 106). Pierson was influential in formalizing the concept of path dependency within the realm of politics (Pierson 2000). Path dependence explains why we may have arrived at a certain equilibrium, based on feedback loops over time and an initial condition. According to the concept of path dependence, once a particular course of action is chosen, deviations from this path are rare, but when they do occur, they are either self-reinforcing or provide positive feedback and can also substantially impact the course of a policy or institution. This positive feedback is what economists call “increasing returns” (self-reinforcement) (Pierson 2000, 251). In a situation characterized by increasing returns, the more frequently a decision is made, the more likely that decision will continue to be made due to the positive feedback received. Once a policy (or an institution) is in a positive feedback loop, it is very difficult to veer from that path due to high set-up costs or the cost to change; coordination required to make the change; bounded rationality; the political and power-related desires of the players; and the density of the institutions surrounding the policy (Pierson 2000). This leads to institutions and policies that remain in the status quo long after exogenous (and even endogenous) factors could have or should have led to change.

These theoretical concepts regarding institutional change revolve around legislative and bureaucratic processes, leaving a peripheral role, if any, to the judiciary. However, when

countries become signatories or ratifiers of international agreements or regimes, for example, they commit themselves to adopting certain policies and programs, even to the point of international adjudication. Signatories are mandated to implement specific reforms to their own institutions as part of their obligations to these international tribunals. This is what Dolowitz and Marsh refer to as obligated transfer (2000, 14-15). The ECHR and its judicial arm, the ECtHR, which are the focus of this study, are such bodies. Obligated transfer is an intentional process, requiring high contracting parties to change domestic policies and institutions as a result of a judicial ruling, not due to domestic political impetus. The next section further demonstrates that judicial bodies have begun to play an increasingly influential role in institutional change.

## **2.4 Judicialization**

*“Certainly courts represent a distinctive institutional setting, whose actors, procedures, language, and processes of reasoning differ from those that prevail in legislatures and bureaucracies. Yet we can conceptualize court cases as processes of policy formulation, with plaintiffs, defendants, and amici as participants proposing alternatives, and judges as the decision makers. Courts thus offer a potentially fruitful comparative case for studies of the impact of institutions on policy formulation”* (Jann and Wegrich 2007, 86)

### **2.4.1 What Is Judicialization?**

In constitutional law, the separation of powers between the executive, legislative, and judicial branches of government has been a taken-for-granted arrangement where each body is charged with carrying out its respective responsibilities relatively independent of the others and each serving as a check on the others. However, over the past few decades, there has been a shift in the transfer of power from representative institutions to the judiciary at both the domestic and supranational levels (Hirschl 2013, 21). This phenomenon, known as judicialization, describes

the expansion of policy making authority to the judiciary, which had previously been agreed upon by most to be best handled by legislative and executive officials (Tate and Vallinder 1995, 2). When the concept of judicialization first began to gain attention as a theoretical framework in the 1990s, it was generally agreed that there were two types of the judicialization of politics: 1) the expansion of the province of the courts or the judges at the expense of politicians and/or administrators (that is, the transfer of decision-making rights from the legislature, cabinet, or civil service to the courts) or, at least, 2) the spread of judicial decision-making methods outside the judicial province proper (Vallinder 1995, 13). As the phenomena has proliferated globally, states are signing on (voluntarily or by compulsion) to supranational agreements that allow their own judicial organs to arbitrate cases between states or cases brought by individuals against a state. Yet scholars continue to grapple with what precisely is meant by judicialization. Hirschl (2013, 3-5) has constructed what seems to be the most contemporary and all-encompassing definition, which he labels the three faces of the judicialization of politics: 1) “the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making fora and processes”; 2) the “expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review, judicial redrawing of bureaucratic boundaries between state organs, and ‘ordinary’ rights jurisprudence” (these cases often concern civil liberties and formal equality issues and are pertinent to this study); and 3) “reliance on courts and judges for dealing with what we might call ‘mega-politics:’ core political controversies that define (and often divide) whole polities” (these cases often concern fundamental restorative justice dilemmas and formative collective identity and are, again, pertinent to this study). Hirschl (2006, 723-728, 2008, 5-6, 2013, 7-10) has further explored the judicialization of mega-politics

and clarified specific subcategories related to national security; corroboration of regime change; the judicialization of electoral processes; fundamental restorative justice issues; and the reliance on courts to contemplate a nation's *raison d'être*, formative collective identity, or nation-building efforts. Such reliance on the courts in the final category is more common in societies that have wide rifts based on ethnicity, linguistics, or religion (Hirschl 2013, 10). In fact, though the last two categories seem to resemble each other considerably, they are distinct from each other in that the former is concerned with issues of procedural justice while the second deals with issues of national self-identity and other largely political issues (Hirschl 2006, 728).

Hamlin and Sala (2018) have astutely recognized that the discrepancies in the definition(s) and the lack of academic discussion about the scope of what judicialization is have impeded the development of a comparative theory of the concept. They have identified nine “categories” of judicialization, while acknowledging that some overlap and some have been previously conceptualized within different disciplines. The nine categories are:

1. **Judicial Review:** refers to the establishment of judicial review around the globe after World War II. In this conceptualization, democracy and judicial empowerment are correlated, and judicial review is equated with judicial empowerment. As such, the judicialization of politics is a worldwide trend; however, it does not explain the power of courts in countries in non-democratic countries (Hamlin and Sala 2018, 4).
2. **Judicial Independence:** takes into account the variations in judicial empowerment among democracies, and in non-democratic regimes, the conflation of the terms “judicial empowerment” and “judicial independence” (Hamlin and Sala 2018, 5–6).
3. **Judicial Activism:** asserts that judicialization occurs when judges intentionally influence policy decisions, in contrast to legislative bodies referring to the courts for validation or invalidation of their legislative decisions (Hamlin and Sala 2018, 6–7).
4. **Constitutionalization:** takes on two forms, the first of which is the establishment of constitutional rights whose interpretation is left largely to the courts, and the second of which can refer to an international context in which international courts enforce international conventions by compelling the ratifiers to satisfy the obligations of said treaties (Hamlin and Sala 2018, 8–9).
5. **Busy Courts:** refers to the increased caseload of the courts, whether in one specific policy area or throughout the judicial system (Hamlin and Sala 2018, 10).

6. Judicialization of Megapolitics: a term coined by Hirschl (2008), it refers to the deferment of “political” issues from the legislative arena to the judicial (Hamlin and Sala 2018, 11–12).
7. Legislative Anticipation of Judicial Decisions: can actually lead to a decrease in litigation, due to executive, administrative, and legislative bodies basing their decision making on predictions about judicial responses (Hamlin and Sala 2018, 12–13).
8. Adversarial Legalism in Administrative Processes: judicialization in which administrative and bureaucratic bodies begin to emulate judicial processes and procedures (Hamlin and Sala 2018, 14).
9. Legal Referents in Cultural Processes: a discursive and symbolic use of legal jargon by groups to assert their legitimacy to the public (also conceptualized as “juridification” by Silverman (the process in which “areas of social life” “are increasingly controlled” by legal language (2009)).

While there are certainly aspects of many of the aforementioned categories that are recognizable throughout this study, the most applicable definitions are that of Hirschl’s “Judicialization of Megapolitics” (2008), and #4 above, “Constitutionalization”. Because there is not one comprehensive and agreed-upon theory of judicialization, it is challenging to precisely pinpoint the causes, outcomes, and variations in judicialization. Yet because there is overlap between some of these conceptualizations, there are inevitably similarities in the processes and consequences of judicialization.

#### **2.4.2 How Does Judicialization Occur?**

Hirschl (2006, 2013) clearly outlined how to recognize judicialization and also most usefully explained, and not merely described, the influence of institutional, societal, and political factors that cause judicialization. While the courts are the focus of this power shift, there are endogenous and exogenous forces that combine to create and sustain judicialization. Drawing primarily from Hirschl’s work, but also the work of his contemporaries, the following factors explain the conditions under which judicialization flourishes.



### *Institutional Factors*

Democracy is a precondition, if not the main cause of judicialization (Hirschl 2008, 22); in fact, “it is very unlikely to encounter the judicialization of politics outside democratic polities” (Tate 1995, 29). Simply put, with greater democracy comes expanded administrative and regulatory agencies, and inevitably, more courts (Hirschl 2008, 22, 2013, 17). In a similar vein, judicialization is also more likely to occur in governments where there is a clear separation of powers, that is, where independent and coequal legislative, executive, and judicial branches exist. Democracy and separation-of-powers systems on their own cannot account for each instance or variation in judicialization worldwide; they merely provide hospitable settings that further facilitate judicialization. It may seem counterintuitive that in systems that require such independent and coequal branches, the judiciary is meant to interpret and not make laws, which would prevent judicialization. Yet recall that “coequal status and personal and institutional autonomy for judges hardly require them to substitute their own policy judgments” (Tate 1995, 29).

However, democracy and separation-of-powers systems on their own cannot account for each instance or variation in judicialization worldwide—they merely provide hospitable conditions for settings that further propagate judicialization. Again, democracy creates multi-layered governments with corresponding administrative and regulatory agencies; judicial review is necessary to efficiently and effectively monitor the expansion of the state (Hirschl 2013, 18). There is immense political power in judicial review, which is the authority granted to apex courts to annul statutes deemed to be in conflict with the constitution (Shapiro and Stone Sweet 2002, 8-9). What was previously acknowledged and accepted as natural and matter-of-fact

constitutional/statutory interpretation of the law is now depicted, and in some cases rightly so, as judicial law-making (Shapiro and Stone Sweet 2002, 9). Though constitutions and judicial review cannot necessarily exercise power independently, they certainly restrict the “institutional flexibility of political decision-makers” (Hirschl 2004b, 11).

Interestingly, another condition hospitable for judicialization is an independent judiciary. According to Hirschl (2013, 12), “At a bare minimum, the judicialization of politics requires the existence of a reasonably independent judiciary, with a well-respected and fairly active apex court.” This implies the presence of a constitution that has established such a framework. Without expanding on the literature on constitutionalism (and new constitutionalism in particular), suffice it to say that the concept of constitutional supremacy, where a state relies on a constitution, a constitutional court, and thus judicial review, is widespread. It is now the system of governance for more than one hundred countries (Hirschl 2006, 721). This has opened the doors for constitutional frameworks that can encourage judicial activism (Hirschl 2008, 2013) that “provides political actors who are unable or unwilling to advance their policy preferences through majoritarian decision-making arenas with an alternative institutional channel (the courts) to accomplish their policy goals” (Hirschl 2013, 12).

### *Societal Factors*

Hirschl (2006, 745-746, 2008, 35, 2013, 12) refers to the aforementioned constitutional settings as “judicialization from below” or “bottom up judicialization,” alluding to the role that society plays in bolstering judicialization. Should individuals or interest groups perceive judicial institutions as more reputable, impartial, and effective decision-making bodies than majoritarian institutions, which may be perceived as “immobilized, self-serving, or corrupt,” it is only logical

that policy-making authority be afforded to the judiciary (Tate 1995, 31). Under these circumstances, “historically under-represented or disenfranchised groups and individuals” act strategically through the courts to achieve rights recognition (Hirschl 2008, 21-22). A politics of rights is likely to emerge in the presence of a constitutionally outlined bill of rights or the explicit recognition of certain individual/minority rights over that of the majority (Tate 1995, 29-30). “When legitimacy is accorded to a politics of rights, it spills over to the procedures associated with the work of the courts, who become key players in this politics” (Tate 1995, 30). Interest groups will either spark movements to initiate litigation that would change the case law of a specific area as it stands, or use the courts because current case law is in their favor (Shapiro 2002, 48). As such, individuals and groups compete to frame their goals in such a way as to establish normative structures, which are the foundation of “social power relations” (Stone Sweet 2000, 7). Power is exercised through ideas, symbols, and the strategic control of information (Stone 2012, 34), enabling individuals and groups to “define themselves, existentially and in community with others” (Stone Sweet 2000, 10). Through the legal codification of social norms, laws and courts are endowed with the authority to construct and characterize political communities (Stone Sweet 2000, 11-12). Hence, constitutionalization, and therefore judicialization, are merely “politics by other means” (Hirschl 2004a, 8).

### *Political Factors*

Judicialization is employed as a politically expedient means to obtain or maintain power or achieve a political goal. Hirschl’s “hegemonic preservation thesis” provides a comprehensive framework with which to understand how political elites behave in the legal arena when their positions of power are threatened. The thesis is based on the strategic interaction of three key

groups: threatened political elites wishing to preserve/enhance their political hegemony by insulating policy-making processes from democracy; economic elites who view constitutionalization of certain economic liberties as a means to promote a neoliberal agenda of open markets, etc.; and judicial elites and national high courts that seek to enhance their political influence and international reputation (Hirschl 2004b, 43-44). Any of these powerful elites may seek to preserve their hegemony using the judiciary when it is disadvantageous to follow majoritarian, democratic means to policy making or when their “worldviews and policy preferences are increasingly challenged in such areas”; when the judiciary holds a higher reputation for impartiality and integrity; when sociopolitical elites determine judicial appointments; and when the courts tend to favor secularist ideologies (Hirschl 2004a, 9). For example, in countries such as Egypt, Pakistan, Israel, and Turkey, constitutional courts are increasingly used as the last bastion against theocratic governance (Hirschl 2008, 27). Such essential disputes over national/collective identity formation related to religion and state are often strategically delegated to the courts, especially if the political stakes are high (Hirschl 2008, 27). Because the corresponding rulings rarely contradict deeply entrenched national narratives, plaintiffs that are dissatisfied with a domestic apex court judgment may seek recourse in the jurisdiction of an international, supranational, or transnational court.

### **2.4.3 International Judicialization and Transnational Courts**

As mentioned above, judicialization is a global phenomenon, often attributed to the international trend of constitutional supremacy and the formulation of conditions favoring increased rights discourse (Hirschl 2013, 2). The powerful elite frequently strategize to transfer “fundamental collective-identity questions of ‘religion and state’ from the political sphere to the courts”

(Hirschl 2008, 27). Such a strategy often appeals to secular power-holders, as the courts become secularizing agents (Hirschl 2008, 27-29). However, this is not always the case, as evidenced in the number of cases that have come before the European Court of Human Rights that argue that the allegedly violating country infringed on basic religious liberties. Accordingly, it is important to examine domestic judicialization independently from international/transnational judicialization, the latter of which is a focus of this study.

The literature on the history of international adjudication typically begins with the Treaty of Westphalia (1648) that effectively ended the Thirty Years' War and introduced a new system of co-existent sovereign states and the inception of modern international law. The first international courts that emerged in response served to resolve voluntary disputes through arbitration, slowly progressing toward compulsory jurisdiction.<sup>7</sup> Eventually, compulsory jurisdiction became commonplace, deepening the practice by moving from general to specialized compulsory jurisdiction.

The massive atrocities that occurred during World War II spurred a revolution that called for greater attention to human rights and to preventing such tragedies from ever occurring again. The movement was a catalyst for the creation of new institutions that would foster cooperation, diplomacy, and peace amongst nations. First and foremost among these was the United Nations and the Universal Declaration of Human Rights in 1948 (United Nations 1948). The following year, in May 1949, the Council of Europe (COE) was established, which drafted the European

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<sup>7</sup> For a detailed historical overview, see (O'Connell and VanderZee 2014).

Convention on Human Rights soon after (1950; entered into force in 1953) and established the European Court of Human Rights (Ovey and White 2002, 1-6). The rights established in the ECHR were inspired by the Universal Declaration, but the European Convention was legally binding and the list of protected rights was more concretely outlined (Ovey and White 2002, 4). Ratifiers of the ECHR were now bound to protect human rights, with the ECHR superseding domestic legal arenas.

Initially, governments could agree to the Court's jurisdiction for short periods of time (for three to five years) and withdraw as they wished (Alter 2014, 69). However, the ECtHR has since evolved to become a fully compulsory jurisdiction court and states' individual systems must comply with the legal rules of the ECHR. This has led to struggles of subsidiarity (acknowledgment that domestic authorities are better equipped to determine the nature of domestic norms and conditions in relation to obligations under the Convention) and margin of appreciation (the amount of leeway granted to states by the bodies of the COE in fulfilling their obligations as ratifiers of the Convention). These debates play out most evidently in the processes of both adjudication and implementation of court decisions.

As mentioned above, international or transnational judicialization differs from domestic judicialization. While judicialization in general changes the arena for political decision making from legislative bodies to the courts, the judicialization of international decisions in particular has permitted courts to take on a role as "social actors," suggesting that they contribute to changes in human behaviors and opinions (Sands 2017, 889). As debates surrounding human rights have expanded beyond domestic borders, international courts have become a mechanism through which to resolve these debates. The rulings issued by these courts, which increasingly

address questions of religion, are an attempt to codify best practices to address disputes over alleged human rights violations (de Galembert and Koenig 2014, 3). While these efforts have certainly not led to a “standardization of national regulations regarding religion,” (de Galembert and Koenig 2014, 11), the gradually increasing number of rulings from human rights tribunals have incrementally shaped how religion is dealt with by individual nation-states.

From 1959 to 1993, not a single conviction was issued from the ECtHR based on Article 9, which is the article relating to freedom of thought, conscience, and religion (Fokas 2015, 60). The first violation was against Greece in 1993 and involved its criminalization of proselytization (*Kokkinakis v. Greece* [Application No. 14307/88] 1993). Subsequent judgments relating to violations of Article 9 were largely made against newer members of the COE from Central and Eastern Europe (former Soviet-dominated nations) and Greece (Richardson 2015, 7).

The challenge with the international judicialization of religion is that it is followed by implementation. This inevitably returns the issue at hand to domestic legislative bodies, placing the victors of rulings at the ECtHR at the mercy of domestic institutions (laws, norms, politics, and organizations) as these institutions determine how the ruling is actually executed. This is particularly relevant in cases where there is a wide margin of appreciation<sup>8</sup> granted to the state. This is often the case and gives the offending state significant leeway in determining what they consider the most appropriate response to a negative ruling. As a result, there are inevitably variations in how different states respond to violations of religious freedom.

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<sup>8</sup> See Chapter 3 for a description of margin of appreciation.

## **2.5 Implementation and Compliance in the European Court of Human Rights**

Variations in implementation exist across the several types of international courts, tribunals, and arbitral bodies. The literature includes multitudes of comparative case studies between international adjudicative bodies in an attempt to formulate a stronger theory of the factors that help and hinder compliance with international court rulings. This study, however, is limited to one body in particular: the European Court of Human Rights. According to Romano, Alter, and Shany's (2014) typology of international adjudicative bodies, the ECtHR is a permanent, regional, human rights-oriented, judicial body with compulsory jurisdiction. As such, theoretical frameworks that attempt to describe or explain outcomes in different kinds of institutions may apply occasionally, but not universally.

Recent scholarship has focused on examining domestic contexts to develop an explanation as to why there are such variations in implementation across the Council of Europe's jurisdiction (Anagnostou and Mungiu-Pippidi 2014, 206). One potential cause of these variations in implementation or compliance is the way in which compliance/implementation is defined. Differences in definition in part reflect disagreements about the utility of using compliance to measure effectiveness (Huneus 2014, 439). A broad definition of implementation, which encompasses a wide margin of acceptance and shallow commitment requirements, (Huneus 2014, 439) can mislead researchers or practitioners into presuming a high rate of legal compliance. On the other hand, a narrow definition may not fully capture the impact of even modest changes to behavior by the relevant parties or peripheral actors (Huneus 2014, 439-440). Different terminology has also been employed to describe implementation/compliance/execution. In this study, the terms will be employed interchangeably



to indicate actions taken on behalf of a state to fulfill their obligations as laid out in ECtHR rulings.

Regardless of the manner in which implementation/compliance is defined, scholars generally agree that the implementation of ECtHR rulings is inherently a domestic and political process (Anagnostou and Mungiu-Pippidi 2014, 207; Hillebrecht 2012, 279; Keller and Marti 2016, 831). The national institutions and actors involved in this process lack the capacity to expeditiously and completely implement judgments. This is due to weak institutions such as the executive but also the judiciary (Anagnostou and Mungiu-Pippidi 2014). Furthermore, when human rights awareness and expertise is concentrated (not diffuse) throughout all branches of the government, implementation is more likely to be slower (Anagnostou and Mungiu-Pippidi 2014, 223), taking months or years to close a case.<sup>9</sup>

In fact, the Parliamentary Assembly (the legislative body) of the COE has issued regular resolutions and reports on the implementation of judgments. The issue is so important because, over time, non-compliance with ECtHR rulings erodes the credibility and legitimacy of the Court and the Council bodies in general. Scholars agree that compliance is a fundamental aspect of adjudication and rule of law (Huneus 2014, 440; Keller and Marti 2016, 830). When the law is applied universally and objectively, the rulings carry weight and merit and, consequently, so too does the adjudicative body. The countries that do not fully implement the rulings (understood as the non-closure of a case by the CoM) pose a threat to the integrity and authority of the Court. As

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<sup>9</sup> Compliance or implementation is deemed satisfactory by the ECtHR when a case is closed by the Committee of Ministers.

a result, the COE has a clear interest in exploring the issue of non-compliance and working to address it.

Resolution 1226 (2000) identified at least seven implementation problems present in the execution of the judgements of the ECtHR, including: political reasons; reasons to do with the reforms required; practical reasons relating to national legislative procedures; budgetary reasons; reasons to do with public opinion; ambiguous or unclear judgments; and reasons related to interference with obligations deriving from other institutions (Council of Europe 2000).

Additionally, in the 10th Annual Report of the Committee of Ministers (CoM) (Council of Europe 2016, 13), the major problems related to implementation were listed as: important and complex structural problems causing difficulties in identifying necessary reforms, including those required to stop the stream of repetitive cases, and in finding the means and resources for the implementation of the reforms; the absence of a common understanding as to the scope of the execution measures; slow or blocked execution as a result of disagreement between national institutions or amongst political parties regarding the substance of the reforms required and/or the procedure to be followed; and refusal to adopt individual measures or to pay just satisfaction.

Progress has indeed been made to close cases, and a record 2,066 cases were closed in 2016 (compared to 1,537 in 2015) (Council of Europe 2016, 9). Furthermore, all bodies of the COE have been cooperating to implement internal reforms to lighten the case load and ensure more complete compliance. For example, Protocol 11, which entered into force in 1998, made individual applications to the Court possible and shifted all judicial responsibility to a single Court that replaced the previous European Commission and Court of Human rights, and delegated supervision of the execution of judgments solely to the CoM. Protocol 14, which came

into force in 2010, was a major shift toward creating greater efficiency in judicial decision making. The pilot judgment procedure became codified through this process and helped states eliminate structural issues in repetitive cases by identifying these issues and supplying more clear recommendations on how to resolve the problems that caused the violations. Protocol 14 also initiated measures for the CoM (under exceptional circumstances and with the support of 2/3 of the body) to bring forward non-compliance proceedings against a state in the Grand Chamber formation of the Court. Additional mechanisms to secure more robust implementation have included:

- The İzmir Conference (2011)
- The Brighton Conference (2012)
- The Oslo Conference (2013)
- The Brussels Conference (2015)

Taken together, these changes were intended to address the portion of member states of the Council of Europe that continue to face severe structural issues, some of which have not been resolved for 10 years. The top “offenders” are Italy, the Russian Federation, Turkey, Ukraine, Romania, Hungary, Greece, Bulgaria, the Republic of Moldova, and Poland. These states have the highest number of non-implemented judgments (Committee on Legal Affairs and Human Rights 2017).

These measures have all affirmed the role of the CoM in securing implementation and simultaneously carved out a new paradigm of shared responsibility. Whereas, in the past, the CoM had been understood to be the primary agent responsible for coordinating with the offending member state to ensure implementation, these two alongside the ECtHR and other actors are tasked with ensuring the execution of judgments. Keller and Marti (2016) refer to this

paradigm shift toward expanded Court involvement as a reconceptualization of implementation, namely, the judicialization of the execution of ECtHR judgments. Within this framework, they propose examining the role of the court at three points: pre-judgment, judgment, and post-judgment. The ECtHR plays a role in the pre-judgment stage by securing implementation prior to a decision on the merits of the case (or even its admissibility) through interim measures that are binding and can lead to an autonomous violation of Article 34 of the ECHR (Keller and Marti 2016, 833). Interim measures can be seen as an adjudicator's tool in securing restitution (a primary form of reparation, which might otherwise occur at a later phase) (Keller and Marti 2016, 834). However, the Court rarely exercises this option and has not explicitly acknowledged interim measures to secure restitution early on (Keller and Marti 2016, 834). In the judgment phase, in spite of the principle of subsidiarity, for the last two decades the Court has provided more unequivocal details in its judgments and so has provided less of a declaration of general measures to be taken and instead outlined specific steps toward repairing the violation and complying with the judgment. This is also true for just satisfaction and individual measures (Keller and Marti 2016, 836-839). In doing so, the Court sets clear expectations and improves accountability; "in the Committee of Ministers, the diplomatic or political leeway for justifying non- or partial compliance shrinks and, in the domestic sphere, the government is more easily exposed to pressure from civil society" (Keller and Marti 2016, 840). Finally, the Court has played a definitively lesser role in the post-judgment phase due to the institutional arrangements of the ECHR, particularly the CoM's oversight regarding the execution of judgments (Keller and Marti 2016, 845-846). The Court possesses the capacity to review compliance, though it has rarely exercised this ability. Keller and Marti suggest that should the Court play a more active

role in the first two phases, measuring compliance in the final phase would become more of a legal interpretation, thus requiring final judicial determination (by the Court) and making comprehensive implementation more compulsory (2016, 849).

Another challenge to understanding compliance is the issue of how it is measured. Various factors such as inconsistent data collection, measurement, and evaluation procedures and a heavy case load contribute to the difficulty in determining state compliance with rulings. In the ECtHR, a state is considered to have fully complied with a judgment when the Committee of Ministers determines that the obligations set out in the judgment have been met. However, while the language ECtHR judgments typically use provides explicit obligations for just satisfaction, costs, and expenses, it provides clear obligations for general and individual measures less frequently. This leads to what Hillebrecht (2014) calls “a la carte compliance” where states only partially comply with a judgment. This is, in fact, the norm in the ECtHR.

Hawkins and Jacoby (2010, 77-82) have indicated four types of compliance: 1) split decisions, in which a state takes action on some but not all measures required (for example, payment of just satisfaction but not taking steps to implement general measures); 2) state substitutions, where a state replaces the requisite measures with its own interpretation of those measures; 3) slow motion compliance, where a state partly moves toward implementation, suggesting that somehow it may take further action later; and 4) ambiguous compliance amid complexity, where the state is faced with exceptionally demanding or politically difficult circumstances that lead to a vast discrepancy between the terms of the judgment and execution. Greater clarity in the language of the judgment has been demonstrated to increase compliance, due to the ease with which non-compliance can be identified (Keller and Marti 2016, 840). This

also restricts the political or diplomatic “leeway” justifying partial or non-compliance that is occasionally exercised in the Committee of Ministers, forcing states to perform their definitive obligations stemming from the judgment (Keller and Marti 2016, 840).

When states do implement, either fully or in part, it is due to a combination of exogenous and endogenous factors. Hillebrecht (2014, 33-39) has identified four broad explanations for compliance: 1) the epiphenomenal nature of international law, with the states having preconceived expectations about enforcement and compliance; 2) compliance as top down coercion or enforcement from a regional or global hegemon, frequently coming in the form of “naming and shaming”; 3) international law shaping new norms and socializing states into those norms, by understanding states under one court’s jurisdiction as a social environment in which the “community’s standards and norms are prescriptive” and as such, “encourag[ing] states to change their underlying preferences and behavior”; and 4) explanations stemming from domestic politics. Other scholars have added that compliance is more likely when there is domestic capacity and political will (Anagnostou and Mungiu-Pippidi 2014; Donald and Leach 2016).

The implementation of judgments “has become increasingly internationalized and judicialized by the ECtHR in recent years” (Keller and Marti 2016, 820). Yet does implementation or full compliance with a judgment from an international court necessarily imply effectiveness? First, one must define effectiveness. According to Meyer (2014, 94), effectiveness in the context of international law “refers to whether the law has changed a state’s behavior from what it would have been in the absence of the law.” It is important to point out that this definition differs from compliance, in that the latter “refers to whether or not a state’s conduct meets the prescribed legal standard.” There are four possible outcomes for compliance and effectiveness:

1) high compliance and high effectiveness; 2) low compliance and low effectiveness; 3) high compliance and low effectiveness; 4) low compliance and high effectiveness (Meyer 2014, 94). It is typically either the tribunal's policy area or the type of lawmaking (adjudicated or negotiated) that determines the outcome (Meyer 2014, 96). Often times, human rights treaties such as the ECHR can produce high levels of effectiveness, even when compliance seems low (Meyer 2014, 97). This theoretical concept directly aligns with two aspects of the aforementioned theories of institutional change, namely, Campbell's (2004, 43) concern with the time frame under analysis (recognizing that change occurs incrementally over time as opposed to taking only a snapshot of a specific period); and Pierson's (2000) path dependence, where the more frequently a decision is made, the more entrenched that decision becomes. For Pierson, however, change can be observable over time.

## **2.6 Conclusion**

Judicialization, therefore, has expanded beyond its initial conceptualization within domestic legal spheres and now plays a role in international and transnational adjudication. That said, the judicialization of international legal bodies is a relatively new phenomenon that has opened new doors for theoretical and practical examinations of its processes and impacts, particularly in the area of human rights. The growth of rights discourse and other conditions favorable for judicialization have led individuals and groups to realize that the courts are another path of recourse to perceived wrongs. By pursuing policy goals through the courts, individuals and groups that cannot take action legislatively have an alternative institutional means to accomplish their policy goals (Hirschl 2013, 12). In turn, courts at all levels, and international human rights courts in particular, have become overburdened. Increased case loads and low levels of

implementation have both called the legitimacy and efficacy of international human rights courts into question.

The next chapter takes a closer look at the European Court of Human Rights. The chapter first discusses the history of the establishment of the COE, which is Europe's preeminent human rights organization. This is followed by a discussion of the administrative and legislative bodies that comprise the COE, with a heavy focus on the procedures and processes of the two bodies that decide upon the judicial and execution arms—the European Court of Human Rights and the Committee of Ministers. The chapter wraps up with a review of the Court's case law on religious freedom and Turkey's history with the Court.



## **CHAPTER 3: A History of the Council of Europe and the European Court of Human Rights**

Human rights are the inalienable and fundamental conditions granted to humanity, merely by virtue of being human. After WWII, a consensus emerged about the need to develop mechanisms to identify, promote, and protect such rights around the world. A number of international and regional human rights organs and their respective conventions and courts were created as a result. One of the first among these was the Council of Europe (COE), the European Convention on Human Rights (ECHR), and the European Court of Human Rights (ECtHR). This chapter provides a history of the COE, starting with the impetus for its establishment. This is followed by concise descriptions of the COE's administrative and consultative bodies and, naturally, a more in-depth description of the COE's legal and decision-making bodies: the ECtHR and the Committee of Ministers (CoM). The chapter concludes with an overview of the religious freedom case law of the ECtHR and Turkey's history with the ECtHR, including comparative statistics on applications and execution.

### **3.1 Establishment**

In 1945, in the dark aftermath of WWII, the United Nations (UN) was founded to prevent another international catastrophe and secure peace around the world. Soon thereafter, in 1948, the UN General Assembly proclaimed the Universal Declaration of Human Rights, which was the first formal document dedicated to the universal protection of fundamental human rights. The member states of the COE (founded in 1949) followed suit and drafted the Convention for the Protection of Human Rights and Fundamental Freedoms (better known as the European

Convention on Human Rights) in 1950. The Convention consists of articles outlining specific rights which the ratifying states are bound to respect. These rights include education, non-discrimination, freedom of conscience and religion, and the right to fair trial.<sup>10</sup> Of the current 47 countries that are members of the COE, 28 are members of the European Union.

### **3.2 Bodies**

The COE has a number of administrative and consultative entities, each with a very different scope. Collectively, they are charged with carrying out the overarching aim of the COE “to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress...through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms” (Council of Europe 1949, Chapter 1, Articles 1a,b).

The Secretary-General of the COE is the highest ranking representative of the body and is “elected for a period of five years by the Parliamentary Assembly from a list of candidates drawn up by the Committee of Ministers” (Ovey and White 2002, 10). The Secretary-General is responsible for heading the Secretariat, which has three directorate generals—Human Rights and Rule of Law, Democracy, and Administration. A separate election is held for Deputy Secretary-General, also a five-year-term. The Secretariat is the depositary of all Council treaties while the

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<sup>10</sup> For the full text of the European Convention on Human Rights, see [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

Treaty Office is responsible for the custodianship, administration, registration, and ratification of treaties (Treaty Office, Directorate of Legal Advice and Public International Law 2009, 1). In the context of the COE, the European Treaty Series encompass conventions, agreements, charters, codes, framework conventions, and outline conventions—all of which are instruments as defined by the Vienna Convention<sup>11</sup> (Council of Europe, Treaty Office 2018).

There are four consultative bodies within the COE. The Congress of Local and Regional Authorities ensures the application of the European Charter of Local Self-Government<sup>12</sup> and advances “consultation between national governments and local and regional authorities” (Council of Europe 2018b). The Conference of INGOs (international non-governmental organizations) forges relationships with NGOs throughout Europe to strengthen their role in civil society with a distinct focus on the promotion of public participation in decision making (Council of Europe 2018a). The Commissioner for Human Rights, instituted in 1999, is an independent body that is “a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe” (Resolution (99)50 on the Council of Europe Commissioner for Human Rights 1999, Article 1). The Commissioner performs its functions outside of the scope of the supervisory bodies of the COE. The Parliamentary Assembly of the Council of Europe (PACE) consists of 324 representatives from the parliamentary bodies of the COE’s member states. While PACE does not have the power to pass binding laws, it does have the authority to “demand action from 47

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<sup>11</sup> The Vienna Convention (1961) codified diplomatic and consular relations worldwide.

<sup>12</sup> European Charter of Local Self-Government, European Treaty Series No. 122, Strasbourg, 15.X.1985

European governments, who must jointly reply;” conduct inquiries to reveal new facts on human rights violations; negotiate the terms of new member states joining the COE; and sanction current member states through exclusion or suspension, among other powers (Council of Europe 2018c).

While all entities play significant roles in the functioning of the COE, the two bodies that are the primary focus of this study are the European Court of Human Rights (the legal body) and the Committee of Ministers (the decision-making body). The Convention created established a judicial body, the European Court of Human Rights (ECtHR)<sup>13</sup>, to arbitrate cases brought to the court by individuals or other entities, or by one state against another.

### **3.3 The ECtHR and Committee of Ministers**

In 1998, Protocol 11 replaced what was previously a two-tier, part-time control mechanism of the European Commission and the Court of Human Rights, with a single, permanent court: the European Court of Human Rights. This allowed individuals to bring applications directly to the Court. Protocol 11 also mandates acceptance of the jurisdiction of the ECtHR for all COE members. The Court consists of judges elected by the Parliamentary Assembly from three candidates nominated by each state for a non-renewable nine-year term. The composition of the Court changes from case to case, which can be heard in one of four ways: 1) “manifestly inadmissible cases are examined by a single judge”; 2) the admissibility and merits of cases that fall under well-established case law are heard by a three-judge Committee; 3) cases may be heard

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<sup>13</sup> Not to be confused with the European Court of Justice, the highest court in the European Union, which is concerned with the interpretation and application of European Union law across member states.

by a seven-judge Chamber, determined by majority vote; 4) on rare occasions, cases may be heard by the 17-judge Grand Chamber (European Court of Human Rights 2014, 4-5).<sup>14</sup> The Court is divided into five administrative Sections. The Chambers are the judicial formation in each Section and include a President, Vice-President, and other judges. In cases where questions about interpretation of the Convention or Protocols arise or where a ruling would be in conflict with previous case law, Article 30 of the Convention permits a Section to move the case to the Grand Chamber (Ovey and White 2002, 398). The cases examined in this study have all either been heard by one of the Chambers or by the Grand Chamber.

An application to the ECtHR must meet certain admissibility criteria.<sup>15</sup> First, the complaint must be against a contracting state to the Convention and the applicant must have suffered a significant disadvantage. Finally, if an individual or an entity has exhausted all domestic legal recourse regarding a complaint of a violation of their Convention rights, and their country has ratified the Convention, they may apply to the Court. Applications to the ECtHR, however, must be submitted within six months of the final decision of the domestic courts. Therefore, all cases that come before the ECtHR have been heard by the highest domestic court, according to jurisdiction, in the relevant country, allowing the defending party an opportunity to seek redress domestically prior to being heard by the ECtHR.

Once an application is received by the Court, it is assigned to a lawyer in the Registry. This lawyer's tasks are "to conduct correspondence with applicants and governments, to prepare

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<sup>14</sup> See Appendix D, Case Processing Flow Chart.

<sup>15</sup> See Appendix C, Life of an ECtHR Application Flow Chart.

cases for examination, to advise the Court on questions of national law and the law of the Convention, and to assist in the drafting of judgments and decisions” (Ovey and White 2002, 399). The Registry lawyer then requests detailed information about the case and an application form from the applicant. The case is then assigned to a judge, who serves as the rapporteur and determines whether the case will be heard by a Committee or a Chamber. If the application will be considered by a Chamber, the appropriate Chamber contacts the government of the state concerned to provide written observations. If the case is then deemed admissible, “a written decision containing summaries of the facts and the parties’ arguments, and brief reasons for the Court’s decision” is prepared and adopted (Ovey and White 2002, 404-405). An attempt is initially made to resolve the issue through a friendly settlement; however, if this is not possible, the Chamber requests additional written observations from the parties and determines whether there will be a hearing or not.

The Court then examines the facts of the case, determining whether or not there has been a violation of one or more of the Articles of the Convention. If there is a finding of no violation, the applicant may request to re-examine the case. If the request is denied, the case is dismissed; if the request is accepted, the case is referred to the Grand Chamber. If the judgment in either Chamber determines one or more violations, the offending state is mandated by the Convention to comply with the judgment of the Court. This means that the state is obliged to, for example, pay material damages to the applicant, return the applicant to a position had there not been a Convention violation (*restitutio in integrum*), take measures (changes to laws, regulations, etc.) to ensure that a similar violation will not occur (also known as general measures), and publish the judgment in applicable domestic publications. The offending state is given wide discretion in

how some obligations are to be carried out. This is called the “margin of appreciation” and is discussed in greater detail below. If *restitutio in integrum* is impossible, and domestic laws do not allow for complete reparation, the Court will award just satisfaction (according to Article 41 of the Convention). This may include pecuniary damages, non-pecuniary damages, and costs and expenses. Pecuniary damage is awarded based directly on *restitutio in integrum*, including actual damages, diminished gains, or expected losses. Non-pecuniary damage is awarded for non-monetary damages, such as emotional or physical suffering. Costs and expenses are awarded based on evidentiary proof of financial burdens incurred by the applicant at both the domestic and ECtHR levels, including fees such as legal retainers and court fees.

According to Rule 77 of the Rules of the Court, the judgment of a case is either read at a public hearing or transmitted in writing to the Committee of Ministers, with the Registrar delivering copies to the relevant parties. The contracting state and the applicant then have three months to apply for an appellate hearing before the Grand Chamber, which is final. Article 44 of the Convention indicates that the judgment of a Chamber becomes final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; (b) three months after the date of the judgment, if no request has been made to refer the case to the Grand Chamber; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43 (Council of Europe 1950, Article 44). The judgment is then submitted to the CoM, which supervises the execution of the judgment (Article 46(2) of the Convention).

The Committee of Ministers is the decision-making body of the COE and meets at the ministerial and the deputy levels. Each COE member has one ministerial representative, typically the state’s minister of foreign affairs. There is at least one annual ministerial session per year.

Each minister of foreign affairs is charged with appointing one deputy as a representative for the three meetings per month that are held outside of the regular ministerial meeting. It is at these meetings that the CoM supervises the implementation of each case that is passed along to them. The case is assigned to either enhanced or standard supervision, the former of which indicates that the CoM gives priority to supervision. Enhanced supervision is typically applied to cases where there are urgent individual measures to be resolved, pilot judgments, cases with major structural issues, interstate cases, or cases with unique reasons to elevate supervision from standard to enhanced.

Pilot judgments are “repetitive cases” where cases brought before the Court repeatedly revolve around a particular structural issue at the national level. To reduce the high volume of cases that are heard by the Court each year, one “leading case” is chosen and it receives priority attention. By selecting a leading case, the Court has the capacity to put some cases on hold temporarily so that the respondent government can implement the appropriate steps to meet the requirements of the judgment. Once the leading case is decided, that judgment is applied to all cases with similar structural issues.

“Once the Committee of Ministers has received the judgment, it invites the respondent State to inform it of the measures taken in order to comply with its undertaking to abide by the judgment. Such measures may be individual or general. Documents submitted to the Committee of Ministers are public unless the Committee decides otherwise in response to a reasoned request for confidentiality” (Sharpe 2010, 88). The offending state must take action to ensure the judgement is executed. This study groups aspects of the judgements into the following categories of measures: general measures, individual measures, pecuniary and non-pecuniary damages, and



costs and expenses. General measures can encompass a broad range of actions, but generally require the state to review its legislation, regulations, judicial practices/structure, or even constitution, with the expectation that the state will take action to remedy the aforementioned laws, codes, or constitutions to prevent similar violations from occurring in the future. Individual measures can include actions ranging from the translation and publication of the judgment in national media, removal of the applicant's name from official records, the return of property, the reopening of domestic proceedings, or the revision or revocation of a domestic order. Article 41 of the ECHR allows for the award of three forms of just satisfaction (should domestic procedures not allow such actions) to the applicant: pecuniary damage, non-pecuniary damage, and costs and expenses. The aim of pecuniary damage is to place them, "as far as possible, in the position in which he or she would have been had the violation found not taken place" (*restitutio in integrum*), including actual loss and diminished gain. Non-pecuniary damage encompasses harm that is non-material in nature, such as mental or physical harm that cannot be precisely appraised. Costs and expenses incurred domestically and at the ECtHR can be included in the applicant's reimbursement request to the Court. They, but must be unavoidable, actual, tangible costs (such as legal assistance, travel, court fees, etc.) and, for reimbursement, must be reasonably incurred, as deemed by the Court. The payments of just satisfaction are often explicitly outlined in the judgment in terms of deadline, currency, recipient, and default interest, while the terms of general or individual measures often are not.

While the aforementioned issues are generally not addressed directly in the judgment, there has been a recent tendency by the Court to provide guidance on more precise execution measures, which has been welcomed by the CoM (Sharpe 2010, 91). In recent years, the Court

has begun to take a less ambiguous approach in its judgments, outlining in greater detail the implementation expectations of the judgment (Keller and Marti 2016, 836). The Court also takes into account case law, practices of the CoM, and domestic circumstances when appraising cases (Sharpe 2010, 90).

The consideration of domestic circumstances is referred to in two ways: the principle of subsidiarity and the margin of appreciation. Subsidiarity “implies that the primary responsibility for ensuring the rights and freedoms laid down in the Convention rests with the national authorities” (Council of Europe, Parliamentary Assembly 2000). The margin of appreciation is the understanding that High Contracting Parties of the ECHR are allowed a significant amount of discretion in the application of a judgment from the Court. This occurs through the occasionally vague rulings that are handed over by the Court itself. Rulings are frequently in declaratory terms as opposed to mandatory and overt expectations of the execution of a judgment. The concept of margin of appreciation was first outlined in the landmark *Handyside v. United Kingdom* case when the Court specified: “By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them...Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (‘prescribed by law’) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force” (*Handyside v. United Kingdom* [Application No. 5493/72] 1976, par. 48). The Court uses this principle extensively under the assumption that international human rights tribunals must take the local situation into account (Ovey and White

2002, 40-41). One area in which the local context can vary widely across all COE states is religion.

### **3.4 Religious Freedom Scope and Case Law in the ECtHR**

Article 9 of the European Convention on Human Rights, which relates to freedom of thought, conscience, and religion, states that: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others” (Council of Europe 1950). While Article 9 is the ECHR’s primary article dedicated to explicitly outlining the scope of religious freedom, issues of belief, philosophical conviction, and conscience can be considered in relation to a number of other Convention rights, as seen in this study. In fact, not even half (nine) of the 19 cases in the current study were found to be Article 9 violations. The remainder are violations of Article 11 (freedom of assembly and association); Article 1 of Protocol 1 (protection of property); Article 2 of Protocol 1 (right to education); Article 14 (prohibition of discrimination); Article 3 (prohibition of torture); and/or Article 6 (right to a fair trial). This is true not only in cases involving Turkey, but throughout COE member states.

Because of the discrepancy in what cases are admitted, and what cases related to religion are heard under Article 9, the ECtHR rulings related to freedom of religion may seem inconsistent. This is due to the particular issues that arise in each case, and more significantly, to

each member state's unique constitutional and legal arrangements, history, and national identity (Murdoch 2012, 83). Naturally, this is why the concept of a "margin of appreciation" is so critical. Yet there is a generally agreed upon "test" for cases that seem to fall within the scope of Article 9. Murdoch (2012) works to narrow the interpretation of Article 9 freedoms (and other associated articles) with five questions:

- What is the scope of the particular guarantee?
- Has there been any interference with the right guaranteed?
- Does the interference have a legitimate aim?
- Is the interference "in accordance with the law"?
- Is the interference "necessary in a democratic society"?

The scope of Article 9 is quite wide, encompassing not only privately held beliefs, but also the manifestation of those beliefs, as well as the individual and collective aspects of that manifestation. While the term "religion" is not defined in Article 9 or in case law, the latter has narrowed the scope of the meaning of "belief" in the case of *Campbell and Cosans v. the United Kingdom* ([Application Nos. 7511/76 and 7743/76] 1982, §36) in that the belief must "attain a certain level of cogency, seriousness, cohesion and importance" and relate to a "weighty and substantial aspect of human life and behavior." The foundational case law for the freedom of thought, conscience, and religion originates with *Kokkinakis v. Greece* ([Application No. 14307/88] 1993), Greek courts had convicted Mr. Kokkinakis, a Jehovah's Witness, of criminal proselytism in 1988. In 1993, the ECtHR ruled that there had been an Article 9 violation, as it relates to a restriction of individual manifestation. The case further identified that non-belief falls within the scope of Article 9, including atheism and pacifism. It further recognized that while religious belief is primarily concerned with private philosophical beliefs, individuals hold the right to manifest their beliefs individually and in community with others, in public and in private.

While the scope of Article 9 is quite broad, the Court has demonstrated that on occasion, it is more appropriate to consider rights guarantees under other articles, rather than Article 9 alone or even at all. This determination is based on whether the Court establishes that there is an “interference” with Article 9, which is distinct from a “violation” (Murdoch 2012, 26). The interference is determined, in part by the positive and negative obligations of the state under the Convention. “What distinguishes positive obligations from negative obligations is that the former require positive intervention by the state, whereas the latter require it to refrain from interference” (Akandji-Kombe 2007, 11). The state’s negative obligation in terms of religious freedom is seemingly inherent in Article 9 itself: the state should refrain from interfering with the right to hold beliefs in private or in public, individually or with others. More subtle interpretations of this include the related right not to forcibly disclose one’s beliefs (*Sinan Işık v. Turkey* [Application No. 21924/05] 2010; *Lombardi Vallauri v. Italy* [Application No. 39128/05] 2009; *Vogt v. Germany* [Application No. 17851/9121] 1995). On the other hand, the state has positive obligations. These are the legitimate aims for interference with manifestation of religion or belief, including “public safety, the protection of public order, health and morals, or the protection of rights and freedoms of others” (Council of Europe, European Court of Human Rights 2015, 13).

In these cases, the state must demonstrate that the interference was justified under one or more of the aforementioned aims. They must address the question of “whether the interference pursues a legitimate aim, whether the interference is ‘prescribed by law,’ and whether the interference is ‘necessary in a democratic society’” (Murdoch 2012, 35). The Court’s dedication to the notion of a pluralist and democratic society, and the importance of state neutrality and

impartiality in this context, was laid out in the case of the *Metropolitan Church of Bessarabia and Others v. Moldova* ([Application No. 45701/99] 2001). The Church complained that domestic authorities refused to recognize it, preventing the Church from gaining legal personality and in turn, depriving it of their right to access the courts to seek a ruling on its rights, namely property rights.

As noted above, there are a number of factors that are considered by both the Court and the CoM when making judgments and monitoring the execution of those judgments, respectively. The Court views the freedom of thought, conscience, and religion as one of the foundations of a democratic society, as well as its inseparable concept of pluralism. However, this guarantee is not absolute. There must be a balance between the right to exercise the aforementioned freedom, and the state's right to restrict this under certain circumstances. This is an argument Turkey often puts forward.

### **3.5 Turkey and the ECtHR**

Turkey became a member of the Council of Europe in 1949 and signed the ECHR in 1950, which came into effect domestically with the adoption by the *Türkiye Büyük Millet Meclisi* (TBMM, Turkish Grand National Assembly) in 1954. However, in the late 1950s, the TBMM passed a number of statutes that were contrary to the ECHR and ultimately led to the 1961 coup (Özden Kaboğlu and Koutnatzis 2008, 455-456). Following two other coups and two constitutions (1961 and the current 1982 Constitution), Turkey accepted the right to individual petition to the Court in 1987. It was among the last countries to recognize that right, and also the very last member to accept the ECtHR's compulsory jurisdiction, which was accepted in 1990 (Özden Kaboğlu and Koutnatzis 2008, 458).

According to an ECtHR statistical report on violations per COE state, Turkey has had the greatest number of judgments of any state by far, with 3,386 from 1959 to 2017, 2,988 of which found at least one violation<sup>16</sup> (European Court of Human Rights 2017). Turkey, which is the third most populous state in the COE (behind the Russian Federation and Germany) and whose population constitutes approximately 10 percent of the total COE population, was party to 16 percent of the total number of judgments at the ECtHR in the same time period (European Court of Human Rights 2017). In 2017, the Court received 31,053 applications from Turkey and delivered 116 judgments from the 990 applications that were accepted (“Country Profile: Turkey” 2018). This is a significant jump in decided applications from previous years (3,218 in 2015 and 4,160 in 2016) (“Country Profile: Turkey” 2018), a majority of which likely originate from the Turkish government’s crackdown on “dissidents” following the 2016 attempted coup.

In terms of new cases that have been transmitted to the Committee of Ministers for supervision, in 2016, Turkey had two leading cases under enhanced supervision, ten under standard supervision, and three awaiting classification. On top of this, there were 26 repetitive cases under enhanced supervision, 45 under standard supervision, and 28 awaiting classification (Council of Europe 2016, 56). In the same year, Turkey had a total of 182 leading cases under supervision in the CoM (34 under enhanced supervision, 144 under standard supervision, 4 awaiting classification) and 1,248 repetitive cases (422 under enhanced supervision, 799 under

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<sup>16</sup> Behind Turkey in this list were Italy (2,382 judgments; 1,819 judgments with at least one violation) and the Russian Federation (2,253 judgments; 2,127 judgments with at least one violation) (European Court of Human Rights 2017).

standard supervision, and 27 awaiting classification) (Council of Europe 2016, 57-59). Turkey was able to close one leading case under enhanced supervision and ten cases under standard supervision, as well as 195 repetitive cases under enhanced supervision and 68 under standard supervision. The average number of closed leading cases was six, placing Turkey above that average. Turkey also had the highest number of closed repetitive cases by far. In spite of these seemingly positive developments, Turkey still remains above average for the length of execution of leading cases closed (5.6 years; overall average: 4.7 years), particularly for cases that are under enhanced supervision (13.5 years; overall average: 7.2 years). This is the core issue that this study seeks to examine: what are some of the institutional barriers that prohibit (or more rarely, encourage) Turkey to comply with violation rulings from the European Court of Human Rights?

The next chapter explains the context within which this question can be explored by providing a comprehensive look at the history of the Turkish Republic from late-Ottoman times to the present. The chapter begins with an explanation of the place of religion during Ottoman rule. This is followed by a periodic survey of the modern Turkish Republic (1923-1950, 1950-1980, 1980-2002, and 2002-2016). Chapter 4 wraps up with a picture of religious governance since the establishment of the Turkish Republic, the mechanisms for doing so, and the classifications of the belief groups that are the subjects of the cases in this study.



## **CHAPTER 4. Turkish History and the Role of Religion: Ottoman Empire to the Present**

Turkey has a unique and complex place in world history. The modern day Turkish Republic is geographically the remnant of the once vast and powerful Ottoman Empire. Yet it is not just geography that ties this once glorious Empire to modern Turkey. The deep history, traditions, culture, politics, and even religious praxes have also been carried forward, and have influenced contemporary cultural, political, and religious institutions. This chapter begins with an account of the governance of religion within the Ottoman Empire. This is followed by a sweeping overview of Turkish history from 1923 to 2016 in four distinct periods (1923-1950, 1950-1980, 1980-2002, and 2002-2016). The chapter concludes with a description of the governance structures of religious classifications in modern Turkey, including a detailed description of the primary mechanism for this, the *Diyanet İşleri Başkanlığı* (Presidency of Religious Affairs, better known as the *Diyanet*), and a brief review of the religious categories included in this study.

### **4.1 Religion in the Ottoman Empire**

In terms of its geography and longevity, the Ottoman Empire (1301-1922) was one of the most expansive empires in world history. The Empire was inspired by Islam early on and became the Sunni caliphate after the conquest of the Mamluks in 1517 (Finkel 2007, 110). It is not considered a theocracy because Islamic law was not the only source of legislation and the

Ottoman *ulema*<sup>17</sup> were civil servants at the service of the sultan (Kuru 2009, 203). A successive line of sultans were more concerned with conquering more territory as the “perceived need for innovative interpretations of Islamic law declined” (Albright 2006, 119). The Ottomans continued to expand their reach, but due to the vast geographic scope of the Empire, they were compelled to create a system under which a religiously, culturally, and ethnically diverse population could flourish. This led to the creation of the *millet* system. The word *millet* is derived from the Arabic word for “nation” (Lewis 2002, 335). Each *millet* was organized by religion, and was allowed to operate loosely under its own rules and leader, but was forced to pay a special tax (or *ceza*). This arrangement is frequently hailed as the first form of religious pluralism. Religious minorities were not granted full rights and the arrangement contributed to relatively peaceful relations amongst the minorities, as well as between the ruled and the rulers. The Ottoman *millet* system did, however, deny Muslim ethnic minority groups separate legal status on the grounds of ethnic or linguistic differences (Aktürk 2009, 905). Such a scheme denied some non-Sunni groups the right to their own *millet*. The Alevi, a distinct and significant cultural and religious minority who are occasionally categorized as Shia,<sup>18</sup> are perhaps the most significant of these groups. This denial of rights was likely a result of the Ottoman Shia alignment with Shah Ismail I and the Shia of the Safavid Empire, and the latter’s subsequent classification of the Alevi as “apostates” and “heretics,” which led to their massacre throughout the Empire (Kehl-Bodrogi 2003, 54).

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<sup>17</sup> Scholars of Islamic law and theology.

<sup>18</sup> This is discussed in greater depth below.

The slow decline of the Ottoman Empire necessitated a new form of government, and the *tanzimat* (reform) period was initiated in the early 1800s. These reforms abolished the *millet* system to create a more unified and centralized government. It was during this period that minorities (non-Sunni, non-Turks) were forced to homogenize their identity into that of “Ottoman citizen.” This was the most odious breach of Islamic tradition. The “toleration” of the Ottoman period was grounded in the “separate but inferior” status of non-Muslim citizens; to shift to a state in which all were equal was seen an “offence against both religion and common sense” (Lewis 2002, 107). The Young Ottomans emerged as liberal constitutionalists who sought to forge a multinational Ottoman patriotism (Mango 2004, 19), in opposition to the *tanzimat* reforms. But the *tanzimat* reforms were so comprehensive and far-reaching that, by 1871, they had reached a point of no return: modernization and Westernization were the only paths forward (Lewis 2002, 128). The Young Ottomans’ failed pursuit was followed by a new iteration of these attempted political revolutions: the Young Turks. To defend the empire from further dissolution, the Young Turks launched the Young Turk revolution in 1908 with the participation of figures that would become instrumental in the founding of the Republic, including Mustafa Kemal Atatürk himself.

World War I erupted in 1914, with the Ottomans joining Austria-Hungary, Germany, and Bulgaria to form the Central Forces. By 1918, the Ottoman forces capitulated and signed the Armistice of Mudros. This was followed by the drawing up of the Treaty of Sèvres, which marked the beginning of the partitioning of the Ottoman Empire and its lands. Under the leadership of Mustafa Kemal Atatürk, the Turkish forces resisted the Allies’ usurpation of former Ottoman Territories and launched the Turkish War of Independence. The Turks emerged

victorious and signed the Treaty of Lausanne in 1923, which became a foundational document of the future Republic of Turkey, the successor state of the Ottoman Empire. While Greece and Turkey had already arranged a population exchange of the Muslim population residing in Greece and the Orthodox Christian population residing in Turkey, the Treaty of Lausanne outlined the rights of minorities in both countries in unequivocal terms. These protections included the right to the free exercise of religion, equal civil and political rights, and the right to establish and maintain “any charitable, religious, and social institutions” (Treaty of Lausanne 1923).

## **4.2 The Turkish Republic 1923-2016**

### **4.2.1 1923-1950**

There has been an enduring debate about the relationship between religion and the Turkish state since Mustafa Kemal Atatürk founded the Turkish Republic in 1923. Atatürk, the Republic’s first president, introduced sweeping political, legal, cultural, social, and economic policy changes in an attempt to create a modern, Westward-looking, democratic, representative, unified, and secular republic.

Atatürk’s drastic reforms included the abolition of the sultanate and the caliphate, as well as other changes to religious affairs. Furthermore, Atatürk aimed to construct a wholly new “Turkish” identity by removing religious affiliation (*millets*) as the organizing principle of society (Aktürk 2009, 895). These changes were inspired by the French concept of *laïcité*, or secularism, which aims to implement an absolute and strict separation of religion and state. The

selection of this term by the early Turkish Republic Kemalists<sup>19</sup> is instructive. According to Öztürk: “*Laïcité/laicism/laic* is the term used to describe state control of religion in the public sphere, as opposed to secularism, which implies merely the separation of state and religion” (2016, 624).<sup>20</sup> However, Turkey’s approach to *laïcité* differed from the French interpretation in that the government is not entirely removed from regulating religion’s influence in private life. The Turkish model of *laïcité* created a “sterilized” Turkish Islam with new institutions and vision (Köse 2013, 595). Such a loose interpretation of secular identity inevitably led to the marginalization and/or homogenization of the religious minorities that were forced to adopt this newly mandated identity. Once again, foremost among these religious minorities was the Alevi population. The Alevi constituted approximately one-fourth to one-third of the population (Kieser 2001, 97)<sup>21</sup> and were the largest religious minority under the Ottoman Empire’s provinces in Asia Minor (modern day Turkey).

The newly constructed Turkish identity was predominately Sunni, particularly Hanefi (Aktürk 2009). In an attempt to secure public order and uniformity, the central government

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<sup>19</sup> Kemalists are those who embrace Kemalism. “Kemalism is the name of the Turkish state ideology, characterized by its state-centric corporatism, a homogenizing nationalism, and an authoritarian secularism. As a political program it was established under the leadership of Mustafa Kemal, since 1934 known by the honorary name Atatürk (‘Father of the Turks’), who is recognized as the founding father of Republican Turkey” (Dressler 2013, xvi).

<sup>20</sup> Though the validity of the theory of secularization has been widely disputed in recent years, and the discourse of religious change in sociological and historical terms has shifted, it was once the dominant theory to explain empirically recognized parallel shifts towards “modernity” and the marginalization or disappearance of religion. Some of the preeminent philosophers that have examined this phenomenon include Max Weber, Emile Durkheim, Auguste Comte, and Talcott Parsons.

<sup>21</sup> Sources citing a precise count of the Alevi population under the Ottoman Empire are difficult to find for factors mentioned throughout this study. This particular estimate was cited in Kieser’s (2001) article, which references a report titled “The Shia Turks” (G. E. White 1908). For a history of Alevi genealogy and signification, see Dressler 2013.

became more and more centralized and rigid. The belief in Turkey as a “unified society without class or privilege” was an important element in the early republican era (Buğra and Savaşkan 2014, 32). The political system and society at large were redesigned to create a highly centralized system (Can 2014, 34). Unfortunately, these same reforms, which aimed to create unity and harmony, resulted in greater violence and inspiring uprisings by the diverse demographic, cultural, religious, and ideological groups that were to be collected under the banner of the new Republic (Can 2014, 35). In the pre-Republic period, this included revolts by and against Armenian, Syrian, and Greek Christians, and in the immediate post-Republican period, by and against Alevis and Kurds.

Atatürk’s modernization reforms were rooted in the theory of secularization, in which a society that identifies as highly religious, gradually progresses through a process of modernization, eventually leading to a decline in religiosity and the removal of religion from public life.<sup>22</sup> Atatürk and his *Cumhuriyet Halk Partisi* (CHP, Republican People’s Party), which was a social-democratic party, as the founders of the republic, were able to shape political and economic institutions in their favor. By writing a constitution that held secularism as its core principle and establishing institutions to reinforce this ideology (i.e. *Diyanet*; a strong military;

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<sup>22</sup> Though the validity of the theory of secularization has been widely disputed in recent years, and the discourse of religious change in sociological and historical terms has shifted, it was once the dominant theory to explain empirically recognized parallel shifts towards “modernity” and the marginalization or disappearance of religion. Some of the preeminent philosophers that have examined this phenomenon include Max Weber, Emile Durkheim, Auguste Comte, and Talcott Parsons.

universal suffrage; statist economic policies), the Kemalists controlled the distribution of resources and empowered those who embraced a similar doctrine.

These initial conditions are instructive to the path that Turkey followed. Once the choice was made for a specific set of institutions, the Kemalists had strong incentives to continue on that path because the first steps gave them an advantage. This positive feedback then locked the country into an arrangement that perpetuated secular dominance. The high density of institutions became self-reinforcing. This is known as path dependence (Pierson 2000). Most importantly, Pierson notes that: “In the long-run, the outcome that becomes locked in may generate lower payoffs than a forgone alternative would have” (2000, 253). As the period from 1950-1980, explored below, demonstrates, this lock into statist economic policy and a zealous commitment to secularism may have generated lower payoffs than an alternative, but the challenge of interrupting entrenched path dependence proved too great to overcome.

#### **4.2.2 1950-1980**

As mentioned above, CHP was able to shape political and economic institutions in their favor until the second free and fair elections in 1950, which were won by the *Demokrat Partisi* (DP, Democrat Party), a conservative-leaning party. The CHP was a well-known party that had developed positive valence based on Atatürk’s reputation for “saving” the republic from its Ottoman past. The DP differentiated itself from the popular CHP by promising significant changes to economic policy. CHP remained on its statist path, while DP campaigned on broader privatization of state industries. This differentiation resonated with the populace and DP won elections with overwhelming majorities again in 1954 and 1957. The DP attempted to shift away from Kemalist/militaristic governance; the popularity of this shift was reflected in its ability to

garner broad political support across Anatolia. This was quite unlike the majority of CHP's support, which came from the urban and industrial centers of Istanbul and Ankara. The DP's minor changes to economic policies, however, were no better at improving the distribution of resources. Instead, inflation rates climbed. This fact, combined with the perceived increase in religiosity under the DP, led the Turkish military to overthrow the DP in a military coup in 1960. The DP was subsequently abolished.

The "Turkish-Islamic Synthesis" began to take shape in the decade following the coup. The concept of the Turkish-Islamic Synthesis was generated by nationalist and Islamist intellectuals who sought to amend the "Kemalist" philosophy and create a Turkish national and religious identity based on Sunni Islam, thereby countering the emergence and proliferation of leftist ideologies (Ciddi 2009, 70; Jongerden 2003, 79). This was achieved by 1970 through the establishment of the *Aydınlar Ocağı*, the Intellectuals' Hearth, which was an association that included representatives from the political, business, and intellectual elites (Jongerden 2003, 79). At the same time, the *Milli Nizam Partisi* (MNP, National Order Party) was founded as an Islamist party that thoroughly embraced a perspective of morals based on Islamic values, and the outright rejection of Western ideology, including secularism.

The 1961 elections placed the CHP back in parliament, with the newly formed *Adalet Partisi* (AP, Justice Party), founded by former members of the DP, trailing closely behind. Turkey's political situation was relatively unstable until 1965, with various coalition governments in and out of power under military-appointed Prime Minister, İsmet İnönü. Thus, the secularists maintained *de jure* power, shaping political institutions through İnönü, a former military general, former President, and first Prime Minister (under Atatürk). All of these



positions were very closely affiliated with the secular CHP and Atatürk. The AP was a more moderate right-wing party than the DP and handily won both the 1965 and 1969 elections under the leadership of Süleyman Demirel. Demirel, a relatively progressive conservative figure, expanded the AP base to include farmers, the rural population, and smaller industrialists of central Anatolia. Yet the AP's policies also failed to improve the economic condition of its supporters and ultimately caused another recession.

The AP's attempt to redistribute resources was, therefore unsuccessful, and the AP was unable shape Turkey's political institutions in their favor. Furthermore, the left-right and secular-conservative divide became more pronounced, with students and laborers on the left, and Islamists and nationalists on the right. This led to an increase in violence, including bombings, kidnappings, and assassinations, and the military once again intervened in 1971, forcing the resignation of the AP. Prior to allowing elections, the military used its *de jure* power to design the political institutions to further exert its control over the country. These reforms included greater state opposition to collective action, more restrictions on education, and tighter control of the media.

The coup proved ineffective at quelling the divisions and violence, which continued in Turkey throughout the 1970s as right-wing, ultra-nationalist groups sparred with leftists. Over 4,000 were killed over the course of a decade.<sup>23</sup> What is often presented as an ideological

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<sup>23</sup> Calculations vary on the precise number killed during this period depending on the time frame examined and whether or not security forces or terrorists are included. The estimate of approximately 4,000 cited here is drawn from Gunter, who wrote that: "During these times, a total of 4,040 people lost their lives as a result of violence, a

conflict between left and right was heavily influenced by the divide between Sunnis and Alevis (Kinzer 2001, 64). The military allowed elections to be held in 1973 and, perhaps through the mobilization of the secular elite, the CHP won. However, they were forced to form a coalition with the conservative *Milli Selamet Partisi* (MSP, National Salvation Party). The coalition only lasted for 10 months. Polarization escalated, as did the country's economic crisis. The reliance on import substitution was failing, the gap between investments and domestic savings widened, and significant government intervention in economic development continued (Erçel 2006). These factors combined to generate high unemployment, low production, and triple-digit inflation, creating the most acute economic crisis in modern Turkey's history. The crisis provoked violence between the left and right, which some claim the military allowed to escalate to provide a pretext for what would become the 1980 coup.

Thus, by the late 1970s, society was polarized along ethnic, sectarian, and ideological lines. However, the immediate trigger for the 1980 coup was a political meeting of MSP, held on September 6, 1980 in Konya. There, a large group of Turkish and Kurdish-Islamist attendees refused to pay homage to the Turkish national anthem and chanted slogans supporting the restoration of an Islamic government in Turkey. These groups were clearly exploiting the apparent weaknesses of the state in this period to voice their long pent-up demands. The military perceived this behavior as an open challenge and decided to end the cycle of left-right and Alevi-Sunni violence by once again intervening directly in Turkish domestic politics (Yavuz 2003, 68).

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figure which includes the members of the security forces who were killed but excludes those from the ranks of the terrorists.” (Gunter 1989, 69).

### 4.2.3 1980-2002

Following the military coup of 1980, which was the most comprehensive military takeover in Turkish history (Ciddi 2009, 66), state elites employed the “Turkish-Islamic Synthesis” to solve the social, cultural, and political left-right/conservative-liberal conflicts that had prevailed in the 1970s. The “Turkish-Islamic Synthesis” has roots in a movement and ideology that attempted to reconstruct the “Kemalist” ideology and reunite Turkish nationalism and (Sunni) Islamic identity (Çetinsaya n.d.). The Turkish-Islamic Synthesis continued throughout the 1980s, expanding the scope of Islamic institutions, politics, and policies. Instead of exhibiting their routine enmity towards religion, the military used Islam to quell the violent left-right divide that had engulfed the country. Three factors shaped the military’s policies of culture and identity (in order of importance): perception of the threat of leftist movements; the personal Islam of General Kenan Evren (the leader of the military administration); and the availability of resources (Yavuz 2003, 69). Because many Kurdish and Alevi activist groups were allied closely with Marxist organizations and movements, the military coup leaders felt compelled to use Islamic institutions and symbols as a legitimizing counterweight (Yavuz 2003, 69).

The most explicit shift in Turkey’s political and economic history occurred in the 1980s. The 1980 coup has been labeled the most brutal of Turkey’s coups, resulting in 650,000 people taken into custody; 230,000 people put on trial; 1,683,000 people blacklisted; 517 people condemned to death; 50 were hanged; 299 inmate deaths from “indeterminate” reasons; 14 inmate deaths from hunger strikes; and 171 deaths from torture (*Hürriyet Daily News* 2012). The military implemented institutional and legal changes designed to minimize further dissent and

conflict. As was the case after the previous coups, the military also closed down and seized the assets of any parties in government at the time of the coup.

By the 1980s, the pious population felt it had long been denied a voice in politics and the economy. The *Anavatan Partisi* (ANAP, Motherland Party) recognized this, as well as more general need for a reform-minded party that was more representative of the general population, and won the 1983 general elections. In addition to government being more religiously conservative, this meant favoring a liberal market economy and so decreased government intervention in the economy. ANAP was led by Turgut Özal, whose name soon became associated with Turkey's positive economic transformation. Even if the reforms aimed to reduce government intervention, the shift in political structures under ANAP unquestionably increased the prime minister's power over discretionary spending without the approval of Parliament (Buğra and Savaşkan 2014, 51).

Özal was above all perceived as a pragmatist who maintained his distance from insulated secular ideologies, and also refused to be heavily influenced by Islam or particular Islamic groups when shaping his policies. Thus, his decisions regarding the distribution of resources were based on objective economic criteria (Heper 2013, 142). In reality, the ANAP's reforms touched a much broader segment of society than had previous reforms, namely Muslim small and medium sized enterprises (SMEs) of central Anatolia.

Perhaps unwittingly, Özal's reforms, alongside the suppression of left-wing political activity, encouraged the further development of the "Turkish-Islamic Synthesis." To quell the violence between left and right, the state sought to impose a "nationalist, Turkish" form of Islam from above. The wider distribution of resources and the silencing of the left also allowed the

Muslims of central Anatolia, who had previously felt disenfranchised and excluded from political and economic life, to collectively organize. Thus, in 1990, a group of conservative SME owners founded the *Müstakil Sanayici ve İşadamları Derneği* (MÜSİAD, Association of Independent Industrialists and Businessmen). This group of “Anatolian Tigers,” as they came to be known, altered the perception of the relationship between religion and the economy. Though knowing the “right” political people remains a significant determinant of capital accumulation, success is far less dependent on political relationships than on “mutual collaboration in network formation” (Buğra and Savaşkan 2014, 56). A key characteristic of MÜSİAD’s success was and is the creation of an internal norm of “close internal solidarity” amongst the group and a strict observance of ethical business practices, both of which constructed an internal credible commitment to cooperate. According to the *New York Times*, “Companies that break these ethics, for instance, by cheating customers or suppliers, and are deemed unrepentant, are summarily expelled from MÜSİAD’s membership” (Keay 2004). The ability to establish internal credible commitment granted MÜSİAD substantial de facto power.

The 1991 elections were dominated by center-right parties, one of which was the *Refah Partisi* (RP, Welfare Party), led by Necmettin Erbakan, former leader of the MNP and MSP.<sup>24</sup> There had not been a religious party in parliament since Erbakan and the MSP held seats in 1977. RP capitalized on the sentiments of disenfranchised Muslims, “alienated by the republican mission to secularize an Islamic society” (Buğra and Savaşkan 2014, 54), and employed rhetoric

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<sup>24</sup> Erbakan also served as leader of the *Fazilet Partisi* (FP, Virtue Party) and *Saadet Partisi* (SP, Felicity Party).

to build its identity around Turkey's new political economy. This new rhetoric was parallel to that of MÜSİAD, which emphasized the coexistence of religious ethics and economic development (Buğra and Savaşkan 2014, 55). Yet the RP and MÜSİAD's economic policies differed. The former, in an attempt to secure cross-class appeal, had a platform of a "Just Order" to bring "justice" (as opposed to "power") to the electorate by replacing a capitalist system with one based on Islamic precepts; the latter favored a neoliberal outlook with a positive view toward international trade—particularly with Muslim-majority countries. Still, the new synthesis of religion and politics was used in an attempt to redesign socioeconomic institutions, and the identity associated therewith shaped allegiances and rivalries within the business community (Buğra and Savaşkan 2014, 55).

The RP unquestionably laid the groundwork for future Islamist political parties to participate as active players in Turkish politics. Ideological divisions within the party and the silent "post-modern coup," during which Necmettin Erbakan resigned as Prime Minister in 1997, caused a split in the party. In 2001, one segment of the party, which included Recep Tayyip Erdoğan, formed the current governing party, the *Adalet ve Kalkınma Partisi* (AKP, Justice and Development Party).

#### **4.2.4 2002-2016**

The AKP won a sweeping victory in the national elections in November 2002. Erdoğan could not immediately become prime minister because, in 1998, as the RP's mayor of Istanbul, he recited a poem inciting religious hatred in 1998 and was subsequently banned from political office and imprisoned. Nonetheless, a special by-election was held for an open seat and Erdoğan replaced the sitting PM and co-founder of AKP, Abdullah Gül. In subsequent elections (both local and

general), the AKP's portion of the vote continually increased, allowing former Prime Minister Recep Tayyip Erdoğan (now President) to declare a "mandate" to implement policies previously challenged by opposition parties.

Since coming to power, the AKP has passed laws and made proclamations that many in the secular camp and opposition consider indicative of the party's creeping Islamist tendencies. In light of the AKP's current reputation of authoritarianism, it is ironic that the platform upon which the AKP initially differentiated themselves from other parties was rooted in an emphasis on democracy, respect for human rights, and the rule of law (Rabasa and Larrabee 2008, 47). These issues had been neglected by previous iterations of Islamic-leaning parties and genuinely resonated with the general population that was disillusioned by religious parties. Furthermore, in 2002, the population was still suffering from the policies that had caused the 2001 economic crisis and was thirsty for a party that presented itself as distinct from the recent coalition government. The AKP delivered (in both word and deed) on their commitment to the European Union process, the further privatization of state owned enterprises, liberal market policies, and a diversified export market. In fact, annual GDP growth rates since the AKP came to power were 6.8 percent (2002-2007), 0.7 percent (2008), -4.80 percent (2009), 8.85 percent (2010-2011), 2.2 percent (2012) (Buğra and Savaşkan 2014, 65), 4.79 percent (2012), 8.49 percent (2013), 5.17 percent (2014), 6.09 percent (2015), 3.18 percent (2016) ("Turkey: Growth of the Real Gross Domestic Product (GDP) from 2012 to 2022" 2018).

Improved economic performance increased the AKP's popularity, which allowed the party to shape political institutions in its favor, further consolidating its *de jure* power and thus its ability to adjust economic institutions. For example, from 2003 to 2013, the AKP changed the

procurement law 29 times, making over 100 amendments and revising the clauses that regulated exceptions (Buğra and Savaşkan 2014, 79). These changes benefitted those in positions to profit from the procurement process who had been loyal to the AKP. Additionally, although the central government retained authority in many government contracting projects, in 2004 and 2005, the AKP passed a number of laws to give municipalities greater authority in infrastructure investments (Buğra and Savaşkan 2014, 87). This decentralization is sometimes viewed as a reward the municipalities that supported the AKP in their early years.

In 2013, millions of citizens gathered across the country to protest the government's increased authoritarianism and threats to the freedom of speech, in what came to be known as the Gezi Park protests, named for the area in which the protests began. Over the course of four summer months, the disproportionate police response led to the death of 11 citizens and thousands of injuries. Unfortunately, because of the protestors' incredibly diverse interests and profiles, they were unable to effectively solve their collective action problem and capture greater *de facto* power that would have forced the government to resign. The backgrounds of the Gezi protestors were disparate (environmentalists, architects, left-wing Islamists, secularists, students, and the elderly, for example); the only shared perspective of the protestors was an anti-government stance and a willingness to risk life and limb in the face of a vehement police response, which was not sufficient to cement a solid base for effective collective action. The Gezi Protests remain a merely memory and the AKP has continued to make the most significant institutional changes in the history of the republic, namely, the direct election of the president. In 2014, abandoning his role as prime minister, Erdoğan became the first directly elected president and Ahmet Davutoğlu became prime minister and party leader.



Both the secularist and conservative camps that opposed Erdoğan remained committed to the Kemalist ideology that favored the absence of faith in public life and embraced rigorous state control of all activities related to religion. This authoritarian secularism inevitably invoked a sense of disenfranchisement among the Sunni majority. In *Fields of Blood: The History of Religion and Violence*, Armstrong (2014) asserts that “Almost every secularizing reform...would begin with an aggressive assault on religious institutions, which would inspire resentment, anomie, distress and, in some cases, a violent riposte” (277). The rise of the AKP is an illustration of how authoritarian secularism stimulated the progression, and eventually the ascendancy of, a conservative, (Sunni) Islamist party. As the dominant ideology since the founding of the Turkish Republic, Kemalism represented the center and those who cannot identify with that ideology or are opposed to it “have suffered political, economic, and ideological exclusion and peripheralization” (Gülalp 2001, 434). Thus, the AKP is rooted in a base of “counter-elites” who aim for upward mobility against the historically privileged who were loyal to the Kemalist state and ideology (Gülalp 2001, 434). Regardless of the ideology of the party in power, what has remained constant throughout the history of the Republic of Turkey is the marginalization and *de facto* and *de jure* non-recognition of non-(Hanefi) Sunni citizens. What follows is a contextual account of these groups in Turkey, and the primary institution that has regulated their existence: the *Diyanet*.

### **4.3 Religious Classifications in the Turkish Republic**

#### **4.3.1 The *Diyanet***

According to most sources, 99 percent of Turkey’s approximately 80 million citizens are Muslim; the US government estimates that approximately 77.5 percent of these Muslims are

Hanefi Sunni (United States Department of State 2016, 2). Other religious groups self-report as constituting approximately 0.3 percent of the population, while other reports indicate that as much as 2 percent of the population is atheist (United States Department of State 2016, 2). The legal framework for handling religious issues is centered around the *Diyanet*, the Presidency of Religious Affairs. The *Diyanet* was first established in 1924 and was first recognized in the 1961 Constitution. It is responsible for “the delivery of service to citizens without discrimination in regard to religious sect, or understanding or practice of religion” (Diyanet İşleri Başkanlığı 2012). From its foundation until approximately the 1980s, the *Diyanet* was regarded as a mechanism to “justify and consolidate” the state’s staunch secularist character and oversee “state hegemony” over religious practices (Öztürk 2016, 620). It is important to recall that Turkey considers itself a *laic* state, preferring to employ the French term *laïcité*. French *laïcité* refers to state control over religion, in contrast to the separation of state and religion. Therefore, as an administrative government institution, the *Diyanet* functions as a “hegemonic manager” of religion (Öztürk 2016, 622).

In practice, the institution regulates the beliefs, practices, and principles of Sunni Islam; administers the country’s more than 85,000 mosques; educates Sunni clerics; issues the subject matter for sermons to be read at Friday services (*cuma hutbesi*); assists in developing the curriculum for the mandatory Religious Culture and Education courses in public primary and secondary schools; and supports pilgrims going on the *hajj* (the requisite Muslim pilgrimage to Mecca), among other activities. The *Diyanet* budget increased fourfold from 2006 to 2015 (Lepeska 2015); from 2015 to 2016, the allocation went from ₺3.6 billion TRY to over ₺5.9

billion TRY<sup>25</sup> (Türkiye Cumhuriyeti Başkanlığı, Diyanet İşleri Bakanlığı 2016). Turkey has also added almost 10,000 new mosques since 2006, meaning that there were 87,381 in 2016 (*Türkiye Cumhuriyeti Başkanlığı, Diyanet İşleri Bakanlığı* 2016).

Notably, these massive hikes in budget allocations, staffing increases, and expanded scope have occurred under the current AKP government. While the *Diyanet* was established as an institution to regulate and control the practice of Islam in defense of the Republic’s secular nature against religion, there has been a tangible shift toward a patent promotion of Hanefi Sunni Islam, both domestically and abroad (Lepeska 2015). The transformation in the *Diyanet*’s raison d’être began in the 1980s during the “Turkish-Islamic Synthesis,” (see above) and intensified after the election of the AKP government in 2002 (Öztürk 2016). It is widely accepted that after the 2011 elections, the governing party adopted more authoritarian tendencies, including more actively controlling the *Diyanet* both overtly and covertly through the aforementioned widening of its scope of activity and budget, making it essentially an extension of the party itself. One manifestation of this came in the form of the removal of Prof. Dr. Ali Bardakoğlu, who was an appointee of devoted secularist and then-President Ahmet Necdet Sezer, as head of the *Diyanet*.<sup>26</sup> He was replaced by Prof. Dr. Mehmet Görmez, who has acquiesced more easily to AKP demands (Öztürk 2016, 627). The AKP’s hold over the *Diyanet* is also evident in the “instrumentalization” of sermons; just prior to the June 2015 elections, media published stories

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<sup>25</sup> Care has been taken throughout this study to differentiate between currencies. The New Turkish Lira (*Yeni Türk Lirası, ₺/TRY*) came into circulation on January 1, 2009. References to the Turkish currency prior to this date are labeled “TL”.

<sup>26</sup> See Section 6.1.2 for a brief description of the end of Bardakoğlu’s term at the *Diyanet*.

that imams (who, it is important to remember, are paid employees of the *Diyanet*) used their *mimbar* (pulpit) to subtly campaign for the AKP. They are reported to have stated: “Muslims, we will be voting on Sunday. This election will not only affect Turkey, but also the world. We must give our votes to Muslims” (*T24.com* 2015). The final phrase was a not-so-thinly veiled reference to the AKP. Other appointed AKP officials have toed the party line in defense of the *Diyanet*’s enlarged scope and budget. For example, Justice Minister Bekir Bozdağ announced that anyone who launched complaints against the *Diyanet*’s budget are “against the presence of the institution itself” (Lepeska 2015). The tightening command of the AKP over this institution has been cause for concern by the groups that do not identify with the Hanefi Sunni identity that the *Diyanet* has conspicuously solidified and supported. What follows is a brief description of the Turkish faith communities that lie outside the government-buttressed Hanefi Sunni identity and are parties to the cases before the ECtHR analyzed in this study.

#### **4.3.2 Alevi**

Of the faith communities examined in this study, the Alevi community is the largest, making up anywhere from 10-25 percent of Turkey’s almost 80 million people. The precise number of Alevi in Turkey is disputed for many reasons related to identity, perhaps including the practice of *takiye*.<sup>27</sup> The Alevi are the second largest religious group in Turkey, after Sunni Muslims, and by far the largest religious minority (Erman and Göker 2000, 99). In spite of the large size of their

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<sup>27</sup> See “Definitions” for an explanation of *takiye*.

population and deep roots in the history of Turkey, the Alevi continue to face discrimination due to the fact that they do not fall within the *de facto* prescribed identity of the Sunni Turk.

The origins of the word Alevi stem from reverence for Ali, the fourth Islamic caliph and, according to Shia Islam, the successor Imam to Muhammed.<sup>28</sup> Though they share etymological roots and syncretic beliefs, the Alevi are not to be confused with the Alewives, who are a distinct sect of Twelver Shia Islam. The Alevi are unique to Turkey and are generally characterized as heterogeneous, with distinctive beliefs and practices drawn from a broad scope of sources; some of these include reverence for Ali (the cousin and son-in-law of the Prophet Muhammed), the twelve imams, and Hacı Bektaş Veli, or take inspiration from Sufism or other religious and cultural practices. *Alevilik* (Alevism),<sup>29</sup> therefore, encompasses a broad set of beliefs but also a common cultural experience of Alevis in Turkey. Various Alevi groups emphasize different aspects of their self-definitions, choosing to accentuate either social, political, or cultural facets of their identity.

The ethnic and religious origins of *Alevilik* are difficult to define, likely due to Turkey's hegemonic version of laicism that has, in essence, installed state-controlled Sunni Islam as the semi-official religion of the country within the scope of a secular constitution (Dressler 2013, xii). There are two widely acknowledged views about *Alevilik*: 1) *Alevilik* is a part of Islam, though located on the margins; and 2) *Alevilik* is an intrinsic part of Anatolian and Turkish

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<sup>28</sup> The schism between the Shia and Sunni branches of Islam that exists today was caused by a disagreement over who Muhammed's successor would be.

<sup>29</sup> See the "Definitions" section at the end of this study for a more complete definition of *Alevilik*.

culture, dating back to Central Asian Turkic history (Dressler 2013, xii). Some Alevi do not embrace the unidimensional religious definition because it ignores the cultural aspects of Alevi identity, as well as the influence of Sufism. Other Alevi discard Islam entirely and consider Alevism to be a unique culture. This syncretism and differences of opinion make it difficult to define Alevi theology. Additional difficulties related to definition are rooted in the group's leadership structure and its historically secretive nature. The discrimination and threats the Alevi face have also played a significant role in the failure to formulate "a fully articulated shared code of theology or conduct" (Yavuz 2003, 66).

Alevi identity in Turkey is communal in nature, with shared culture, moral values, rituals, and common collective emotions, all of which make this group very distinct from the Sunni majority (Köse 2012, 576). Their liberal positions on gender equality, alcohol consumption, and their religious practices (which often include music and dancing) do not strictly follow the five pillars of Islam (declaration of the unity of God and Muhammad as His Prophet; ritual prayer five times per day; almsgiving; fasting during the Holy Month of Ramadan; and pilgrimage to Mecca). As a result, the Alevi have often found themselves the victims of Sunni Muslim prejudice, stereotyping, and discrimination (Erman and Göker 2000, 101).

The community that is now recognized as the Alevi has a history in Turkey dating back to Ottoman times. In the first three hundred years of the Ottoman Empire, all dervishes and *tekkes* (dervishes' houses of worship) were consolidated under one religious figure, Hacı Bektaş Veli (Melikoff 1998, 5), a 13th century mystic and saint. During this period, the Alevi were divided into two groups: the Bektaşî, who were relatively sedentary, and the Kızılbaş, who were nomadic or semi-nomadic (Melikoff 1998, 5; Yavuz 2003, 66). The Kızılbaş and Bektaşî share

similar beliefs. However, the Kızılbaş identity arose from the tension “between [the] sedentary and nomadic lifestyles of Turkic tribes, the rivalry between Ottoman and Safavid empires, and the presence of heretical ideas in Anatolia” (Yavuz 2003, 66). The nomadic Kızılbaş struggled against the Ottoman Empire to retain their customs and conventions as the state attempted, even then, to impose Sunni Islam upon the population (Yavuz 2003, 66). The Bektaşî order was abolished by Sultan Mahmut II in 1826 (Vorhoff 1998, 25), which resulted in the closure of the *tekkes* and the dervishes being exiled.

The oppression of the Bektaşî was relaxed during the Tanzimat period (1839-1876), but the Alevi had the memory of Ottoman oppression fresh in their minds and were generally supportive of Atatürk’s reforms—namely the disestablishment of Sunni Islam and the implementation of strict secularism (Yavuz 2009, 66). Atatürk and his colleagues attempted to unify the diversity of religions, ethnicities, and cultures under a wholly new identity of “Turk.” These political, legal, cultural, social, and economic policy changes were an attempt to create a modern, Westward-looking, democratic, representative, unified, and secular republic. Some components of Alevi identity were included to construct the newly envisaged Turkish identity, with the Young Turks idealizing the Alevi as “true Turks” (Kehl-Bodrogi 2003, 57). For example, the use of Turkish in the call to prayer (*ezan*) was in line with the Alevis’ use of Turkish as its liturgical language in contrast to Sunnis, who prefer Arabic. Alevis consider themselves Turkey’s “true democrats” (Kinzer 2001, 64) because of their influence on Atatürk’s reforms.

No sooner had these reforms been implemented, that further secularization laws were passed in the name of nation building. This included the legislation package in 1925 that closed

all Sufi lodges (*dergah*) and Alevi places of worship (*cemevi*) and banned the use of religious titles for both Sunnis and Alevis (Kuru 2009, 221), which are essential to Alevi religious structure. This forced an “internalization of faith” and the need for Alevis to distance themselves from the religious aspects of Alevism, adopting an identity focused more on culture rather than religion.

Alevis remained relatively unnoticed until the 1960s. The debate over what it meant to be “Alevi” still centered on actual beliefs and whether Alevism was a religion, a denomination of Islam, or a Sufi *tarikât* (sect). As a result, Alevis adopted the aforementioned “Turkish” identity as form of legitimization (Massicard 2005, 121). In 1963, President Cemal Gürsel inquired about the establishment of a “*mezhepler dairesi*” (denominational department) within the *Diyanet* so that “all Muslim communities be treated equally” (Massicard 2005, 119). This proposal sparked outrage among conservatives who claimed that such a project would “bring ‘*mum söndü*’ ceremonies into the mosques.”<sup>30</sup> They further argued that Alevism was not a *mezhep* (denomination) but a *tarikât*, which remained an illegal institution (Massicard 2005, 119). It was also in the 1960s that Alevi associations began to form and the *Birlik Partisi* (BP, Unity Party; later changed to *Türkiye Birlik Partisi*) was established as the first “confessional” Alevi political party, winning 2.8 percent of the vote<sup>31</sup> and eight seats in Parliament in 1969 (Yavuz 2003, 67).

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<sup>30</sup> There is a fairly widely known misrepresentation of the ceremonies that occur in *cemevi*, which is occasionally propagated as Alevi congregants “turning out the lights” (*mum sönmek*, which literally means “to extinguish a candle”) and committing acts of incest and adultery.

<sup>31</sup> The current 10 percent electoral threshold that is in currently effect was not implemented until 1983, following the 1980 coup.



Political, cultural, and religious tensions increased throughout the 1970s. What was primarily framed as a struggle between left and right in fact had deeper undertones of religious animosity between ultranationalist Sunni fundamentalists and the Alevi. Towards the end of the decade, the Alevis were victims of a number of brutal assaults. In April 1978, eight Alevis were killed and approximately one hundred injured over three days of violence in Malatya. Later that year, in September, 12 Alevis were killed and approximately 200 injured in an attack on an Alevi neighborhood in Sivas. The most violent attack, known as the Kahramanmaraş (Maraş) Massacre, took place in December 1978. This single event took the lives of more than 100 Alevis and injured thousands. Some claim that these massacres were carried out by the state; at the very least, the state stood by in silent complicity (Kılıç 2011). The same accusation is made in relation to nationwide tension that peaked in 1980 and led to the coup that ushered in three years of military rule.

It is important to recall the identity politics that so heavily influenced the 1980s to appreciate the Alevi experience during this time. Alevi identity underwent a revival in this decade and began to more firmly assert their identity. Part of this process included the revitalization and reformation of Alevi institutions and the development of new networks aimed at ending their social and institutional discrimination, “as well as their recognition as a community legitimately different from the Sunni majority population” (Dressler 2013, xi). This revival was likely the result of a reaction to the further homogenization and solidification of a Sunni Turk national identity that came about as part of the Turkish-Islamic Synthesis following the 1980 coup. Thus, by the 1990s, the Turkish state’s homogenization project was being

countered by the resurgence of ethnic and religious groups, including the Alevis and also the Kurds (Çelik 2003, 141).

Minority resurgence coincided with an upsurge in fundamentalist Sunni Islam, as reflected in the 1994 local elections and 1995 parliamentary elections when the Islamist RP increased first its proportion of provincial mayorships and then parliamentary seats significantly (Hale and Özbüdün 2010, 4). The rise of fundamentalist Sunni Islam can also be seen in a series of violent events that took place before and after these elections. In July 1993, Alevi intellectuals assembled at the Madımak Hotel in Sivas to honor the work and life of 16th century Alevi poet Pir Sultan Abdal. Just after the Friday prayers, a mob of pro-RP activists burst through security and set the hotel on fire. Video recordings of the Madımak Incident indicate that “police clearly sided with the mob and did not use force to disperse it” (Yavuz 2003, 77). Thirty-seven were killed and more than 50 injured. The police were again slow to react to the 1995 attacks in the Alevi-majority Gazi neighborhood in Istanbul where 23 people were killed and more than 1500 injured over four days of rioting. After this incident, Alevis began to assert their identity and mobilize politically (Yavuz 2003, 78, 242).

When the AKP government was first elected to office in 2002, many Alevis felt discriminated against. The AKP government had ignored or denied Alevi claims for rights recognition and then-PM Erdoğan made no mention of the Alevi in his speeches or in the party platform (Köse 2010b, 147). In response to Alevi discontent, during the AKP’s second term of office (2007-2011) the government initiated what became known as the Alevi Opening, a dialogue between the government and the Alevi community to identify and attempt to accommodate Alevi identity claims within Turkey’s political and legal setting (Soner and Toktaş

2011, 420). A series of workshops were conducted in 2009 and 2010 that gathered participants from the Alevi organizations, government representatives, academics, journalists, and members of civil society organizations to address the Alevi's major demands:

- State support for Alevi institutions comparable to support for Sunni Islamic institutions,
  - or, alternatively, as some Alevi organizations demanded, the state's complete retraction from the organization of religious affairs (i.e., complete detachment from the *Diyanet*);
- the abolition of mandatory school classes on "Religious Culture and Ethics,"
  - or, alternatively, adequate and positive representation of Alevism therein;
- the recognition of *cemevi* as "houses of worship," a status that is granted to mosques, churches, and synagogues (i.e., to the houses of worship of those religions that are recognized in traditional Islamic discourse as *din* [religions] and had already been privileged within the Ottoman state);
- some form of state recognition and material support for Alevi ritual leaders (*dede*);
- and conversion of the Madımak Hotel in Sivas (the site of the Madımak Incident) into a museum to commemorate the tragedy (Dressler 2013, xii-xiii).

The Alevi community claims that no concrete steps have been taken to meet their demands for recognition and that the "opening" was simply an electoral ploy by the government (Doğan 2014). The number of domestic and ECtHR cases that the Alevi have brought forward to date are an indication that Alevis continue to face barriers to recognition of their identity and the free exercise of their political and associational rights.

#### **4.3.3 Lausanne Minorities: Armenian Orthodox, Greek Orthodox, and Jews**

Turkey's long-standing policy toward religious minorities is based on the Lausanne Treaty of 1923, which is considered a foundational document of the Turkish Republic. The treaty takes a simplistic view on national minorities and defined them as "non-Muslims." The treaty, however, only included the Armenian Orthodox, Greek Orthodox, and Jewish communities (Treaty of

Lausanne 1923, Articles 37-45). These religious minorities' distinct and recognized status is due to the fact that they were the three largest *millet*s during the Ottoman Empire (Toktaş and Aras 2009, 700).<sup>32</sup>

The relevant articles of the Lausanne Treaty outline the rights and freedoms these minorities possess. These rights were reinforced in subsequent constitutions, at least in writing, if not in practice. While non-Muslim citizens are granted citizenship rights, the Lausanne Treaty has been interpreted in ways that place restrictions on minority individuals. The government's refusal to recognize the leadership or administrative structures of the Lausanne Treaty communities has forced them to depend on their own independent foundations with separate governance boards for their properties. The subjective interpretation of Lausanne has also posed a problem in terms of the election of leaders. For example, religious clergy of any faith (even Islam) are required to be Turkish citizens, posing challenges for the selection of qualified clergy since Turkey has prohibitively restrictive laws on training and selecting clergy.

These three "Lausanne" communities have a long-standing history and presence in the territory of modern Turkey, distinct characteristics, and are concerned with preserving their common identity, all of which are elements of what the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms has defined as a "national minority" (Council of Europe Parliamentary Assembly 1993, Section 1, Article 1). They remain

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<sup>32</sup> In 1925, The Bulgarian-Turkish Treaty of Friendship extended recognition to Bulgarian Christians of Turkish origin, though this has few implications since there is no significant Bulgarian population in Turkey (Toktaş and Aras 2009, 700-701).

present and active today, although their populations have dwindled significantly over the years for various reasons.

### *Armenian Orthodox*

Turkey's Armenian Orthodox community is the country's largest Christian denomination with a population of approximately 90,000 (60,000 of which are Turkish citizens, and 30,000 are undocumented immigrants from Armenia) (United States Department of State 2016, 2). Most of the community resides in Istanbul, which is the seat of the Armenian Patriarchate of Constantinople, one of the two autonomous Sees of the Armenian Apostolic Church (the other is in Jerusalem).

The Patriarchate is led by the Armenian Patriarch of Constantinople, a position that is currently vacant. Archbishop Mesrob Mutafyan was elected patriarch for life in 1998, but stepped down in 2016 due to health concerns. The selection of a new Armenian Patriarch is complicated by the fact that the relationship between the Patriarchate and the Turkish government is still (*de facto*) governed by an 1863 Ottoman regulation. Though there are differing views of whether this regulation is still valid, the Patriarchate assumes it is (Yıldırım 2010a). The problem is that the regulation does not stipulate what to do when a patriarch falls ill, as is the case with Mutafyan; it only explains a procedure to follow when a patriarch dies or resigns (Yıldırım 2010a). Though there are no Turkish laws that address this issue specify how this process is to take place, the Turkish Ministry of Interior has repeatedly interfered with the nomination and selection process. This process that is complicated by the fact that the community is divided about how and when to hold an election, in part due to the government's repeated interference. As of February 2018, while Patriarch Mesrob is "incapacitated" and

unable to fulfill his duties, the “established practice” of seeking the state’s permission to conduct elections remains. The Turkish Ministry of Interior, however, has informed the community that the necessary conditions have not been met to hold a new election (i.e., Patriarch Mesrob is still living) (Yıldırım 2018). It is also worth noting that the Turkish government refuses to accept the jurisdiction of the Armenian Patriarchate outside Turkey and denies its use of the title “Patriarch of Constantinople” and instead uses “Armenian Patriarch.”

The complicated and delicate relationship between the Armenian Orthodox community and the Turkish government is also tainted by late-Ottoman history. The long-standing animosity between Turks and Armenians, both domestically and in the diaspora, dates back to World War I when the Ottoman Armenian population sided with Russia against the Ottomans. This resulted in a massive relocation campaign of the Armenians living in Ottoman territory and the subsequent arrest and death of what some estimate reached nearly 1.5 million. Armenians, particularly those in the diaspora, aim to have Turkey officially recognize what happened in 1915 as genocide. While 28 countries (Armenian National Institute 2018) and a number of international bodies, including the European Parliament, the COE, and the Catholic Church, have made official proclamations of genocide recognition, Turkey does not acknowledge the events as such.

#### *Greek Orthodox*

Byzantium, which became Constantinople to honor the Emperor of the Eastern Roman Empire, Constantine the Great (the first Christian Emperor) and later became Istanbul, was officially recognized as the Patriarchate of Constantinople at the Council of Chalcedon in 451. At this Council, the Roman Catholic Church, Eastern Orthodox Church, and the Oriental Orthodox Church divided over “Christology.” The Oriental Orthodox Church rejected the outcomes of the

Council, one of which was the declaration of the dual nature of Christ as divine and human. It was then that the Ecumenical Patriarchate of Constantinople representing the Eastern Orthodox Church, which is an autocephalous communion of churches, was recognized as the “first among equals” of all of the bishops, and the Roman Catholic Church remained in communion<sup>33</sup> until the Great Schism of 1054. The Ottomans’ 1453 Conquest of Constantinople marked the fall of the Byzantine Empire and Orthodox Christians were absorbed into what would become the *millet* system. At its peak, the Greek Orthodox population of Istanbul was 350,000 (see Figure 1, below); but, much like the Armenian Orthodox population, this had dwindled by the end of the Ottoman Empire. In 1923, Turkey and Greece agreed to a population exchange where many Greek Orthodox citizens would be returned to Greece and Muslims to Turkey. The Lausanne Treaty solidified the rights of the approximately 100,000 Greek Orthodox Christians that remained in Turkey and their religious institutions. The same applied to the Muslim population in Greece.

In September 1955, violence erupted in Turkey over claims that Atatürk’s birth home in Salonika (Thessaloniki), Greece, had been burned. Known as the Istanbul Pogrom, these attacks on the Greek population in Istanbul spurred the return of many ethnically Greek Turkish citizens to Greece. Nine years later, another mass expulsion of thousands of ethnically Greek Turkish citizens occurred due to the Cyprus conflict, when Turkey halted an agreement that had been in place that permitted ethnic Greeks to reside in Turkey (Walz 1964).

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<sup>33</sup> “Communion” here referring to the common acceptance among churches and individuals holding common beliefs, not to the sacrament of Holy Communion.

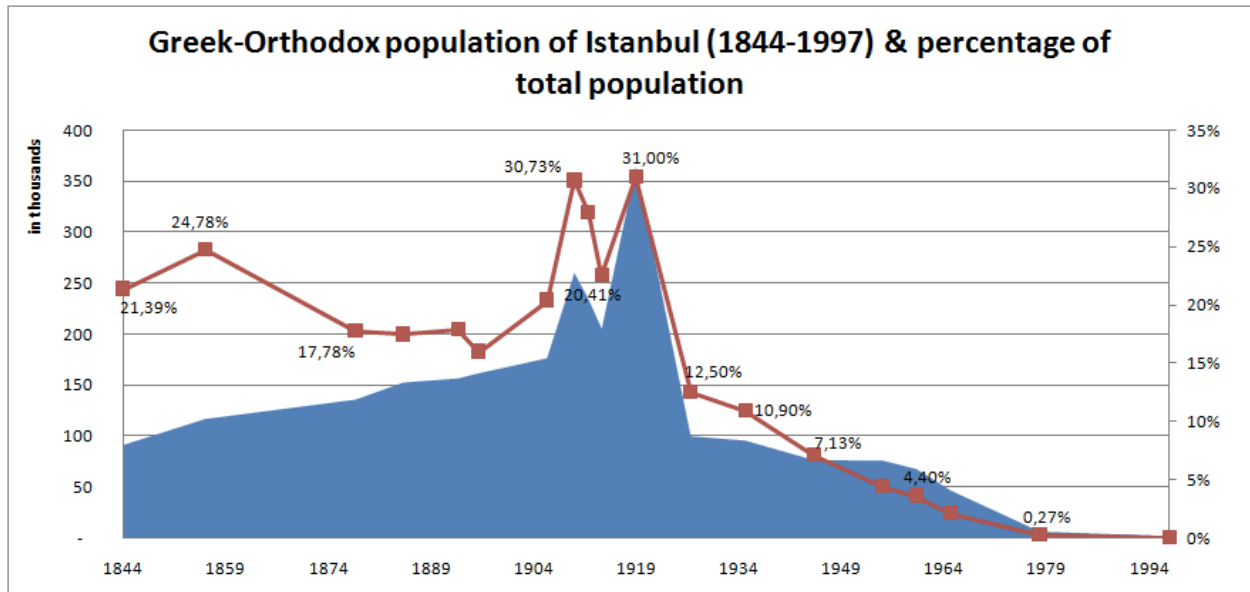


Figure 1. Greek-Orthodox population of Istanbul (1844-1994) & percentage of total population

Source: “Greek Orthodox Population of Istanbul: 1844-1997” 2017

The Ecumenical Patriarchate remains in Istanbul and serves the approximately 300 million Orthodox Christians worldwide. As in the case of Armenian Christians, the Turkish government refuses to recognize the jurisdiction of the Greek Orthodox Patriarchate outside of Turkey and does not acknowledge the title “Ecumenical Patriarchate”; instead, the government uses the title “Patriarch of Fener,” in reference to the neighborhood in Istanbul in which the Patriarchate is located. The Halki Theological College (the higher education branch of the Patriarchate), which had been operating on an island just outside Istanbul since Ottoman times, has been closed since 1971 after the Turkish Constitutional Court ruled that private higher education institutions must be affiliated with a state-operated university. In 2004, the reopening of the seminary was indefinitely suspended due to “concerns of the Turkish military and the National Security Council that the Greek Orthodox minority constitutes a potential security



threat to the territorial integrity of the Turkish State” (Prodromou 2005, 19). Furthermore, the Turkish government mandates that the designated Patriarch must be a Turkish citizen, in spite of the fact that this contradicts the Lausanne agreement. The elimination of clerical training opportunities for Greek Orthodox Turkish citizens, requiring that the Patriarch be a Turkish citizen, and significant hurdles put in place by the government for the actual appointment process pose incredible challenges in the community’s appointment of spiritual leaders. These direct and indirect discriminatory practices have led the Greek Orthodox population to flee Turkey, as seen in Figure 1. The approximately 2000 Greek Orthodox Christians who remain today (Bulut 2017) are primarily elderly and living in Istanbul.

### *Jews*

The history of Jews in Anatolia dates to the 4th century BCE, as indicated by remnants of settlements discovered along the Aegean coast (American-Israeli Cooperative Enterprise 2018). Since then, there has been a continuous Jewish presence on the land that currently constitutes modern-day Turkey. Though the Jewish population is included among the recognized Lausanne minority groups, unlike the Armenian and Greek minorities, the Jewish minority in Turkey is not ethnically or linguistically homogenous (Karimova and Deverell 2001, 10). Most of the population consists of Sephardic Jews exiled from Spain during the 15th century Inquisition who speak Ladino; a smaller group of Askenazi Jews from central and northern Europe who speak Yiddish; and an even smaller group of Karaite Jews who speak Greek (Karimova and Deverell 2001, 10).

In 1933, when the Nazis came to power in Germany, Turkey offered safe haven to a number of Jewish scholars, and during WWII, Turkish diplomats secured citizenship

documentation, protection, and repatriation to Jews in France and Greece (Bishku 2017, 441). In spite of the fact that the Jewish population in Turkey grew to around 125,000 during the war, the 1942 *Varlık Vergisi* (Capital Tax), which was imposed for two years, had a severe impact on the Jewish and Christian populations of Turkey, forcing business owners who were unable to pay the tax into forced labor, causing a number of businesses to declare bankruptcy, and pushing Jews to flee Turkey after the war (Bishku 2017, 441).

Jews migrated en masse to Israel when the state was established in 1948 (Toktaş and Aras 2009, 704). Another wave of emigration occurred after the 1967 Arab-Israel War, when right-wing nationalist/anti-Semite groups in Turkey, who viewed the war as a religious conflict, took sides with the Palestinians (Bishku 2017, 443-444). Today, there are approximately 17,000 Jews residing in Turkey (United States Department of State 2016, 2), mostly in Istanbul. While the Jewish population has faced comparatively fewer acts of violence or discrimination and reports that it is able to practice and worship freely, the community is still targeted by hate speech in online and print media, and occasionally in speeches by Turkish government officials (United States Commission on International Religious Freedom 2016, 188). The most overt attack occurred in 2003 with the bombing of two Istanbul synagogues. Still, there are positive developments. In 2015, the Great Synagogue in Edirne reopened and services were held for the first time in nearly 50 years. Hanukah was also celebrated publicly with government officials in attendance (United States Commission on International Religious Freedom 2016, 204). It seems, however, that the population is headed for another drastic decline. From approximately February 2016 to May 2017, nearly “4,700 Turkish Jews applied for or received passports from Spain, Portugal, and Israel” (O’Brian 2017).

#### 4.3.6 Protestant

While it may not be explicitly recognized as such, the territory of the Republic of Turkey has a rich Christian history. For example, according to the Bible, believers were first called “Christians” in Antioch (modern Antakya).<sup>34</sup> As well, two-thirds of the 27 books of the New Testament were written either on the way to or from Asia Minor (modern Anatolia) (Wilson 2010, 13). This is likely due to the fact that, as the Gospels were being disseminated from Israel toward Rome, the disciples, especially Paul, spent significant amounts of time proselytizing to the communities in Turkey on their way.

Today, while there are more than 140 small and large Protestant fellowship communities in Turkey, consisting of five religious foundations and 34 church associations, the Protestant community is small (approximately 6-7,000 people) and situated mostly in Istanbul, Ankara, and İzmir (Association of Protestant Churches 2017, 2). Interactions between Turkish citizens and Protestants are rooted in the 200-year history of evangelical missionary work in Turkey (Özyürek 2012, 100). Missionaries have been considered a threat to national unity and identity since Ottoman times, and the Turkish state remains paranoid about (Protestant) Christian missionary activities. Missionizing was prohibited for a period of time, but was permitted again in the 1980s under Turgut Özal’s reforms (Özyürek 2012, 102).

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<sup>34</sup> Acts 11:25-26: “Then Barnabas went to Tarsus to look for Saul, and when he found him, he brought him to Antioch. So for a whole year Barnabas and Saul met with the church and taught great numbers of people. The disciples were called Christians first at Antioch.”

In 2016, as in previous years, the Protestant community reported continued hate crimes against them, including physical attacks, church vandalism, and hate speech directed at the clergy (United States Commission on International Religious Freedom 2016, 189). The same year, citing security concerns, Turkish officials prohibited the public celebrations of Christmas and Easter (Association of Protestant Churches 2017, 3-4). The 2016 Human Rights Violations Report of the Association of Protestant Churches (of Turkey) lists numerous examples of the various ways in which Protestants in Turkey face discrimination and violence, including problems related to places of worship, the right to propagate religion, education and compulsory religious classes, the training of religious leaders, legal personality and the right to organize, and obligatory declarations of faith (as it relates to the Turkish national identification card) (Association of Protestant Churches 2017, 4-9). One recent story that has garnered attention is the detention of and charges laid against Reverend Andrew Brunson, a US citizen who has lived in İzmir and led a small church there for more than 20 years. The Turkish government alleges that he has ties to the Gülen Movement, recognized by the Turkish government as *Fetullahçı Terör Örgütü* (FETÖ, the Fetullah Gülen Terrorist Organization).

#### **4.3.7 Jehovah's Witness**

Formed in the United States in 1931, the Jehovah's Witness movement is relatively new. The official website of Jehovah's Witnesses in Turkey declares that there has been a consistent presence of Witnesses in Turkey since that date, with 40 active congregations and more than 3,000 members (out of approximately 7 million worldwide) (Jehovah's Witnesses 2018). Accordingly, Jehovah's Witnesses has been categorized as a "new or relatively new" religion under Article 9 of the ECHR, meaning that the organs of the Convention have implicitly or

explicitly acknowledged a “certain level of cogency, seriousness, cohesion, and importance” to the convictions of the group and afford them protection under Article 9 (Council of Europe, European Court of Human Rights 2015, 7-8).

Jehovah’s Witnesses share some similarities with Christianity, and even consider themselves Christian, but are non-Trinitarian (i.e., they deny the doctrine of the Holy Trinity, that God is triune—Father, Son, and Holy Spirit in one “body”). They recognize all 66 books of the Bible (New and Old Testaments) as the inspired word of God, but will only use their own New World Translation (NWT). They refer to God as “Jehovah,” which is a transliteration of the name Yahweh, spoken in the narrative of the burning bush in Exodus (Patheos 2017). One of the core rituals is attendance of five meetings each week (home Bible study and Watchtower study) and committing to a minimum of ten hours per month of door-to-door proselytizing (Patheos 2017).

While the group claims that they have had a presence in Turkey since just after the founding of the Turkish Republic, they also claim that they did not face religious persecution until the 1980s (Jehovah’s Witnesses 2018). Like many other non-Hanefi Sunni groups, Jehovah’s Witnesses have faced challenges to obtaining legal recognition and establishing places of worship and religious activity, though they did receive favorable domestic court decisions in 2007 that permitted their official registration (Jehovah’s Witnesses 2018). Though Jehovah’s Witnesses should legally be granted the right to establish Kingdom Halls (the place of worship of Jehovah’s Witnesses), Turkish municipal authorities frequently deny this right (see *Association of Solidarity with Jehovah’s Witnesses et al. v. Turkey* [Application Nos. 36915/10 and 8606/13] 2016).

Yet one of the recurring challenges to the community is Turkey's non-recognition of conscientious objection to military service. Jehovah's Witnesses have brought three cases to the ECtHR since 2011. In each case, the Court ruled that Turkey had violated the right to conscientious objection. Nevertheless, Turkey remains the only member of the Council of Europe that does not recognize this right and continues to prosecute those who refuse to perform mandatory military service.

#### **4.3.8 Atheism and Pacifism**

While some may not consider atheism or pacifism "beliefs" in the strict sense of the term because they are considered philosophical convictions, they fall within the scope of Article 9 of the Convention. The organization American Atheists states that: "Atheism is not an affirmative belief that there is no god nor does it answer any other question about what a person believes. It is simply a rejection of the assertion that there are gods. Atheism is too often defined incorrectly as a belief system. To be clear: Atheism is not a disbelief in gods or a denial of gods; it is a lack of belief in gods" (American Atheists n.d.). In its rulings, the ECtHR has been unequivocal that freedom of thought, conscience, and religion is "a precious asset for atheists, agnostics, sceptics and the unconcerned" (*Kokkinakis v. Greece* [Application No. 14307/88] 1983, §31).

Due to continuous repression of atheists in Turkey, it is very difficult to obtain information or statistics about atheism or atheists in Turkey. For example, the website of the Atheist Association, which was founded in 2014 in Istanbul, was blocked in March 2015 by a court, citing Article 216 of the Turkish Penal Code which prohibits "provoking the people for hate and enmity or degrading them" (Middle East Eye 2015); 47 other websites were also shut down at the same time with the same argument (D. Jones 2015). The founding member of

Turkey's Atheism Association, Onur Romano, told VOA that "Through Facebook, Twitter, emails, and to our call center, we have received a couple of hundred death threats already," (D. Jones 2015). On two occasions in the past few years, then-PM and current President Erdoğan has conflated "terrorists" and "atheists" in an attempt to criticize those with non-Hanefi Sunni beliefs or those who defend them (*Hürriyet Daily News* 2014; *Hürriyet Daily News* 2015).

Another group that is included in this study is pacifists. Though pacifists are not subject to the same severe level of outright discrimination and violence as other minority belief communities, they still face challenges. While it is virtually impossible to find information and statistics on pacifism in Turkey, Turkish pacifists and atheists share a common challenge: conscientious objection. The Stanford Encyclopedia of Philosophy defines pacifism as a broad commitment to peace and opposition to war (Fiala 2014). The ECtHR has also acknowledged that pacifism is protected under Article 9 as one among other "various coherent and sincerely-held philosophical convictions" (*Arrowsmith v. United Kingdom* [Application No.7050/75] 1978, §69). Article 9 is not always included as a violation in judgments related to conscientious objection (the most common application category of cases by pacifists). It is often read in conjunction with Article 3 (prohibition of torture and inhuman or degrading treatment or punishment) and/or Article 6 (right to a fair trial), depending on the nature of the cases.

#### **4.4 Conclusion**

In conclusion, Turkey has had a complicated and complex history. Some of the challenges that have arisen since the founding of the Turkish Republic are rooted in the institutional arrangements that were carried over from or influenced by the institutional settings of the Ottoman Empire. This is particularly true for the approach to the governance of religious

classifications. The *Diyanet* remains the monolith of the state's heavy-handed influence, or even authority, over religion in Turkey. The institution's intent is to manage (Hanefi) Sunni Islamic practices and manifestations; yet as illustrated in some cases here, it also interferes in the interpretation, practices, and manifestations of other belief systems in Turkey.

The next chapter provides the methodological framework through which this study was conducted. It includes a review of the study's purpose and research questions. Next is a section acknowledging the difficulties in any analysis of measuring compliance with the judgments of a supranational court. The research approach is then justified and explained with this in mind. The chapter concludes with a description of the data, instrumentation, collection, and analysis.



## **CHAPTER 5. Methodology**

The conclusion of Chapter 3, which described Turkey's experience with the European Court of Human Rights (ECtHR), introduced the issue of high volume of applications made against Turkey, as well as challenges surrounding implementation. Taking these issues into consideration, this chapter will explain how this study systematically approached the research questions it seeks to answer. The chapter begins with a contextual examination of ECtHR compliance and a reiteration of the aim of the study through a review of the research questions. This is followed by an overview of the challenges surrounding the measurement of compliance with supranational judicial bodies, the ECtHR in particular, and a justification for the chosen research approach. The chapter closes with a description of the data, instrumentation, data collection, and data analysis.

### **5.1 Context and Aim of the Study**

State compliance with adverse rulings in the ECtHR varies across European Convention on Human Rights (ECHR) articles and issues and is contingent on the nature of the issue and the state involved. Compliance is a multi-faceted process, largely determined by domestic political circumstances and involving a number of actors with conflicting interests in relation to the mechanisms and outcomes of implementation (Anagnostou 2010; Hillebrecht 2012, 2014; Huneus 2014). The fact that effective execution remedies are largely a domestic issue was even acknowledged in the ECtHR's 2017 Annual Report (European Court of Human Rights 2018, 7). The most recent report of the Council of Europe's (COE) Committee of Ministers (CoM) demonstrates that while the Court and CoM continue to increase the number of cases closed each year, owing to structural changes that have been made in the Court and CoM, executing these

judgments in a timely and comprehensive manner remains a challenge. While structural and operational issues within the COE certainly contribute to non-implementation by High Contracting parties, certain “repeat offender” states have reinforced the idea that domestic institutional arrangements also play a significant role in inhibiting the full implementation of adverse judgments.

This study aims to examine precisely these domestic institutional factors that both prevent Turkey’s compliance with the obligations of implementation and have led to greater judicialization at the ECtHR on issues related to thought or belief in Turkey. The research questions that guided data collection and analysis<sup>35</sup> are identical to the ones initially formulated in Chapter 1:

- What are the similarities and differences in the cases non-Hanefi Sunni groups have brought to the ECtHR that have been ruled to be violations regarding religious freedom in Turkey and what are the explanations for these variances or similarities?
- What mechanisms have contributed to Turkey’s implementation/non-implementation of these rulings (political reasons, nature of the reforms required, budgetary reasons, public opinion, judgment language/margin of appreciation, interference with obligations from other institutions)?
- Which types of cases have come closest to implementation, which measures (if any) were selected to implement (general measures, individual measures, just satisfaction, costs and expenses)?

From these questions, six factors were identified as responding to the research question. These were significantly guided by the language of Resolution 1226 of the COE Parliamentary Assembly (Council of Europe, Parliamentary Assembly 2000). Resolution 1226 identified some

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<sup>35</sup> All cases in this dataset except one were still pending in the Committee of Ministers.

of the major issues regarding non-implementation of judgments. The six selected factors and the questions they inspire are: 1) *political reasons*: are there active or passive political coalitions that are pro- or anti-reform of the issue at hand? Which political party was in government while the case was open? Did the political party in power seek to avoid political responsibility for a contentious issue or did they take ownership of it to appear responsive to external pressure (domestic or international)?; 2) *reasons to do with required reforms*: what was the relative difficulty or ease in changing the judicial, constitutional, administrative, legislative, executive, or military laws, structures, or operations; 3) *budgetary reasons*: were there financial barriers related to individual reparations (compensation, return of property)? If so, why? Were there constraints on the national budget that prevented the implementation of the requisite general measures (financial/revenue concerns regarding changing laws, administrative procedures, or other institutional structures)?; 4) *reasons to do with public opinion*: what is the identity of the minority involved (their historical reputation and treatment by society)? Were there simultaneous exogenous events that swayed public opinion during the execution of the case (wars, attacks, the issuance of other international rulings regarding the group involved)? Did the Turkish government seek to demonstrate a respect for human rights or evade responsibility thereof (related to public opinion)?; 5) *judgment drafted in an ambiguous or explicit manner*: is the language used in the judgment regarding the expectations and/or obligations for compliance with the ruling explicit or vague?; and 6) *reasons relating to interference with obligations deriving from other institutions*: what is the weight of institutional dependence (what is the impact of the number and type of other domestic and international institutions that are involved)?

## 5.2 Challenges to Measuring Implementation

Measuring implementation of adverse rulings from human rights tribunals is not merely related to case closure. Implementation can often be subjective and is occasionally political, particularly in the case of the ECtHR where the Committee of Ministers (CoM), a body consisting of the Ministers and Deputy Ministers of Foreign Affairs of COE member states, is the ultimate arbiter of case closure. Inconsistent data collection, the failure to define standard measurement benchmarks, and the volume of cases create even more obstacles to accurately assessing compliance (Hillebrecht 2014, 41).

If a violation is found, the Court's default is toward subsidiarity in guidance for a state to take particular measures. On the one hand, this gives the state the opportunity to fashion a solution that is best suited to domestic circumstances; on the other hand, the Court and the CoM's less clear expectations can make it difficult for the state to understand what an optimal and acceptable solution (according to the Court and CoM) would be—not only for case closure, but also to ensure that similar structural issues do not come before the Court again.

Another challenge to measuring implementation is accessibility to information. Although the CoM has taken measures in recent years to increase the transparency of the execution process, it is still relatively difficult to gather information on the status of cases. The HUDOC-EXEC database ([hudoc.exec.coe.int](http://hudoc.exec.coe.int)) stores documentation related to the status of case execution, government action plans and action reports, communications and submissions about the cases, CoM decisions, and final resolutions. However, the HUDOC-EXEC system was only officially launched in January 2017 and does not include complete documentation for each case. In fact, CoM decisions only date from January 1, 2011 onwards; this means that searches for CoM

meeting decisions prior to that date (and in some cases even after that date) require the use of the CM Search (search.coe.int/cm), a non-intuitive system that demands a proficient knowledge of search parameters and key words.

The databases of the CoM are also sparsely populated due to the fact that some states fail to submit action plans and reports in a timely manner, or even at all. Considering this is the primary medium through which the states and the CoM stay abreast of execution developments, the lack of robust official and public communication signals that either the states are not submitting the documents or simply not taking action to report any measures that have been taken to execute a judgment. Importantly, the provision to submit an action plan was introduced into the CoM working methods in 2004, and became obligatory in 2011. Regulations surrounding the submission of action plans have become definitive as the working measures have been updated and clarified. Currently, the Execution Department of the CoM can request follow-up through the Secretariat if the state does not comply with the six-month time limit for submission of an action plan or report and the subsequent reminder and three-month extension. It is unclear how often this procedure is followed in practice due to the outdated or absent action plans/reports for the cases included in the current study.

### **5.3 Research Approach**

This is a qualitative case study of 19 cases of violations Turkey committed related to freedom of belief or religion that have been heard before the ECtHR and were either closed or are still awaiting closure by the CoM. A qualitative case study is most appropriate design to explore this issue because statistics alone cannot answer why Turkey has such a high number of cases against it. A qualitative approach to examining these cases will allow for a multifaceted, contextual

analysis of the circumstances under which these cases have been brought to the ECtHR and the possible causes for the outcomes. Qualitative research also allows for the exploration of intangible factors beyond statistical evidence, including abstruse and obscure elements such as social norms, deeply entrenched historical narratives, cultural and religious identities (whether imposed or chosen), or latent institutional frameworks. Furthermore, a qualitative case study facilitates the examination of phenomena through multiple lenses to reveal the range of conditions that can produce certain outcomes, while binding the type of cases to certain criteria.

As for case studies, according to Yin (2003, cited in Baxter and Jack 2008, 545) a case study is most appropriate when: “(a) the focus of the study is to answer ‘how’ and ‘why’ questions; (b) you cannot manipulate the behavior of those involved in the study; (c) you want to cover contextual conditions because you believe they are relevant to the phenomenon under study; or (d) the boundaries are not clear between the phenomenon and the context.” These criteria suit the study at hand. The current study is considered a multiple-case, explanatory and exploratory case study because it compares outcomes across multiple cases; it seeks to explain “presumed causal links in real-life interventions that are too complex for the survey or experimental strategies, linking program implementation with program effects”; and explores the cases in which there is “no clear, single set of outcomes” (Yin 2003, cited in Baxter and Jack 2008, 547-548). Cases relating to the international judicialization of religion fall squarely within these criteria because they explore “how” and “why” international judicialization occurs, as well as “how” and “why” cases are executed, or not.

### **5.3 Data, Instrumentation, and Collection**

Before explaining the current study's data, instrumentation, and collection, it is important first to define "implementation" to understand more clearly what is being examined. While some scholarship conflates compliance, implementation, and execution, this study chooses to use these terms interchangeably. "Some juxtapose 'compliance' as adherence to a legal rule, to implementation as the behavioral change that such adherence produces; others see compliance as an advanced phase of instrumental (as opposed to principled) conformity, in the continuum from the coincidental abiding with a rule to its full internalization domestically; yet others see compliance as referring to the degree of a state's deviation from the central tenets of a treaty but also extending to the depth of a state's commitment to it" (Anagnostou and Mungiu-Pippidi 2014, 211-212). For the sake of this study, these three words (compliance, implementation, and execution) will refer to the process in which an offending state works toward its obligations under the ECHR to remedy adverse rulings from the ECtHR in a way that is ultimately deemed satisfactory by the CoM, resulting in closure of the case. It is worth noting that while the CoM may decide to close a case or set of cases, this is in no way an indication that similar cases may not come forward and be deemed admissible by the Court, but only that foreseeable structural issues have been resolved domestically.

While the European Court of Human Rights case judgments and their associated documentation in the Committee of Ministers were the primary sources of data for this study, the study is also informed by interviews conducted at the Council of Europe in Strasbourg, France, other government documents, media sources, books, and archival material. The use of a number of data sources allows for triangulation, thus increasing the data's reliability, as well as

elucidating themes within and across various categories of cases. This research project has been exempted from approval by the University of Saskatchewan Research Ethics Board due to the nature of the research and data intended to be collected.

### **5.3.1 ECtHR Court Cases and CoM Documents**

Knowing Turkey to be a repeat offender at the ECtHR, the initial search for cases to be included in this study began at the HUDOC ([hudoc.echr.coe.int](http://hudoc.echr.coe.int)) site. The search criteria were initially delimited by cases where Turkey had violated Article 9. After reviewing the results from this query, and recognizing that a number of cases related to freedom of belief and religion were not included, the search was expanded to include violations of other articles. At the same time, a query for cases brought against Turkey in the database of the Strasbourg Consortium ([www.strasbourgconsortium.org](http://www.strasbourgconsortium.org))<sup>36</sup> was conducted. These two databases contain case information dating from the 1950s (1955 for HUDOC and 1957 for the Strasbourg Consortium). The two lists were compared for matches or missing cases. The number of cases was narrowed further by applying the following criteria:

- The case must have been heard and decided on by the ECtHR Grand Chamber or other chamber (excluding cases that have been deemed inadmissible, communicated, or settled out of court) and been ruled to be a violation;
- The case must not concern the military, with the exception of conscientious objector cases;

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<sup>36</sup> The Strasbourg Consortium is an association of academic institutions interested in freedom of religion or belief primarily maintained by the International Center for Law and Religious Studies at Brigham Young University's Law School. It is a good resource for news, research, discussion, and the status of cases at the ECtHR.



- The primary issue of the case must not be related to terrorism or recognized terrorist groups (Kurdistan Worker's Party [PKK], Hizbollah, etc.);
- The primary issue of the case must not be related to a political party;
- The case must not concern belief expression related to attire or jewelry;
- The case must have been brought against Turkey directly (i.e., no cases related to Cyprus);
- The case must have been brought by an individual or group who claimed their thoughts, religion or conscience were infringed upon (whether or not the belief is recognized by the Turkish government);
- The case must concern an individual or group that does not identify as Hanefi Sunni.

The decision to only include cases that had been heard and ruled to be a violation was made to be able to examine the execution phase of the case. Cases that were deemed inadmissible, were communicated, or settled out of court (friendly settlements) are not necessarily indicative of measures Turkey had taken to resolve the issues that were raised in the case. Excluding cases related to the military<sup>37</sup> (with the exception of conscientious objectors), terrorism/terrorist groups, and political parties was deemed appropriate so as not to conflate issues of belief or conscience and direct political ideologies, military objectives, or terrorist intentions. Also, cases related to religious attire or jewelry were excluded due to the extensive amount of research that has already been conducted on this issue in the Turkish context.<sup>38</sup> Finally, the limitation that the

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<sup>37</sup> In the late 1990s, approximately 15 cases were brought forward by individuals and groups from Turkey alleging that their dismissal from the military was due to their religious fundamentalism and/or their wives wearing the Islamic headscarf. These cases were deemed inadmissible by the ECtHR.

<sup>38</sup> Most notable in this category is the case of *Leyla Şahin v. Turkey* (Application No. 44774/98) where the ECtHR ruled that Turkey did not violate Article 9 for a ban on the wearing of the Islamic headscarf at Turkish universities. Şahin applied to have the case heard by the Grand Chamber, which upheld the decision of the Fourth Section (the court of original jurisdiction). On the same day that the decision of the Fourth Section was announced, the ECtHR also unanimously struck out the case of *Zeynep Tekin v. Turkey* (Application No. 41556/98) at the applicant's request. The application emerged from a related ban on the wearing of the Islamic headscarf for clinical training at nursing colleges in Turkey. There are other cases of religious attire or jewelry for which Turkey was ruled to be in violation of at least one of the articles of the ECHR. *Ahmet Arslan et al. v. Turkey* (Application No. 41135/98), for example, involved 127 applicants who were members of the Azcimendi Tarikati. However, because this and other cases involved Sunni applicants, they were not included in this study. Additionally, in the case of *Melek Sima Yılmaz*

case must have been brought to the ECtHR by an individual or group claiming infringement of their belief was necessary to examine cases of relatively well-established belief systems, excluding those related to Sunni Islam<sup>39</sup>; this resulted in the inclusion of Alevi, Armenian Orthodox, Greek Orthodox, Jehovah's Witness, Protestant, Jewish, atheist, and pacifist beliefs.

The cases from HUDOC and the Strasbourg Consortium were measured against the above criteria, 19 of which cases fell with the established parameters. Cases were then grouped into six categories according to the issues they addressed: associational laws (non-profit foundations and associations), property rights, places of worship/public provision of religious services, identity cards, education, and conscientious objection. Interestingly, the time period in which these 19 cases were brought to the ECtHR generally coincided with the *Adalet ve Kalkinma Partisi's* (AKP, Justice and Development Party) time in power. The earliest case was filed in 1996 and the most recent was in 2011. Three of the most recent final judgments were issued in 2016. The cutoff date for inclusion was July 15, 2016, the date of the attempted military coup in Turkey. After that date, the government declared a state of emergency; under Article 15 of the ECHR, this allows parties to the Convention to take measures that deviate from their

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*v. Turkey* (Application No. 37829/05), a teacher was tried for repeatedly violating the public headscarf ban at the school where she taught. The Court ruled that there had been a violation of Article 6 (right to a fair trial) due to the failure of the government to relay an official opinion of the Council of State to the applicant. The Court held that this violation superseded any rights claimed by the applicant under Articles 7, 9, and 14. This case was also excluded due to the fact that it primarily dealt with government regulation of Sunni beliefs and practices.

<sup>39</sup> Sunni Muslim applications were excluded from the case selection because most (if not all) cases that would not have been excluded under other criteria and were Sunni Muslim applicants were the abovementioned cases that focus on the manner in which Sunni Islam is practiced. The primary inquiry of this study is on non-majoritarian groups and not the manner in which the Turkish government regulates the majority religion.

obligations providing that these are not inconsistent with other obligations under international law. Articles 2, 3, 4, or 7, however, must be respected.<sup>40</sup>

In addition to the judgments in each case, all documentation related to each case under supervision by the CoM (all 19 cases) was downloaded from the CoM's Department of Execution HUDOC-EXEC database. Because this database is relatively new and not a fully robust database, the website of the Department of Execution was also searched to find relevant documents for each case. The documents include proceedings of the meetings of the CoM; interim resolutions; action plans; action reports; and communications from the Turkish government, the plaintiff, and NGOs.

The time each case spent in the CoM was also measured. This was calculated from the date of the final judgment to the cutoff date of July 15, 2016. However, this cannot serve as a reliable indicator of ease of implementation due to the fact that the cases arrived at the CoM on different dates and all but one case are still pending before the CoM.

### **5.3.2 Interviews**

To further understand the context, processes, and statuses of the cases that were selected, interviews were conducted at the European Court of Human Rights and the Committee of Ministers in May-June 2017 in Strasbourg, France, where both bodies are located. Participants were selected through snowball sampling, also known as chain referral sampling. Snowball

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<sup>40</sup> The state of emergency (*olağanüstü hal*) was extended by a parliamentary motion for the sixth time in January 2018 for an additional six months. Therefore, Turkey has been under a continuous state of emergency since the July 2016 attempted coup.

sampling is a method in which the researcher uses existing contacts as references to find other potential primary data sources to interview. In this study, a committee member provided two individual contacts (Dr. Samim Akgönül, a professor at the University of Strasbourg with expertise in religious minorities in Turkey, and Mr. Hasan Bakırcı, Deputy Section Registrar at the ECtHR). Initial meetings were arranged with these two individuals, who provided further contacts with the following other individuals: Vice-President of the ECtHR and President of the Second Section (January 1, 2015-April 30, 2017) Işıl Karakaş; Senior Lawyer and Head of Division Dr. Atilla Nalbant; Head of Division, Department for the Execution of Judgments of the European Court of Human Rights, Mr. Özgür Derman; and Lawyer at the Registry of the European Court of Human Rights, Mr. Gökçe Türkyılmaz. Interviews with other individuals within the COE system were briefly conducted; however, the interviews were discarded due to the irrelevant nature of the interviewees' the area of expertise and professional responsibilities.

The individuals that were included for interviews in this study all worked directly on the selected cases and/or had expertise on the issues covered in those cases, either at the admission, hearing, or execution stages. Each individual was contacted with an e-mail invitation to participate in an interview. The invitation included information about the researcher's academic profile (university and department), the scope of the study, and the nature of the interview. Arrangements were made to meet with participants at a mutually agreed upon location, either at a COE location or nearby. During the interviews, participants were informed once again of the scope of the study, and signed a "Participant Consent Form," which outlined the purpose and objectives of the research, procedures, potential risks and benefits, confidentiality issues, data storage, and the right to withdraw. Each interview was conducted in person in Strasbourg and

lasted anywhere from 45 minutes to 1.5 hours. Interviews were audio recorded with participant consent and the researcher also took notes on an iPad. The interviews were conducted primarily in English and partially in Turkish, as necessary. The audio recordings of the interviews were transcribed and translated into English by the researcher and stored securely on the researcher's password-protected computer.

The interviews were semi-structured and a list of established questions was prepared prior to each interview. Semi-structured interviews were most appropriate for this study because the specific expertise, experience, and professional knowledge of the interviewees was unknown prior to the start of the interview. A semi-structured interview format allows the researcher to have a list of questions that are important to the study but allows the interviewee to respond to the predetermined questions and expand on them freely. Semi-structured interviews also give the researcher the flexibility to pursue points that may not have emerged otherwise. The questions were categorized into the following groups: professional background of the interviewee, general questions about the selected cases, questions about the domestic situation in Turkey as it relates to the cases, general questions about implementation, questions about implementation in Turkey specifically, and projections for the future.

### **5.3.2 Secondary Sources: Government Documents, Media Sources, Archives**

Government documents, media sources, and archival materials formed the third set of data included in this study. These documents and sources were searched and analyzed simultaneously with the collection and analysis of other data points. The data collected from these sources provided additional information on the context of each case, including the domestic hearing, the execution phase, and information about the variables that were under examination.

Documentation from government institutions included: the United States Commission on International Religious Freedom (uscirf.org), an independent, bipartisan federal government commission that provides annual reports on religious freedom throughout the world; the International Religious Freedom Report, an annual report on religious freedom issued by the US Department of State; legislative resolutions from the US House and Senate; US Central Intelligence Agency World Factbook; the EU's European Commission's annual progress reports on enlargement for Turkey; documentation from the Greek Ministry of Foreign Affairs; annual reports of *Diyanet İşleri Başkanlığı* (Directorate for Religious Affairs); documentation from the Turkish Ministries of Foreign Affairs, Justice, the Interior, Education, and Finance; Turkish legal and regulatory documents, including the Constitution, laws, regulations, and codes; and AKP, *Cumhuriyet Halk Partisi* (CHP, Republican People's Party), *Milliyetçi Hareket Partisi* (MHP, Nationalist Action Party), and *Halkların Demokratik Partisi* (HDP, People's Democratic Party) political party platforms. NGO sources included the annual Civic Freedom Monitor Report for Turkey by the International Center for Not-For-Profit Law; documents and reports from *İnsan Hakları Ortak Platformu* (Human Rights Joint Platform); websites of Alevi organizations in Turkey; Human Rights Violation Reports from the Association of Protestant Churches of Turkey; the Jehovah's Witnesses website; and *Ateizm Derneği's* (Association of Atheism) website. Media sources included the websites of major Turkish news outlets. All of this information was analyzed to triangulate the emergent events and themes that arose from the case judgments and interviews, and under the thematic dependent variables.

## 5.4 Data Analysis

As with many qualitative studies, data was collected and analyzed simultaneously. After the 19 cases had been selected, interviews were conducted in Strasbourg and the analysis of the government documents, media sources, and archives began.

After the data for each set of cases had been collected, it was analyzed and scored according to the factors that had contributed to the case being brought forward and to the closure (implementation) of the ECtHR's judgment. Each independent variable was given two scores from 0-5, with 0 indicating there were no apparent factors from that category, and 5 indicating there were a significant number of events that had had a significant impact. The first two scores indicated factors that contributed to or hindered the institutional barriers that caused the violation in the first place. The second two scores indicated factors that facilitated or hindered the process of implementation. As mentioned earlier, this is a qualitative study that takes the broader picture of Turkish history and contemporary events into account, making it challenging to quantify which factors were more consequential. However, though a loose quantitative examination may not provide a perfect understanding of the elements that impacted each set of cases, it can shed light on general trends present across thematic and structural issues, across different groups affected, and across violations of different ECHR articles.

The cases were further analyzed and scored according to their progress in the execution of judgments. Again, all of the cases in this study except one are still pending and were passed to the CoM at different times. As a result, the Turkish government has had more time to take action in some cases than in others, making it difficult to make accurate comparisons across cases. Still, this analysis can be an indicator of variations in the execution of judgments across the same

parameters mentioned in the above paragraph. The cases were scored on a scale of 0-2, with 0 indicating that no action has been taken, 1 indicating that partial action has been taken, and 2 indicating that conclusive action has been taken, either as a result of language in the judgment or assumed necessary action taken to remedy the harm (general measures or individual measures). As indicated earlier, payments of just satisfaction are generally explicitly outlined in the judgment in terms of deadline, currency, recipient, and default interest, while the terms of general or individual measures often are not. However, it is often assumed that some form of general and/or individual measures are required, whether indicated in the judgment or not. Therefore, for the purposes of this study, cases where no explicit just satisfaction awards were indicated in the judgment were classified as “NI” (not indicated) in the assessment. The assumption was made that general and individual measures were expected.

Considering both *if* judgments have made progress towards implementation (scoring for action taken on general measures, individual measures, and just satisfaction) and *how* judgments have progressed (scoring for factors that encourage or discourage implementation) provides a more holistic picture of execution in the cases selected for this study, and perhaps insight into inferences that can be drawn for similar cases in Turkey or in countries that have similar domestic conditions.

Only including this set of cases, however, potentially underestimates implementation because all of these cases (with the exception of *Tarhan and Küçükergin v. Turkey*, which was closed in 2010) are still pending before the CoM and had judgments entered at varying dates. Sample size also makes it difficult to generalize across countries and across violations of other



articles. Nonetheless, due to the domestic commonalities of these cases, some general trends can be observed from the results.

Within the aforementioned framework, the next chapter offers a complete analysis of the 19 selected cases. The cases are categorized thematically based on common issues addressed in each case: associational laws (foundation and association non-profit organizations); property rights; places of worship and public provision of religious services; identity cards; education; and conscientious objector cases. The sections each contain a description of the context for the theme under examination, followed by an explanation of the domestic remedies the applicants attempted prior to the case being heard at the ECtHR. Each thematic section concludes with an analysis of the case set, in consideration of the independent variables, the research questions, and the literature areas examined in Chapter 2.

## CHAPTER 6. Violations of Religious Freedom against Turkey

Turkey had the highest number of cases brought against it in the European Court of Human Rights (ECtHR) between 1959 and 2017, with 2,988 judgments finding at least one violation among 17,307 cases with the same findings for all member countries (European Court of Human Rights 2017). Even considering that Turkey has one of the largest populations among Council of Europe (COE) member countries, Turkey still ranks highest with 37 percent per million population of cases finding at least one violation, which places it far beyond the 75th percentile.<sup>41</sup> It is also worth noting that in the same period, Turkey had the highest number of Article 9 violations (13 of 71 total violations).<sup>42</sup> However, as this study demonstrates, while violations of religious freedom extend beyond Article 9, they still fall within the scope of rights protected under the European Convention on Human Rights (ECHR). Moreover, a mere glance at execution statistics indicate that Turkey today has the second highest rate of non-implemented judgments, with 1,446 cases pending in the Committee of Ministers (CoM) among a total of 7,584 cases (Council of Europe, Committee of Ministers 2018, 64-66).

This chapter examines the selected cases in light of the research questions and independent variables that were explained in the previous chapter. The cases are analyzed categorically according to the issue that is addressed in each of them: associational laws

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<sup>41</sup> Again, it is important to keep in mind that many Eastern European countries did not join the Council of Europe until the 1990s or even 2000s, and Russia joined in 1996. Specific statistical data regarding applications and judgments from the ECtHR by year and country was unavailable, so a country-to-country comparison was not possible.

<sup>42</sup> As mentioned above, the first ruling of an Article 9 violation did not occur until 1993 in *Kokkonakis v. Greece*.

(foundation and association non-profit organizations); property rights; places of worship and public provision of religious services; identity cards; education; and conscientious objector cases. Each section begins with the contextual background of the issue and a description of the domestic proceedings of each case.<sup>43</sup> This is followed by an analysis of each set of cases.

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<sup>43</sup> The descriptions of the domestic proceedings for each case were largely taken from the language as described in the final judgments of the ECtHR, as reported in the HUDOC database.

## 6.1 Association and Foundation Laws

Though there have recently been changes to the legal structures pertaining to how religious communities are permitted (or not) to organize themselves and gain legal personality in Turkey, an examination of the background of the governance of religious groups dating back to the pre-Republican era is in order. These frameworks have largely determined how religious communities continue to be administered by the Turkish state and clarify the context in which the relevant laws and bureaucratic rules have evolved.

The Treaty of Sèvres was signed in 1920 and divided Ottoman territory up between the various powers who had been victorious in World War I. Only a portion of the remaining land was left for the Turks. Mustafa Kemal Atatürk, incensed by what he and many others perceived as an unjust redistribution of Ottoman territories, and provoked by the 1919 Greek invasion of Anatolia, led the resistance movement to secure lost land in the Turkish War of Independence. The Turks proclaimed victory and the Treaty of Lausanne was signed in 1923, assuring Turkish sovereignty and establishing the terms of the newly founded Turkish Republic. For Turkey, the concepts of nation building and state building were inextricably linked and concepts such as the *millet* system were carried forward into the Republican era. This is evident in the Treaty of Lausanne where Greece and Turkey agreed to a compulsory population exchange based on religious identity—Turkey's Orthodox Christians would resettle in Greece, and Greece's Muslims would do the same in Turkey, with the exclusion of the respective populations in Istanbul, the Turkish islands of Gökçeada and Bozcaada, and western Thrace (Trakya, part of Greece). The exchange, proposed by Greek Prime Minister Eleftherios Venizelos, would be drawn up and carried out by the League of Nations. The exchange was mutual, but was rooted in

the belief that non-Muslims (namely Christians) had played an essential role in Western interference in the internal affairs of the Ottoman Empire (Yıldırım 2015, 167). The Treaty also established a legal framework for the religious minorities that remained in both Greece and Turkey, granting them language rights and freedom of religion, as well as the right of pious, social, educational, or religious community foundations to acquire, use, and sell property (Kurban and Tsitselikis 2010, 8). It is worth noting that the Treaty extended these rights to all non-Muslim communities; however, in reality, Turkey has only extended these rights to the Greek Orthodox, Armenian, and Jewish communities.

Yıldırım has identified at least four factors that have determined the manner in which the Lausanne Treaty is interpreted: the protection of minorities (particularly Christians) has been relegated to the realm of foreign affairs rather than being viewed as a fundamental aspect of human and minority rights; the Turkish state views minority rights claims as a mechanism through which foreign powers can interfere in Turkey's sovereignty; minority rights being understood as begrudgingly granted privileges or exceptions, as opposed to legitimately conferred rights; and finally, the principle of reciprocity (with Greece) being extensively employed, leading to the conditional expectation of protection of Muslims, particularly in western Thrace (Yıldırım 2015, 168).<sup>44</sup> Though numerous other factors can certainly be listed, these four are the primary determinants that have shaped the modern governance of collective rights in Turkey, particularly those of religious groups.

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<sup>44</sup> Kurban and Tsitselikis provide a comprehensive overview of the challenges related to Turkish-Greek reciprocity as it relates to minority foundations in Greece and Turkey under the Treaty of Lausanne in a TESEV report (2010).

## *Foundations Law*

Without delving too deeply into the distinction between public and private law, generally speaking, non-profit law in Turkey is governed by private law (Akbaş 2014, 1). However, as this study illustrates, there are a number of realms in which public law confers rights to belief communities, such as *vakıflar* (foundations), including the most considerable of all *vakıf*, the *Diyanet*. It is worth noting that the *vakıf* is a vestige from Ottoman times and a tool of governance under Islamic law. Whereas Roman law recognizes the legal personality of a collective of individuals and considers the property acquired by that group to be owned by the entity, Islamic law views the property itself to have legal personality and the “owners” as “those benefiting” from the property (Yıldırım 2015, 204). Thus, a collective of believers would not enjoy legal personality as a *vakıf*, although they would be able to collect revenues and make use of the land/facilities. The *vakıf* structure under the Ottomans was not created to provide legal personality to belief communities, nor was it considered to be a governing structure for such communities, although they *de facto* cultivated the community through service acts in the areas of education, charity, and health “for the benefit of a belief community” (Yıldırım 2015, 221). Considering that the most common founding functions of *vakıfs* today are related to social welfare, education, health, and culture (Akbaş 2014, 13), it is easy to recognize that modern Turkish law governing *vakıfs*, which falls under public law, deviates very little from the Ottoman

form; today, *vakıfs* are defined as “real estate entities” that do not have members, partners, or shareholders<sup>45</sup> (*Türk Medeni Kanunu* 2001, Article 101).

There are generally two categories of foundations: those established prior to the Turkish Civil Code of 1926 (*tesis*) and those established after (*mülhak vakıflar*<sup>46</sup>). Both are administered by the *Vakıflar Genel Müdürlüğü* (VGM, General Directorate of Foundations).<sup>47</sup> The “community foundation” system (*cemaat vakif*) is based on the Ottoman system, where Muslim and non-Muslim communities could only acquire property by establishing a foundation on land granted by the Sultan via a *firman* (decree) (Kurban and Tsitselikis 2010, 7). The foundation was regarded as privately owned property but was, in essence, considered property of God. Over time, the foundations came under the control and supervision of the state (Kurban and Tsitselikis 2010, 7). The Treaty of Lausanne codified the status of foundations under one umbrella, the “minority community property foundation,” yet the discrepancies of asset ownership remained unclear due to the elimination of the previous foundation categories (family foundation, educational foundation, etc.) that had managed these properties (Kurban and Tsitselikis 2010, 10). Foundations were not allowed to conduct religious activities; they were only allowed to manage the property, which is quite unlike the leadership of the religious communities actually

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<sup>45</sup> On April 17, 2008, the Turkish Constitutional Court (Case No. 2005/14, Decision No. 2008/92) allowed foundations to accept members if the deed of the trust had a provision for membership (Akbaş 2014, 20-21).

<sup>46</sup> The original term used for these foundations was *tesis* meaning “institution,” but the word *tesis* is commonly used today to designate a facility, premise, or site, which is indicative of the intent behind the selection of this term to signify the distinction between the property and the community itself. *Tesis* was replaced with *vakif* in 1967 in an amendment to the Turkish Civil Code (Yıldırım 2015, 231).

<sup>47</sup> The *Vakıflar Genel Müdürlüğü* was established in 1924, replacing its predecessor, *Şer’iyye ve Evkaf Vekaleti* (Ministry of Sharia Courts and Religious Foundations), that had carried out similar functions (Yıldırım 2015, 226).

using the property (Oehring 2011, 2). While granting rights to establish new foundations, Article 74 (2) of the 1926 Turkish Civil Code explicitly prohibited the establishment of such foundations in support of a religious community. Yet the application of the law at this time permitted foundations to maintain property for religious purposes or religious activity, including the construction of mosques, churches, and synagogues and the maintenance thereof (Yıldırım 2015, 232). Thus, there were (and continue to be) unresolved legal issues arising from the conflict of the constitutionally specified secular nature of the Turkish Republic, and Turkey's requirements under the Lausanne Treaty (Yıldırım 2015, 223-224). Considering that non-Muslim community foundations did not have charters/deeds,<sup>48</sup> since they are essentially being grandfathered into modern Turkish law, they reside in a somewhat grey legal area—they themselves do not have legal personality, but their properties (buildings and lands) essentially do. As of 2016, 167 exempted foundations that had been founded before the enactment of the long-standing law prohibiting foundations from being established based on a religion or ethnicity existed (United States Department of State 2016, 3).

In 2006, the Turkish Parliament passed a new law on foundations, which was rejected by then-President Ahmet Necdet Sezer (*Vakıflar Kanunu* 2006) due to concerns that its language would chip away at Turkey's long-standing secular principles. A new law was adopted in 2008 (*Vakıflar Genel Müdürlüğü* 2008), albeit reluctantly and with strong opposition, as part of the

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<sup>48</sup> As mentioned above, Ottoman foundations were allowed to acquire property through a *firman* by the Sultan; however, there were no regulations issued on this and foundations that were established prior to the 1926 Civil Code had no founding deed or charter. This created property rights issues, which are discussed in the section on property rights.



Third Harmonization Package for European Union accession (Yıldırım 2015, 233). Article 4 of the Regulations for Foundations, which came into effect on September 27, 2008, states that a foundation may be established through a declaration of intent to establish a foundation, the decision of a court to grant permission (following an opinion issued by the VGM), and its registration with the VGM (*Vakıflar Genel Müdürlüğü* 2008). Foundations may also be established under the Civil Code (Article 101), but faith groups have rarely used method of registration.

### *Associational Law*

The right to form an association in Turkey is granted under Article 33 of the Constitution, which regulates freedom of association, including the right to form associations, become a member of an association, and withdraw from an association (*Türkiye Cumhuriyeti Anayasası* 1961). This right can be restricted on the grounds of national security and public order, prevention of crime, or protecting public health and morals. The laws and regulations governing associations have undergone fewer changes compared to those related to foundations.

Prior to the founding of the Turkish Republic, associations were governed by the 1909 *Cemiyetler Kanunu* (Association Law), which was replaced by the 1938 *Cemiyetler Kanunu* (Law No. 3512) (*Cemiyetler Kanunu* 1938) in the Republican era. This law remained in effect until a provisional law was passed on July 1, 1960 that expanded the right to form associations after the May 1960 Military Coup (*Türkiye Cumhuriyeti Anayasasının bazı Maddelerinin Değiştirilmesi ve Geçici Maddeler Eklenmesi Hakkında Anayasa Değişikliği* 1971). A referendum on what would become the 1961 Constitution was held and passed on July 9, 1961. Article 29 outlined the rights to form associations as: “Every individual is entitled to form

associations without prior permission. This right can be restricted only by law for the purposes of maintaining public order or morality” (*Türkiye Cumhuriyeti Anayasası* 1961). Association rights were restricted by an omnibus package of provisional laws after the 1971 coup (*Türkiye Cumhuriyeti Anayasasının bazı Maddelerinin Değiştirilmesi ve Geçici Maddeler Eklenmesi Hakkında Anayasa Değişikliği* 1971). A new associations law was adopted on November 22, 1972 (*Dernekler Kanunu* 1972) that outlined regulations on associations. Yet another coup occurred on September 12, 1980 and associational rights were again circumscribed. The 1982 Constitution, which governs Turkey today, again recognized the right to form new associations in Article 33 (*Dernekler Kanunu* 1983; *Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun* 2001).

In 2004, Associations Law No. 5253 was passed to regulate freedom of association (*Dernekler Kanunu* 2004). The By-law of Associations (March 31, 2005) further regulates associations (*Türkiye Cumhuriyeti İçişleri Bakanlığı* 2005). Situations where there is no specific provision for an association are regulated by the Turkish Civil Code No. 4721 (Akbaş 2014, 12). Article 56 of the Civil Code defines associations as “a society formed by unity of at least seven real persons or legal entities for the realization of a common objective other than sharing of profit by collecting information and performing studies for such purposes” (*Türk Medeni Kanunu* 2001). Article 2(a) of the regulation states: “The societies are founded with the status of legal entity by at least seven real persons or legal entities by continuously pooling their knowledge and efforts in order to realize a given and common objective not prohibited by the laws, excluding those of profit-sharing purposes” (*Türk Medenî Kanununun Yürürlüğü ve Uygulama Şekli Hakkında Kanun* 2001). In contrast to foundations, associations have legal personality.

The below case is illustrative of the issues that religious organizations (whether foundation or association) often encounter.

### **6.1.1 Ozbek et al. v. Turkey**

Sixteen Turkish citizens brought *Özbek et al. v. Turkey* ([Application No: 35570/02] 2010) to the ECtHR on August 29, 2002. They claimed they had been denied their right to freedom of assembly and association by Turkish authorities' refusal to allow them to establish a charitable foundation called the *Kurtuluş Kiliseleri Vakfı* (Foundation of the Churches of Liberation) in Ankara.

Domestic proceedings began in 2000 when representatives of the *Kurtuluş Kiliseleri Vakfı* applied to the Court of First Instance in Ankara, where the Foundation was located, under (former) Article 74 of the Civil Code.<sup>49</sup> The Court requested an opinion from the VGM, which informed the former that it was officially opposed to the registration of the Foundation due to the fact that its fundamental purpose was to serve only the Protestant community, contrary to Article 74§2 of the Turkish Civil Code that prohibited exclusive service to a specific community. The Court rejected the application on these grounds. In 2001, the applicants appealed to the Court of Cassation (*Yargıtay*, Supreme Court of Appeals of Turkey), arguing insufficient judicial reasoning based on broad and abstract considerations with no legal basis. They further contended that the court had failed to exercise impartiality in their request for an expert opinion from the

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<sup>49</sup> Article 74 § 2 of the Civil Code, as amended by Act No. 903 of July 13, 1967, read at the time: “Foundations that have been created contrary to the law, morality and public morals, or to the interests of the nation, or those which have been created to support a particular political idea or race or the members of a particular community cannot be registered.” Article 74 reads essentially the same as Article 101(4) of the current Civil Code.

VGM. The Court of Cassation upheld the Court of First Instance's judgement, declaring that Article 74§2 of the Civil Code should be interpreted in the context of the Constitution, which can limit freedoms to guarantee public safety and public order, prevent crime, and protect public health and morals. It also referred to two existing organizations, the *İstanbul Protestan Kilisesi Vakfı* (Istanbul Protestant Church Foundation) and the *İstanbul Süryani Katolik Vakfı* (Foundation of the Assyrian Catholic Church in Istanbul), which the applicants had mentioned in their testimony, as examples consistent with the above requirements. Both foundations had legal personality through their lawful registration with the courts.

In 2002, the foundation applied to the Court of Cassation for a correction of judgment for a misinterpretation of the Foundation's statutes. The Court had assumed that the Foundation would provide services only to Protestants. However, the Foundation argued that Article 3 of their constitutional documents stated their intended provision of material and moral support to victims of natural disasters, regardless of religious affiliation. The Court again dismissed the Foundation's application. The Turkish government informed the Court in 2007 that some of the foundation's members had established an association, *Kurtuluş Kiliseleri Derneği* (Association of the Churches of the Liberation).

The Turkish government initially objected to the admissibility of the case at the ECtHR based on the exhaustion of domestic remedies. The government also objected to the lack of victim status of the applicants since they had established an association in the same name with the same purpose. The applicants contested this, stating that an association must not prove any capital to be established, but a foundation must have funds and the ability to raise funds to be able to operate. The applicants argued that they could no longer fulfill their financial obligations

to establish a new foundation because of these increased requirements. They confirmed that some applicants had established an association, but that the public prosecutor had applied to dissolve it. Furthermore, they stated that no legal provision existed for changing a foundation's statutes when civil action was pending. Through these arguments, both the Turkish government and the applicant foundation agreed that there had been an interference with the right to freedom of association. However, the government argued that it was justified in order to defend public safety, public order, and the rights and freedoms of others (as outlined in Article 34 of the Turkish Constitution).

The ECtHR ruled that there had been a violation of Article 11 of the ECHR on the grounds that the national courts had failed to register the Foundation's statutes. The Court considered this to be an interference with the right to freedom of association. The Court, citing relevant case law on the freedom of association (i.e., *Gorzelik et al. v. Poland* [Application No. 44158/98] 2004, §92-93), confirmed that Article 11 did include the right to establish a foundation and that by refusing to register the foundation, the government had exceeded the margin of appreciation within the bounds of what is "necessary in a democratic society."

The Court awarded the applicants €2000 for pecuniary damages, to be paid to the Foundation's representative who would be responsible for distributing the sum to members who had advanced notary fees for the registration of the Foundation's statutes; €500 to each applicant for non-pecuniary damages; and €5,200 jointly to the applicants for costs and expenses. The Court's final judgment did not explicitly mention general or individual measures.

From the time of application to when the judgment was issued, the case spent 85 months in the Court. From the time of the final judgment to July 15, 2016, the case had been under

standard supervision in the CoM for 78 months. According to the Status of Execution report listed on the online database of the Department for the Execution of Judgments (HUDOC EXEC), Turkish authorities indicated in an action plan dated November 8, 2011 that just satisfaction had been paid in due time; however, the CoM awaits further information on individual measures (Department for the Execution of Judgments 2016). The same action plan stated that the judgment had been translated into Turkish and published on the official website of the Ministry of Justice and had been disseminated to the relevant authorities; however, the CoM awaits further information on additional measures taken/to be taken to prevent further violations (Department for the Execution of Judgments 2016). According to the HUDOC EXEC site, the CoM reported they would resume consideration at the 1108th meeting (March 2011); more recent information regarding the case was not available as of June 2017.

### **6.1.2 Analysis**

Cases that relate to associational rights hit right at the heart of religious identity and how governments, legislatures, and courts regulate these rights. Because these issues are sensitive to handle within domestic legislative domains, largely due to contentious theological, philosophical, and identity questions, applicants have turned to domestic courts to seek rights recognition (see examples below), and in the above case, to the European Court of Human Rights.

As demonstrated at the beginning of this section, for a number of reasons, the laws and regulations governing foundations and associations have undergone various iterations since the founding of the Turkish Republic. This would seem to indicate that, if there is sufficient momentum, either politically, socially, or institutionally, changes can be (and have been) made

to the constitution, laws, bureaucracy, and temporary provisions/statutes. However, the predominant element that has remained in each version of these laws is an underlying restriction on the right to association—particularly as it applies to religious minorities. The Law on Associations does not explicitly prohibit establishing associations with a stated religious purpose, but they must not be contrary to law and morals. However, Article 101(4) of the Civil Code states that foundations that aim to support a certain race or community (i.e., religious community) are prohibited (*Türk Medeni Kanunu* 2001). In practice, the courts and bureaucracies differ in their interpretation of these laws and regulations (Yıldırım 2015, 240). In addition to the *Özbek et al.* case above, where the domestic application was rejected because it intended to establish a foundation to support a specific denomination or religious community, two other domestic examples include the *İstanbul Protestan Kilisesi Vakfı* (IPKV, Istanbul Protestant Church Foundation), and the *Yedinci Gün Adventistleri Vakfı* (YGAV, Seventh Day Adventists' Foundation). The IPKV, following the regulations of the VGM, was established by a decision of the court, but the VGM appealed to the High Court of Appeals; the decision was upheld and the foundation was established (Yıldırım 2015, 240).<sup>50</sup> On the other hand, a domestic court rejected the YGAV's application on the same grounds as the *Özbek et al.* case. These three cases are representative of a number of other cases that have been heard domestically and received mixed decisions. The inconsistency of decisions at all levels of government, coupled with the fact that there were no specific general measures listed in the *Özbek* judgment, implies

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<sup>50</sup> 18th Chamber Court of Appeals, E3402/2000, K5989/2000, May 29, 2000

that, inevitably, similar cases could find their way to the ECtHR, leading to greater judicialization at the ECtHR.

The social pressure on citizens that do not identify as Hanefi Sunni Muslims to either conform or remain quiet has manifest in covert and overt ways. This has ranged from the social stigma attached to “outing” oneself or one’s organization when applying for public services (due to the public nature of the application process), to media propaganda, and outright violence. A non-exhaustive list of examples of these acts include:

- A grenade was tossed into the Ecumenical Patriarchate in Istanbul in 2005.
- In February 2006, Catholic priest Fr. Andrea Santoro was murdered in Trabzon while praying, and his assailant was said to shout “*Allahu akbar*” (“God is great”) while carrying out the act (*New York Times* 2006); Father Pierre Francois Rene Brunissen, Fr. Santoro’s replacement, was also stabbed and wounded a few months later by a Muslim claiming to be opposed to the priest’s “missionary activities.”
- Three Protestants that worked in a Bible publishing house were murdered in April 2007 in Malatya (King 2007). Their lawyer, Orhan Kemal Cengiz, who is also a well-known journalist, received death threats for defending their case. The trial was not concluded until 2016.
- Roman Catholic bishop Luigi Padovese, the apostolic vicar of Anatolia (the Vatican’s representative in eastern Turkey), was stabbed to death outside his home in 2010. Though officials claim that the murder had no political or religious motivations, at the murder trial, the bishop’s driver said that he was the *Masih ad-Dajjal* (“false Messiah”) (Donadio 2010).
- An assassination plot was revealed against Armenian Patriarch Mesrob Mutfayan. Turkish society and the media also participate slander<sup>51</sup>:
- “During Christmas and the period around New Years, the following caused apprehension during Christmas celebrations: billboard notices with hate filled slogans, brochures distributed on the street which also contained hate language, newspaper and television programs, and especially a street show featuring a Santa Claus with a gun pointed at his

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<sup>51</sup> The Association of Protestant Churches has published an annual report of human rights violations since 2007 that lists acts of violence, threats, intimidation, and other discriminatory acts against the Protestant community.



head. Christmas celebrations, due to this language and terror threats, were carried out under heavy security.” (Association of Protestant Churches 2017, 3)

- In 2016, Dion Ross Bremner, an Australian national, won a case (*Bremner v. Turkey* [Application No. 37428/06] 2016) against Turkey in the ECtHR in an Article 8 (right to private and family life) violation. He took the case to the Court on the grounds that footage of him talking about Christianity had been filmed surreptitiously and used as part of a documentary on “foreign peddlers of religion” in Turkey. For this, he was prosecuted for insulting God and Islam.
- Hakan Tastan and Turan Topal were put on trial in 2006 for “insulting Turkishness” under Article 301 of the Turkish Penal Code. More specifically, they were accused of joining a Protestant church, proselytization, and collecting data on locals for a Bible correspondence course.
- In 2008, church goers were asked for their identities and why they attended the church in an attempt to determine which attendees were foreign, local foreigners, or possible converts (Oehring 2008b).
- Habername.com began a series of articles titled “New Trap for Young People: House Churches” (Oehring 2009a).
- An *Ilgazetesi* article “Local Missionaries” published on June 17, 2009 stated that: “The primary goal of missionary activity is to break the resistance of people to imperialism and abuse. Making them Jewish or Christian is the second goal” (Oehring 2009a)
- On October 21, 2009, Haberler.com reported that Muslim clergy were warned by the Mufti in Muğla that “missionaries are in town” (Oehring 2009a)
- Dr. Adnan Odabaş, owner of *Üsküdar* and *Hergün*, published a book of allegations called *Dikkat Misyoner Geliyor (Beware, the Missionaries are Coming)* (Odabaş 2005)

A significant source of paranoia about non-Hanefi Sunni Muslims is rooted in a concern about “missionary activities” and the conversion of Turkish citizens to Christianity. Again, this paranoia is perpetuated by the media and government. This deep-seated suspicion has inspired the government to keep religious minority leaders under surveillance. Their telephones have been tapped and mail opened before delivery (Oehring 2006). For example, the Turkish National Intelligence Organization (MİT) is known to have kept the locations of the murders of Fr. Santoro and the Zirve Publishing House in Malatya under surveillance and the media has reported that the *Jandarma* (Turkish military police) track missionary activities (Oehring 2008b,

2009a). A February 2005 *Milli Güvenlik Konseyi* (MGK, National Security Council) evaluation indicated “a need for social activities that will prevent the spreading of organizations and ideologies that will have an impact on Turkey’s unity...Abusive missionary activities should not be permitted” (Ceyhan 2007).

Government officials reaffirm and bolster this belief with their own public statements. Following the Malatya murders, then-Ministry of Justice’s Director-General of Laws Niyazi Güney remarked to Turkish members of Parliament that “missionary work is even more dangerous than terrorism” (*Milliyet* 2007). Addressing parliament in 2006, MP Muharrem Kılıç warned his colleagues of missionaries who “have attacked the Turkish people” (*Genel Kurul Tutanağı* 2006). The *Diyanet* had also issued a Friday sermon in March 2005 urging caution against the dangers of missionary activity, which it described as “a scheme of foreigners to steal the faith of the young” (*NTV MSNBC* 2005a). Minister of State Mehmet Aydın also affirmed the unofficial state stance on missionaries by asserting that “the goal of missionary activity is to break up the historical, religious, national, and cultural unity of the people of Turkey” (*Sabah* 2005).

Given this atmosphere, the Ministry of the Interior issued a circular in June 2007 requesting the protection of non-Muslim houses of worship and dedicate resources to uncover attacks against them. These measures did thwart some attacks, namely a plot to assassinate the pastor of a church in Antalya (Oehring and Ceyhan 2009). A plot labeled “Operation Cage” (“*Kafes Eylemi*”) was also uncovered, this time in connection with the *Ergenekon* investigations. *Ergenekon* is a secret secularist group consisting of members of the military, parliament, and the media suspected of attempting to overthrow the government. Evidence appeared to demonstrate

that members of the Turkish military were clandestinely involved in acts of political violence and assassinations against non-Muslim Turks. Operation Cage was designed to generate perceived hostility towards non-Muslims and to challenge the authority of the governing *Adalet ve Kalkinma Partisi* (AKP, Justice and Development Party) party by exploiting the burgeoning concern in society about the government's alleged hidden agenda to create an Islamic state, or at least implement a more Islamist agenda. However, in the aftermath of the 2016 coup attempt, it was revealed that the *Ergenekon* accusations and arrests (and the related plots, namely *Balyoz Harekatı* ("Sledgehammer")) were brought forward on falsified evidence in connection to cleric Fethullah Gülen<sup>52</sup> and the accused were acquitted.

From the above, one can conclude that there is an unspoken "strategy" amongst the media, the public, and the government, with each set of actors subtly crystallizing various forms of discrimination and violence against non-Hanefi Muslims. Orhan Kemal Cengiz, the lawyer in the Malatya murder cases who also represents the Kurtuluş Protestant Church and the Association of Protestant Churches, summarized this situation in an interview with *Bianet*, a media outlet. He declared that missionary activity is not a crime in Turkey and that politicians and the media have, by constant repetition, invented such crimes and then tried to punish the crimes (Ceyhan 2007). Ordinary citizens carry out these heinous acts or slanderous activities, but

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<sup>52</sup> Fethullah Gülen is the reclusive leader of a global initiative called "*Hizmet*." He is in self-imposed exile in the United States, but Turkey has repeatedly made demands for his extradition based on charges that he is heading a terrorist organization (FETO, Fethullah Gülen Terrorist Organization) and organized the 2016 attempted coup.

they are either unreported, unacknowledged, or trapped in a seemingly never-ending bureaucratic or legal black hole and the perpetrators rarely face justice.

Beyond statements that stigmatize or slander non-Hanefi Muslims, the government has taken actions that have directly inhibited the minority rights outlined in the ECHR, even while seemingly attempting to “correct” the inconsistencies in foundation and association laws. Abdullah Gül first discussed reforming the Law on Foundations in late 2002 in response to EU pressure to bring Turkey’s law in line with European standards (Oehring 2005). In 2003, an official from the Ministry of Foreign Affairs—which is often tasked with handling relations with many of the indigenous non-Muslim religious communities that existed before the Lausanne Treaty—requested that a respected Istanbul professor of law draft a Foundations Law to resolve the discriminatory practices, but that it be done quietly so as not to draw attention from Islamists and nationalists. Just as quietly as the suggestion was made, it disappeared because it was too politically risky at the time (Oehring 2007a). As mentioned above, parliament proposed a new foundations law in 2006, which was met with fierce opposition by the opposition parties in the government at the time (*Cumhuriyet Halk Partisi* [CHP, Republican People’s Party], *Milliyetçi Hareket Partisi* [MHP, Nationalist Action Party], and *Demokratik Sol Partisi* [DSP, Democratic Left Party]). The MHP criticized the legislation<sup>53</sup> harshly and it was vetoed by then-President Sezer on December 2, 2006. This move was criticized by the media, but Sezer justified his

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<sup>53</sup> The *Özbek et al.* case was decided in 2009, after the 2008 Foundations Law had been passed.

rejection stating that the provisions interpreted the stipulations outlined in the Lausanne Treaty that dictate Turkey's obligations to ethnic and religious minorities too liberally (Oehring 2007a).

There were a number of incidents in Turkey around the time that the legislation was proposed that provoked reactions from some segments of society. These include, for example, the resurgence of identity politics related to Kurdish and Alevi issues as a result of the EU harmonization process; the announcement of a new strategy for resolving the Cyprus issue; fear on both the left and right of developments in the Middle East and the loss of national sovereignty; fear of foreign invasion; and fear that the Treaty of Sèvres would once again be implemented and the public would be "Christianized" by foreign missionaries (Çarkoğlu and Toprak 2007, 19). Nonetheless, a Foundations Law was passed two years later, in 2008. The CHP, the main opposition party, challenged the law in the Constitutional Court in 2011 on the grounds that the law contradicted the Republic's secular nature (Constitutional Court January 11, 2011, E22/2008; June 17, 2010 K82/2010, RG: 27812, as cited in Yıldırım 2015, 233). The articles of the 2008 Foundations Law the CHP cited in their case, which placed community foundations and ordinary foundations in the same class of organization, included: "establishing branch offices (Article 25), election of the executive board of community foundations from among the community (Article 6), acquisition of new property (Article 12(1)), possibility of altering 'purpose and function' (Article 14), international activities, receiving donations from abroad (Article 25), [and] establishing economic corporations and companies (Article 26)" (Yıldırım 2015, 234). While the Constitutional Court's ruling on this case demonstrates that it has made progress in its jurisprudence regarding religious minorities, viewing such rights as fundamental and needing to be widely interpreted (Yıldırım 2015, 234), there is still much work

to be done to bring domestic legislation and bureaucratic regulations in line with the 2009 ECtHR ruling in the *Özbek et al.* case and to address other issues that may arise in contradiction to other ECHR associational articles.

The Foundations Law has historically been linked to religious groups protected under the Lausanne Treaty. However, the Associations Law has become a new tool that religious groups that are not in that class of citizens can use to establish legal personality for themselves. The inconsistency with which the laws and regulations on associations and foundations are implemented and interpreted has been a source of frustration for the groups applying for status and has also generated domestic court cases that may very well find their way to the ECtHR.

One egregious example of such variance is the long-standing presence of the *Diyanet* and the *Türk Diyanet Vakfı* (TDV, Turkish Diyanet Foundation). The TDV was established in 1975 to support the activities of the *Diyanet İşleri Başkanlığı* (Presidency of Religious Affairs, better known as the *Diyanet*), an official state body. The *Diyanet*, established in 1924, is responsible for “the delivery of service to citizens without discrimination in regards to religious sect or understanding or practice of religion” (*Diyanet İşleri Başkanlığı* 2012). The *Diyanet* is the successor institution of the Office of the *Şeyhülislam* (Sheik al-Islam, Grand Mufti) of the Ottoman Empire. When the Empire fell, the state confiscated the financial resources of all Islamic foundations, which remained under the control of the *Diyanet*. The *Diyanet* is currently regulated by Law 6002 (published July 1, 2010) that made changes to Law 633. Law 6002 expanded the scope the institution’s work and elevated the institution from a general directorate to the level of undersecretary, which is overseen directly by the Office of the Prime Minister.

The website of the TDV clearly states the connection between it and the *Diyanet* and the purpose of each: “The Presidency of Religious Affairs aims to support activities set out by the *Türkiye Diyanet Vakfı* (TDV)” (Türkiye Diyanet Vakfı 2018a). The TDV has played an important role in “reaching a wider audience of religious operations and in the upbringing of future generations to take part in conducting these religious services” (*Türkiye Diyanet Vakfı* 2018b). Although Article 101(4) of the Turkish Civil Code expressly states that no foundation may be established that contradicts the characteristics of the Republic as defined by the Constitution, constitutional rules, laws, morals, national integrity, and national interest or with the *aim of supporting a distinctive race or community*” (emphasis added), this has not been challenged in courts or by administrative authorities (Yıldırım 2015, 243). Yet the very foundation (TDV) that cooperates with the *Diyanet*, a government agency, states in its mission, in no uncertain terms, that “in accordance with the purpose of the establishment of the *Diyanet*, the TDV provides significant support services for mosques, Kuran courses, and assists in meeting the needs of training muftis and education centers” (*Türkiye Diyanet Vakfı* 2018b)—which is clearly in violation of Article 101(4) of the Turkish Civil Code.

The *Diyanet* has been a stumbling block not only for non-Muslims, but for Muslims as well. The Caferi community, a sect of Shia Islam, has publicly voiced concerns on this subject. “Our constitution says we are a secular state, but unfortunately it is not so,” CHP MP Ali Özgündüz said, pointing to the annual \$3 billion budget allocated to the religious affairs department. “This is a Sunni state, whose state-run religious-affairs department serves only Sunni Islam, and only the Hanafi school at that” (Güsten 2013). At one point, stressing the importance of the principle of secularism, former *Diyanet* leader Ali Bardakoğlu issued a

statement through the newspaper *Radikal* that the *Diyanet* should be an autonomous institution with its own resources and that Turkey was ready for such a move (İnsel 2010). Just a few weeks later, Bardakoğlu “retired” (“Diyanet İşleri Başkanları, Prof. Dr. Ali Bardakoğlu” 2013).<sup>54</sup>

Foundations and associations also face substantial bureaucratic and administrative burdens when maintaining their organizations. Established foundations, which are under the control of the General Directorate of Foundations, must obtain permission for even minor upkeep to their properties. Additionally, though foundations are recognized, the communities behind them are not and so individuals must be named on the bank accounts (Oehring 2007a). Oftentimes, these communities are small and unable to meet the demands to establish or maintain their foundation, including financial auditing, accounting, and reporting (Oehring 2007a). Associations face similar issues. Decisions to grant permission to establish an association are often up to the subjective views of the *Dernekler Dairesi Başkanlığı* (Ministry of Interior’s Department of Associations) or judges, as has been the experience of some Protestant churches.

Furthermore, state bureaucracy also interferes in the internal governance of non-Muslim foundations. Regulations guiding the election or appointment of the communities’ religious leaders are drawn up by the communities themselves, yet the Ministry of Interior has the ability to approve, deny, or change them if they are deemed to be incompatible with existing regulations—whether or not this is in the regulations (Yıldırım 2010a). “Christian Churches are

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<sup>54</sup> There was speculation surrounding Bardakoğlu’s departure as to whether he was fired, dismissed, or did actually retire.



led by spiritual leaders whose authority derives from their position, not from being elected,” which is the required format of a foundation; and yet “the state has frequently interfered with the election of board members, removing persons or entire boards it does not like.” Armenian Apostolic and Greek Orthodox foundations have been disproportionately impacted by this (Oehring 2005). As of 2013, no regulation existed to govern the election process for non-Muslim foundations, which prevented such organizations from electing board members (European Commission 2016, 77). The government also takes a heavy hand in determining the leaders of the spiritual communities that fall under the Lausanne Treaty. In June 2007, a domestic court ruled that Greek Orthodox Patriarch Bartholomew can only be referred to as the head of the local Greek Orthodox community, with no jurisdiction outside the country, and, moreover, rejected his title of “Ecumenical Patriarch.” The Venice Commission of the Council of Europe issued an opinion against the domestic court’s decision in 2010, stating that the interference of Turkish authorities in restricting religious rights to legal personality is a violation of Article 9 read in conjunction with Article 11 of the ECHR (Sejersted 2010). Furthermore, the Commission indicated that there is no reason to restrict the Patriarch’s use of the historically recognized title. The Commission recognized that Turkish authorities are not obligated to use the title, but saw no reason why they would not (Sejersted 2010, paras. 6 & 9). One might concede that Turkish officials fail to recognize that other spiritual communities (non-Muslim) have a formal organizational structure and hierarchy that simply does not exist in Islam; however, that should not prevent authorities from recognizing these communities’ rights to legal personality, the enjoyment of their associational rights, and their right to internal governance.

The long-standing reciprocity between Greece and Turkey, as established in the Lausanne Treaty, has also caused deadlock on Turkey's movement towards alignment with the ECHR. Article 2(2) of the 2008 Foundations Law upholds this by reaffirming that reciprocity shall be reserved by continuing to employ the reciprocal nature of the Lausanne Treaty that permits Turkey and Greece to play tit-for-tat in restricting the rights of non-majority spiritual communities in each country.

Beyond the ECtHR, international human rights law mandates that states cannot deny legal personality to an association of individuals and that doing so restricts the exercise of the right to freedom of religion or belief. Authorities' refusal to register a group or decisions to withdraw its legal personality directly affect both the group itself and also its presidents, founders, or individual members (European Commission for Democracy through Law [Venice Commission and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR)] 2014). Furthermore, Turkey ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) on September 16, 2002, one year before it ratified the International Covenant on Civil and Political Rights (ICCPR), further solidifying its obligations to uphold religious and associational freedoms for Turkish citizens. Though progress has been piecemeal, Turkey's attempts to bring its associational laws in line with international standards have been a result of pressure from the EU. However, given that relations between Turkey and the EU are currently strained, these efforts have been halted.

In the *Özbek* judgment, the ECtHR determined that denying permission to establish a charitable foundation was a clear violation of associational rights. The ruling further implied that states should be given a margin of appreciation to interpret what is most appropriate to restrict

rights “in accordance with law” and as “necessary in a democratic society” (Council of Europe 1950, Article 11). However, it is clear that Turkey’s domestic law is incompatible not only with its ECHR obligations, but also with the ICERD, ICCPR, and the EU. It is worth noting that the violation of associational rights, as understood by the organizations mentioned above, contradicts Article 90 of the Turkish Constitution and the primacy of international human rights treaties that Turkey has ratified (*Constitution of the Republic of Turkey* 1982, Article 90).

Because of the laws that govern associational rights in Turkey, non-Hanefi Sunnis face challenges in collectively organizing. In the *Özbek* case, in which a Protestant group attempted to formally establish itself, the group faced barriers to doing so for a number of reasons. For Protestant Christians, navigating the intricate web of governmental institutions that govern associational rights in Turkey can be opaque and complex, leading to situations akin to the *Özbek* case. One might assume that this convoluted institutional set-up is intentional, with the government purposefully establishing a system that is difficult for Protestant Christians to navigate, which effectively leaves their and other religious minorities’ legal status in limbo, prohibiting associational activity. Alternatively, if it is not willful on the part of the government, the institutional embeddedness, and long-standing configuration of these structures is incredibly difficult to change. Furthermore, the socially constructed aspects of this group’s identity by both government actors and society itself have led to their stereotyping as having a clandestine missionary agenda to shift Turkey’s well-established national identity as a Sunni country through religious conversion.

In sum, reasons related to public opinion, including influences from the government and the media in combination with long-standing stereotypes about the Protestant population in

Turkey, seem to be hindering actual progress towards not only the execution of the *Özbek* judgement, but also any real reform in favor of equal associational rights for non-Hanefi groups. While various governments have attempted to shift associational law since the ECtHR's ruling, the changes seem to be vaguely cosmetic. The actual implementation of these laws leave associations and foundations in limbo. The Court and the CoM could be working more closely with their counterparts in Turkey to arrive at a more clear-cut resolution, although again, this could be quite difficult considering the tangled web of domestic institutions involved in such reforms. The complex domestic institutional arrangement, where the *Diyanet* is the primary determinant for Hanefi Sunni affairs, and the VGM (which is under the Prime Ministry) and the *Dernekler Müdürlüğü* (which is housed under the Ministry of Interior) rely on a convoluted matrix of laws and regulations governing various types of foundations and associations. Although the EU accession process has proven instrumental in pushing some reforms in this area, a holistic, durable, and just solution has yet to be in place. Therefore, it seems that the *Özbek* case could be the first among other cases to find their way to the ECtHR because applicant associations and foundations denounce Turkey's inconsistent and arbitrary interpretation and implementation of relevant domestic laws and regulations. The next section addresses another issue that foundations have encountered in Turkey: property rights.

## 6.2 Property Rights

As described in the previous section, the associational rights of non-Hanefi Sunni Muslims in Turkey are governed by a complicated matrix of foundation and association laws that are often inconsistently interpreted and implemented. One particular set of cases that has come before the ECtHR concerns properties belonging to religious foundations and how these properties are governed by the state.

Until 1912, the Ottoman Empire did not provide legal personality to foundations (*vakif*). After that date, foundations were permitted to own property and register it with the Land Registry, thus granting the property legal status. After the Turkish Republic was founded in 1923, the legal framework for regulating non-Muslim communities was established through the creation of community foundations. These foundations were permitted to own properties, including houses of worship, educational buildings, orphanages, hospitals, and other similar institutions. With the passage of Foundations Law No. 2762 in 1935, the governance of foundations and their properties was transferred to the VGM. The following year, under the so-called “1936 Declarations,” the government demanded that the foundations declare the purpose behind their existence, as well as their assets and income, supposedly to formalize the organization of the national land registry. Foundations were also required to submit documentation of property deeds to prove ownership; however, because these foundations had acquired the properties by *firman* under Ottoman rule,<sup>55</sup> they did not have these deeds. As a

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<sup>55</sup> See the previous section for a description of the Ottoman *firman*.

result, the VGM determined that the submitted documents would serve as the constitutive documents of each foundation (Yıldırım 2015, 227). Starting in the 1960s, these declarations were used against the foundations to seize their properties, claiming that the foundations did not have the legal capacity to acquire property and that all property acquisitions after 1936 were null and void (Yıldırım 2015, 227-228). Importantly, this policy was implemented at the peak of tensions between Turkey and Greece in connection to Cyprus (Kurban and Tsitselikis 2010, 12).

In general, any category of foundation can be closed by court order.<sup>56</sup> If the court, at the government's request, deem a foundation to be "inactive," all assets are transferred to the state (United States Department of State 2016, 4). As such, the properties that these foundations had acquired from 1936-1970 (which were recorded in the land register with documentation provided by the governorship, lending them the appearance of legality) were confiscated by either the VGM, the Treasury, or National Real Estate (Yıldırım 2015, 227). From the 1970s to approximately 2010, "the VGM has seized 16 Greek Orthodox foundations and 24 Jewish foundations, taking over their management and confiscating hundreds of properties belonging to them" (Kurban and Tsitselikis 2010, 11).

Minority communities that are permitted to maintain community foundations (Greek Orthodox, Armenian Orthodox, Syriac Orthodox, and Jewish communities) are permitted to own their places of worship. However, for Catholics and Protestants who have not historically been given such permission, though title deeds state that the congregations or the communities own

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<sup>56</sup> During emergency rule or martial law, the government may issue a decree for closure.

the buildings, the state frequently fails to acknowledge this. Another manner in which the state has seized properties is through unclear ownership claims. Turkey has asserted that because some Christian churches owned by foundations are the property of the individual saints after which they are named, and because these saints or their heirs cannot be located, the properties cannot be returned to their rightful owners. The state, therefore, seizes them (Oehring 2007a).

The state has also used the rules governing the foundation's board elections to acquire property. If the state determines that a foundation has not held regular elections, it can declare that the foundation is no longer in use, which justifies the seizure of property.<sup>57</sup> Yet it has often been state policies themselves that have worked against some foundations' holding regular elections (Kurban and Tsitselikis 2010, 11). The executive regulation on the Law on Foundations states that the board candidates must reside in the district in which the foundation is located; however, for a number of foundations, there are few to no non-Muslims left in these areas (Kurban and Tsitselikis 2010, 11).

The VGM has made concessions to this in recent years, yet non-Muslim foundations still complain of the "ad hoc, arbitrary, and unpredictable nature" of a system that places serious restrictions on the autonomy of these groups, as granted in the Treaty of Lausanne (Kurban and Tsitselikis 2010, 11). Thus, in 2002, the legislation governing foundations was amended to allow religious community foundations to acquire immovable property (*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun* 2002, Article 4). Additionally, in 2003, Law No. 4778 reaffirmed the

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<sup>57</sup> Officially "inactive" foundations are labeled "seized foundations" (*mazbut vakıf*) (Kurban and Tsitselikis 2010, 12).

ability of community foundations to secure immovable properties to “meet their religious, charitable, social, educational, health, and cultural needs through the permission of the General Directorate of Foundations” (*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun 2003*, Article 3). Finally, in spite of substantial opposition, Law No. 5737 on Foundations repealed Act No. 2762 on Foundations.

In a 2011 action report the Turkish government submitted to the CoM, the government claimed that this final law enabled 181 non-Muslim community properties to be registered (Secretariat of the Committee of Ministers 2011). This law, adopted on October 1, 2011 (*5737 Sayılı Vakıflar Kanununun Geçici 11inci Maddesinin Uygulanmasına İlişkin Yönetmelik 2011*) allowed community foundations to apply to regain property confiscated from them by the state since 1936. On the surface, this seemed like a win for the foundations who had been victims of confiscations; however, there are exceptions. The decree only includes property that was “nationalized [and] property confiscated by the state from community foundations and handed back to previous owners from whom the foundations had legally acquired;” however, it conveniently ignores the property of community foundations seized by the VGM (Yıldırım 2015, 238).<sup>58</sup> Instead of loosening the restrictions on the right to own property, in 2012, a land registry law was passed that included measures to restrict property acquisition by Greek nationals. As can be seen in the cases below, Turkey has taken some steps to compensate the plaintiffs for their seized properties or to return these properties.

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<sup>58</sup> It is worth noting that the decree was passed when the government had been granted temporary authority to issue legislative decrees for the six months after May 2, 2011 (Yıldırım 2011).



### **6.2.1 Fener Rum Erkek Lisesi Vakfi v. Turkey**

The *Fener Rum Erkek Lisesi Vakfi (Fener Greek Boys' High School Foundation) v. Turkey* case was submitted to the European Commission of Human Rights on November 25, 1996 and transmitted to the Court on November 1, 1998, when Protocol 11 came into effect (*Fener Rum Erkek Lisesi Vakfi v. Turkey* [Application No: 34478/97] 2007). The foundation provides educational facilities at the Greek Orthodox High School in the Fener neighborhood of Istanbul. It has been in operation since Ottoman times and, as required by Section 44 of Law No. 2762, in 1936 registered its purpose and immovable property. With this, it acquired legal personality. In 1952, the foundation received a donated property in Istanbul that was registered with the Land Registry and the foundation paid the property taxes due on the property. In 1958, the foundation purchased another part of the same building through co-ownership; the title to the property was again registered in the Land Registry and the property taxes paid.

However, in 1992, the Turkish Treasury applied to the District Court of Beyoğlu (in Istanbul) to annul the foundation's title to these properties and to return them to their former owners. Citing established case law, the Treasury claimed that the foundation did not have the right to obtain immovable property and further alleged that, because the properties were not mentioned in the documents filed in 1936 (the foundation's constituting documents), the foundation was not eligible to obtain the land title. In 1994, the District Court requested an expert opinion on the case. Referencing the established case law of 1974 (that such organizations cannot obtain property, this report reaffirmed the Court's opinion and stated that the foundation's title should be annulled and the property re-registered in the name of its former owners. The foundation objected, claiming that the documents filed in 1936 did not amount to constitutive

instruments and that foundations could, in fact, acquire property, as determined in the Land Registry Act (Law no. 2644 of 1934, which was in effect at the time of application).<sup>59</sup> In 1996, the District Court ordered both the annulment of the foundation's title and the re-registration of the property in the former owners' names. The foundation appealed later that year and received a dismissal. Soon thereafter, the foundation applied for rectification of the judgment, which was also dismissed. In 2000, the foundation applied to the Directorate General of Foundations to amend its constitution to permit the acquisition of immovable property, but the request was rejected.

In its decision, the ECtHR affirmed that Article 1 of Protocol 1 does not guarantee the right to acquire property, and that states should be granted a wide margin of appreciation in governing the acquisition of land or immovable properties. The Court further noted that the 1996 judgment of the District Court of Beyoğlu relied on the 1974 case law based on Law No. 2762, which in fact does not state anywhere that foundations that fall under that legislation are prohibited from acquiring property. Furthermore, the ECtHR argued that the authorities who had validated the land certificates in the 1952 and 1958 property acquisitions did not object and that judicial interpretation was the impetus behind the restriction. Additionally, the ECtHR noted that the foundation could in no way have reasonably foreseen that its title would be annulled in the

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<sup>59</sup> After the application was submitted to the ECtHR, but prior to the hearing, an amendment was made to the legislation regulating foundations (*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun 2002*, Article 4) that explicitly stated that "Religious community foundations, whether or not they have a constitution, shall be entitled to acquire or possess immovable property, with the authorization of the Council of Ministers [of Turkey], in order to meet their needs for religious, charitable, social, educational, sanitary, or cultural purposes." Furthermore, Law No. 4778 ensures that such foundations can acquire immovable property, whether or not they have a constitutive instrument (*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun 2003*, Article 3).

future due to new judicial interpretation. The Court thus ruled that Turkey was in violation of Article 1 of Protocol 1.

In the measures stemming from the judgment, the Court considered that the re-registration of the disputed property in the applicant's name in the Land Register would serve, to the greatest extent possible, to place the foundation in a position equivalent to that which might have occurred had Turkey complied with Article 1 of Protocol 1. Should re-registration not occur within three months of the final judgment, Turkey was to pay the foundation €890,000 for pecuniary damages as a result of the annulment and non-enjoyment of possession from 2002 forward. A September 2011 action report indicated that the VGM had accepted the foundation's requests on October 31, 2012, and that Turkey had paid the requisite just satisfaction on time. As mentioned above, in compliance with the general measures, Turkey also issued a regulation on the implementation of Provisional Article 11 of Law on Foundations 5737 in 2011 by declaring that the immovable properties of non-Muslim communities that had been adversely impacted by the 1936 Declarations could be registered in the foundation's name upon request.

*Fener Rum Erkek Lisesi Vakfi v. Turkey* was not declared admissible until 2004, and was heard in September 2005. The case spent 121 months in Court, which is an unusually long period of time for the court to hear a case. The delay was most likely a result of the volume of submissions the Turkish government made to support its actions. From the date of the final judgment to July 15, 2016 (i.e., 111 months), the case was under standard supervision by the Committee of Ministers. It is the leading case in a group of four related, repetitive cases (below) that brought similar structural issues forward.

## **6.2.2 Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarlığı Vakfı Yönetim Kurulu v. Turkey**

The *Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarlığı Vakfı Yönetim Kurulu* (Samatya Surp Kevork Armenian Church, School, and Cemetery Foundation) Board of Directors filed their case with the ECtHR on October 17, 2002 (*Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarlığı Vakfı Yönetim Kurulu v. Turkey* [Application No: 1480/03] 2008). The foundation was established in 1832 during the Ottoman Empire and is compliant with the Lausanne provisions. In 1955, the foundation received a property in Istanbul by donation and subsequently registered it in the Land Registry in the name of the foundation. In 1998, the Istanbul Regional Foundation Authority filed with the District Court of Şişli (where the properties were located in Istanbul), for the annulment of the title to the foundation's immovable property (three contiguous houses) citing the aforementioned 1974 case law that ruled that such organizations did not have permission to obtain immovable properties because the 1936 constitutive documents did not include the property. In November 2000, the court of first instance ordered the annulment of the title and the re-registration of the houses in the name of their former owner. In September 2001, the Court of Cassation upheld the judgment and, in 2002, rejected the request for appeal. In 2005, the Council of State issued a judgment that the legislative and regulatory amendments enacted in 2002 (*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun 2002*, Article 4) and 2003 (*Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun 2003*, Article 3) governed only property registered to specific foundations, not those properties registered by third parties.

In hearing the case, the ECtHR ruled in favor of the foundation, concluding that the Turkish government had violated Article 1 of Protocol 1 by infringing on the applicants' right to

peaceful enjoyment of the foundation's possessions by striking the name of the foundation from the land registry 40 years after the acquisition of the property. The Court also cited its judgment in the *Fener Rum Erkek Lisesi Vakfi* case, recalling that the application of the 1974 case law did not meet the requirements of foreseeability. The Court ruled unanimously that Turkey must re-register the Şişli properties in the Land Registry in the foundation's name within three months of the final judgment of the case. If it failed to do so, Turkey would be required to pay the foundation €600,000. There is currently no specific information available from the HUDOC-EXEC database as to whether Turkey has taken individual measures (return and reregister the properties in question) or paid the just satisfaction.

The case spent 74 months waiting for the ECtHR's judgment and, from the date of the final judgment to July 15, 2016, spent 88 months under standard supervision as part of the repetitive cases under the *Fener Rum Erkek Lisesi Vakfi* case.

### **6.2.3 Yedikule Surp Pirgi Ermeni Hastanesi Vakfi v. Turkey (No. 2)**

*Yedikule Surp Pirgi Ermeni Hastanesi Vakfi* (Foundation of the Armenian Hospital Surp Pirgiç of Yedikule) was established in 1832 under the Ottoman Empire, in conformity with the Lausanne Treaty. The foundation applied to the ECtHR on July 16, 1999 and August 20, 1999 (*Yedikule Surp Pirgi Ermeni Hastanesi Vakfi v. Turkey* [Application Nos. 50147/99 and 51207/99], respectively), alleging an infringement on their peaceful enjoyment of property as stipulated in Article 1 of Protocol 1 of the ECHR. The case was heard by the Court, and on May 29, 2006, the Registrar proposed that the parties agree on a friendly settlement within the meaning of Article 38§1(b). On March 16, 2007 and March 29, 2007, the applicant and the government, respectively, submitted formal declarations of a friendly settlement in the case. The

properties were returned to the applicant and the foundation received €15,000 for costs and expenses. This was the first case where Turkey returned properties (Hrant Dink Foundation 2012). The CoM closed the case at their 1128th meeting in December 2011 (European Court of Human Rights, Committee of Ministers 2011). The foundation, however, applied to the ECtHR again with another application on July 24, 2002 (*Yedikule Surp Pırgiç Ermeni Hastanesi Vakfı v. Turkey* [Application No: 36165/02] 2008).

The applicant acquired a property by donation in 1962 in Beyoğlu (Istanbul) upon which an immovable structure was built. The title to the property was registered in the land registry. In November 1998, the State Treasury applied to the Beyoğlu District Court to nullify the applicant's title and reinstate the property in the name of the former owner. The Treasury argued that the immovable property was not mentioned in the original declaration in 1936 and that the applicant's status did not grant it the right to acquire immovable property. In 2001, the District Court ruled to annul the applicant's title and to reinstate the property in the land registry under the former owner. The judgment was upheld by the Court of Cassation in 2001, which rejected the request for a correction of judgment in 2002. As such, the property was re-registered in the name of the donor, the late Ms. Virkinya Basreisyan. Ms. Virkinya Basreisyan's heirs applied for a license in the Beyoğlu District Court since they had decided to sell the apartment in question by tender. In January 2007, the property was sold to Mr. H.D. Erseven for 771,000 TL.

In hearing the case, the ECtHR drew on the judgment in the *Fener Rum Erkek Lisesi Vakfı* case to determine that the annulment of the title was illegal and had infringed upon the applicant's right to the peaceful enjoyment of its possessions. The Court ruled that there had been a violation of Article 1 of Protocol 1. Turkey was to pay the applicant €275,000 in

pecuniary damages (the market value of the property at the time of the case). The properties were returned and fines were paid. The case spent 77 months in Court and 88 months in the CoM. The case remains under standard supervision as a repetitive case within the *Fener Rum Erkek Lisesi* group of cases.

#### **6.2.4 Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey**

The *Bozcaada Kimisis Teodoku Rum Ortodox Kilisesi Vakfi* (Foundation of the Bozcaada Kimisis Theodosian Greek Orthodox Church) is a foundation in Çanakkale, Turkey, established through the provisions related to religious minorities under the Lausanne Treaty.

In the first set of cases in the ECtHR (Application Nos. 37639/03, 37639/03, 26736/04, and 42670/04), the Foundation claimed to have acquired three properties and an immovable, which was used as a chapel. Though these properties had been in the Foundation's uninterrupted possession for more than 20 years, they had not been registered in the Foundation's name in the land registry. In 1991, the land registry divided the plots and new numbers were assigned to each plot. Since the applicant did not file its declaration of the properties according to Law No. 2762 on foundations, the names of the owners of the properties were left blank. In spite of this, experts and witnesses verified that the Foundation was in fact the owner of the properties.

In 2000, the VGM sent a letter to the Foundation requesting that the applicants bring the matter to court to legally register the properties in the land register. The Foundation did so with the Bozcaada Cadastral Court in 2001 and 2002. The court granted the request and ordered the registration of the properties in the land registry. The State Treasury filed for an appeal of the decision and the Court of Cassation reversed the judgments, noting that the Foundation had not filed a declaration as required by Law No. 2762 and claiming that foundations did not have the

right to obtain property. The Court of Cassation dismissed the Foundation's appeals for rectification of the judgment. In 2002, Law No. 4771, which amended Law No. 2762, became effective, allowing foundations to register their immovable properties in the land registry. Yet in 2003, two cases were heard before the Land Titles Court claiming that the Foundation could not be considered the owner of the properties according to the 1974 case law on the subject. The properties were ordered to be registered in the name of the State Treasury. On November 20, 2003, and November 3, 2004, after a number of appeals and dismissals, the Foundation applied to the ECtHR.

The ECtHR ruled that, based on government's refusal to register the properties in question in the Foundation's name, Turkey had violated Article 1 of Protocol 1. Turkey's actions violated the Foundation's right to the peaceful enjoyment of possessions. The Court considered that the registration of the disputed properties in the land registry in the name of the Foundation would place the Foundation as far as possible in a situation equivalent to that which they would have been had Article 1 of Protocol 1 not been violated. In the absence of such action, Turkey should compensate the Foundation €100,000 for all damages. The Court also awarded the Foundation €5,000 in costs and expenses. The case spent 70 months in the Court until the judgment, and 88 months in the CoM from the time the judgment became final to July 15, 2016. Two properties were considered rectified on October 2, 2010. The case remains under standard supervision in the CoM as a repetitive case under the *Fener Rum Erkek Lisesi Vakfi* cases.

The circumstances regarding the second set of properties (Application Nos. 37646/03, 37665/03, 37992/03, 37993/03, 37996/03, 37998/03, 37999/03, 38000/03) were similar to the previous applications in that they were in possession by the foundation for a significant amount



of time but had not been registered in the land registry. Again the work carried out by the land registry in 1991 and 1992 did not indicate the name of the Foundation as the rightful owner of the properties and the applicant did not file them as required by Law No. 2762. The VGM sent a letter to the Foundation, inviting them to file with the courts to register the properties in question in the land registry. The request was granted in 2001. The State Treasury filed an appeal in 2002 with the Court of Cassation, and the court determined that the Foundation could not acquire property according to Law No. 2762, further noting that since one of the properties in question was a cemetery, it should be registered in the name of the municipality. The Foundation applied for rectification but was dismissed and the court ordered that the property in question be registered in the name of the Bozcaada municipality. The remainder of the properties in this set of cases were immovable properties (some in a state of ruin, including a pension, chapels, a monastery, and a depot that the government had refused to register in spite of the fact that the Foundation had regularly paid property taxes on the properties and had held them uninterrupted for an extended period of time, as witnesses and experts attested.

In hearing the case, the ECtHR cited its decision in the *Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi* (1) judgment, ruling that there had been a violation of Article 1 of Protocol 1 based on domestic officials' refusal to register the properties in the land registry in the Foundation's name (*Bozcaada Kimisis Teodoku Rum Ortodoks Kilisesi Vakfi v. Turkey* [Application Nos. 37639/03, 37639/03, 26736/04, and 42670/04] 2009). The Court considered that registering all properties in question in the Foundation's name in the land registry would place the Foundation, to the greatest extent possible, in a situation equivalent to that in which they would have been had there not been a violation of Article 1 of Protocol 1. The Court listed

three particular properties that should be returned, with their return being the only appropriate form of redress. Should the remaining properties not be returned, Turkey was ordered to pay the foundation €173,000. The foundation was also awarded €5,000 in costs and expenses. The case spent 72 months in the Court until it was heard, and 78 months in the CoM from the final judgment to July 15, 2016. It remains under standard supervision as a repetitive case under the *Fener Rum Erkek Lisesi Vakfi* group of cases.

### **6.2.5 Fener Rum Patrikliği v. Turkey**

The case of *Fener Rum Patrikliği v. Turkey* ([Application No: 14340/05] 2010) first came to the Court in 2005. The *Fener Rum Patrikliği* (Ecumenical Patriarchate of Fener) is the representative of the Orthodox Church established in Istanbul that is charged with the representation and coordination of the global Orthodox community. It is represented by His Holiness the Ecumenical Patriarch.

The applicant acquired a plot of land in 1902 by contract of sale on Büyükada Island (Istanbul) that had a building and an annex on the property. Because the property was acquired under Ottoman law, the acquisition of the property was confirmed by the issuance of a *firman*. In 1903, the property was ceded to the “Büyükada Greek Orphanage for Boys Foundation.” When Law No. 2762 came into force in 1935, the Foundation acquired legal personality and the property was declared to be a registered property managed by the Foundation. In 1995, the Foundation made an arrangement with a private company to manage and renovate the buildings. Two years later, the VGM issued a decree that classified the formerly *mülhak* (attached) Foundation as a *mazbut* (seized/disused) foundation, stating that, because the foundation no longer conducted charitable activities, the board of directors had been revoked and the

management handed over to the VGM. The Foundation applied for an annulment but the court dismissed the application in 1998. In 2001, the Council of State reversed the judgment dismissing the Foundation's application. In 2002, the Court dismissed the Foundation's application again and, this time, the Council of State upheld the judgment. In the meantime, the VGM, on behalf of the Foundation, appealed to the Adalar High Court for an annulment of the title and the reinstatement of the property in the land register. The property was subsequently reregistered but the Court of Cassation invalidated the judgment on procedural grounds. The District Court once again annulled the title and ordered that the property be reregistered. The Court of Cassation upheld the appeal and declared that the Foundation was no longer the owner of the property.

In hearing the case on July 8, 2008, the ECtHR ruled that there had been a violation of Article 1 of Protocol 1 due to the fact that Turkish authorities had deprived the Foundation of their property without providing adequate compensation, even though the government sought to preserve the original purpose of the property in question. Furthermore, citing case law from *Fener Rum Erkek Lisesi Vakfi*, the Court determined that the application of the 1974 domestic jurisprudence, by which the government confiscated properties that did not have "appropriate" articles of foundation from 1936, did not meet the requirements of "foreseeability." At the time of the hearing, the application of Article 41 (just satisfaction) of the ECHR was not ready for decision, and the Court invited the government and the foundation to submit their arguments within six months, which both parties did. The Court deliberated in private on May 25, 2010 and issued a judgment that was adopted on June 15, 2010. In the deliberations, the Court determined that reinstating the property in the land registry in the Foundation's name would serve as the only

adequate measure to redress the damage incurred. As a result, there was no need for pecuniary compensation. The Court also awarded the Foundation €6,000 in non-pecuniary damages for “moral injury” inflicted on the applicant and €20,000 for costs and expenses. The case spent 62 months in the Court awaiting judgment (including delays related to Article 41 decisions) and 70 months in the CoM from the final judgment to July 15, 2016. The case remains under standard supervision as a leading case on its own.

### **6.2.6 Analysis**

The cases included in this category differ slightly from the others in that they relate to what has become a relatively technical process of property acquisition and restitution, as opposed to issues relating directly to the manifestation of religious freedoms or rights. Yet the number of applications at the ECtHR religious minorities have made for property restitution demonstrates that the applicants were unable to have their properties returned to them through purely domestic legislative or even judicial means. This set of cases points to the judicialization of non-Hanefi Sunni Turkish rights recognition by these groups seeking recourse through the ECtHR.

Naturally, the Turkish government has been reluctant to move forward on taking action regarding the return of properties or compensation for the illegal acquisition of such properties out of concern for the large sum of money that would be required in direct payments or the financial burdens that would arise from the transfer of properties that are currently used for other purposes. Indeed, when the 2008 Foundations Law passed, then-PM Erdoğan indicated that restitution would be costly and the issue should be dropped (Oehring 2008a). It is unclear from the action reports that Turkey has submitted to the CoM precisely the amount of money that has been paid or which properties have been returned (and under what terms). The United States

Commission on International Religious Freedom’s 2016 report on Turkey states that, according to the Turkish government, “more than 1,000 properties—valued at more than 2.5 billion Turkish Lira (1 billion U.S. Dollars)—had been returned or compensated for” between 2003 and 2014 (United States Commission on International Religious Freedom 2016, 186). No figures could be found for the total cost Turkey incurred during this period.

Nevertheless, according to the Greek Ministry of Foreign Affairs site, after the new Foundations Law was implemented, 70 percent of the cases where the property of Greek Orthodox pious foundations had been expropriated “were dismissed as inadmissible” (Hellenic Republic Ministry of Foreign Affairs 2017). The United States Department of State’s 2016 International Religious Freedom report noted that none of the properties that had been seized in previous decades had been returned that year. The report further noted that, since the 2011 provisional amendment to the Foundations Law, 1560 religious minority foundations had applied for compensation for seized properties, only 333 of which were returned while only 21 received financial compensation. The remainder of the applications were rejected for not meeting the criteria of the aforementioned law (United States Department of State 2016, 11). The rejection of such a high volume of cases under Law 5737, even after the provisional amendment was added in 2011, indicates that financial compensation is not the only deterrent for resolving these reparations.

As mentioned above, the history of associational law in Turkey has been piecemeal, inadequate, and not uniformly implemented or consistently interpreted. Yıldırım (2015, 228) claims that this is largely due to the inadequacy of regulations and “the lack of a regulation that should have accompanied the 1949 amendments to the then-Law on Foundations.” These grey

zones have allowed “de facto rule-makers” such as police officers to widen the scope of their authority to interpret associational law (Yıldırım 2015, 228). This extends to other government institutions, such as the Forestry Directorate, which filed a lawsuit in 2012 that requested the cancellation of the property deeds that had been returned to the Ecumenical Patriarchate (United States Department of State 2016, 12). More significantly, had the language of the law been more explicit and included properties the VGM (*mazbut vakiflar*) had confiscated from religious communities or had a more comprehensive regulation been issued when provisional Article 11 to the Foundations Law (5737) was adopted, many applications for restitution would have been accepted and the properties could have been returned.

Without explicit national laws in place, legal interpretation is left to local districts and municipalities that often have no incentive or desire to see properties returned. These seemingly deliberately structured loopholes in laws and regulations essentially authorize discriminatory intervention by any level of government into the establishment, operation, and property rights of religious communities. It can become a political issue, left to the whim of the party in control of whatever level of government is left to decide.

Politics has, indeed, played into decisions regarding the restitution of religious communities’ properties. All parties in Parliament have consistently opposed compensating groups whose properties have been confiscated. This sentiment extends not only to the return of the properties themselves or compensation, but also to the legal structure establishing any kind of rights for such groups. For example, after Parliament passed the 2006 version of the Foundations Law (No. 5555), then-President Ahmet Necdet Sezer, a staunch secularist, vetoed it and sent it back to Parliament for review. He stated that no special status should be granted to religious

foundations, as this is already granted in Article 101 of the Civil Code and has been provided through the Lausanne Treaty and Turkey's secular nature. Parliamentary elections held in November 2007 changed the makeup of the body slightly: the AKP party remained in power but lost seats; CHP (secular, social democrat) also lost seats; and the MHP (nationalist) gained a significant number of seats. Just a few months after being in power, the AKP faced potential closure in a case brought forward by the Chief Public Prosecutor for violating the secular principles of the country. The party defied closure, but was hit with a 50 percent cut in public funding.<sup>60</sup>

In the following session, the AKP introduced a bill almost identical to the one Sezer had vetoed. The bill passed, but not without opposition from within the AKP itself and from the CHP and MHP. It was then signed by newly-appointed President Abdullah Gül, who was an AKP member prior to his appointment.<sup>61</sup> Soon thereafter, then-Prime Minister Erdoğan made a statement to Parliament signaling his preference for state non-interference with the "Ecumenical issue," leaving the decision to the Patriarchate. This was viewed by some as a positive step towards increased rights recognition for such communities yet, to date, no action has been taken to allow the Patriarch to assume the "Ecumenical" title.<sup>62</sup> As well, the return of some properties

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<sup>60</sup> According to the Constitution, political parties receive public funding. The amount allocated to each party is determined by a scheme based on national thresholds.

<sup>61</sup> The office of the president was a non-partisan position until a referendum was held in April 2017 to convert Turkey into a presidential system, which allows for the president to have a party affiliation.

<sup>62</sup> Under current law, the Greek Orthodox Patriarch must be born a Turkish citizen. Furthermore, the Turkish government can oppose any candidate that is presented for the position. To resolve this, the government proposed to grant citizenship to any approved candidate, but they have yet to accept any that have applied. Furthermore, the government does not recognize the title of the Patriarch, instead referring to him as the "Greek Orthodox Patriarch

has been criticized as being politicized in that they are returned with great fanfare, as was the case with the return of an Armenian orphanage property to the Gedikpaşa Armenian Protestant Church Foundation. The property was returned after then-PM Davutoğlu intervened just weeks prior to a national election.

Some political parties have taken more overt action to express their opposition to increased rights recognition for religious communities—particularly those that are seen as “foreign” to Turkey. At the time the 2008 Foundations Law was about to pass in Parliament, the *Hak ve Eşitlik Partisi* (HEPAR, Law and Equity Party) was formed with virtually no other agenda than to advance Turkish nationalism. The party took out full-page advertisements in a number of newspapers, attacking what it deemed as missionaries’ “colonization” of Turkey (Oehring 2008b). The creation of such an overtly nationalist party can be seen as a reflection of the sentiments of the society at the time. The brief list of incidents in the previous section are evidence of some of the nationalist and anti-non-(Sunni)-Turk attitudes held by certain segments of society. As well, in 2008 when HEPAR was founded, the country was still reeling from the assassination of Armenian-Turkish journalist Hrant Dink, a proponent of human rights and the deeper integration of Armenians into Turkish society. The trial of his 18-year-old assassin was ongoing and the *Ergenekon* trials were just starting.

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of Fener” (*Fener Rum Ortodox Patriği*, named after the neighborhood where the Patriarchate is located). To simply call him Patriarch would imply recognition of his role as an international religious leader.



Nevertheless, domestic court cases related to property expropriation and restitution continue to be filed and heard, the most notable of which related to the Syriac Orthodox Mor Gabriel Monastery.<sup>63</sup> The Forestry Ministry, Land Registry, and three villages opened a case against the monastery in 2008 for their alleged occupation of Forestry land. The monastery lost this case, but won another case brought against it by the Ministry of the Treasury. It is important to note that there was significant pressure to resolve the Mor Gabriel property issue coming from international organizations and institutions, including the Syriac Universal Alliance (which represents the interests of Syriacs globally), the European Syriac Union, the European Union, and the Council of Europe. The properties were returned piecemeal over the years, transferring hands from the *Diyamet*, to the VGM, and finally back to the foundation in 2017.

The European Union continues to pressure the government to return properties and respect religious communities' rights in the Commission's annual progress reports. In 2006, the Turkish government welcomed the Commission's suggestions, requesting that experts from the EU travel to Turkey to work on issues related to religious communities; the EU obliged, but Turkey backed out at the last minute, claiming they had no need for such assistance (Oehring 2006). Though some reforms have been made as part of the EU accession process reform packages, namely to associational laws, some EU states' (for example France and Germany)

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<sup>63</sup> In 2014, the status of Mardin was changed to be a metropolitan municipality, and the title deeds to the properties of the Foundation of the Mor Gabriel Monastery were transferred to the Department of the Treasury, under a "transfer and liquidation" process that confiscated properties of "expired" legal entities.

clear opposition to Turkey's candidacy from has diminished the leverage that the EU has to influence the Turkish government.

The United States government and US NGOs have also been quite vocal and active in compelling Turkey to return confiscated properties and/or award compensation. For example, representatives of the American Hellenic Educational and Public Affairs Association, the American Hellenic Council, the American Hellenic Institute, the Armenian National Committee of America, the Armenian Assembly of America, and the Syriac Universal Alliance have made a number of visits to congressional and departmental leaders to express their views on the return of confiscated properties. These primarily diaspora organizations wield an enormous amount of influence on congressional representatives and have persuaded them to sponsor or vote for legislation favorable to their respective causes. Their actions prompted the House of Representatives to pass H. Res. 306<sup>64</sup> in December 2011 that urged Turkey to end religious discrimination and return confiscated religious properties. A related bill (S. Res. 392) was introduced in the Senate but did not receive further action. The language from H. Res. 306 was then used in H.R. 2583, the Foreign Relations Authorization Act for FY 2012, which passed in the Foreign Affairs Committee. The Act again called on Turkey to “allow church and lay owners of Christian church properties to organize and administer religious and social activities” and to “return to their rightful owners all Christian churches, monasteries, schools, hospitals,

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<sup>64</sup> H. Res. indicates that the bill is a “House Resolution,” meaning that it merely expresses the sentiment of the chamber and is not legally binding.

monuments, relics, and other religious properties, and allow their preservation and reconstruction as necessary” (Part II: Country-Specific Provisions Section 1165, HR 2583 112th Congress).

A stand-alone bill called the “Turkey Christian Churches Accountability Act” was introduced in March 2014 in the 113th Congress and passed Foreign Affairs markup in June of that year. The bill (according to Congressional Research Services):

Directs the Secretary of State to report annually to Congress until 2021 on the status and return of stolen, confiscated, or otherwise unreturned Christian churches, places of worship, and other properties in or from the Republic of Turkey and in the areas of northern Cyprus occupied by the Turkish military.

Requires such report to: (1) list all the Christian churches, places of worship, and other religious properties, including movable properties such as artwork and other artifacts, in or from Turkey and in the territories of the Republic of Cyprus under military occupation by Turkey that are claimed as stolen, confiscated, or otherwise wrongfully removed from their Christian church owners; and (2) describe all engagement over the previous year on this issue by Department of State officials with representatives of the Republic of Turkey.

Requires that a summary of such information be included in the annual Country Reports on Human Rights Practices and the International Religious Freedom Reports (Royce 2014).

The language of the bill requests the United States Department of State’s collaboration in exerting pressure on Turkey through its annual human rights reports by highlighting any progress (or lack thereof) made in Christian property restitution. Importantly, though the State Department, through the Secretary of State and Deputy Secretary of State, acts independently of congressional direction in meetings with counterparts in Turkey, diaspora organizations often have input and influence in these meetings.

Confronted with the formidable domestic grassroots power of the Greek and Armenian diasporas, the Turkish government has in the past employed “hired guns” to handle its lobbying efforts in the United States or has indirectly funded pro-Turkey grassroots efforts. However, in recent years, the Turkish American community has become much more involved in grassroots activism. This can be seen in the 2009 emergence of the Turkish Coalition of America, which receives no support from either the Turkish or US governments, and the creation of the Ten Thousand Turks Campaign, which established five political action committees in 2007. Diaspora groups’ relative silence on property restitution issues in recent years, and the subsequent lack of political action by Congress, could very well be due to the increased political activism of Turkish Americans in the US.

In sum, the fact that Turkey made such concrete steps toward the execution of the judgments in these cases is unique. According to Gökçe Türkyılmaz, a lawyer at the Registry of the ECtHR, the execution of judgments related to property rights is simply a matter of returning the properties, which is more of a technical issue and not necessarily a policy issue (Türkyılmaz 2017). Yet as mentioned above, the actual percentage of properties that have been returned seems surprisingly small, and the return of properties in ECtHR cases is likely due to the judgments themselves or as a result of the 2011 reforms. The judgments have been quite clear in their language by indicating, in a majority of the cases, that individual measures include the return of the property or monetary compensation, and that general measures would include a change in the relevant regulations. Though the properties in question at the ECtHR have been returned, the CoM is reluctant to close these cases. This is likely due to the fact that the requisite general measures have not fully been implemented, as is evident in the very recent domestic case

of the Mor Gabriel properties, mentioned above. There are still no barriers to the government's expropriation of religious minority properties, meaning that this issue will likely continue to be judicialized at the ECtHR as properties continue to be confiscated and the structural issues that require attention on this issue are fully addressed.

The Lausanne Minorities, who have been the most disproportionately affected group by property rights issues, face a unique institutional framework in Turkey. Their official recognition by the Lausanne Treaty formally established their rights, though not fully applied in reality.

The cases considered in this section have included properties that have existed for a number of years and the issues at the Court were related to the historic trajectory of the ownership of those properties. Minorities in Turkey today face another issue—the establishment of newer places of worship and how the government recognizes the group in terms of services provided (or denied). The following section considers four such cases.

### **6.3 Place of Worship/Public Provision of Religious Services**

The first clause of Article 9 of the ECHR, which deals with freedom of religion, affirms the right to freedom of thought, conscience, and religion and the right to manifest that religion or belief either alone or in community with others “in worship, teaching, practice, and observance.” The second clause provides further details regarding manifestations; they are “subject only to such limitations as are prescribed by law and are necessary in a democratic society, in the interests of public safety, for the protection of public order, health, or morals, or for the protection of the rights and freedoms of others.” The Court and CoM have embraced rather narrow interpretations of the term “manifestation,” causing challenges for applicants to prove that this right has been restricted (Evans 2001, 101). Nonetheless, these cases continue to come before the Court and, as in the cases examined in this section, the Court has concluded that rights to religious freedom related to manifestation were violated.

More than half a century ago, Arcot Krishnaswami issued a report for the United Nations on religious discrimination and noted that: “The right of a group to manifest its religion or belief through public worship is also sometimes curtailed—and occasionally even negated—by unreasonable regulations. Licenses for the opening of places of worship may be arbitrarily withheld, or permits for the assembling of a group of worshippers arbitrarily refused. Or, if the license or permit is not withheld or refused, it may be granted on terms which are onerous or difficult to comply with, and which may in effect negate — or at least seriously curtail — the right to worship in common” (1960, 31). As the following cases illustrate, Turkey has been found to be in violation of Article 9 in this regard. It is worth noting that Article 9 is often read in conjunction with Article 14 (as in *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey*

[Application No. 32093/10 ] 2014; *İzzettin Doğan et al. v. Turkey* [Application No. 62649/10] 2016), which establishes the protection of Convention rights without discrimination on a number of grounds, one of which is religion. This applies to cases not only related to the manifestation of faith or beliefs, but also to the public provision of religious services and the manner in which communities of faith are privileged with or denied access to services or recognition as it relates to collective manifestation. According to Evans, “‘worship’ has been given the highest status of the manifestations listed in Article 9(1)” of the ECHR (2001, 107). However, as manifestations, the Court and Commission have thus far assumed that the terms “worship” and “observance” are self-evident and do not need to be explicitly defined (Evans 2001, 108). Furthermore, states seem to have been given a wide margin of appreciation in practice, and as such, case law has made it difficult to concretely identify cases of discrimination or “unnecessary restrictions” (Yıldırım 2015, 127).

Places of worship, as defined by Turkish law, are limited to mosques and *mescits* (small mosques), churches, and synagogues as they relate to Islam, Christianity, and Judaism, respectively. However, there is no particular procedure for obtaining the status of a “place of worship” in Turkish law (*mabed/ibadethane*). A number of regulations have been issued by the Turkish Council of Ministers that regulate taxes from which certain organizations and buildings are exempt, including “houses of worship.”<sup>65</sup> Tax exemptions include electricity and gas costs, property taxes, environmental cleanliness taxes, and income tax.

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<sup>65</sup> The July 19, 2003 amendment to Act No 4928 specifically replaced the term “mosque” with “house of worship.”

Turkey has been ruled to be in violation in cases related to restrictions on places of worship and discrimination in the public provision of worship services. As of 2016, “holding religious services at a location not recognized as a place of worship is illegal and may be punished with fines or closure of the venue” (United States Department of State 2016, 3). Religious minorities continue to report difficulties and file cases related to challenges in opening and operating houses of worship (United States Department of State 2016, 1). A few domestic cases have mentioned the *Diyanet*’s continued refusal to provide financial support for the construction of Alevi houses of worship (*cemevi*), while it continued to support the construction of Sunni mosques. As of 2015, the *Diyanet* was also continuing to pay the salaries of nearly 120,000 Sunni religious officials of mosques but refused to pay the salaries of any other religious officials, in spite of an appeal by the Boyacikoy Surp Yerits Mangants Armenian Church Foundation (United States Department of State 2016, 16). The Istanbul Municipality offered the Syriac Orthodox community land to build a second church that had previously belonged to the Latin Catholic community. According to the Regional Board for the Preservation of Cultural Heritage, this requires a written agreement between the communities that has yet to be signed. These are just a few examples of the institutional difficulties that non-Sunni groups face when attempting to open or operate houses of worship. The following ECtHR cases are examples of Turkey’s violations in relation to houses of worship and the pluralist public provision of religious services.

### **6.3.1 Tanyar and Küçükergin v. Turkey**

On June 28, 2001, Mr. H Zekai Tanyar and Mr. Ali Cengiz Küçükergin brought their case to the ECtHR (*Tanyar and Küçükergin v. Turkey* [Application No: 74242/01] 2006). The applicants



had purchased housing on the ground floor of a building in İzmir that, as they informed the Prefect of İzmir, would be used as an independent Protestant place of worship, prayer, assembly, and study. The Security Directorate of the Prefecture of İzmir responded, explaining that a private room could not be used as a place of worship unless approved by the co-owners. The applicants continued to assemble at the dwelling in question, even though they did not have all the co-owner's prior agreement. Furthermore, the applicants affixed a plaque with the name of their community at the entrance to the building. The public prosecutor of İzmir dismissed the case that had been brought against the applicants, citing the protection of freedom of religion. The public prosecutor then fined the applicants 15,000,000 TRL for holding the aforementioned meeting. The applicants did not pay the fine within the fixed time. Once again, the İzmir Police Court found the applicants guilty of organizing a religious ceremony (in violation of Article 529 §1 of the criminal code) and ordered a fine of 22,500,000 TRL. The applicants lodged a complaint against that order with the İzmir Criminal Court, citing Articles 9 and 6 of the ECHR. On December 15, 2000, the applicants were notified that the Criminal Court had dismissed the complaint without a hearing. The applicants then took the case to the ECtHR.

The ECtHR ruled that there had been a violation of Article 6(1) of the ECHR because the applicants were not granted a public hearing. Though the applicants had also filed the complaint as a violation of Article 9, the Court held that Tanyar and Küçükergin's argument regarding religious freedom was manifestly ill-founded in that the fine they were handed was "justified in principle and proportionate to the intended objective of protecting the rights and freedoms of others and order" (*Tanyar and Küçükergin v. Turkey* [Application No: 74242/01] 2006). The

Court granted the applicants €1500 for costs and expenses; the finding of the violation itself deemed just satisfaction.

The case was one of 31 repetitive cases under *Adem Arslan v. Turkey* ([Application No. 75836/01] 2006), all of which related to Article 6 violations. The case spent 65 months in Court and 39 months in the CoM prior to the leading case and repetitive cases' closure by the CoM's ResDH(2010)64 on June 3, 2010. The costs and expenses awarded by the Court were paid by the government on June 1, 2007. Since the payments had been made and since the Turkish Constitutional Court had declared in June 2004 preventing the holding of public hearings was unconstitutional, the case was closed on June 3, 2010.

### **6.3.2 Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey**

The case of *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı (CEM Vakfı; Foundation for Republican Instruction and Culture) v. Turkey* was filed with ECtHR on May 7, 2010 ([Application No: 32093/10] 2014). The CEM Vakfı was established in 1995 as a public benefit foundation. As a cultural foundation, it manages a number of *cemevis* throughout Turkey, including the *Yenibosna Pir Koca Ahmet Yesevi Cem Kültür Merkezi (Yenibosna Cemevi)*. The Yenibosna complex houses the foundation headquarters, a restaurant, a library, a conference room, a classroom, a funeral hall, and a *cemevi*. In August 2006, the Director of the Foundation sent a letter to the management of Boğaziçi Elektrik Dağıtım A.Ş. (BEDAŞ), a private electric distribution company, stating that, as a house of worship and a funeral hall, the Yenibosna *Cemevi* should be exempt from payment of electricity bills. The request was rejected by BEDAŞ, which claimed that since Turkey's adoption of the CoM's Decision No. 2002/4100, the provision of electricity, which had been granted to places of worship, had been transferred to a fund under

the *Diyanet*. In a May 2008 judgment, the District Court dismissed the claims based on the *Diyanet*'s view that Alevism is not a religion and that *cemevis* are not houses of worship. The CEM Vakfi appealed against the first instance judgment but, in March 2009, the Court of Cassation upheld the judgment.

While the scope of Article 9 does not guarantee that religious groups are granted a particular legal status or a special tax status, special status for places of worship was written into Turkish law after the CoM's decision. This status means, for example, that electricity bills are paid through a *Diyanet* fund. This denied *cemevis* the status of a house of worship because the *Diyanet* does not recognize them as such and is discrimination based on religion (Article 14), taken together with Article 9.<sup>66</sup> The question of the application of Article 41 of the ECHR was not ready for hearing, as the Court rejected the portions of the case concerning the other invoices the applicant had submitted and considered the present case to be relevant only to the electricity bills for the Yenibosna center. The Court thus granted the parties six months to come to an agreement for the remaining invoices submitted as part of this case. At the March 8-10, 2016 meeting of the CoM, Turkish authorities submitted the government's overall Action Plan (announced on December 10, 2015, received by the CoM on January 5, 2016), which envisages giving a legal status to "spiritual knowledge centers" (*geleneksel irfan merkezleri*) and "assembly houses" (*cemevleri*). The case spent 35 months in the Court and 15 months in the CoM. It remains under enhanced supervision in the Committee of Ministers.

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<sup>66</sup> In a separate judgment on June 20, 2017, the Court awarded the applicants €44,400 for material damages and €10,000 in moral damages.

### 6.3.3 İzzettin Doğan et al. v. Turkey

*İzzettin Doğan et al. v. Turkey* is a leading case submitted to the ECtHR on August 31, 2010 by 203 Turkish Alevi citizens<sup>67</sup> ([Application No. 62649/10] 2016). The case was originally assigned to the Second Section of the Court, but the judges of the section relinquished jurisdiction so that the case would be heard by the Grand Chamber in a public hearing on June 3, 2015.

Domestic proceedings had begun in June 2005 when the applicants submitted a petition to the Prime Minister complaining that the *Diyanet* confined its activities to a single school of Islamic thought (Sunni Islam), while disregarding other faiths. The petition stated that Alevi rights had been infringed upon due to the fact that Alevi *cemevi* were not recognized as houses of worship; that numerous obstacles prevented *cemevi* from being built; that no budgetary provision in the national budget was allocated to the operation of *cemevi*; and that Alevi's free exercise of rights and freedoms was subject to the good will of public officials. The petition requested that Alevi religious services be recognized as a public service; that *cemevis* be given status as a place of worship; that Alevi leaders be recruited as civil servants; and that budgetary provisions be allocated to the Alevi community. The Prime Minister's public relations department rejected the requests in August 2005, claiming that the *Diyanet*'s services were general and supra-denominational and were available to everyone; that it would be impossible to grant *cemevi* the status of a place of worship; and that no privileges could be given to a group based on faith or

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<sup>67</sup> The primary applicant, İzzettin Doğan, is the founding president of the CEM Vakfı, the applicant in the *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey* case above.

belief, including allocating budgetary funding for services not provided for in the Constitution. The applicants were among 1,919 Alevi citizens who applied for judicial review with the Ankara Administrative Court. The Court dismissed this particular case in July 2007. The applicants appealed to the Supreme Administrative Court on points of law, but the case was dismissed in February 2010. The applicants then took the case to the ECtHR.

When reviewing the case in light of Article 9, the Court considered that the government had interfered with the applicants' right to freedom of religion by refusing to recognize the Alevi faith and its practices (*cem*), thereby denying *cemevi* and religious leaders (*dede*) legal protection. The Court considered the government's approach to Alevi practices, community, and places of worship to be incompatible with the state's obligation of neutrality and impartiality. Furthermore, by maintaining that the Alevi were a "Sufi order," the government placed them in a position to be further discriminated against under Law. No 677,<sup>68</sup> which, among other punishable offenses, prohibits the use of the term *dede*.

Although states are granted a margin of appreciation in their relations with faith groups, in this case, the Court determined that Turkey had overstepped the boundaries of this understanding. While there are varied interpretations of the precepts and practices of Alevism and Alevis, respectively, the government had not identified the community's common requests,

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<sup>68</sup> Law no. 677 of November 30, 1925, "Closure of Dervish Monasteries and Tombs, the Abolition of the Office of the Keeper of Tombs and the Abolition and Prohibition of Certain Titles," was one of the first laws of the Turkish Republic that explicitly restricted a specific religious group. It was primarily aimed at Sufis and Bektaşis, whom some believe have similar origins and beliefs as the Alevi.

particularly related to autonomy, fundamental elements of faith, and the functions and purpose of *cem*, *cemevi*, and *dede*.

The Court ruled that Alevis—who did not enjoy legal protection as a religious denomination, whose houses of worship were not recognized, whose religious leaders had no legal status, and who did not enjoy any of the benefits of the public religious services provided by the government—faced discrimination, as understood under Article 14 in conjunction with Article 9, due to the imbalanced *de facto* and *de jure* interpretations of Turkish laws and regulations. The Court further ruled that the Alevi were unable to freely practice their faith and that the government had refused to provide public religious services to Alevi citizens, which were included under a separate violation of Article 9. The Grand Chamber considered that the finding that Turkey had violated Article 9 and Article 14 in conjunction with Article 9 was sufficient just satisfaction. The Court jointly awarded the applicants €3,000 in miscellaneous expenses. The case spent 66 months in the Court awaiting judgment and three in the CoM from the time of the final judgment to July 15, 2016<sup>69</sup>. It remains under enhanced supervision.<sup>70</sup>

#### **6.3.4 Association of Solidarity with the Jehovah's Witness et al. v. Turkey**

The case of the *Association of Solidarity with the Jehovah's Witnesses et al. v. Turkey* originated in two separate applications to the ECtHR, filed in June 2010 and December 2012. The

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<sup>69</sup> The case spent such a short amount of time in the CoM because the final judgment was issued being just prior to the cutoff date of this study.

<sup>70</sup> The Turkish Government submitted an Action Plan to the CoM on February 9, 2017 (DH-DD(2017)166) indicating that a translated judgment was circulated to institutions such as the Prime Ministry, the Constitutional Court, the Court of Cassation, the Religious Affairs Department, the High Council of Judges and Prosecutors, the Ombudsman Institution, and the relevant court.

Association (*Yahova'nın Şahitlerini Destekleme Derneği*) was established in 2007, but prior to that, the Mersin branch of the community was represented by the Mersin Congregation of Jehovah's Witnesses.

*Mersin Case (Application No. 36915/10)*

Until 1998, the Mersin Jehovah's Witness congregation met for worship in the "Gazi apartment" in Mersin and relied on authorizations granted by the Mersin security section. In September 1998, the congregation requested to worship, pray, and assemble in a new location (the "Akdeniz apartment"). In December 2000, during a religious ceremony at the Akdeniz apartment, police officers arrived to conduct a search and ordered the closure of the apartment, claiming that the congregation did not have permission to organize religious ceremonies in that location. The public prosecutor charged 12 members of the congregation, but they were later acquitted. In August 2001, the Directorate of Security of the Ministry of the Interior issued a circular for requests to open places of worship, citing Section 1 of a by-law of Planning Act No. 3194, which states that it is forbidden to open a place of worship not intended for such a purpose. The applicants informed the prefecture of their intent to re-open the Gazi apartment as a place of worship, but were denied permission by the prefecture's security directorate that stated that it was not allowed without modifying local planning laws. On July 15, 2003, Article 2 of Act 3194 was amended by Act 4928, replacing the term "mosque" (*cami*) with "place of worship" (*ibadet yeri*). The Ministry of Interior responded with a circular cancelling the 2001 circular, thus making it possible to establish houses of worship other than mosques.

In August 2003, the Security Directorate informed the applicants that they should submit a request to register their place of worship within 15 days or it would be closed. The same day,

the applicants requested that the Gezi apartment be included in the list of places of worship in the local planning scheme but the request was dismissed because the building was listed as a place of residence. The Gezi apartment was closed by the police on August 27, 2003, on the grounds that the local urban plan did not provide for a place of worship. The applicants successfully applied to the Mersin Administrative Court for the decision to be annulled. The prefecture appealed on points of law. In October 2007, the Council of State reversed the Administrative Court's decision, siding with the municipality by claiming that a residential space in the urban plan could not be used for other purposes. The applicants appealed on points of law, but the Council of State upheld the judgment of the Mersin Municipal Court. The applicants applied for rectification, but were rejected by the Council of State in 2009.

*İzmir Case (Application No. 8606/13)*

In 1999, the *Kule Kitaplari Ticaret Limited Sirketi*, an LLC under Turkish law, obtained land in the name of the Jehovah's Witness Community in İzmir to construct a building, the ground floor of which was to serve as a house of worship. Construction was completed in 2005. During construction, in January 2000, Kule applied for an amendment to the local urban plan to hold "meetings" on the ground floor and received approval in May 2000. In 2004, the Deputy Prefect of İzmir sent a letter to minority groups within its jurisdiction informing them of the recent amendments to the Planning Act (No. 4928) and reminding them that groups were required to make a request to the local administrative authorities for a building permit to create a house of worship or to amend the local plan. The letter indicated that a permit for the construction of a house of worship could be issued after a needs assessment, taking into consideration the number of members of the religious community in question. The Jehovah's Witness Community of İzmir



made a request to the İzmir Municipality for land on which to construct a house of worship in February 2004 and, in March 2004, also applied for an amendment to the local planning scheme to use the ground floor of the constructed apartment as a place of worship. The Municipality rejected the application, stating that the local urban plan did not include land to be used for the construction of a house of worship. The amendment application was also rejected as contrary to planning rules and the principles of city planning.

In January 2005, Kule applied to the İzmir Administrative Court for the decision to be annulled. The annulment was granted based on the court's view that the denial of the request amounted to suppression of religious freedom, as guaranteed in the Turkish Constitution. The Karsiyaka Municipality appealed and the Council of State reversed the judgment, referring the case to Administrative Court. In May 2010, the Administrative Court of İzmir dismissed the application, stating that changes could be made to the municipal plans to accommodate the needs of smaller congregations.

Though the law had been amended, places of worship were still required to have a mandatory minimum surface area of 2,500m<sup>2</sup>. Following the passage of this act, the Jehovah's Witness congregation was denied use of the apartment in a block of flats, as well as the ground floor of another building, on the grounds that a building that was used as housing could not be used as a place of worship and that, in any case, a place of worship must comply with the aforementioned minimum surface area requirements. The municipality also informed the community that there were no other locations available for a place of worship and no available land suitable for one's construction. The applicants then filed their case with the ECtHR.

The ECtHR ruled that there had been a violation of Article 9 due to the fact that the community could not acquire a venue for practicing their faith, which infringes on their religious freedom. While states are often given a broad margin of appreciation in the implementation of urban development policies, when states consider the right to obtain a place of worship, they have an obligation to “preserve genuine religious pluralism” (*Association of Solidarity with Jehovah’s Witnesses et al. v. Turkey* [Application Nos. 36915/10 and 8606/13] 2016). Additionally, the Court rejected the government’s claims that the applicants had repeatedly received permission to meet (based on Act 2911 on Meetings and Demonstrations) because authorization was required for each religious activity the group organized and decisions were left to the goodwill of local authorities. These actions directly and disproportionately infringed on the community’s right to religious freedom. The applicants from Application No. 36915/10 and Application 8606/13 were each awarded €1,000 in non-pecuniary damages and €4,000 jointly for costs and expenses. No explicit individual or general measures were stated.

The cases were in the Court for 71 months before a judgment was made. The case became final and was transferred to the CoM on October 17, 2016, after the cutoff date of this study (July 16, 2016). After the final judgment, the Turkish government informed the CoM that the İzmir and Mersin Administrative Courts have accepted requests to reopen the proceedings.<sup>71</sup> The cases remain under enhanced supervision in the CoM.

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<sup>71</sup> In the same Action Plan (DH-DD(2017)722) submitted to the CoM in June 2017, the government relayed information about regulations on spatial planning, introduced with Article 44 of Law No. 3194, indicating that small houses of worship could be built in a space measuring 1000m<sup>2</sup> and large houses of worship could be built in a space no larger than 15,000m<sup>2</sup>.

### 6.3.5 Analysis

The implementation and interpretation of rules, regulations, and laws regarding places of worship and the pluralistic public provision of religious services have been significantly shaped by, and are also deployed in ways that shape Turkey's political and social environment. As illustrated in a number of cases throughout this research, non-Hanefi Sunni groups do not enjoy the same associational rights as Sunni groups. The institutional structure was established in 1925, early in the Republic, with the passage of Law No. 677, "The Closure of *Tekkes* (Dervish lodges), *Zaviye* (small Islamic monasteries), and *Türbes* (mausoleums/shrines)." This was largely directed at Sufi orders and the Alevi community since these are their primary houses of worship. The law further proscribed the use of the honorifics affiliated with the leaders of these communities, specifically *dede* (in Alevism) and *derviş* (in Sufism). While amendments were made to the law in 1950 (No. 5566/1) and in 1990 (No. 3612/5) to allow for the opening of some *türbeler*, the law is largely interpreted and implemented as it was initially written, though the government rarely enforces the ban against *tarikats* and *cemaats* and such groups "remain active and widespread" (United States Department of State 2016, 8). It is worth noting that Article 174 of the Constitution prohibits changing this law. However, a larger issue remains: the recognition of these minority communities. The four cases under analysis in this section are all faith communities that are not officially recognized by the Turkish government (Protestant, Alevi, and Jehovah's Witness). Their houses of worship are also unrecognized.

The recognition of Alevi identity and houses of worship is a highly debated and sensitive issue. The *Diyanet*, as a matter of policy, does not provide funding for the construction or operation of *cemevi*, yet it allocates significant portions of its budget to the construction and

operation of Sunni mosques throughout the country and provides a number of other religious services to the Sunni community. The budget appropriation to the *Diyanet* has generally increased each year—particularly under the AKP government. From 2015 to 2016, the allocation went from ₺3.6 billion TRY to over ₺5.9 billion TRY (*Türkiye Cumhuriyeti Başkanlığı, Diyanet İşleri Bakanlığı* 2016).<sup>72</sup> Since 2006, the number of mosques in Turkey has increased from 78,608 to 87,381 (*Türkiye Cumhuriyeti Başkanlığı, Diyanet İşleri Bakanlığı* 2016). According to the *Diyanet*'s 2017 performance plan, the institution employs 117,378 personnel, of which 115,218 are *muftis* (religious clergy). The funding allocated to the *Diyanet* regularly exceeds the funding allocated to important ministries, such as the Ministry of Foreign Affairs, the European Union Ministry, the Culture and Tourism Ministry, the Finance Ministry, and the Ministry of Interior, among others.

The massive budget granted to the *Diyanet*, and the blatant exclusion of other religious communities, are indicative of government's general policy towards non-Hanefi Sunni citizens. The argument frequently put forward by the Alevi community is that taxes are collected from all Turkish citizens, regardless of faith, and as such, the provision of public religious services should be delivered equitably for all citizens, and not just Sunni Muslims. As illustrated above, this is simply not the case. The challenge that the Alevi community faces as a whole on this issue is intra-community division about how to resolve the issue. For example, the *Cumhuriyetçi Eğitim ve Kültür Vakfı* (the plaintiff in the case above) and the *Dünya Ehlibeyt Vakfı* (Global Ehlibeyt

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<sup>72</sup> Some media sources have reported that the final version was upwards of ₺ 6.5 billion TRY.

[Ahl al-Bayt] Foundation) would prefer to have either a separate directorate for Alevi within the government (similar to the *Diyanet*) or distinct representation within the *Diyanet*, including payment of the salaries of Alevi *dede* (Köse 2010a, 11). In contrast, the *Alevi-Bektaşî Fedarasyonu* (the Alevi-Bektaşî Federation) wants to see the *Diyanet* abolished entirely and does not want any government involvement in any religious activities (Köse 2010a, 11). These internal disagreements about how to optimize the associational rights of the Alevi community make it difficult to make progress, especially in terms of reaching an agreement on identity claims and presenting a united position to the government.

As has been noted several times throughout this dissertation, the government refuses to acknowledge the Alevi as a religious community independent of Sunni Muslims, going so far as to reject *cemevi* as houses of worship and instead recognizing them as “cultural centers.” The government maintains that Alevis are “de facto” Sunni Muslims. Yet in 2015, the Supreme Court ruled that *cemevi* are, indeed, houses of worship (*ibadethane*); as such, they would have their electricity paid for by the specified *Diyanet* funds and municipalities would be able to allocate space for and recognize *cemevi*. Even prior to this decision, the municipalities of Konak and Karşıyaka (both located in the province of İzmir, which is generally a stronghold for the CHP party), moved to recognize *cemevi* as houses of worship. The Turkish government did submit an action plan to the CoM on January 11, 2016 (DH-DD(2016)13) that stated that the government announced in its program and Action Plan that spiritual knowledge centers (*geleneksel irfan merkezleri*) and assembly houses (*cemevleri*) would be given legal status. However, no legislative action has been taken to clarify this situation. This could be due to the number of legislative changes required, as the AKP 2015 platform underscored: “On this subject, we will

recognize the legal status of *geleneksel irfan merkezleri* and *cemevi*. Likewise, we will make the necessary amendments to Municipal Law No. 5393, Construction Law No. 3194, and Electricity Market Law No. 6446 to meet the needs of *geleneksel irfan merkezleri* and *cemevi*” (*Adalet ve Kalkınma Partisi* 2015). The government’s inaction could also be a concern for revenue. Reform could set precedent for other houses of worship to apply for official recognition, cutting a potential source of tax revenue from the state since places of worship are exempt from certain taxes, not limited to property, water, and electric.

There has been progress. In 2016, the Turkish government paid for the utility costs of 419 minority places of worship, including 355 churches, 24 chapels, and 40 synagogues (United States Commission on International Religious Freedom 2016, 189). Yet any steps taken toward the execution of the ECtHR’s judgments have been piecemeal due to the sheer number of changes that would be required to a number of interconnected institutions (i.e., organizations, laws, and social norms). Foremost among these institutions is the *Diyanet*, whose scope and budget loom large in establishing the political, social, and inter- and intra-institutional settings for both Sunni and non-Sunni groups.

While these cases were brought to the ECtHR by three different religious groups (Alevi, Protestant, and Jehovah’s Witnesses), and while each addresses various aspects of the laws and regulations surrounding places of worship and the pluralistic public provision of religious services, what is common to them is the Turkish government’s non-recognition. This indicates that these groups each face similar issues due to their identity as outside of the widely accepted Turkish Sunni paradigm. Their identity is essentialized, contested, and negotiated all at once (Fitzgerald 2015, 314). The “othering” of non-Sunni Turks permits the political and legal

authorities to categorize what qualifies as religion or not, which aspects of belief systems are regarded as legitimate, who their representatives are, and ultimately, who and what are suppressed.

Though the *Tanyar and Küçükergin* case was closed, this was likely due to the fact that it was a repetitive case where the general structural issues were addressed as part of the leading case. However, the Court did not find an Article 9 violation (due to the non-exhaustion of domestic remedies), which very well could have removed this case from the set of cases under which it was heard, meaning that fundamental issue the applicants were concerned with—their right to worship collectively—was not addressed. The Jehovah’s Witness case is similar in that the applicants were attempting to exercise the aforementioned right and were repeatedly circumscribed in doing so by municipal authorities. The two Alevi cases were directly related to the non-recognition of Alevism as a distinct religion. While there is no legal basis for denying the Alevi recognition or the right to operate a house of worship, the *de facto* application by the laws governing associations and foundations (under which the Alevi are organized) excludes *cemevi* as houses of worship. This issue also arose in the CEM Vakfi case (*Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfi v. Turkey* [Application No: 32093/10] 2014) where the government claimed that Alevism could not be classified as a religion and so their houses of worship cannot be recognized as such. The government’s argument revolved around the fact that Alevism is not offered as an option on one’s Turkish National Identity Card (see section 9 of the judgment). This issue is discussed in relation to the Sinan Işık case in the next section.

## 6.4 Identity Cards

The Turkish national ID card (*nüfus cüzdanı*) is an identification document used in Turkey that all citizens must possess to receive government services such as health care, voting rights, property (vehicle, home) acquisition, and domestic utilities. The ID card system was initiated in 1927 and has been updated a number of times since then. The document contains the following information: Turkish ID number, name, surname, father's name, mother's name, birthplace, birth date, marital status, religion, blood type, registration information (location, number),<sup>73</sup> location of issue, and date of issue. Gender is indicated through the color of the card (orange/pink for women and blue for men). This information is openly displayed on the card.

The choices for religious categories are Islam, Christianity, Judaism, Buddhism, Hinduism, Zoroastrianism, and, since 2006, blank (Yıldırım 2010b). In 2006, the Population Services Act (*Nüfus Hizmetleri Kanunu*) was amended to allow citizens to leave the box indicating religious affiliation blank (*Nüfus Hizmetleri Kanunu* 2006). Prior to this date, it was mandatory to select one's religious affiliation from the list of recognized religions. The following case is illustrative of some of the issues that have emerged stemming from the information displayed on the card, as well as the restrictions on options given to complete the requisite fields of the ID card.

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<sup>73</sup> This is different from the ID number; it is the name, family number, individual number, and location of one's family registration. This system has been adapted slightly from Ottoman times, but is still in place today.



#### 6.4.1 Sinan Işık v. Turkey

The case of *Sinan Işık v. Turkey* ([Application No. 21924/05] 2010) originated in an application against Turkey that was the result of allegations by Mr. Işık that he was unable to use the word “Alevi” in place “Islam” on his identity card.

In 2004, Sinan Işık, an Alevi citizen from İzmir, Turkey, applied to the İzmir District Court to change the religion on his ID card from “Islam” to “Alevi.” The court requested the opinion of the *Diyanet*, which responded that listing religious interpretations or subcultures in the religion box on ID cards was incompatible with national unity, republican principles, and the principle of secularism. They added that “Alevi,” as a sub-group within Islam, was not a separate religion but an interpretation of Islam influenced by Sufism with distinct cultural characteristics. The court dismissed the request on the basis of these arguments. Işık appealed to the Court of Cassation, contending that because it was mandatory to complete the religion field on ID cards, he was forced to disclose his religious beliefs publicly without consent in violation of Article 9§1 of the ECHR and Article 24§3 of the Turkish Constitution. The plaintiff further argued that he had lodged two applications, the first to remove the word “Islam,” and the second to insert the word “Alevi.” The court had accepted the first and denied the second. Later that year, the Court of Cassation upheld the judgment of the lower court, without providing additional reasoning.

On June 3, 2005, Işık applied to the ECtHR on the grounds that the denial of his request to have the word “Islam” replaced by the word “Alevi” was a violation of Article 9 (freedom of religion), Article 6 (right to a fair trial), and Article 14 (prohibition of discrimination) of the ECHR. On January 15, 2008, the Second Section of the Court gave notice to the Turkish government that they would rule on the admissibility and the merits of the application at the

same time. On February 2, 2010, the Court ruled that freedom to manifest one's religion or beliefs had a negative aspect—that is, the right to not disclose or manifest one's religious beliefs. By the time Işık's case was heard, the 2006 amendment allowing the religious box on the ID card to remain blank had been passed and implemented, but the Court did not find this change sufficient. The Court maintained that because applicants were required to apply in writing to the authorities to have religious indication removed from the ID card and civil registries, there had been a violation of Article 9. Furthermore, the Court noted that presence of a religion box on the ID card was in conflict with the principle of freedom not to manifest one's religion or belief.

The Court determined that there was no need to examine the violations of Article 6 and 14 separately, as Işık had requested in his application. As such, the Court only reviewed the case under Article 9 and ruled that there was a violation. The Court determined that the individual measures and general measures could be resolved together by the deletion of the religion box on the ID cards. The applicant did not submit any claims for just satisfaction and so the court did not award any. There were no indications of claims for costs and expenses. The case was submitted to the CoM on May 2, 2010 for supervision of execution.<sup>74</sup> As of July 15, 2016, the cutoff date for this study's collection of data, this case had spent 72 months in the Committee of Ministers and was still open under enhanced supervision. It is also worth noting that the case was not heard for almost 56 months (55 months and 30 days) from the time of application.

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<sup>74</sup> This case was downgraded to standard supervision at the 1273rd Deputies meeting (December 6-8, 2016).

The most recent action plan on record in the CoM database indicates that Turkish authorities have undertaken measures to prevent similar violations, including amendments to Law No. 5490 (*Askerlik Kanunu ve Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun* 2016), which introduced the new system of identity cards (Secretariat of the Committee of Ministers 2016). Pursuant to the Court’s ruling, the legislation states that no religious information will be indicated on the card but that citizens may request the addition of religious information on their card’s electronic chip. Similarly, the law allows citizens to delete or amend religious information, or request the information to be blank on the civil registry. Seeing as the case did not put forth arguments about information on the civil registry and only concerned the identity cards, the Court’s decision is not binding on amendments related to the civil registry. The pilot scheme was introduced in March 2016 and was fully implemented on January 2, 2017. In light of the actions taken by the Turkish authorities, the action report also determined that the *Sinan Işık* case continue under standard supervision from then on, downgrading it from enhanced supervision.

#### **6.4.2 Analysis**

One significant push behind the forward movement on seemingly difficult changes to the long-standing structure of the ID system was the Presidency of the Constitutional Court (*Anayasa Mahkemesi Başkanı*). Ahmet Necdet Sezer, as a member of the Constitutional Court (1988-2000) and then as President of that body (1998-2000), was outspoken about his opinion on this issue. Sezer, a firm adherent to the principle of secularism, made public statements as a member of the Constitutional Court in 1995, such as: “According to Article 15 of the Constitution concerning the suspension of the exercise of fundamental rights and freedoms, even in cases of war,

mobilization, martial law, or extraordinary circumstances, an individual cannot be forced to reveal his/her religion. Nevertheless, the rule that is the subject of the objection obliges individuals to reveal his/her religion. For these reasons, it is necessary to cancel the religious wording in Article 43 of the Population Act, which is contrary to the Constitution” (*NTV MSNBC* 2000).

Following his appointment to the Constitutional Court, Sezer was elected President of the Turkish Republic, a position he held 2000-2007.<sup>75</sup> Sezer’s position at the Constitutional Court was filled by another overtly secular judge, Mustafa Bumin. It was during this time that the *Işık* case was heard in both domestic courts and at the ECtHR. Although the Constitutional Court did not hear this case, nor did the Office of the President have any explicit role in the changes that were made in 2006 and beyond, one could speculate about the impact of Sezer’s comments and those of his successor on the need to protect the secular nature of the state and the importance of not allowing faith and politics to be conflated. Bumin and leaders of the AKP disagreed on other secular issues facing Turkey during this period, such as the headscarf issue (*NTV MSNBC* 2005b; *Milliyet* 2005).

In spite of the discord between the Constitutional Court of that time and the governing AKP, then-Prime Minister Recep Tayyip Erdoğan made a public statement about the *Işık* case. He said that that he “did not see the European Court of Human Rights’ decision on this matter as abnormal” and that the religion box can be removed, as it is not important (*Milliyet* 2010). The

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<sup>75</sup> At the time Sezer was elected, the presidential system was not in place and therefore “election” refers to Parliament’s three-round, secret ballot vote to elect a president.

Ministry of Foreign Affairs (*Dışişleri Bakanlığı*) also declared that the required changes would be possible; the Constitutional Court issued an advisory opinion reflecting the same conclusion; and the *Diyanet* indicated that the information was unnecessary and did not have religious meaning (Yıldırım 2010b). The government moved forward with testing the pilot procedure for the new identity cards. Yet, if then-Prime Minister Erdoğan, who wields a disproportionate amount of power, viewed the ECtHR judgment as expected and that the changes could easily be made, why did the *Işık* case make it to the ECtHR? This seems to be indicative of the natural nudge that the judicialization of this issue at the ECtHR provided to garner domestic attention that had not been concretely acknowledged up to that point.

Most significantly, the 2006 reforms and subsequent actions taken are also likely a result of Turkey's efforts towards European Union harmonization (Secretariat General for EU Affairs 2007). Certainly, the *Işık* domestic court rulings attracted attention. However, considering that this reform came prior to the ECtHR giving notice to the government of *Işık*'s application, which occurred in 2008, the government had clearly already been spurred to take action prior to the ECtHR's judgment as European Union accession requirements demanded. It is worth recalling that Turkey had opened accession negotiations the previous year (2005) and was likely eager to prove its mettle as an EU candidate country.

The fact that the ECtHR ruling was quite explicit could also partially explain the relative ease with which the changes occurred. In its rulings, the ECtHR generally adheres to and respects the principle of "margin of appreciation," which is the acknowledgment that local officials are better equipped than the ECtHR to implement judgments within the context of that state's norms, cultural customs, and governmental structure. The language in the Court's

judgments reflects this principle. Except to order payment of just satisfaction, the ECtHR typically avoids specifying the measures that a government must take action upon to remedy a violation and prevent future infractions (Anagnostou and Mungiu-Pippidi 2014, 214). Occasionally, though, the judgment will expressly outline what is expected of a state that is found to be in violation of an article of the ECHR. In the *Işık* case, the Court determined that individual and general measures were one and the same and that “the removal of the religion box could constitute an appropriate form of redress to put an end to the breach it has found” (*Sinan Işık v. Turkey* [Application No. 21924/05] 2010, §60). Thus, Turkey had a clear idea of what might be expected from the Committee of Ministers. As such, the Turkish government asserted in its April 2016 Action Plan that the legislative amendment that was in the process of implementation should serve as sufficient grounds on which to execute the judgment (Secretariat of the Committee of Ministers 2016).

Additionally, an interview with Second Section ECtHR Judge Işıl Karakaş indicated that the government was afforded a very narrow margin of appreciation in this case (Karakaş 2017). Yet the government chose to retain the religious information on file while removing the information on the physical card itself. The government justified this action by claiming that they had other uses for that information. Critics assert that this version of the execution is not in line with the judgment.

As mentioned in the ECtHR judgment, the problem with the *Işık* case also arose from the fact that a citizen applying for a new or amended ID card is required to submit the application in writing. The Court referenced case law (*Folgero et al. v. Norway* [Application No. 15472/02] 2007, § 98; *Hasan and Eylem Zengin v. Turkey* [Application No. no. 1448/04] 2007, § 73) to

draw attention to the fact that, although domestic legislation and regulations do not acknowledge it, the mere fact of having to apply to change one's religious affiliation with the civil registry could constitute a personal disclosure of religious beliefs (*Sinan Işık v. Turkey* [Application No. 21924/05] 2010, §49). This point is all the more salient for religious groups that have a history of being victims of discrimination and violence—particularly in a country like Turkey where national identity was initially constructed on two elements: Sunni Islam and “Turkishness.” Various entities have intentionally solidified that national identity over time, sometimes at the expense of those who do not adhere to such identity claims. Sinan Işık identified with one such group—the Alevi. The discrimination that Işık faced was illustrated in the fact that the domestic courts denied the existence of Alevi as a separate faith category.

Furthermore, up until the Alevi Revival in the 1980s, Alevi identity remained either non-manifest, marginalized, or misunderstood. Disagreements amongst the Alevi about what the Turkish government's ideal policy position should look like left them divided about their identity and with loose and ineffective networks through which to spur any sort of policy change in their favor. The Turkish government, particularly the *Diyanet*, has maintained a stance that Alevis are *de facto* Sunni Muslims and therefore do not deserve any rights recognition outside that paradigm. This has played out not only in court cases like Sinan Işık's, where domestic courts stated that, based on their consultation with the *Diyanet*, that Alevi faith is an interpretation of Islam with specific cultural features (*Sinan Işık v. Turkey* [Application No. 21924/05] 2010, §9). The government has also used this argument to deny equal provision of public services to Alevi (*İzzettin Doğan et al. v. Turkey* [Application No. 62649/10] 2016; *Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfı v. Turkey* [Application No: 32093/10] 2014). The coordination between the

branches of government demonstrates once again how entrenched Turkish national identity is, and how the Alevi are located (constructed) outside of that context. Therefore, the issue of changing such an integral and affirmative component of Turkish national identity could be understood as an affront not only to the legitimacy of the state, but also to citizens themselves. The potential social backlash could have been a factor behind delays in the execution of this judgment; however, in comparison to other possible causes that seems to be a minor argument.

With myriad governmental and political institutions involved, and the path dependence of such a long-lived system in place, one might presume that changes to the identity card would be extremely difficult, if not impossible, to undertake. Furthermore, the fact that this particular case involved an individual applicant who identified with a group that has a long-standing history of discrimination and outright violence merely strengthens the argument for resistance to change in the ID card. However, the support of key actors in the most influential and involved institutions helped overcome potential friction and the historically solidified path dependence of the system. Additionally, one can look to the exogenous force of the European Union's pressure to comply with the accession requirements of a candidate country. In doing so, Turkey very well may have been attempting to demonstrate to domestic and European audiences its legitimacy and commitment to human rights protections by following a "logic of appropriateness" (March and Olsen 2004) by behaving as an acceptable EU candidate and member of the COE.

It was certainly the political impetus and the integration of political institutions that worked in the Alevis' favor to achieve the changes required by the ECtHR ruling. Although it took time for the execution of the case to be realized, this could be attributed to the fact that the government had to undergo pilot testing of the project, which was a legitimate logistic constraint.



Additionally, because the government was already in the process of changing the system, the momentum to make the additional changes as required by the ECtHR judgment were conceivably expedited.

The indication of one's religion on the national ID card directly relates to the Turkish state's negative obligation in terms of religious freedom, which entails the right *not* to practice or reveal one's beliefs. In this situation, the negative obligation has affected all religious identities by being required to reveal one's religion on a state document that is frequently seen by ordinary citizens and government actors alike. It is in and of itself a violation of the negative aspect of religious freedom. This violation is further exacerbated by non-Sunni citizens being forced to reveal religious identity for purposes of exemption from the mandatory religious education courses (discussed in the subsequent section). As such, the *Işık* case, filed by an Alevi citizen, is representative of a broader population of non-Sunni citizens that saw no domestic movement towards removing this requirement, and moved to have this issue heard in the ECtHR. The judicialization of this issue led the government to begin taking some of the necessary steps to remedy the problem. This punctuation was a significant change to a policy that had essentially been in place since even the Ottoman period, and could have even wider implications, disrupting the incredibly dense institutional structure surrounding the negative aspect of religious freedom.

In conclusion, the congruent opinions of a number of domestic institutions certainly contributed to this case's progress toward full execution. Typically, institutional interconnectedness would hinder, or at least slow, any attempted changes on a policy issue. Yet in this case, the surprising consensus among political actors, the *Diyanet*, the courts, the Ministry of Foreign Affairs, and the Ministry of Interior allowed substantial changes to the ID card to be

made. Additionally, it is indisputable that the explicit language of the ECtHR ruling, which viewed the general and individual measures as one in the same and provided specific instructions on suggested measures, and the fact that no other obligations were stated (just satisfaction or costs and expenses), made this a case that was comparatively easy for Turkey to execute. It remains to be seen how the implementation of the new ID card system will play out, particularly in light of the fact that two major issues of the *Işık* case remain unaddressed: the limited options available in selecting one's "religion" and that public officials continue to have access to an individual's religious identification, even if it is not revealed on the ID card itself. This issue is tied to the next section of this study, where the religion listed on one's ID card dictates who is and who is not exempt from certain primary and secondary education courses.

## 6.5 Education

Turkey's system of education is for the most part nationally governed, as outlined in the constitution, national laws and regulations, and national institutions, namely the *Milli Eğitim Bakanlığı* (MEB, Ministry of National Education). Article 24 of the 1982 (current) Turkish Constitution affirms the right to freedom of conscience, religious belief, and conviction. It further ensures that there is no obligation to participate in religious rites, reveal one's religious beliefs, or be blamed or accused due to religious convictions (*Türkiye Cumhuriyeti Anayasası* 1961). Article 24 also outlines the nature of the education and instruction of religion and ethics in Turkey, in that they are under state supervision and control; that such instruction is compulsory in primary and secondary schools; and other religious instruction of minors is at the discretion of their legal representatives. The framework is reiterated in Section 12 of the State Education Act, which states that "Secularism is the basis of Turkish state education. Religious culture and ethics shall be among the compulsory subjects taught in primary and upper secondary schools and in schools of an equivalent level" (*Milli Eğitim Temel Kanunu* 1973).

It was after the 1980 coup that the religious education courses became compulsory. The purpose was not necessarily to indoctrinate students in Islam, but rather as part of the "Turkish-Islamic Synthesis" to tightly control the instruction students would receive on "proper" (Sunni) Islamic practices.<sup>76</sup> The 1982 constitution thus made the religion and ethics courses mandatory in primary and secondary schools, whereas in previous years, these courses were elective. The

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<sup>76</sup> See Chapter 3 for further information about the Turkish-Islamic Synthesis and the 1980 coup.

compulsory nature of the courses, the curriculum content and mandate (course content with an overtly Hanefi Sunni slant and no instruction in other religious beliefs and practices), and manner of instruction (outright indoctrination; forced memorization of Surahs of the Kuran; and demonstration of prayer practice) have been frequently questioned by students and parents alike. This changed in July 1990, after the Supreme Council for Education granted permission for Jewish and Christian students in primary and secondary schools to be exempt from the religious culture and ethics courses. Though granted permission for exemptions, the student and/or parents were forced to validate their faith through the indication of their religious identity on the national identity card.

In 2000, Minister of Education Metin Bostancıoğlu<sup>77</sup> approved new guidelines for Religious Culture and Ethics classes, highlighting the importance of the principle of secularism and respect for freedom of religion, conscience, thought, and expression. At the same time, the course curriculum continued to place heavy emphasis on Sunni Islam, including education on the Koran and pilgrimage. The textbooks for elementary and middle school students included sections on Judaism, Christianity, Hinduism, and Buddhism. As it stands, the courses include two hours per week for students grades 4-8, and one hour per week for students grades 9-12 (United States Department of State 2016).

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<sup>77</sup> Prior to being National Minister of Education, Bostancıoğlu was a MP in Parliament for the Demokratik Sol Partisi (DSP, Democratic Left Party), a party that espouses the ideology of Atatürk, secularism, and social democracy.

The ECHR protects the right to education under Article 2 of Protocol 1: “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions” (Council of Europe 1950). This assumes that parents can decide to exempt their child from religious education courses. As seen in the cases below, this has not been the case in Turkey.

### **6.5.1 Hasan and Eylem Zengin v. Turkey**

The case of *Hasan and Eylem Zengin v. Turkey* ([Application No. 1448/04] 2007) was brought before the ECtHR in 2004, when the applicants alleged an infringement of their rights under Article 2 Protocol 1 and Article 9 of the ECHR. Hasan Zengin initiated domestic action on behalf his daughter, Eylem Zengin, in 2001, when Eylem was a seventh-grade student at a state school in Istanbul. The Zengins are an Alevi family and submitted a request to the Provincial Directorate of National Education in the Istanbul Governor’s Office for an exemption from the compulsory Religious Culture and Ethics course. Citing the Universal Declaration of Human Rights, Zengin maintained that parents had the right to determine the nature of their children’s education and that these courses were incompatible with the principle of secularism. The Directorate responded that such an exemption would not be allowed, citing Article 24 of the Constitution and Article 12 of the State Education Act (Law No. 1739). Zengin applied to the Istanbul Administrative Court for judicial review, asserting that the Religious Culture and Education classes were heavily concentrated on Hanefi Sunni Islam and that no information was provided on Alevism. He also argued against the compulsory nature of the course. The Administrative Court dismissed the case, again citing the Constitution and the State Education

Act. Zengin appealed, relying this time on articles of the ECHR. In 2003, the case was dismissed by the Supreme Administrative Court, which upheld the first instance judgment.

The Zengins applied to the ECtHR on January 2, 2004, maintaining that the content and methods of the compulsory Religious Culture and Ethics course violated their rights under the ECHR. They argued that the content and syllabi of the Religious Culture and Ethics courses were taught from a primarily Sunni perspective and ignored Alevism as a faith. The Court determined that the syllabus did not meet the objectives of pluralism and objectivity necessary when teaching religious education in a democratic society. Secondly, the Court considered that the exemption procedure involved a heavy burden of disclosing the religious or philosophical beliefs of the parents and the student. This was especially the case for students whose parents held beliefs other than Sunni Islam. As such, the Court ruled that there was a violation of Article 2 Protocol 1. No separate questions arose under Article 9. The Court stated that the finding of a violation of Article 2 Protocol 1 constituted sufficient just satisfaction. According to the Court, bringing the educational system and domestic legislation in line with Article 2 Protocol 1 would serve as an appropriate form of compensation and would put an end to the violation. The General Measures stated in the case were not explicit but did include “bringing educational system and domestic legislation into conformity with Article 2 of Protocol 1.” However, one can infer from the judgment that the government must either make the Religious Culture and Ethics courses non-compulsory, alter the nature of the courses from indoctrination of a specific faith to a broader course in both theory and practice, or establish an appropriate exemption practice that does not make parents/children disclose their beliefs. Because Ms. Zengin was of college age and no longer attending a state secondary school when the decision was made, the court deemed that

no further individual measures were necessary. Forty-eight months passed from the application date to the final judgment. From the final judgment to the cutoff date of this study (July 15, 2016), this case was under standard supervision of the CoM for 102 months.

### **6.5.2 Mansur Yalçın et al. v. Turkey**

The case of *Mansur Yalçın et al. v. Turkey* ([Application No. 21163/11] 2014) is a repetitive case under the leading case of *Hasan and Eylem Zengin v. Turkey* (above). The domestic case was launched by 14 citizens from Istanbul, including parents and former, current, and future students. In 2005, the applicants requested that the Ministry of Education engage in a consultation process with Alevi leaders to redesign the Religious Culture and Ethics courses to include information on Alevi culture and philosophy. Additionally, the applicants asked that teachers take a compulsory training course and that monitoring and supervisory mechanisms be established. The Religious Education Department of the Ministry of Education rejected the proposal and responded that, at the primary school level, the courses focused on teaching ethics and religious values common to society as a whole while at the secondary school level, the syllabus had a supra-denominational approach and included other understandings of Islam. The Department defended its inclusion of information on other interpretations of Islam, drawing attention to its 12th grade syllabus, which contained information on Alevi-Bektaşî culture, and noting that Alevi topics were included in the secondary school curriculum in the 2005/2006 academic year.

In response to this rejection, the 14 applicants and 1,905 other citizens took the case to the Ankara Administrative Court. They asserted that the courses were not objective or respectful of pluralism, citing case law and Articles 9 and 14 and Article 2 of Protocol 1 of the ECHR. They supported their argument with reports by experts who had examined the textbooks. In

response, although the expert examination presented by the applicants had investigated the textbooks that were in place prior to the changes that had taken effect in March 2005, the Ankara Administrative Court gathered its own committee of experts to examine the post-reform curriculum. The new syllabus was reported to have a supra-denominational approach and included topics related to Alevism that were sourced from publications written by prominent Alevi. The report suggested that more information on Alevism be included and also indicated that the *cemevi* was not a place of worship, but rather a cultural gathering space.

The applicants retorted in 2009, arguing that *cemevi* are in fact houses of worship for Alevi and that the textbooks presented Alevism in a cultural light, as opposed to as a faith on its own. Later that year, the Ankara Administrative Court rejected the claims, again insisting that the textbooks presented a supra-denominational approach. The applicants filed an appeal on points of law in July 2010, which the Supreme Administrative Court dismissed, upholding the first instance judgment.

The original group of 14 Alevi citizens applied to the ECtHR in February 2, 2011 on the grounds that the Religious Culture and Ethics courses were a violation of their rights under Article 2 of Protocol 1, Article 9, and Article 14 of the ECHR. While the Court recognized that both the government and the applicants agreed that changes had been made to the mandatory course, both since the *Zengin* judgment and since the case in question had been lodged, it noted that the modifications did not significantly change the key elements of the syllabus. Additionally, although information on the Alevi faith had been added, the Court agreed with the applicants that the course content continued to be presented from a Sunni perspective, maintaining that Alevism is more of a cultural tradition instead of a faith in its own right. The Court also noted that the



courses have the potential to create a “conflict of allegiance” for the children between the instruction received at school and the values imparted by their parents.

Moreover, the exemption process in and of itself created a problem in that if the compulsory course were indeed presented in a supra-denominational manner, there should be no need for exemption (which as it stands, is only permitted for Christian and Jewish students, thus requiring a disclosure of belief). On the other hand, a course that intends to teach Islam or any other specific religion, should not be mandatory and should respect parents’ philosophical convictions. For these reasons, the Court ruled on September 16, 2014 that Turkey was in violation of Article 2 of Protocol 1. Because the children of the applicants in this case had completed their secondary education at the time of the judgment, they did not file for just satisfaction and the court stated that there was no need for individual measures. The general measures were in accordance with the leading case of this group (i.e., *Hasan and Eylem Zengin v. Turkey*). The Turkish government applied for the case to be referred to the Grand Chamber but the request was dismissed and the judgment became final. Forty-three months passed from the date of application to the date of judgment. From the time of referral to the Committee of Ministers to the cutoff date of this study, the case was under standard supervision for 17 months. Because this case is relatively recent, the short time in the CoM should not serve as an indicator of the ease of execution of the case. In fact, this is a repetitive case of a leading case that was decided three years prior to the application date of the *Mansur Yalçın et al. v. Turkey* case.

### **6.5.3 Analysis**

During the period in which these cases were heard both domestically and at the ECtHR, there were essentially three political parties in the Turkish Grand National Assembly (parliament), and

a fourth party was able to exceed the 10 percent threshold in the July and November 2015 elections.<sup>78</sup> The AKP held a majority of seats throughout this period without the need to form a coalition government;<sup>79</sup> and the CHP, the MHP, and the *Halkların Demokratik Partisi* (HDP, People’s Democratic Party), which finally managed to cross the threshold after years of running independent candidates. The party platforms have remained relatively consistent over the years, and because the final judgments by the ECtHR of these cases is fairly recent (the *Zengin* case in 2008 and the *Yalçın* case in 2015), it is instructive to examine the most recent electoral platforms of each of the aforementioned parties.

As a secularist party that has consistently espoused Atatürkist values, the CHP expressly maintained their goal of abolishing the mandatory nature of the courses, which would be considered execution of the relevant judgements in the CoM. However, the party does not seek to eliminate the courses entirely, instead stating: “We will bring these courses into a more pluralistic context and make them optional” (*Cumhuriyet Halk Partisi* 2015, 43).

The MHP also indicated its dedication to pluralistic courses, with special attention paid to the Alevi matter: “An ‘Alevi Research Center of Turkey’ will be established to meet the needs of qualified educators and staff. ... A ‘Specialization Commission’ will be established within the Ministry of National Education to ensure that the curriculum of the religious lessons will include objective and scientific information on the Alevi with their direct participation and input”

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<sup>78</sup> Turkey uses the D’Hondt method in general elections, and its 10 percent threshold is the highest in the world.

<sup>79</sup> With the exception of the June 2015 election, where there was a hung parliament. Elections were held again in November 2015.

(*Milliyetçi Hareket Partisi* 2015, 218). What is interesting about the MHP position is that they did not call for the elimination of the courses, but instead affirmed their high regard for secularism and insisted that the state's provision of religious education would ensure national unity and integrity and eliminate certain types of prejudices (*Milliyetçi Hareket Partisi* 2015, 201).

The HDP was more straightforward in its position on religious education courses, proclaiming: "The implementation of compulsory religion courses will be ended, and each student will have the right to choose courses and education based on their own beliefs. Civil religious education will be completely liberated" (*Halkların Demokratik Partisi* 2015, 19).

The governing party, the AKP, was the only party of the four that did not categorically mention the mandatory religious education courses. Instead, it reiterated the need to "ensure that our children are educated as conscious, well-educated, respectful and self-confident individuals with human and moral values" (*Adalet ve Kalkınma Partisi* 2015, 80) and prided itself on the addition of new elective courses. "We have included optional lessons on the Life of the Prophet Muhammed, the Koran, and Basic Religious Information in the curriculum" (*Adalet ve Kalkınma Partisi* 2015, 63). Though these courses are electives, they are mandatory in *imam hatip* schools—parochial vocational schools funded by the government.

The issue is not only with religious public schools themselves, but also with the proliferation of such schools under the AKP. These schools were nearly all shuttered in the aftermath of the 1997 post-modern coup but have since grown exponentially. Some claim that this is retaliation for their elimination. Since the AKP has controlled the government, enrollment in state-funded *imam hatip* schools has increased 15-fold, from approximately 65,000 to almost

one million (Makovsky 2015, 5). Though there are no precise official figures to support this claim, 1,477 general high schools were phased out and converted to other types of schools in the 2010-2011 and 2013-2014 academic years, many of which became *imam hatip* institutions (Makovsky 2015, 9). One of the most controversial educational reforms of the AKP period has been the transition from the elementary to secondary education system, which requires an exam to determine high school placement. The system has been heavily criticized for placing Christian and Jewish students in *imam hatip* schools. Alevi families have also expressed frustration with the placement system as they are forced to answer questions that they may not have taken classes in, nor are there any alternative questions not related to the religious education course that can act as substitutes (Gürcan 2015, 1).

The 2014 reforms also included the purge of senior bureaucrats at the Ministry of National Education and the dismissal of more than 8,000 provincial and district administrators; however, in a case brought forward by an opposition teachers' union, the Council of State (*Danıştay*) ruled that the dismissed administrators should be reinstated within 30 days (Çetingüleç 2015). The *Danıştay*, which has a history of defending the secular nature of education, also concluded in an 8th Section ruling that the Religious Culture and Ethics courses amounted to “religious education” (*Hürriyet* 2015). Still, the AKP pushed forward with its agenda of raising a “pious generation” (*Radikal* 2012) by permitting girls as young as 9 years old to wear the headscarf in the classroom (Daloğlu 2014) and the Ministry of National Education extending the mandatory Religious Culture and Ethics courses to the 1st, 2nd, and 3rd grades of primary school (Oehring 2009b).

The aforementioned reforms in education indicate that the AKP has the political will to make a number of changes to design the system as they see fit. Yet these reforms have done little to move the education system in line with ECtHR judgments; indeed, these reforms have pushed public education in precisely the opposite direction. The AKP's strong hold on Parliament and the Ministry of National Education have facilitated the implementation of a slew of conservative initiatives. In spite of domestic judicial decisions to uphold the principle of secularism, the AKP's reforms to the educational system have gone entirely contrary to ECtHR execution requirements. The most odious of these reforms is the Ministry of National Education's General Directorate of Religious Education directive circulated to the governors' offices that mandated that all students, with the exception of Christian and Jewish students, were required to enroll in the Religious Culture and Ethics courses—regardless if a religion other than “Islam” is listed on their ID card or if that section is blank (Koca 2015).<sup>80</sup>

As indicated in the above judgments, the recommended modifications addressed not only exemption from the compulsory course, but also the content of the curriculum. The content of the curriculum and textbooks in general courses have also contained defamatory or inaccurate information about other faiths. For example, the 8th grade textbook used in 2009 for a course on the “History of Turkish Republican Reforms and Atatürkism” stated that missionaries “try to fulfil their goals through the significant financial support of foreign powers, some non-governmental organizations and from their own supporters...They are a threat to the national

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<sup>80</sup> With the new electronic ID cards, where the “religion” box is not visible, the implementation of this directive is yet to be seen. See the Sinan Işık case.

unity and integrity of our state and nation” (Oehring 2009b). The inclusion of such disparaging content in state-run education further entrenches the public opinion regarding Turkey’s non-Sunni citizens. This is evidenced in a 2010 survey published by the International Republican Institute in Washington, DC, in which 63 percent of respondents claimed that schools should provide more religious education to students (“International Republican Institute: Turkish Public Opinion Survey” 2010). Furthermore, though content on the Alevi was added to the curriculum for 7th-12th grades in 2011, some Alevi contended that the content was insufficient and sometimes simply incorrect. For example, information on Alevism was included in the section titled “Sufi Interpretations within Islam” (Gürcan 2015, 10). Textbooks for the 2014-2015 academic year included cosmetic changes, continued to virtually ignore religious pluralism, and labeled Sunni (Hanefi) Islam as “our religion” (Gürcan 2015, 9-10). Additionally, in June 2016, Alevi organizations issued a statement protesting a Ministry of National Education memorandum mandating that teachers read and study a book that the Alevi said described their faith as “distorted” and “decayed” (*Cumhuriyet* 2016). Despite the *Zengin* and *Yalçın* rulings, Turkey continues to insist on the inherent domestic nature of this issue and prefers the widest margin of appreciation for implementation.

The cases included in this category were filed by Alevi citizens, and reflect how disproportionately they are impacted by the essentialized version of their identity, not only by society, but also by the government. This is manifest in the way that various government institutions (Ministry of National Education, the *Diyanet*, *Yüksek Öğretim Kurumu* [YÖK, Council of Higher Education], and the judiciary) determine and influence the narratives, ideas, and ideologies about the Alevi, which in turn shape “subjective mental constructs” that

determine perceptions and choices (North 1990). Through the construction of course curriculum that defines (and according to some Alevi, defiles) what it means to be Alevi, these institutions are imposing an externally essentialized identity upon the Alevi, which as seen above, is disputed by the Alevi themselves. By doing so, in turn, the government establishes and perpetuates institutions that intentionally marginalize and discriminate against the Alevi. As such, the Alevi presumably are left with no domestic alternative to attempt to resolve this inherent institutional discrimination and take their cases to courts such as the ECtHR. This is an indication of the increased judicialization of Alevi issues. When the rulings of the ECtHR are returned to domestic institutions for execution, the Alevi continue to face barriers to full implementation of these cases, due to the reasons enumerated herein.

Looking beyond the AKP's agenda to explore other potential reasons why there has been so little movement to execute the ECtHR's judgments on these cases, the language in the judgments is quite obvious. The *Zengin* judgment is clear in its expectations that the violation is rooted in a problem related to the syllabus and an inability to ensure respect for parents' convictions. It is also clear that an appropriate form of compensation would be to change the education system and domestic legislation to ensure that no further violations occur. Turkey took no action and the *Yalçın* decision specifically referenced the structural problems evident in the *Zengin* case and noted that Turkey had yet to provide appropriate methods to ensure respect for parents' convictions.

NGOs are also permitted to submit information to the CoM on supervised cases, which can be instructive for both the CoM and the offending party. On August 12, 2013, the Turkish NGO *Insan Hakları Ortak Platformu* (Human Rights Joint Platform) submitted a communication

to the CoM with clear directions on how to ensure that the judgments in this group of cases was executed: 1) change the nature of the Religious Culture and Education courses from compulsory to optional; 2) modify the lessons from indoctrination of one specific religion to a culture lesson in both theory and practice; or 3) take measures to ensure that parents' convictions are respected and that neither parents nor children are required to disclose their religious beliefs (Altınparmak 2013, 4; Secretariat of the Committee of Ministers 2013). Not only have Alevi groups been directly organizing to exert pressure to make these changes, but other general human rights organizations have participated, as seen above.<sup>81</sup>

Turkey's domestic judicial system has played an interesting role in relation to religious education. Since the founding of the Republic, the military has been heralded as the guardian of secularism. Following the coup in 1971, the military government amended the Constitution substantially, including diminishing the authority of the judiciary. These changes only exacerbated divisions within society, leading to yet another coup in 1980. The 1982 Constitution maintained the basic principles that Atatürk had instituted in the Republic's early years; the principle of "secularism" retaining its prominent placement in Article 1. While the judiciary has retained its independence in writing, in reality, the principle of secularism reigns supreme. Thus, prior to the AKP's election in 2007, the Constitutional Court closed a number of parties with a similar ideology for betraying the principle of secularism. Along with the military, the Constitutional Court has also seen itself as a defender of state secularism. Following the re-

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<sup>81</sup> The *Alevi Düşünce Ocağı* (Alevi Philosophy Center) also submitted two communications to the CoM regarding the *Yalçın* case.



election of the AKP in 2007, the 2010 referendum increased the number of Constitutional Court judges from 11 to 17 (three selected by Parliament; four directly appointed by the President from practicing judges, lawyers, and prosecutors; three selected by the President from nominations made by the *Yüksek Öğretim Kurumu* (YÖK, Council of Higher Education), three from nominations from the Court of Cassation, two from nominations from the Council of State, one from nominations of the Military Court of Cassation, and one from the High Military Administrative Court) (Özbüdün 2011, 193-194). On the surface, it is not clear that this would impact the Constitutional Court's decisions, but the Court's new composition circumscribes the role of Parliament in the appointment process by decreasing the number of members they are permitted to appoint, and leaving the President to select from individuals he has already appointed to political posts. For example, YÖK has 21 members, seven of which are appointed by the President. These 21 members constitute the pool from which the President then chooses three Constitutional Court judges.

The effects of the 2010 referendum and the "new" make-up of the courts manifest in the Constitutional Court's decision on the constitutionality of the 2012 Education Reform Law. This ruling reaffirmed the state's interference in religious education and confirmed that offering more elective courses on Sunni Islam did not constitute a violation of secularism in a democratic country; rather, it is merely an expansion of services to believers of the majority religion. While one cannot categorically assert that the new composition of the Constitutional Court is a reflection of policy directives from the AKP leadership, there are definite parallels with this judgment and the AKP's party platform. In spite of this apparent shift in the Constitutional Court, in a case brought forward by an atheist family, the Court of Cassation ruled that the

Religious Culture and Ethics Course was indeed “religious instruction” and cited the ECtHR’s judgment on the *Yalçın* case.

Turkey’s membership/participation in other international organizations and platforms with a heavy focus on education and the role of religion therein provide, at a minimum, inspiration and more optimistically guidance on a pluralist and just education system, especially when issues of faith are involved. For example, along with Spain, Turkey co-founded the United Nation’s Alliance of Civilizations in 2005, which was established to bring “mutual respect among peoples of different cultural and religious identities...and embrace diversity” (“UNAOC: Who We Are” 2017). One of the top four priorities identified early on was education and the “Education about Religions and Beliefs” program includes a web-based portal for resources on education about religions and beliefs, a platform for research on religious education theory and practice, and a network to promote the positive role of religion and interfaith harmony (“UNAOC: Education about Religions and Beliefs” 2017). In spite of much fanfare surrounding Turkey’s early role in the Alliance of Civilizations, there has been seemingly little activity on Turkey’s part in recent years. Turkey is also a member of the Organization for Security and Cooperation in Europe (OSCE). In 2007, OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) gathered experts from member countries (Turkey included) in Toledo, Spain, to write the “Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools,” a comprehensive theoretical and practical overview on the intersection of human rights, religion, education, and the state (“Toledo Guiding Principles on Teaching About Religions and Beliefs in Public Schools” 2007). Moreover, as mentioned throughout this analysis, Turkey’s EU accession process is complementary to its membership in the COE in that

the issues that arise in the ECtHR that Turkey fails to implement are often scrutinized in the European Commission's annual progress reports. For example, in their two most recent reports, the Commission called on Turkey to amend and implement the necessary legal frameworks to comply with the judgements related to compulsory religious education courses (European Commission 2015, 63, 2016, 71). While the EU has no binding force on these rulings, the attention its opinions bring to the issue are certainly of consequence. However, the fallout between Turkey and the EU in recent years may have somewhat softened the influence that the EU has to bolster ECtHR judgments.

In conclusion, the government has indeed taken measures, even if cosmetic, to attempt to resolve the structural issues that non-Sunni students and their families face when applying for exemption from mandatory religious instruction courses. However, considering that the government has consulted only with groups that would seem to facilitate merely modest changes indicates that there is still resistance on the part of the government to fully restructure the courses. The sweeping reforms that have been made to the educational system in general over the last few years demonstrate that, when there is political will, drastic changes can be made. However, it seems that the secular Turkish citizenry exerts tacit political pressure on the government to maintain the system as it is, citing the need to reinforce Turkey's secular system, particularly in education. In addition, Sunni citizens would see no need to radically alter the course content as it generally adheres to a Sunni perspective.

Furthermore, the obligations laid out in the judgment were expressly made: bring the educational system and domestic legislation in line with the ECHR. There were no other requirements in terms of just satisfaction or costs and expenses. As such, complying with the

terms of the obligations should be relatively straightforward. Yet the domestic institutional structure that this issue is entangled with is quite complicated and complex. Reforms to this specific issue would require legislative changes and the issuance of regulations so that reforms would be applied universally and not left to municipal authorities. Additionally, the execution of other cases that have come before the ECtHR, namely *Sinan Işık v. Turkey* ([Application No. 21924/05] 2010), would potentially facilitate the execution of this set of cases. Should Turkey make structural changes to what information is maintained in the national ID database and how that information is used, there could conceivably be movement on how exemptions from the religious courses are determined. Since it seems unlikely that the course will not be removed in the near future, Turkey, which has been given a wide margin of appreciation in these cases, must fashion a solution that respects parents' and children's rights to determine the type of education they receive.

## 6.6 Conscientious Objector

The Turkish Armed Services have a long-held reputation as the guardian of secularism in Turkey. According to Global Firepower, Turkey has the 8th strongest military of 133 countries surveyed, boasting 743,415 total military personnel (382,850 active personnel), and a defense budget of over \$8.2 billion USD (Global Firepower 2017). After the US military, Turkey has the second largest armed forces in NATO. While the military has played a prominent role in politics in the past, conducting military coups in 1960, 1971, 1980, a “soft coup” in 1997, and an attempted coup in 2016, the AKP government has aimed to reduce the role of the military in political life, reasserting civilian control over the military and reducing the role of the armed forces in internal security (United States Central Intelligence Agency 2017). The military still considers fundamentalism, separatism, and extreme leftism as domestic threats (United States Central Intelligence Agency 2017).

Compulsory conscription has been in place in Turkey since the founding of the Republic. Article 72 of the Turkish Constitution states: “National service is the right and duty of every Turk. The manner in which this service shall be performed, or considered as performed, either in the armed forces or in public service, shall be regulated by law” (Constitution of the Republic of Turkey 1982). Law No. 1111 (Law on Military Service), Article 1, regulates this: “Every man who is a citizen of the Republic of Turkey is obliged to perform military service in accordance with this law” (*Askerlik Kanunu* 1927). Twelve months of military service in Turkey is

compulsory for male citizens aged 20 to 41 years.<sup>82</sup> The Military Criminal Code states that recruited citizens must report once called for service or be held criminally responsible for disobeying orders and desertion (*Askerlik Kanunu* 1927, Article 63).

There is no article that provides parameters for conscientious objection. In fact, Article 45 of the Military Criminal Code explicitly states that one's conscience or religious beliefs do not exempt a conscript from punishment (*Askeri Ceza Kanunu* 1930). There are exemptions, reductions, deferments, and options to "buy out" of one's service based on criteria such as mental or physical fitness, residence abroad, enrollment in higher education, or loss of a brother serving in the military. Yet there remains no provision that accommodates individuals who claim to be conscientious objectors. Thus conscientious objectors are considered draft evaders and, because of their repeated failure to report for duty, are considered to have repeatedly disobeyed orders and are subject to criminal prosecution. The scope of punishment for draft evasion and desertion (or aiding and abetting such) are described in Articles 63-81 of the Military Criminal Code (*Askeri Ceza Kanunu* 1930) and vary in severity from fines to extensive prison sentences. Turkey is the only member of the Council of Europe that does not recognize conscientious objection to military service. The number of conscientious objectors in Turkey is unknown and up-to-date statistics are difficult to find.

Conscientious objectors face penalties beyond the charges brought against them by the military. The Ministry of Defense, since 2016, has been issuing directives to employers in the

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<sup>82</sup> Women, therefore, are exempt. The conscription term was 15 months prior to January 1, 2014, when the period was reduced.

private sector to guarantee that evaders report for duty (*Vicdani Ret Derneği* [Association for Conscientious Objection] 2017). Because these directives are based on Article 93 of the Military Law and Article 75 of the Military Criminal Law, employers are legally permitted to “rightfully terminate” any employee who does not comply with the call for conscription (*Vicdani Ret Derneği* 2017). As well, according to Article 48/5 of the Law on Civil Servants, those who have not carried out their military service are prohibited from working in the public sector. Finally, conscientious objectors cannot re-register in the social security system, effectively preventing access to public health care and retirement funds (*Vicdani Ret Derneği* 2017). These *de facto* punishments result in what the ECtHR labeled “civil death,” as described in the *Ülke* judgment below, in that conscientious objectors are excessively punished for exercising their right to practice and carry out their sincerely held beliefs.

In the context of cases that have come before the ECtHR, the case law of the Court has established that principled opposition to military service, as decided in (*Bayatan v. Armenia* [Application No. 23459/03] 2011), is included among the protected coherent and sincerely-held philosophical convictions. Two cases included in this study (*Savda v. Turkey* and *Tarhan v. Turkey*) are the earliest cases in the Court to establish that pacifism is among the convictions that are protected under Article 9.

### **6.6.1 Ülke v. Turkey**

The case of *Ülke v. Turkey* originated in an application to the ECtHR on January 22, 1997 ([Application No: 39437/98] 2006). Mr. Osman Murat Ülke had lived in Germany until he was 15, at which point he returned to Turkey to continue his high school education and go to university. He became an active member of *Savaş Karşıtları Derneği* (Association of Opponents

of War) in 1993, but the association was dissolved later that year. He then went on to serve as the chairman of the *İzmir Savaş Karşıtları Derneği* (İzmir Association of Opponents of War) from 1994 to 1998. In August 1995, he was called to perform the requisite military service but refused to comply and publicly burned his call-up papers, citing his pacifist convictions. He was arrested in October 1996, and indicted by the military prosecutor at the Ankara Military Court of General Staff under Article 155 of the Criminal Code and Article 58 of the Military Penal Code. He was sentenced in January 1997 to a six-month prison sentence and a fine. From his first arrest in 1996 to his last conviction in 1998, Ülke was imprisoned a total of eight times and served a total of 701 days for both his overt conscientious objection grounds and for “persistent disobedience” and refusing to wear the Turkish military uniform. At the time the case was filed with the ECtHR, he was wanted by security forces for the execution of his sentence and was in hiding.

The case law for the scope of Article 3 is based significantly on the *Ireland v. United Kingdom* case ([Application No: 5310/71] 1978/2018) and the *Peers v. Greece* case ([Application No: 28524/95] 2001), which have stated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3, depending on the circumstances of the case, such as the duration of treatment and its physical or mental effects. Treatment is considered to be “inhuman” within the scope of Article 3 if the punishment was premeditated, applied over a long period of time, and caused intense physical or mental suffering. Under Article 3, punishment is “degrading” if the objective is to humiliate and debase the individual and “adversely affected his or her personality in a manner incompatible with Article 3” As such, the Court ruled that there was a violation of Article 3 of the Convention and that it was not



necessary to examine the applicant's other complaints under Articles 5, 8, and 9 separately.<sup>83</sup>

Ülke was awarded €1000 for costs incurred for legal fees. Furthermore, Turkey was required to pay €10,000 for non-pecuniary damages. The remainder of the claim was dismissed for just satisfaction. The case spent a total of 108 months in the Court from the submission of the application to the date of judgment. From the date of the final judgment to July 15, 2016, the case had spent 123 months pending under enhanced supervision in the CoM.

The CoM adopted an initial Interim Resolution in October 2007 (1007th meeting) that urged "the Turkish authorities to take without further delay all necessary measures to put an end to the violation of the applicant's rights under the Convention and to adopt rapidly the legislative reform necessary to prevent similar violations of the Convention." Seeing that the government had not taken any concrete steps to rectify the situation, the CoM issued another Interim Resolution (CM/ResDH(2009)45) on March 19, 2009, reiterating Turkey's obligations under Article 46 of the Convention to adopt individual measures to end the violations and actions to prevent similar violations in the future. The Court included the prevention of future violations because Ülke was still in hiding at the time and was wanted by security forces to serve his sentence.

In a communication to the CoM on September 6, 2012, the Turkish government relayed that Ülke could "fully exercise his civic rights without any hindrance" since the warrant for his arrest had been lifted by the Eskişehir Military Court on June 4 of that year and guaranteed that

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<sup>83</sup> This was the only case in this category that was not ruled to include an Article 9 violation.

his name would be removed from police and gendarmerie records. The CoM did not view these steps as sufficient to guarantee Ülke's rights and prevent further prosecution or conviction and urged the Turkish government to take appropriate legislative action to remedy the situation. The most recent communication from the applicant's representative to the CoM dates from March 6, 2015 (DH-DD(2015)320) and indicates that there had been no developments regarding these "necessary legislative measures with a view to preventing prosecutions and conviction of conscientious objectors" and that Ülke still faced "victim" and "potential victim" status. The communication further claimed that the ECtHR ruling, as well as the CoM's interim resolutions and decisions, had not impacted the government's attitude "despite the assurances of the Government on paper to the CoM and the applicant." There was no information available as to whether the non-pecuniary damage award or costs and expenses had been disbursed to the applicant. The case remains pending in the CoM under enhanced supervision and await concrete assurances from the Turkish government that general measures have been taken to ensure that similar structural issues will not arise in the Turkish courts as they relate to conscientious objection. It is the leading case for the remaining five repetitive cases in this set.<sup>84</sup>

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<sup>84</sup> There is one other repetitive case included under the *Ülke v. Turkey* set of cases, that of Enver Aydemir (*Enver Aydemir v Turkey* 2016), who was the first Muslim conscientious objector in Turkey. The Court ruled that there had indeed been a violation of Article 3 (inhuman treatment); however, the Court also ruled that there was no violation of Article 9 in that the applicant's objection arose from a political stance, not a religious one, based on his rejection of "secularism."

### 6.6.2 Erçep v. Turkey

The case of *Erçep v. Turkey* ([Application No: 43965/04] 2011) originated in an application to the ECtHR on October 6, 2004 by Yunus Erçep, a Turkish citizen who was baptized as a Jehovah's Witness in 1982 when he was 13 years old. Citing his knowledge of the Bible and his faith, he refused to perform his military service as required by Section 1 of the 1927 Military Act.

The applicant reported to the military recruitment office in Şişli (Istanbul) in 1997 and was called to duty in 1998. He returned to the military recruitment office in March 1998, stating that he could not present himself at the recruitment site in Rize. He voluntarily surrendered and the military judge at the Trabzon command office decided that there was no need to prosecute and the applicant paid 35,000 TL. Since March 1998, Erçep has failed to report for duty after approximately 15 call-ups and more than 25 cases have been filed against him. He has been sentenced to prison and fined. At the time of the ECtHR court hearing, the applicant faced additional criminal proceedings because of repeated refusal to perform military service.

Relying on its recent Grand Chamber judgment in *Bayatan v. Armenia* ([Application No. 23459/03] 2011), the Court recognized that Article 9 did not explicitly refer to conscientious objection. However, it did note that objecting to military service due to a sincere and insurmountable conflict between the obligation to serve and one's conscience constituted a conviction or belief that is protected under Article 9. Therefore, the Court ruled that there had been a violation of Article 9 because Erçep had been convicted multiple times due to his beliefs under circumstances in which there was no alternative civilian service. Furthermore, due to the fact that Mr. Erçep was tried before a court of military officers at a time when he had not yet

reported for duty with a regiment,<sup>85</sup> the Court determined that his concerns about the independence and impartiality of the court were legitimate and, as such, ruled that there had also been a violation of Article 6. The applicant was awarded €10,000 in non-pecuniary damages and €5,000 for costs and expenses. The remainder of the claim was dismissed for just satisfaction. The case was in the Court for 86 months until the ruling, and has been in the CoM for 53 months. It remains under enhanced supervision as part of the *Ülke* group of cases.

In a communication to the CoM on May 7, 2015 (DH-DD(2015)627), the Turkish government indicated that Erçep was a candidate for appointment as a reserve officer and was summoned to military service in February 2015. The government also noted that the applicant did not face prosecution under military jurisdiction. Furthermore, he was acquitted of the charges that had been brought against him at the 3rd Chamber of the Rize Criminal Court of General Jurisdiction. Erçep is still under the obligation to pay an administrative fine for draft evasion. There was no information available as to whether the non-pecuniary damages or costs and expenses had been awarded to the applicant.

### **6.6.3 Feti Demirtaş v. Turkey**

Feti Demirtaş is a Jehovah's Witness who refused to perform his military service and was forcibly conscripted in 2005. He joined the regiment but refused to wear his uniform.

Consequently, nine sets of criminal proceedings were brought against him before the Air Force

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<sup>85</sup> The Jurisdiction Disputes Court ruled on October 13, 2008 that an individual is considered part of the Turkish Armed Forces only after reporting for duty. On October 6, 2006, the Turkish Parliament passed a law that military courts no longer held jurisdiction to try civilians.

Command Tribunal. The tribunal imposed several custodial sentences on Mr. Demirtaş who, while in custody and in pre-trial detention, was subject to poor treatment and threatened by prison officers. He was eventually demobilized and sent home.

The case of *Feti Demirtaş v. Turkey* was lodged with the ECtHR on January 26, 2007 (*Feti Demirtaş v. Turkey* [Application No: 5260/07] 2012). The Court ruled that Mr. Demirtaş had experienced inhuman and degrading treatment while in custody and, therefore, that there had been a violation of Article 3. Furthermore, the applicant had objected to serving in the military for reasons motivated by his genuinely held religious beliefs, which were in serious and insurmountable conflict with his obligation to perform military service. Because there was no alternative civilian service available, and because of the penalties that had been imposed on him, among other reasons, the court ruled that there had been a violation of Article 9. Additionally, because the applicant had been forcibly conscripted and had at no point accepted military status during the conscription process, the applicant should have been apprehensive about being tried by judges affiliated with the armed forces since they could be considered a party to the proceedings. As such, the Court ruled that there had also been a violation of Article 6. The court awarded €15,000 for non-pecuniary damages and €5,000 in costs. The case spent 60 months in the Court awaiting a ruling and 51 months in the CoM, where it remains under enhanced supervision as part of the *Ülke* group of cases.

In a communication from the Turkish government to the CoM on May 7, 2015 (DH-DD(2015)627), the government indicated that Demirtaş had been discharged from the military on February 23, 2007 on the grounds that he was medically unfit for service. The applicant's criminal case for persistently disobeying orders is still pending before the İzmir Air Force

Command Tribunal. There are no investigations or prosecutions against him under military jurisdiction, nor does the applicant have any arrest warrants in his name. There was no information available on the payment of the non-pecuniary damages and costs and expenses the Court had awarded to the applicant.

#### **6.6.4 Buldu et al. v. Turkey**

The case of *Buldu et al. v. Turkey* originated in an application to the ECtHR by four Turkish citizens: Çağlar Buldu, Barış Görmez, Ersin Ölgün, and Nevzat Umdu, on March 17, 2008 (*Buldu et al. v. Turkey* [Application No: 14017/08] 2014). The citizens are Jehovah's Witnesses. The four applicants applied jointly because the circumstances of their conscientious objection to Turkey's mandatory military service were similar.

Buldu's case began domestically after he had repeatedly informed the military authorities of his refusal to perform his military service due to his religious convictions. He was notified on November 25, 2004 that there was no exemption from compulsory military service. The applicant refused to sign enlistment documents on at least three occasions and was arrested on the grounds of disobedience on multiple occasions. On February 9, 2006, the Military Court of the General Command of the Gendarmerie of Ankara joined the actions brought against Buldu, at which point another charge was brought against him and he was sentenced to five months in prison. This decision which was upheld by the Military Court of Cassation. The previous charges of disobedience were also heard by the Military Court of the General Command of the Gendarmerie; the applicant was declared guilty of persistent disobedience and was sentenced to seven months and fifteen days in prison. He was "demobilized" on March 2008. Additionally, the Military Court of the General Command of the Gendarmerie of Ankara ruled the applicant

guilty of three other acts of disobedience and sentenced him to another seven months and fifteen days; however, the Court decided to stay the judgment. Throughout the period of 2004 to the filing of the application with the ECtHR, Buldu was repeatedly placed in pre-trial detention. He had also filed a complaint of inhuman treatment while being held in Mamak military prison, but the General Command of Ankara rejected this complaint.

The second applicant of this case, Barış Görmez, informed the military authorities as early as February 16, 2006 of his refusal to participate in compulsory military service on the grounds of his faith and requested alternative civilian service. His request was denied and he was informed that he could be considered a deserter. On October 22, 2007, he was arrested by the gendarmerie and placed in pre-trial detention at the Maslak Military Detention House until November 3, 2007. On several occasions, he was taken to his regiment, but he refused to wear the military uniform. On August 27, 2009, Görmez was sentenced to five months and five days in prison for two acts of refusal. His appeals were dismissed. On November 19, 2009, he was again convicted in military court for two other instances of refusal and was sentenced to seven months and fifteen days for each charge. A number of criminal proceedings were filed against Görmez and he was subjected to penalties involving deprivation of liberty for his persistent disobedience. He was also repeatedly detained or placed in pre-trial detention and subjected to medical examinations to determine his fitness for military service. The applicant complained of poor treatment while held at the Maslak Military Detention Center, alleging that the individuals detaining him mistreated and threatened him. On April 30, 2008, the Hasdal Military Prosecutor in Istanbul issued a decision of incompetence regarding the applicant.

The third applicant, Mr. Ersin Ölgün, repeatedly informed military authorities of his refusal to perform the compulsory military service on the basis of his religious beliefs. He requested an alternative civilian service and was informed it was not available. He was charged with two acts of non-compliance with a draft call in the military court and was sentenced to custodial sentences. This was commuted to a fine of 2000 TL, which he appealed. After Act No. 5530 entered into force on October 5, 2006, the Military Court of Cassation transmitted his files to the judicial authorities. The applicant was sentenced to the same custodial sentences, which were again commuted to a single fine of 2000 TL. On February 1, 2010, the Pendik Criminal Court sentenced the applicant to three months and ten days in prison, but stayed the judgment. Görmez potentially faces new criminal proceedings due to his refusal to carry out the mandatory military service.

Nevzat Umdü, the fourth applicant in this case, repeatedly informed military authorities of his refusal to perform the compulsory military service due to his religious beliefs and requested civilian service, which he was denied. Criminal proceedings against Umdü for non-compliance began in a military criminal court and he was sentenced to two months and fifteen days in prison. This was commuted to a 1,113 TL fine. After the adoption of Act No. 5530, which became effective on October 5, 2006, the applicant's case was transferred to "courts of judicial order." On November 1, 2006, the Gaziantep Military Court determined that it did not have jurisdiction and the case was transferred to the Hatay Criminal Court. Umdü was fined in the Hatay Criminal Court; the judgment was not subject to appeal on points of law. Meanwhile, the applicant was declared unfit for military service due to obesity.



In its judgements, the ECtHR noted that military conscription is mandatory in Turkey but that there are no alternative civilian service options available, which leaves conscientious objectors with no other choice than to refuse enrollment. Thus, the ECtHR ruled that there had been a violation of Article 3 for all applicant parties in this case. The Court, again referencing its judgments in *Bayatan v. Armenia* ([Application No. 23459/03] 2011), *Feti Demirtaş v. Turkey*, ([Application No: 5260/07] 2012), and *Erçep v. Turkey* ([Application No. 43965/04] 2011), determined that there had been a violation of Article 9 in all cases because the applicants, as Jehovah's Witnesses, held religious convictions that were in "serious and insurmountable conflict" with the performance of military service. The Court also determined that there was a violation of Article 6(1) in the *Görmez* case. Similar to the *Erçep*, *Savda*, and *Demirtaş* cases, *Görmez* expressed doubts concerning the "independence and impartiality" of the military court where he was tried since the military could be seen as a party to the proceedings. His assertion of conscientious objection, forced conscription, and subsequent trial in a military court, as opposed to a civilian court, further supported *Görmez's* argument. The Court awarded each applicant the following sums for non-pecuniary damages: Buldu: €12,000; *Görmez*: €15,000; *Ölgün*: €7,000; and *Umdü*: €5,000. The Court also awarded the following sums for costs and expenses: Buldu: €5,000; *Görmez*: €5,000; *Ölgün*: €5,000; and *Umdü*: €3,650. The case was in the Court for 75 months and in the CoM for 22 months from the final judgment to July 15, 2016. There was no information available as to whether the non-pecuniary damages and costs and expenses have been disbursed to the applicants. The case is still pending under enhanced supervision as part of the *Ülke* group of cases.

### 6.6.5 Tarhan v. Turkey

The case of *Tarhan v. Turkey* ([Application No: 9078/06] 2012) originated in an application to the ECtHR on February 16, 2006. Tarhan claimed that violence is a crime against humanity and that his objection to military service is motivated by his sincerely held pacifist convictions.

In 2001, Tarhan declared his refusal to carry out mandatory military service. In 2005, he was arrested in İzmir and taken to his regiment in Tokat, where he again declared his position as a conscientious objector and refused to wear a military uniform. The applicant was sentenced to four years imprisonment by the Sivas Military Criminal Court in 2005. However, the Military Court of Cassation reversed the judgment because the court had not requested a physical examination of the applicant to determine if he was gay, as he claimed.<sup>86</sup> The applicant refused the examination, arguing that it was against the Turkish Constitution and the ECHR, and the examination was not conducted. The applicant was held in pre-trial detention for more than ten months while criminal proceedings against him took place. He was subjected to disciplinary penalties for refusal to have his hair and beard cut. In the end, both were forcibly cut by seven soldiers and the applicant was bruised and scratched and suffered pain as a result. The same day, he began a 28-day hunger strike. He deserted in 2006 and the police immediately started a search for him. He faces new criminal charges for repeated refusal to perform the compulsory military service and will likely be sentenced again.

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<sup>86</sup> Homosexuality is grounds for dismissal from the Turkish military.

When he brought the case to the ECtHR, the Court held that there had been a violation of Article 3, due to the fact that there was no alternative civilian service available for conscientious objectors and considering that Tarhan's situation that faced was tantamount to "suppression of the applicant's intellectual personality." The Court used the case law of *Ülke* (the leading case of this set) to reaffirm that Tarhan's treatment while in detention was tantamount to serious pain and suffering, "which went beyond the usual humiliation inherent in a criminal conviction or detention." The Court also ruled that there had been a violation of Article 9 of the Convention. Although Tarhan did not invoke religious conviction as grounds for conscientious objection, he does claim to adhere to a pacifist and anti-militarist philosophy, which is included in the scope of Article 9 (as established in *Bayatan v. Armenia* [Application No. 23459/03] 2011).

The Court awarded the applicant €10,000 in non-pecuniary damages and €2,300 in costs and expenses. The case spent 78 months in the Court and 45 months in the CoM from the judgment to July 15, 2016. It remains under enhanced supervision as part of the *Ülke* group of cases. There was no information available about whether non-pecuniary damages or costs and expenses were disbursed to the applicant.

Interestingly, a communication from the *Vicdani Ret Derneği* (Association for Conscientious Objectors) to the CoM dated March 6, 2015 (Secretariat of the Committee of Ministers 2015) indicated that in spite of the ECtHR judgment, Tarhan was convicted by the Sivas Military Court for "failing to obey orders" and was given a sentence of 15 months in prison, which was converted into a ₺9000 TRY fine. The domestic military court's ruling could allow Tarhan to apply to the ECtHR once again.

### 6.6.6 Savda v. Turkey

*Savda v. Turkey* was originally brought to the ECtHR on November 11, 2005 ([Application No: 42730/05] 2012). Halil Savda was enlisted in the Turkish military in 2004, at which point he declared himself a conscientious objector and refused to perform his military service. He was an active member of the anti-militarist movement in Turkey, and is the owner of the “War Resisters” website ([www.savaskarsitlari.org](http://www.savaskarsitlari.org)) that is associated with War Resisters International, an organization that supports non-violent protest against war and aids those who refuse to participate in war.

The applicant had served a prison sentence in 1995 for supporting the *Partiya Karkerên Kurdistanê* (PKK, Kurdistan Worker’s Party), which is considered a terrorist organization in Turkey. Savda was called to serve in 1996, but deserted. He was imprisoned again in 1997 for aiding the PKK.<sup>87</sup> He was released from Gaziantep Prison, tried again, and held for six days before being questioned. He was taken to his regiment, where he refused to wear the military uniform, claiming conscientious objection. He also cited his objection to the operation that occurred in his village in 1993, during which he was violently tortured in the military barracks. Criminal charges were brought against him. He was detained and released numerous times for desertion and finally taken to court for his actions. Savda challenged the impartiality and independence of the Military Court. By 2008, after another cycle of desertion, arrest, and

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<sup>87</sup> This case is complicated by Savda’s convictions for affiliation with a domestically recognized terrorist organization, the PKK. While there is no formal system in place in Turkey to determine individual claims of conscientious objection, Savda had been twice imprisoned for terrorist connections prior to his sentencing in relation to conscientious objection.

detention, he was transferred to the Çorlu Military Hospital. There, he was diagnosed with “antisocial personality disorder” and deemed unfit for military service.

Following case law, and particularly *Ülke v. Turkey* ([Application No: 39437/98] 2006), the ECtHR determined that there had been a violation of Article 3 of the Convention due to the serious and repetitive nature of the ill treatment Savda received and the pain and suffering inflicted upon him that went beyond the bounds of inherent humiliation. Additionally, relying on its case law in *Bayatan v. Armenia* ([Application No. 23459/03] 2011) and *Erçep v. Turkey* (2011), the Court determined that Turkey lacked a procedure for examining applicants who declared themselves to be conscientious objectors. This, the Court declared, presented an insurmountable conflict between Savda’s obligation to perform his military service and his sincere and profound convictions as a pacifist/anti-militarist. Moreover, there is no alternative civilian service available for conscientious objectors, preventing a balance between the interest of society and that of the objector him/herself. This affirmed the Court’s decision to declare an Article 9 violation. Furthermore, because the Court recognized that the applicant would legitimately doubt the independence and impartiality of a military court in which he would be tried as a conscientious objector, it was established that there had also been a violation of Article 6(1) of the Convention.

The Court awarded Savda €12,000 in non-pecuniary damages and €1,975 in costs and expenses. The case spent 80 months in court from the application to the judgment, and 46 months in the CoM from the final judgment to July 15, 2016. The case is still pending under enhanced supervision as part of the *Ülke* group of cases. The most recent communication from the Turkish government to the CoM indicated that Savda was no longer required to perform his

military service due to the 2008 medical report that indicated he was suffering from anti-social behavior and was not fit to perform his service. The communication also indicated that Savda had no arrest warrant or pending investigations against him.

### **6.6.7 Analysis**

One of the greatest obstacles to rectifying the situation of conscientious objectors in Turkey is political. The current government has, on numerous occasions, reiterated that it has no intention of amending legislation to comply with its obligations under the ECHR. While there has been action taken in individual cases to remove charges, acquit defendants, eliminate search warrants, or annul fines, no concrete steps have been taken to change legislation to permit conscientious objection or implement an alternative civilian service. As part of the general measures, Turkey has followed through with translating and the ECtHR cases into Turkish and publishing them on the Human Rights Department of the Ministry of Justice website (Secretariat of the Committee of Ministers 2012). The government also reports that it worked on the two-year COE project titled “Human Rights Training of Military Judges and Prosecutors,” which aims to “improve the knowledge and implementation capacity of military judges and prosecutors and legal counsellors” at the Ministry of National Defense. However, the most blatant correction as a part of the general measures required—establishing a provision for conscientious objection to military service—has seen no attention.

As early as 2008, *Demokratik Toplum Partisi* (DTP, Democratic Society Party) MP Akın Birdal and 23 other DTP MPs drafted a proposal to allow conscientious objectors to be exempt from military service, but the bill received no attention from the rest of Parliament (*cnnturk.com* 2008). In 2011, a bill related to conscientious objection was introduced by opposition MP and

member of the *Barış ve Demokrasi Partisi* (BDP, Peace and Democracy Party), Sebahat Tuncel. The bill “disappeared without a trace” and responses from the Ministries of Defense and Justice to another proposal by Tuncel indicated that conscientious objection was linked to the “establishment of a professional army,” which was not on the agenda (European Bureau for Conscientious Objection 2014, 25). In November 2011, Justice Minister Sadullah Ergin claimed that the Defense Ministry was working on a legal regulation on conscientious objection, just as that Defense Ministry had claimed after the *Ülke* judgment was released in June 2008 (Yıldırım 2012). However, on the day of the *Erçep* judgment was released, then-Prime Minister Erdoğan spoke dismissively of the verdict, declaring that the issue of conscientious objection had never been on the government’s agenda and reiterating his praise for obligatory conscription (*Hürriyet* 2011).

The CHP and BDP presented statements at a parliamentary constitutional reconciliation commission meeting in 2012, calling for conscientious objection to be protected in the new constitution. The AKP proposal, however, did not include such a provision; as the party argued, the right to freedom of religion and conscience should not apply to cases of conscientious objection (Yıldırım 2012). The *Diyanet* backed this argument following a query from the *Milli Gazete* (newspaper) to the “Fatwa Line” of the *Diyanet*. The newspaper asked, “Is there a right to conscientious objection in Islam?” within the context of someone exercising their religious beliefs. The *Diyanet* responded that it is not permissible to abandon one’s responsibility to serve and that, if “everyone had the right to conscientious objection, who would defend the state?” (*Milli Gazete* 2012).

Turkey's domestic courts have tried a number of conscientious objector cases but, because of the inconsistent and occasionally unreliable rulings in the courts of first instance and, moreover, due to the fact that there is no law pertaining to conscientious objection, the Constitutional Court inevitably hears these cases. The *Vicdani Ret Derneği* reported that, as of February 2017, there were at least six cases pending before the Constitutional Court by applicants who had been fined or had arrest warrants issued against them for their claims of conscientious objection. These cases had yet to be concluded (*Vicdani Ret Derneği* 2017). This is likely a result of any legislative action on behalf of Parliament to write legislation or make amendments in this regard.

In this sense, the ECtHR and the CoM have been very clear: Turkey must correct its legislation to prevent further cases from coming before the ECtHR. The judgments have been explicit about the individual and general measures that are to be taken. The judgments vaguely declare that the “legal framework is evidently not sufficient to provide an appropriate means of dealing with situations arising from the refusal to perform military service on account of one's beliefs” (*Ülke v. Turkey* [Application No: 39437/98] 2006 and subsequent). It is interesting to note, though, that the *Ülke* case was not ruled to have been a violation of Article 9, but only Article 3, and is the only case in this set *not* to be ruled an Article 9 violation. To reinforce the language in the judgments, in repeated resolutions, decisions, and communications to the Turkish government the CoM has conveyed in unambiguous terms that part of its obligations under Article 46 of the ECHR is to legislate to ensure that similar cases related to the violations that were ruled upon would not find their way to domestic courts or the ECtHR again. Not only is Turkey obliged, as a COE member, to comply with these rulings, but its own Constitution



upholds this responsibility. Article 90 of the Turkish Constitution states: “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.” The ECtHR and CoM have made it clear that there is very little room for a “margin of appreciation” on this matter, particularly considering that Turkey is the only country that does not offer a civilian alternative to compulsory conscription.

In terms of international obligations, Turkey is not bound to the ECHR alone. It is also a ratifier of the International Covenant on Civil and Political Rights (ICCPR), which falls under the jurisdiction of the United Nations. Article 18 of the Universal Declaration of Human Rights and the ICCPR establish the right to freedom of thought, conscience, and religion. However, conscientious objection is not explicitly mentioned.

Societal stereotypes and prejudice against “non-majoritarian” religious adherents have also indirectly influenced the lack of public outcry for recognition of the rights of conscientious objectors. Article 301 of the Penal Code is frequently invoked against authors, journalists, or other public figures to legally reprimand actions or expressions that “denigrate the Turkish nation, the state of the Republic of Turkey, the Turkish Parliament, the government of the Republic of Turkey and the legal institutions of the state.”<sup>88</sup> While none of the cases in this set

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<sup>88</sup> Slight changes were made to Article 301 in 2008 as part of the European Union accession process, in particular requiring the Minister of Justice’s authorization prior to prosecutors initiating judicial proceedings. Still, Article 301 continues to be used against what the state perceives as “traitors” as well as in cases that mention the controversial terminology surrounding the slaughter of more than one million Ottoman Armenians in 1915. Some well-known figures that have been charged under Article 301 include Nobel Prize-winning author Orhan Pamuk; author and activist Elif Şafak; and slain Turkish-Armenian journalist Hrant Dink.

relate directly to Article 301, this law has certainly aided in the construction and reinforcement of how “Turkish identity” is defined, and who is excluded from this definition. Journalist Perihan Mağden was prosecuted for an article she wrote on December 25, 2005 in *Yeni Aktuel* titled “Conscientious Objection is a Human Right.” Mağden was tried but acquitted and the court ruled that her writing was not a violation of Article 301. Still, military service in Turkey is held in high regard and conscientious objectors are perceived as “traitors.” This sentiment manifest in the *Demirtaş* case when a captain told the plaintiff: “Pray not to be assigned to my military base, since I will make you lead a dog’s life. I will force you to perform military service.” Another officer told him, “Leave Turkey if you do not want to be in the military” (Oehring 2007b).

Turkish national and religious identity has been constructed in a way that is deeply connected to national pride and its bastion—the Turkish Armed Forces. Thus anyone objecting to serving the Turkish military on any grounds is perceived as anti-Turk or non-Turk. Three of the six cases included in the conscientious objector category were brought forward by Jehovah’s Witnesses (of the three remaining cases, two made anti-militarist/pacifist claims, and another simply based his claims on conscientiousness). The sincerely held belief of Jehovah’s Witnesses requires that in matters involving politics, Witnesses to be “strictly neutral, following Jesus’ example of being no part of governmental affairs.” (Watch Tower Bible and Tract Society of Pennsylvania n.d.). The ECtHR has affirmed this a number of times in cases brought against other COE countries, namely Russia and Armenia. Still, Turkey remains the only COE country that does not recognize the right to conscientious objection to military service. Considering all of the above factors, in addition to the treatment received while in detention for refusing military service, it is no wonder that Jehovah’s Witnesses and others have taken their cases to the ECtHR.

Though five of the six of these cases have been ruled to be violations of Article 9, the fact that Turkish identity is so thoroughly entwined with service to country in the military, leaves very little expectation that Turkey will move to recognize conscientious objection any time soon.

The public outcry against conscientious objectors or those who criticize the military may also be rooted in Turkey's battle with the PKK, a group that has been recognized as a terrorist organization by Turkey, the United States, the North Atlantic Treaty Organization (NATO), and the European Union. The PKK was formed in the 1970s, partly in response to the oppressive and assimilationist policies of the Turkish government restricting a number of Kurdish rights inside Turkey, namely the use of the Kurdish language. The group resorted to violence in the mid-1980s, establishing training camps where members would plan to carry out attacks on various state institutions. Intermittent periods of armed insurgency have led to the deaths of more than 40,000 since the start of the conflict. Turkey's struggle with the PKK has recently been complicated by the conflicts in neighboring countries like Syria and Iraq. Kurds in Syria have been one of the major opposition forces to the Islamic State (also recognized as ISIS) and created a semi-autonomous region there. In Iraq, Kurdish Peshmerga forces have also been a key player in fending off ISIS in the Kurdish autonomous region in Northern Iraq. Kurdish groups in both regions have received the military and financial backing of the United States. This has heightened tensions in US-Turkey relations because of Turkey's concern for the implications of greater Kurdish independence in the region.

Many Turks inherently revere the Turkish military as defending national security and even preserving national identity. In a 2015 survey by the Pew Research Center, the military was the only institution in the country that received a positive rating from among those surveyed,

with 52 percent stating that the military has a good influence on the country (Poushter 2015, 6). The same survey reported that only 36 percent supported Turkey joining the US-led international coalition against ISIS (Poushter 2015, 10). Interestingly, support for the military has declined in recent years, but one study indicates that this is a reflection of AKP supporters' increased criticism of the military's political role, the increased visibility of AKP supporters since the party took office, and the corresponding decreased visibility of those parties that have been viewed as historically having a favorable view of the military, like the CHP and MHP (Sarigil 2015). In spite of the military's declining popular support, its position as the institution with the highest vote of public confidence indicates that the armed forces have managed to retain their reputation as the defender of Turkey and Turkish nationalism. Those who would challenge the importance and function of the military, and thus, compulsory military service, are, as stated above, perceived as "traitors."

In sum, the reputation of the military both political figures and the general public hold contributes to conscientious objectors' increased judicialization of the ECtHR, as well as the lack of substantial changes to laws and regulations surrounding conscientious objection in Turkey. The judgments that have condemned Turkey for violations have been very clear in what expectations for implementation are: change the laws to be in line with the ECHR. As the case law has established, this means the creation of an exemption for military service for conscientious objectors. There are few other factors that seem to have hindered progress on this front. With Turkey as the sole contracting party to the Council of Europe that does not have exemptions for conscientious objectors, it would seem that other late-adopting members' institutional pressure on Turkey, as well as pressure from members that have had such

exemptions in place for a long time, would encourage Turkey to move toward full compliance with ECtHR judgments. However, the long-standing reputation of the military as a guardian of secularism and democracy has shaped and solidified Turkish identity and it will be incredibly difficult to shift away from the notion that military service is a national obligation and pride.

## **CHAPTER 7: Conclusion**

Turkey is unique among other high contracting parties of the Council of Europe (COE). Though it was one of the earliest members of the COE, it has faced challenges similar to both well-established democracies of Western Europe and the newer members of the COE that joined after the 1990s as a result of how its complicated, complex, and rich history has shaped contemporary institutional structures. Turkey has the third highest population in the COE after the Russian Federation and Germany at nearly 81 million. Of the 47 member states, Turkey has the greatest number of cases at the European Court of Human Rights (ECtHR) that have been found to have at least one violation of the European Convention on Human Rights (ECHR). Turkey is a party in 20 percent of the more than 14,000 cases involving violations of the ECHR. Moreover, Turkey has the third highest rate of non-implemented judgments in the Committee of Ministers (CoM). The focus of this study is explaining Turkish non-implementation by examining institutional barriers for the execution of judgements in Turkey.

The study began with an overview of the situation, followed by a review of the relevant academic literature that was taken into consideration, namely the concepts of identity, institutionalism, judicialization, and implementation. Chapter 3 explained the bodies of the COE, with a focus on the ECtHR and the CoM, as well as an explanation of cases involving religious freedom in the ECtHR and Turkey's experience as a party to the ECtHR. Chapter 4 explored the history of Turkey and the Council of Europe, with a focus on the ECtHR and the CoM. Chapter 5 described the methodology of the study, including sample selection, data collection, and analysis. Chapter 6 provided a detailed account of the results of the analysis of the 19 selected cases and examined the independent variables that work against implementation (political reasons, reasons

to do with the reforms required, budgetary reasons, reasons to do with public opinion, language of the judgments, and reasons related to obligations deriving from other institutions) and research questions. The current chapter is a summary of the conclusions reached and the contributions this study makes to the literature. It concludes with a discussion of the limitations of the study and suggestions for future research.

### **7.1 Executive Summary**

A cursory glance at Turkey's history suggests that political reasons and reasons to do with public opinion in relation to the identity of non-Hanefi Sunnis have significantly shaped the trajectory of the human rights structure to date. This is particularly salient when considering the rights of religious minorities in Turkey. Researching the cases in this data set has affirmed that these two factors have contributed significantly not only to the emergence of human rights issues related to religious identity, manifestation, and association, but also to the perpetuation of such quandaries and ultimately, their just resolution.

The institutional set up initially created during the Ottoman Empire was based on a governmental and societal categorization of religious identity and remains in place today, albeit loosely. This structure is the foundation for the establishment of the *Diyanet*, which largely determines the nature of the recognition (and non-recognition) of the identity and rights for all religious classifications in Turkey. Because "Turkish" and "Muslim" are regarded as foundational elements of national identity, a policy of assimilation (and repression) has been pursued with a view to strengthening these identities (Nalbant 2017). Among government institutions, the *Diyanet* has taken the lead in producing, propagating, and crystallizing Turkish national identity. Its policies have shaped societal opinions and governmental policies that

determine what rights are bestowed on certain religious identities and what benefits they will enjoy. The long-standing presence and influence of the *Diyanet* in Turkey is fundamental to the interpretation of rights in religious matters (Karakaş 2017). The *Diyanet*'s initial institutional settings have remained in place since its foundation and have shaped the trajectory of religious governance, meaning that historical institutionalism is indeed applicable to these case studies.

Furthermore, the policies of the *Diyanet* have impacted other institutions, making policy change incremental or even impossible. The density of Turkish institutions is evident from this study, particularly as it relates to how identity is constructed and regulated. For example, the issue of one's religious affiliation as it appears on the national identity card (as addressed in the case of *Sinan Işık v. Turkey*) largely shapes educational policies, specifically participation in religious education courses (as seen in *Mansur Yalçın et al. v. Turkey* and *Hasan and Eylem Zengin v. Turkey*). In these cases, the requisite changes must occur across a number of ministries and governmental bodies, including the Ministry of Interior, Ministry of Education, and the justice system, to name a few. This study illustrates that while changes can be made, they are largely incremental and punctuated due to the Turkish institutional structures—namely societal norms, governmental institutions, political parties, and non-profit organizations.

It is also clear from this research that the religious identity of victims seeking recourse at the ECtHR can affect the manner and extent of compliance and implementation. For example, Lausanne Minorities (Jewish, and Armenian and Greek Orthodox communities) seem to have broader and more extensive implementation of the cases they take to the ECtHR. This could likely be due to their long-standing presence in Turkey (and even prior, the Ottoman Empire). Though the Lausanne Minorities, as illustrated throughout, are victims of overt and systematic



discrimination, their longevity in the country has lent to their “legitimacy” in the eyes of the Turkish Government. Longevity, however, is not a determinant for legitimacy in the eyes of the Turkish Government for other communities. For example, the Alevi have been part of the Turkish fabric for an even longer period of time than the Lausanne Minorities; yet from the incomplete or absent movement on cases brought forward by Alevi groups and individuals, it is clear that in this case, the government does not differentiate between non-Sunni communities.

According to Senior Lawyer and Head of Division of the Registry of the ECtHR, Dr. Atilla Nalbant, because “secularism” has been an ideology that has been imposed by the Turkish state, creating tensions in civil society, religious movements’ demands are dealt with in the justice system (Nalbant 2017). Yet the actors that bring these demands to the justice system do not find a satisfactory result domestically, and thus turn to international human rights tribunals to seek justice. This rising trend is referred to as judicialization. Judicialization is indeed a trend in Turkey, according to Gökçe Türkyılmaz, a Lawyer at the Registry of the ECtHR, because “governments or parliaments do not want to take the risk of giving too much religious freedom, especially to minority groups, who are in the end forced to try [to achieve rights recognition] legally” (Türkyılmaz 2017). This resistance on the part of governments points to a lack of political will, regardless of the political party, and relates back to the electorate’s general animosity toward non-Hanefi Sunni citizens.

## **7.2 Contributions to the Literature**

This study’s overall examination of religious identity and rights recognition has provided a framework to study the intersection of religious identity, freedom, and associational rights where one religion imposes its identity, attempts to silence, or denies rights to others. In the case of

Turkey, a fundamental failure to create a pluralistic and just rights recognition scheme at the domestic level has disproportionately impacted individuals and groups that are not Hanefi Sunni.

An exploration into the religious identities included in the current case studies has demonstrated that there are indeed essentialist and constructivist identity formations at play in Turkey. Because the Turkish national identity that has been reified over time reinforces the dual elements of nationality/ethnicity (Turk) and religion (secular Sunni), any individual or group that does not identify as such has been essentialized as “other.” For the Lausanne Treaty faiths (Armenian Orthodox, Greek Orthodox, Jewish), their intrinsic religious identities have been essentialized by the long-standing history of their faiths, but also by the government because of how these groups have been stereotyped as far back as Ottoman times. The institutional structures for how to “govern” these non-Sunni groups were carried from the Ottoman Empire into the modern Republic. As this research demonstrates, these structures have been quite difficult to change, and the changes that have taken place (i.e., property rights laws, national identity cards) have been piecemeal and slow to occur. Protestants and Jehovah’s Witnesses have faced similar identity issues, although they do not fall into the historic *millet* system like the Lausanne minorities. Jehovah’s Witnesses are not as well known in Turkish society, which has created some distrust because they have a relatively recent vocal presence. One interviewee for this study claimed that parts of society do not even believe they are religious people—that by knocking on people’s doors [proselytizing] they simply want to sell something. As for atheists, agnostics, and deists, they are often dismissed as having irrelevant or baseless beliefs, as both President Erdoğan and *Milliyetçi Hareket Partisi* (MHP, Nationalist Action Party) leader Devlet Bahçeli recently claimed in public statements (*Ahval* 2018; *cnnturk.com* 2018). Statements by

such high-ranking officials only serve to reinforce the well-established, negatively constructed identities imposed on non-Sunni citizens.

The cases brought forward by Alevi (five of the 19 in this set) suggest that the Alevi as a group have been most extensively impacted by essentialized and constructed identity issues in Turkey. The identity issues the Alevi face are threefold: 1) internal disagreement on what it collectively means to be Alevi; 2) the Turkish government's framing of Alevi identity as "part of Islam" (not as having its own distinct practices, beliefs, and traditions); and 3) the Turkish government relegating Alevism to the cultural realm (categorizing unavoidably conspicuous practices, beliefs, and traditions as folkloric customs).

This study has also reaffirmed that it is the institutions and institutional structures that influence how certain individual or group identities are constructed. The construction of these identities is employed strategically to change institutions or resist change to institutions. For the Alevi in this study, the government has indeed imposed an identity on the Alevi as being either "within Islam" or as a cultural tradition in order to "distribute benefits and burdens so as to reflect and perpetuate these constructions" (Ingram, Schneider, and DeLeon 2007, 93). As such, these identities become embedded (especially through legal means) and difficult to change (Ingram, Schneider, and DeLeon 2007, 111). The government's embedded construction of Alevi identity is evident in the cases in this study, especially in relation to educational issues, the refusal to recognize Alevi houses of worship as such, and of course, refusal to allow the designation of "Alevi" as one's personal faith on the national ID card. Alevi issues have also been a challenge to tackle in part due to the rift in the community about agreed upon beliefs, practices, and collective objectives. Occasionally, however, some groups that agree upon their

collective identity can navigate the opportunity structures that policy designs give them and influence their socially constructed identity (Ingram, Schneider, and DeLeon 2007, 111). In the current study, the cases that confirm this are those related to property issues.

The Greek and Armenian Orthodox communities do not have the same intra-communal identity issues as the Alevi, and therefore have been able to better organize to ensure implementation of the judgments and the return of some of the properties confiscated from them. However, the Armenian Orthodox community is divided on how to handle the selection of a new patriarch since government regulations do not specify the process and since the government has regularly interfered in the nomination and selection process in the past.

This study also affirmed much of the theoretical literature surrounding institutionalism and institutional change. For the sake of this study, institutions were defined broadly and included organizations, laws, social norms, and symbols. Each case included in the study illustrated how institutional structure constrains or enables actors, particularly by defining identities. The institutional environment in Turkey as it relates to religious governance is highly integrated and has largely remained structurally consistent since Ottoman times. These two factors alone are indications of the obvious path dependence of institutional structure, which makes change incredibly difficult, if not impossible. The fact that partial progress has been made to the requisite general measures on a majority of these cases, however, demonstrates that change is possible, though it may be slow and/or take place on the periphery. Given Turkey's deeply integrated institutional structure, particularly in the form of organizations and laws, it is interesting to speculate about what punctuated and evolutionary change could potentially occur should one critical shift in a single institution occur. One might suspect that a change to the

*Diyanet* would instigate such a radical transition. However, returning to the theories that affirm that stasis and stability (or even incremental change) are the norm, and that such radical punctuations are rare, such a revolutionary transformation is highly unlikely. The changes that have been made are most often initiated as part of the general measures required from the judgments and not from domestic political action. This indicates the supranational judicialization of politics in Turkey.

The sheer number of applicant cases coming to the ECtHR that relate to Turkey is indicative of the turn towards the “judicialization of mega-politics” (Hirschl 2013, 10). Hirschl, one of the foremost scholars on judicialization and religion, hones in on judicialization as it relates to these two spheres and defines it as the transfer of “fundamental collective-identity questions of ‘religion and state’ from the political sphere to the courts” (Hirschl 2008, 27). The mere fact that the cases examined in this study, as well as a number of other cases questioning other fundamental identity issues, have been taken to the ECtHR indicates that this transfer has already occurred in Turkey.

However, one must be careful about making generalizations about judicialization theories and instead differentiate between domestic judicialization and international judicialization. The study at hand did not include a review of domestic judicialization trends. However, as Hirschl mentions, democracy is one of the key conditions for judicialization to flourish and, as dysfunctional as Turkey’s government can appear at present, democracy functioned relatively well during the period of this study. Interestingly, as Hirschl and a number of other scholars have noted, with democracy comes “bottom-up” judicialization or “judicialization from below,” where individuals who have been disenfranchised can mobilize by turning to the courts rather than the

political sphere for rights recognition (Hirschl 2006, 2008, 2013; Shapiro 2002; Stone Sweet 2000; Tate 1995). Again, the very fact that these cases have a domestic judicial history (as required to be heard in the ECtHR) indicates that the groups of this study felt compelled to turn to the courts, either directly or following fruitless efforts in the political sphere. This is not to say that some groups have not attempted to participate in the political process. Indeed, the Alevi have played quite an active role in the political (legislative, bureaucratic) realm in comparison to the other groups in this study. These other groups engage in very little domestic political activism.

As mentioned in previous chapters, there is very little scholarship on international judicialization (in contrast to domestic judicialization), and even less on the international judicialization of religion. The judicialization of rights recognition in an international context differs from other public policy areas, such as the environment or trade or even social policy issues such as sexuality or family life. In any judicial setting, rights issues present an enormous challenge to balancing individual rights, state's obligations, and individual and national identities—matters that become even more complicated when dealing with issues of religion.

Importantly, when viewing these cases strictly through the lens of belief or conscience, these matters differ from the international judicialization of other issues, such as the environment, labor rights or health care. This is in part due to the more vertical relationship between the individual and state in human rights courts and the horizontal (state-to-state) relationship in other types of courts. More importantly, the international judicialization of religious issues differs from other considerations of international judicialization simply because of the profoundly personal and deep-seated manner in which belief or conscience shape one's

worldview. These factors pose considerable challenges to resolving conflicts through legislative means, and naturally, through the courts, as well.

Nevertheless, one can surmise from this study and others that the public regulation of religion has indeed drifted into the legal arena, possibly because “religion is seen as a fundamental freedom” (de Galembert and Koenig 2014, 4). International courts have served to proliferate regulations and in a sense codify how to manage religious freedom in various domestic contexts. Yet as demonstrated from the case studies in this study, national institutional settings still weigh heavily on the impact these judgments have. As such, we should not leap to the conclusion that the “internationalization of the law leaves national models unchanged” (de Galembert and Koenig 2014, 11).

Yet the problem with international judicialization is that while judgments carry weight, domestic actors are ultimately responsible for executing them, and it can take time to resolve the domestic conflicts that were the impetus for the initial grievances. As seen in this study, domestic institutional settings have considerable influence on issues of religious freedom in Turkey. As the theories of institutionalism and institutional change suggest, this process is slow and long-standing institutional settings or deep institutional embeddedness make change difficult. Nevertheless, domestic actors have taken some steps to execute these judgments.

Though the CoM has closed only one of the 19 cases in this study, this does not indicate that steps have not been taken to move closer in that direction. For example, in regards to changes in association and foundation cases, a new Foundations Law was passed in 2008, albeit reluctantly and later challenged in the Turkish Constitutional Court. These changes were minor and still do not provide a holistic solution to foundations’ rights, yet these small steps indicate an

acknowledgment of the organizational problems associations and foundations face. Interestingly, this change occurred as a result of European Union harmonization reforms, as opposed to ECtHR rulings.<sup>89</sup> Additionally, though piecemeal, domestic laws and regulations have been passed that permit the return of religious minorities' properties that were confiscated by the government, and indeed, a number of properties have been returned. There has been much concrete movement in this area; even so, many applications for the return of properties are still denied. Furthermore, the Turkish Supreme Court ruled in 2015 that *cemevi* are indeed houses of worship and so should have their electricity bills paid for by the government—a change that was likely influenced by three of the ECtHR cases (decided in 2015 and 2016) analyzed in this study. Also in 2016, the Turkish government paid for the utility costs of 419 minority places of worship, including 355 churches, 24 chapels, and 40 synagogues (United States Commission on International Religious Freedom 2016, 189). What is even more interesting about the category of “places of worship” is that prior to these cases coming to the ECtHR, a number of municipal governments determined that *cemevi* should be considered places of worship and were regarded similarly to mosques by the local governments, meaning that their electrical expenses were covered and assistance was provided for the upkeep of *cemevi*.

There has also been meaningful progress to address the structural issues that emerged from the Sinan Işık case. The new identity card system that was implemented in 2017 complies for the most part with the Işık ruling by removing information about one's religious affiliation

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<sup>89</sup> The *Özbek et al. v. Turkey* case was decided in 2010, after the Foundations Law came into effect.



from the physical card. It is possible that, since the Turkish government has initiated substantial structural changes, the CoM could review the case and consider the case executed, though the timeline for this is nearly impossible to speculate. The Işık case could also determine potential changes to domestic laws surrounding mandatory religious education courses since students must prove religious affiliation to apply for exemptions from the course. There have been cosmetic changes to the religious education courses to appease Alevi demands for the inclusion of information on Alevism or petitions for exemptions. It remains to be seen, however, how the government will handle exemptions now that the national identity card does not indicate religious affiliation overtly and since citizens may apply to remove their religious affiliation from the civil registry.

The category of cases with the least movement toward execution deal with conscientious objection. Six of the cases in this category remain under enhanced supervision and Turkey is still the only member country of the COE that does not permit conscientious objection or have a civilian alternative available for mandatory military service. While some issues in each individual case have been addressed (such as the removal of arrest warrants), the applicants still face domestic charges. As well, other potential conscientious objectors face a similar fate since the current government has repeatedly claimed that it has no intention of complying with these ECtHR judgments. Overall, the cases in this study indicate that the process of implementation is slow and incremental and that institutional settings will only occasionally permit the necessary changes to domestic institutions (including laws, rules, norms, organizations) that would eventually lead to full execution of the judgment.

What became apparent from this study but the literature addresses less often is that the Court and the CoM themselves have also hindered full compliance and implementation of the judgments. The Court and the CoM have acknowledged this fact and have taken steps in recent years to reduce their case load and improve the mechanisms to make the process more efficient and effective. Still the Court remains overburdened, particularly by repetitive cases from Turkey. This can be attributed to the wide margin of appreciation and a lack of explicit guidance from the Court and CoM. Judge Karakaş notes: “Sometimes the margin of appreciation is too wide; everything is linked to subsidiarity in the Court. We are giving very much credit to the domestic authorities, especially to the supreme courts” (Karakaş 2017). But taking into account the sensitivities of state concerns and allowing governments to largely determine what an acceptable execution might look like does not always lead to fulfillment of obligations under the ECHR. Judge Karakaş adds that execution must be viewed holistically: “Especially in religious cases, the purpose is not just to pay compensation. You can pay. But you must also change the law. You must implement the whole system” (Karakaş 2017). Yet as in the cases studied here, the language of the drafted judgments is often vague, leaving domestic authorities with an unclear understanding of the expectations of implementation. States can also exploit the vague language and only partially implement the judgement, leaving room for similar cases to come before the court again. Even though governments are not given a wide margin of appreciation to determine what is and is not a religion or religious practice (Türkyılmaz 2017), the imprecise directives in the judgments can encourage the offending state to merely pay just satisfaction or make “cosmetic” changes to regulations or laws, while the fundamental issue for the infraction remain.

Such vague language also makes implementation difficult to measure—for both the CoM and those outside the system. The monitoring process is opaque and inaccessible, making the measurement of implementation a challenge beyond the benchmark of case closure. The Parliamentary Assembly of the Council of Europe (PACE) and a number of INGOs have called upon the CoM to make their meetings and documentation more accessible to outside observers (The AIRE Center et al. 2015, 4; Committee on Legal Affairs and Human Rights 2017, 22). “Although the Committee of Ministers since 2011 has published action plans or action reports on its website, this does not always happen immediately or in a way that makes them easily accessible” (Donald and Leach 2016, 96).

Though the measurement of implementation can be opaque and can be interpreted in different ways depending on the time frame analyzed and the measurement tools used, it is important to consider the *effectiveness* of ECtHR rulings. In the Turkish context, religious rights recognition can be sparked by judgments from the ECtHR. Often times, human rights treaties such as the ECHR can produce high levels of effectiveness, even when the outcome seems to be low compliance (Meyer 2014, 97). Though the CoM has closed only one of the cases in this study, steps have been taken to address some of the structural issues under scrutiny in the categories of associational and foundation laws, property rights, places of worship, education, and, particularly, identity cards. In terms of effectiveness, the category that has seen the least movement by the Turkish government is conscientious objectors; in fact, none of the judgements’ general measures have been addressed. Still one can deduce that some of the government’s corrective moves in other categories, as piecemeal and incomplete as they may be,

have been effective (as defined by Meyer [2014, 94]) in that the rulings have “changed a state’s behavior from what it would have been in the absence of the law.”

### **7.3 Policy Recommendations**

The ECtHR is regarded as one of the most effective human rights tribunals in the world. Yet complete implementation is a challenge, both for the offending state in its creation of an “acceptable” solution, and for the bodies of the COE as they measure implementation and decide upon the terms of case closure. The overarching challenge facing the COE that emerged from this research was finding the balance between the Court and CoM’s attempts to provide a wide margin of appreciation to the offending country, but still offering concrete parameters for what complete execution means. What follows are some recommendations that could potentially narrow the gap between how the COE and member states define and execute judgments.

The Court should be more explicit in the drafting of judgments and the CoM should take a more active role in engaging the states, while still respecting the margin of appreciation that the ECtHR is so widely recognized as having. The Court need not identify the precise legislative or bureaucratic reforms that are necessary, but should give more concrete suggestions for the scope of solutions available, as well as a more precise timeline in which to carry out these obligations. Additionally, the CoM should continue to cultivate a more transparent supervision of execution process. As more recent cases in this study have suggested, doing so would encourage domestic NGOs to contribute to the process by submitting arguments and suggestions to the CoM. The advantage of this is twofold: 1) the process would become more democratic, allowing the input from organizations that have a stake in the judgments, and 2) it would potentially alleviate the burden on the CoM to conduct in-depth research on possible domestic remedies to the

judgments. Atilla Nalbant, Senior Lawyer and Head of Division of the Registry of the ECtHR agrees, in that when there is no progress at the national level, civil society and other institutions must monitor the execution of these judgments (Nalbant 2017).

Another policy suggestion that emerged from the interviews that were conducted at the ECtHR and the CoM was directed at the trainings provided to national judges. According to Judge Karakaş, seminars are held for the Turkish Ministry of Justice, in which a number of judges and prosecutors go to the COE every month (Karakaş 2017). Yet, according to some, these trainings do not produce immediate or concrete results, or any results at all: “The court administrators and lawyers train the national judges to apply the principles of the ECtHR. They [the judges] are very happy, they understand; they visit Strasbourg and go back, but are then under national pressures and national sovereignty, and end up repeating the same decisions...the same violations, endlessly” (Akgönül 2017). Hasan Bakırcı, Deputy Section Registrar of the ECtHR, acknowledged that these trainings have the more intrinsic purpose of increasing knowledge and familiarity with the Court and the execution process, noting that trainings do not always reduce the ECtHR caseload or repetitive cases. He commented that, “They [the trainings] have an awareness-raising function. When we meet the judges, they don’t necessarily learn a lot; they just become aware” (Bakırcı 2017). It would be worthwhile for the Court and the CoM to review the outcomes of these trainings; a survey or an academic study would provide suggestions on ways the trainings are effective in their current form, and how future trainings could be improved.

The most interesting policy observation and recommendation to emerge from this study concerns the articles the Court determined to have been violated. Nine of the 19 cases in this

study were Article 9 violations; yet all cases included in this study were related to one aspect or another of religious freedom, association, or manifestation. As Judge Karakaş pointed out in an interview, “In Article 9 cases you can see a wide margin of appreciation—sometimes so much that you might never see a violation. Discrimination is very easy in Turkey. You can change the foundation and association laws to be in line with the Copenhagen Criteria, preparing reform packages, but you can still discriminate.” The fact that ten of the cases included in this study were not ruled as Article 9 violations ignores the fact that there is an “unspoken” structural issue in Turkey regarding how non-Hanefi Sunnis are treated. One must acknowledge the difficulty of tasking the court with fully comprehending complex identity issues in each country. However, by taking a less essentialist view of identity and understanding it from a more constructivist perspective, the Court might acknowledge that some of these cases are indeed Article 9 violations. Being more open to ruling that cases that involve non-Hanefi Sunnis are violations of Article 9 would send a signal to Turkey that these violations arise not only due to structural issues (as indicated in the judgments), but the manner in which the majoritarian construction of Hanefi Sunni identity in Turkey has been created, perpetuated, and solidified. Furthermore, it could potentially instigate the slow-moving and punctuated process of reshaping institutions (broadly defined as organizations, laws, societal norms) in a more pluralistic manner over time.

In conclusion, it is recommended that the Court and the CoM take steps toward even further judicialization—becoming an adjudicator that shapes domestic public policy. On the one hand, this means that the Court should take a more active role in drafting explicit expectations for execution in the judgment itself. On the other, when a case is transferred to the CoM, this means opening the supervision of judgments and making the process more transparent to the

public and inviting their participation in the submission of recommendations. These two steps would make the execution process more accountable, democratic, and more closely in line with the expected obligations under the ECHR. Furthermore, judicialization would make the measurement of compliance easier and more legal, as opposed to being political and diplomatic (Keller and Marti 2016, 849), two factors that have contributed to the notoriously slow and incomplete post-judgement execution process, particularly as demonstrated in the cases of this study.

Though increased judicialization may have a positive effect on the execution of judgments, practitioners and scholars should be aware of the potential impact that excessive judicialization may have on democracy, civil society, and rule of law.

#### **7.4 Limitations**

This study examined 19 cases based on the criteria set forth in the methodology section, focusing primarily on cases that were brought to the ECtHR by non-Hanefi Sunnis that were ruled to be in violation of the ECHR's standards related to religious identity, but not necessarily only Article 9 (religious freedom) violations. The criteria created a narrow scope for case selection, thus limiting some generalizations that might otherwise be made from the analysis.

For example, this dataset considers only cases brought against Turkey and not other countries within the COE. This is an important factor to consider since the religious groups that were parties to the cases in this study also reside in other COE states and occasionally face similar restrictions on their religious rights. There are approximately half a million Alevi residing in Germany (Dressler 2008, 282) and, although they are not restricted in how they manifest their religious identity as are the Alevi living in Turkey, Alevi identity is taking on a more universally

agreed upon character, due in part to the increased transnational networks and communication among Alevi communities in Turkey and Germany. This study does not take into account that relationship, which may have impacted the domestic and international judicialization of Alevi rights recognition in Turkey.

Similarly, this study did not consider the cases of conscientious objectors in other COE countries. While Turkey is the only COE member state that does not have an official policy permitting conscientious objection, Russia has a high number of conscientious objector cases, most frequently brought forward by Jehovah's Witnesses. Thus, this study examines conscientious objection purely through the lens of applicants in Turkey.

Additionally, this study did not include a comparison of property rights issues in Greece that are inherently connected to the property rights issues examined here. This connection is a result of a long-standing policy of reciprocity on this issue between Turkey and Greece, largely stemming from the Lausanne Treaty. An inquiry into the outcomes of property rights cases of Muslims in Greece may have shed light on the successes or failures of the Greek government in the execution of that category of cases in comparison to Turkish cases.

This study was also limited by the non-inclusion of friendly settlements. Friendly settlements, by their very nature, are an opportunity for the applicant and accused state to resolve the dispute without a hearing, which is similar to an out of court agreement. By excluding friendly settlements, this study does not consider cases where Turkey was able to successfully achieve a solution without having the case heard by the ECtHR. However, because one of the main considerations of this study was to explore the execution of judgments, friendly settlements were excluded from the data set out of necessity.



Furthermore, while Alevi applicants were involved in five of the 19 cases in this study, the fact that approximately three million Alevi in Turkey also identify as Kurdish was not considered. Because the case criteria mandated that the cases must not be related to the military (outside of conscientious objectors) or groups that are considered terrorist organizations, this excluded cases that involved the PKK. This certainly does not mean that all Kurds are terrorists; the exclusion of this set of actors aimed to narrow the scope of cases specifically to those whose claims are rooted in a violation of religious identity and freedoms. This is not to say that Kurdish Alevis in Turkey have not experienced similar violations of their associational rights; in fact, may face even greater discrimination due to their dual identity as Kurd and Alevi.

Finally, this study is limited by access to information about the progress of the cases. As indicated previously, the CoM has been a relatively opaque institution. Several factors have contributed to this, including the political nature of the process since the members of the CoM are representatives of COE member states' respective foreign affairs offices. While diplomacy is, on occasion, best worked out behind closed doors, there is a certain accountability that is inherent and expected in international human rights tribunals. The COE has acknowledged the calls from outside actors, as well as its own internal bodies (namely, PACE), and has taken steps to make the process more transparent and accessible to the public. Thus, action plans and action reports of the offending country have been published and domestic NGOs and INGOs have been invited to submit opinions and recommendations. Still, access to the case files is not comprehensive. This could also be due in part to the failure of states themselves to submit the requisite documents as part of their obligations, as ordered by the Rules of the Committee of Ministers (namely, Rules 8 and 9). In spite of this, conjectures were made from other publicly

available information, such as media reporting, NGO press releases, and reporting by other governments.

Though this dataset is small, and so poses some issues for generalizing outcomes for the execution of cases, this study and the larger bodies of literature on this subject are nevertheless indicative of a greater trend of supranational judicialization of domestic politics, particularly on the issue of human and civil rights. The next section includes suggestions for further research.

### **7.5 Suggestions for Future Research**

The limitations of this study indicate that there are several potential avenues for future research. One avenue would be a case comparison between COE states that have similar religious demographic experiences and issues. Such a study might compare Turkey and the Balkan states (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia, for example), which could elucidate trends among countries that have historically constructed a national identity based on a single religious identity and the outcomes of implementation in cases brought to the ECtHR by individuals and groups that do not identify with the predominant religion. Additionally, case comparisons in states with state-sanctioned or state-privileged religions and non-majoritarian belief groups could also indicate similarities or differences amongst such countries as Germany, Denmark, Malta, the United Kingdom, or Russia.

As mentioned above, though the literature broadly views issues with implementation as a domestic political problem, this study indicated that the role of the Court and CoM in implementation also has an effect on the amount of time a case awaits full execution. As such, a comparative case study on recent changes to the Court and CoM (for example, Protocol 11),

could suggest the ways in which these reforms have and have not achieved their intended purposes.

Finally, an in-depth examination of the COE-wide implementation of cases, delineated by criteria similar to this study (for example, cases related to religious freedom issues that have been ruled to be a violation of any ECHR article, including but not limited to Article 9 violations), would allow for greater generalization across the COE. It could potentially elucidate trends in religious freedom cases that are not always evident to the Court and CoM and might, therefore, allow for a more clear, prompt, and intentional execution of judgments by offending states.

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## Appendix A: Court Cases Examined in this Study

*Association of Solidarity with the Jehovah's Witnesses et al. v. Turkey*, [Application Nos: 36915/10 and 8606/13], ECtHR, 2016

*Bozcaada Kimisis Teodoku Rum Ortodox Kilisesi Vakfi* (Foundation of the Bozcaada Kimisis Theodosian Greek Orthodox Church) *v. Turkey (no.1)*, [Application Nos: 37639/03, 37655/03, 26736/04, and 42670/04], ECtHR, 2009

*Bozcaada Kimisis Teodoku Rum Ortodox Kilisesi Vakfi* (Foundation of the Bozcaada Kimisis Theodosian Greek Orthodox Church) *v. Turkey (no.2)*, [Application Nos: 37646/03, 37665/03, 37992/03, 37993/03, 37996/03, 37998/03, 37999/03, and 38000/03] ECtHR, 2010

*Buldu et al. v Turkey*, [Application No: 14017/08], ECtHR, 2014

*Cumhuriyetçi Eğitim ve Kültür Merkezi Vakfi (CEM Vakfi; Foundation for Republican Instruction and Culture) v. Turkey*, [Application No: 32093/10], ECtHR2014

*Erçep v. Turkey*, [Application No: 43965/04], ECtHR, 2011

*Fener Rum Erkek Lisesi Vakfi (Fener Greek Boys' High School Foundation) v. Turkey*, [Application No: 34478/97], ECtHR, 2007

*Fener Rum Patrikliği v. Turkey*, [Application No: 14340/05], ECtHR, 2010

*Feti Demirtaş v. Turkey*, [Application No: 5260/07], ECtHR, 2012

*Hasan and Eylem Zengin v. Turkey*, [Application No. 1448/04], ECtHR, 2007

*İzzettin Doğan et al. v. Turkey* [GC], [Application No. 62649/10], ECtHR, 2016

*Mansur Yalcın et al. v. Turkey*, [Application No. 21163/11], ECtHR, 2014

*Özbek et al. v. Turkey*, [Application No. 35570/02], ECtHR, 2010

*Samatya Surp Kevork Ermeni Kilisesi, Mektebi ve Mezarlığı Vakfi Yönetim Kurulu* (Samatya Surp Kevork Armenian Church, School, and Cemetery Foundation) *v. Turkey*, [Application No. 1480/03], ECtHR, 2008

*Savda v. Turkey*, [Application No. 42730/05], ECtHR, 2012

*Sinan Işık v. Turkey*, [Application No. 21924/05], ECtHR, 2010

*Tanyar and Küçükergin v. Turkey*, [Application No. 74242/01], ECtHR, 2006

*Tarhan v. Turkey*, [Application No. 9078/06], ECtHR, 2012

*Ülke v. Turkey*, [Application No. 39437/98], ECtHR, 2006

*Yedikule Surp Pirgi Ermeni Hastanesi Vakfi* (Foundation of the Armenian Hospital Surp Pirgiç of Yedikule) *v. Turkey (no.2)*, [Application Nos. 50147/99 and 51207/99], ECtHR, 2009

## **Appendix B: Additional ECtHR Court Cases Referenced in this Study**

*Ahmet Arslan v. Turkey*, [Application No. 41135/98], ECtHR, 2010

*Arrowsmith v. UK*, [Application No. 7050/75], ECtHR, 1978

*Bayatan v. Armenia*, [Application No. 23459/03], ECtHR, 2011

*Bremner v. Turkey*, [Application No. 37428/06], ECtHR, 2016

*Campbell and Cosans v. the United Kingdom* [Application Nos. 7511/76 and 7743/76], ECtHR, 1982

*Enver Aydemir v. Turkey*, [Application No. 26012/11], 2016

*Folgerø v. Norway*, [Application No. 15472/02], ECtHR, 2007

*Gorzelik et al. v Poland*, [Application No. 44158/98], ECtHR, 2004

*Handyside v. United Kingdom*, [Application No. 5493/72], ECtHR, 1972

*Ireland v. United Kingdom*, [Application No. 5310/71], ECtHR, 1978/2018

*Kokkonakis v. Greece*, [Application No. 14307/88], ECtHR, 1993

*Leyla Şahin v. Turkey*, [Application No. 44774/98], ECtHR, 2005

*Lombardi Vallauri v. Italy* [Application No. 39128/05], ECtHR, 2009

*Melek Sima Yılmaz v. Turkey*, [Application No. 37829/05], ECtHR, 2008

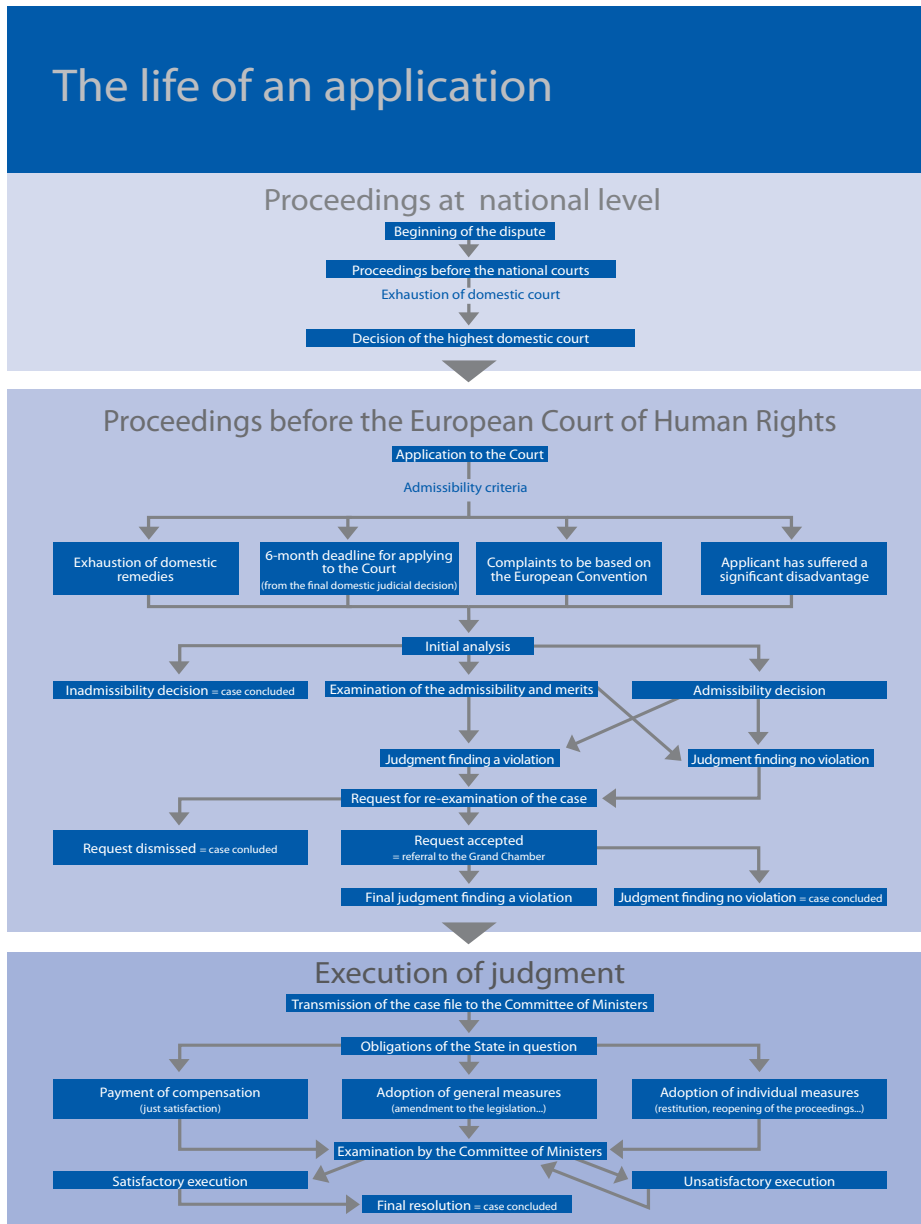
*Peers v. Greece*, [Application No. 28524/95], ECtHR, 2001

*Vogt v. Germany*, [Application No. 17851/9121], ECtHR, 1995

*Yedikule Surp Pirgi Ermeni Hastanesi Vakfi v. Turkey*, [Application Nos. 50147/99 and 51207/99], ECtHR, 2007

*Zeynep Tekin v. Turkey*, [Application No. 41556/98], ECtHR, 2004

# Appendix C: Life of an ECtHR Application Flow Chart

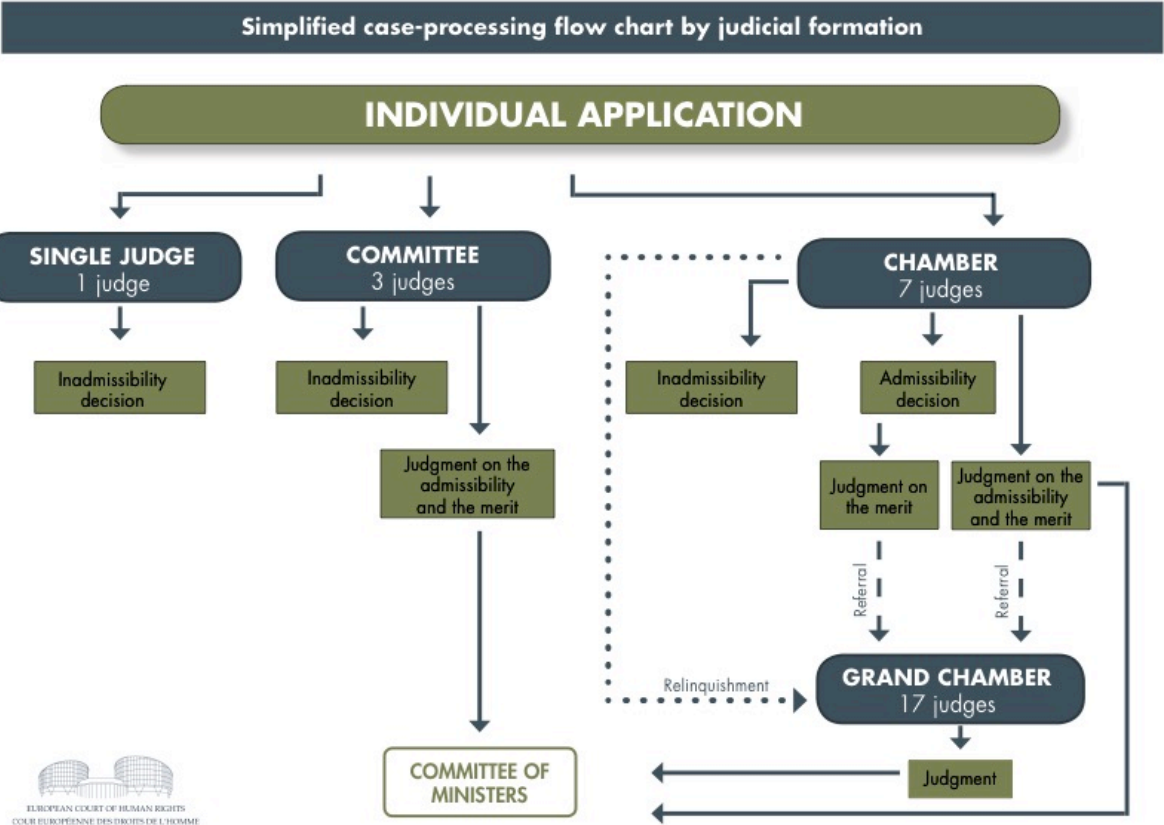


[www.echr.coe.int](http://www.echr.coe.int)

Source: [https://www.echr.coe.int/Documents/Case\\_processing\\_ENG.pdf](https://www.echr.coe.int/Documents/Case_processing_ENG.pdf)



# Appendix D: Case Processing Flow Chart



Source: [https://www.echr.coe.int/Documents/Case\\_processing\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Case_processing_Court_ENG.pdf)

## Appendix E: Association and Foundation Law

Organizational Forms	Associations	Foundations
Registration Body	Ministry of Interior, Department of Associations	The courts, with possible review made by the General Directorate of Foundations
Barriers to Entry	<p>At least 7 founders required to establish an association.</p> <p>Executive board of at least 5 people required. Board must have Turkish majority. Foreigners can be members of board provided they reside in Turkey.</p>	<p>In 2016, the minimum endowment amount for foundations was increased to 60,000 TRY (approx \$20,000).</p>
Barriers to Activities	<p>Standard annual reporting forms and numerous mandatory books considered cumbersome and time consuming.</p> <p>All associations are obliged to obtain permission from the governorship of the city in which they will be conducting the fundraising activity and indicate the exact amount of money they aim to collect.</p> <p>Requirement to complete standard forms before receiving or using foreign funding or opening new branch offices.</p>	<p>Standard annual reporting forms considered cumbersome and time consuming.</p> <p>All foundations are obliged to obtain permission from the governorship of the city in which they will be conducting the fundraising activity and indicate the exact amount of money they aim to collect.</p> <p>Requirement to complete standard forms before receiving or using foreign funding or opening new branch offices.</p>
Barriers to Speech and/or Advocacy	<p>Prohibition against directly engaging in “political” activities in practice. This is not written into any applicable laws, however. Websites with "insulting" content may also be blocked. Under a post-coup attempt decree issued in the State of Emergency, a total of 102 media outlets (3 news agencies; 16 TV channels; 23 radio stations; 45 newspapers; and 15 journals) and 29 publishing houses/distribution firms were closed down. The prosecutor also issued arrest warrants for journalists, media workers and executives. Several dozens of them were placed in police custody.</p>	<p>Prohibition against directly engaging in “political” activities. This is not written into any applicable laws, however. Websites with "insulting" content may also be blocked. Under a post-coup attempt decree issued in the State of Emergency, a total of 102 media outlets (3 news agencies; 16 TV channels; 23 radio stations; 45 newspapers; and 15 journals) and 29 publishing houses/distribution firms were closed down. The prosecutor also issued arrest warrants for journalists, media workers and executives. Several dozens of them were placed in police custody.</p>

<b>Barriers to International Contact</b>	Required to notify Government when receiving grant from international organization.	Required to notify Government when receiving grant from international organization.
<b>Barriers to Resources</b>	Required to notify Government before using foreign funding.	Required to notify Government within one month of receiving foreign funding.
<b>Barriers to Assembly</b>	Vague grounds to justify restrictions, excessive force on protesters, and advance notification requirement.	Vague grounds to justify restrictions, excessive force on protesters, and advance notification requirement.

Source: <http://www.icnl.org/research/monitor/turkey.html>

## Definitions

**Alevi/Alevilik:** A group unique in Turkey who are generally characterized as heterogeneous, with distinctive beliefs and practices drawn from a broad scope of sources. Some of these include reverence for Ali (the cousin and son-in-law of the Prophet Muhammed), the twelve imams, and Haci Bektas Veli. Other beliefs take inspiration from Sufism or other religious practices. The Alevi constitute 10-25% of the Turkish population. Alevilik (Alevism) encompasses a broad set of beliefs, as well as a common cultural experience of Alevis in Turkey (the practice of being Alevi). Defining Alevilik has had consequences for Alevi rights in Turkey, touching on a number of policy areas, including education, associational rights, and the public provision of services related to religion. For an expansive discussion of the far-reaching implications of how religious minorities are defined (the Alevi in particular), see Elizabeth Shakman Hurd's "Alevis Under Law: The Politics of Religious Freedom in Turkey" (2014)

**Cem/cemevi:** A cemevi is a house of worship in the Alevi tradition (though not currently recognized by the Diyanet). A cem (or Âyîn-i Cem) is the worship ceremony/service of the Alevi.

**Dergah:** Sufi lodges

**Dernek:** Association (status of a domestic NGO)

**Diyanet:** The Presidency of Religious Affairs. It is a government cabinet directly under the control of the Prime Ministry of the Republic of Turkey.

**Firman:** A formal decree issued by the Sultan in the Ottoman Empire

**Hanefi:** The most widely followed sect of Sunni Islam's four sects and the predominant sect in Turkey

**İçişleri Bakanlığı:** Turkish Ministry of Interior

**Laïcité:** Secularism; particularly a derivative of the French version

**Kemalism:** "Kemalism is the name of the Turkish state ideology, characterized by its state-centric corporatism, a homogenizing nationalism, and an authoritarian secularism. As a political program it was established under the leadership of Mustafa Kemal, since 1934 known by the honorary name Atatürk ('Father of the Turks'), who is recognized as the founding father of Republican Turkey" (Dressler 2013, xvi). There are six fundamental pillars of Kemalism: republicanism, statism (economic), populism, secularism, nationalism, and reformism.

**Margin of Appreciation:** The latitude that COE member states are given to determine the most suitable way to fulfill their obligations under the ECHR

**Mezhep:** Religious denomination

**Millet system:** The governance structure in the Ottoman Empire that administered religious groups, namely Jewish, Armenian Orthodox, and Greek Orthodox citizens of the Empire, and that granted these groups the right to maintain their own legal and civil systems by paying a special tax (ceza)

**Milli Eğitim Bakanlığı:** Turkish National Ministry of Education.

**Restitutio in integrum:** Legal term to describe compensation to an injured party in a way that returns the injured party to the situation they would have been in had no injury occurred. In the ECtHR, this can mean restitution for actual losses, diminished gains, or expected losses in the future.

**Subsidiarity:** Principle exercised by the ECtHR in which the Court is charged with only the functions that cannot be suitably executed at the national level.

**Takiye (Taqlia):** A religious practice where a believer is permitted to conceal his or her faith while under threat of persecution; primarily practiced in Shia Islam.

**Tarikat:** Religious sect

**Tekke:** Dervish house of worship

**Vakif:** Foundation (status of a domestic NGO)