

Kurdish Human Rights Project

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# LEGAL REVIEW

Kurdish Human Rights Project

**KHRP**

Established 1992

(2009) 15 KHRP LR







## **The Kurdish Human Rights Project**

The Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.

### **AIMS**

- To raise awareness of the human rights situation in the Kurdish regions of Iran, Iraq, Syria, Turkey and the Caucasus;
- To bring an end to the violation of the rights of everybody who lives in the Kurdish regions;
- To promote the protection of the rights of Kurdish people wherever they may live;
- To eradicate torture both in the Kurdish regions and across the globe.

### **METHODS**

- Monitoring legislation and its application;
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions;
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states;
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, national parliamentary bodies and inter-governmental organisations including the United Nations;
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights;
- Assisting individuals with their applications before the European Court of Human Rights;
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms.



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The views expressed are those of the contributors and do not necessarily represent those of the KHRP.

Submissions for consideration by the Editorial Board should be sent to:

*KHRP Legal Review*  
Kurdish Human Rights Project  
11 Guilford Street, London WC1N 1DH, England  
Tel: +44 20 7405 3835  
Fax: +44 20 7404 9088  
Email: [khrp@khrp.org](mailto:khrp@khrp.org)

Communications regarding proposed articles should be addressed to the Editorial Board at the address above or [khrp@khrp.org](mailto:khrp@khrp.org). Contributors are encouraged to contact the relevant editors regarding drafts or proposed contributions with abstracts of proposed articles preferred.

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11, Guilford Street,  
London WC1N 1DH,  
Tel: +44 20 7405 3835  
Fax: +44 20 7404 9088  
Email: khrp@khrp.org  
http://www.khrp.org

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Mark Muller QC

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Saniye Karakaş

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Margaret Owen (*Barrister*)

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## Abbreviations

CERD	International Convention on the Elimination of all Forms of Racial Discrimination
CPT	Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECRI	Commission against Racism and Intolerance
EEC	European Economic Community
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICJ	International Court of Justice
KHRP	Kurdish Human Rights Project
OPCAT	Optional Protocol to the Convention against Torture
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner on Refugees



# Relevant Articles of the European Convention on Human Rights

Article 1:	Obligation to respect human rights
Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 5:	Right to liberty and security
Article 6:	Right to fair trial
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 35:	Admissibility criteria
Article 38:	Examination of the case and friendly settlement proceedings
Article 41:	Just satisfaction to the injured party in the event of a breach of the Convention
Article 43:	Referral to the Grand Chamber
Article 44:	Final judgments

## **Protocol No. 1 to the Convention**

Article 1:	Protection of property
Article 2:	Right to education
Article 3:	Right to free elections

## **Protocol No. 7 to the Convention**

Article 2:	Right of appeal in criminal matters
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## Section 1: Legal Developments and News



## Concluding observations of the UN Committee on the Elimination of Racial Discrimination on Turkey

In February 2009, the UN Committee on the Elimination of Racial Discrimination, set up under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), considered the third periodic report submitted by Turkey under Article 9 of the Convention.<sup>1</sup>

A shadow report submitted by the Kurdish Human Rights Project (KHRP) focused on the observation that Turkey's latest periodic report provided no reliable proof that the State was actually implementing the measures it claimed to be taking in order to eliminate racial discrimination, or that it was actually attaining CERD standards. KHRP argued that relevant legislation cited by Turkey in its report has not actually been used in practice to effectively combat discrimination.

The shadow report focused in particular on Turkey's failure to comply with CERD Articles 2, 4, 5 and 6. Problems in this regard include the lack of adequate Kurdish-Turkish translation services within the justice system; severe restrictions on the right to peaceful expression, including harassment and persecution of Kurdish writers, publishers, broadcasters, intellectuals and others who expressed dissenting opinions or Kurdish sympathies; a prohibition on the use of minority languages in election campaigning; a requirement that any given political party must secure ten per cent of the entire national vote in order to secure representation in Parliament, which presents a severe obstacle to political participation by minorities; restrictive legislation governing trade unions; the denial of mother tongue education for minorities; infringement of the right of minorities to broadcast in their own languages; economic marginalisation of the south-eastern Kurdish regions as a result of discriminatory policies; and a severe lack of gender equality, which impacts most of all on Kurdish women, who already face discrimination by virtue of their ethnicity.

KHRP observed that in the past Turkey had displayed a reluctance to commit to binding international standards in the field of human rights, and had failed to sign up to a series of agreements relating specifically to discrimination and minority rights. Even where Turkey has signed up to international human rights agreements, it has frequently registered reservations in relation to provisions concerning minority rights.

In March 2009, the Committee published its observations on Turkey's periodic report. The Committee noted that the document lacked statistical data on the ethnic composition of Turkey's population, and emphasized that such information is a prerequisite for identifying the specific needs of different ethnic groups and possible gaps in their protection against racial discrimination. The Committee recommended that, in the absence of quantitative data on the issue, Turkey should provide information on the use of mother tongue languages, languages commonly spoken, or other indicators of ethnic diversity, together with any information derived from academic research carried out in this field.

1 The observations and shadow reports can be found at <http://www2.ohchr.org/english/bodies/cerd/cerds74.htm> (last accessed 3 June 2009).

The Committee also noted a lack of representation of Turkey's various ethnic groups in Parliament and other elected and public bodies, and invited the State to promote adequate representation.

The Committee further observed that Turkish domestic law does not define racial discrimination and noted that the absence of such a definition could impede the effective application of relevant legislation prohibiting discrimination. The Committee therefore recommended that the State should consider adopting a clear and comprehensive definition of racial discrimination in its domestic law, including all elements contained in Article 1 of CERD.

The Committee also highlighted the fact that under Turkish law, only citizens belonging to non-Muslim minorities mentioned in the 1923 Treaty of Lausanne<sup>2</sup> fall within the scope of the term 'minority', and that the treaty is restrictively applied by Turkey to cover only Armenian, Greek and Jewish communities. The Committee expressed concern that the application of restrictive criteria to determine the existence of ethnic groups would lead to the official recognition of some and refusal to recognise others, which may in turn give rise to differing treatment for various groups and pave the way for de facto discrimination. In addition, the Committee raised concerns about the lack of comprehensive anti-discrimination legislation in Turkey's domestic law and recommended that the State should enact such legislation.

The Committee was particularly concerned at the situation of the Greek minority in Turkey, including questions relating to the training of religious personnel and restitution of property. The Committee called upon Turkey to address such discrimination and, in particular, to reopen a Greek Orthodox theological seminary on the island of Heybeliada and return confiscated property. The Committee also found that persons of Roma origin continued to experience discrimination, particularly in the fields of education, employment and housing, and recommended that the State should take special measures to improve their situation.

The Committee raised concerns that, despite the existence of relevant legislation (such as the 'Law on Foreign Language Education and Teaching, and the Learning of Different Languages and Dialects by Turkish Citizens' and its by-laws), children belonging to ethnic minority groups have inadequate possibilities to learn their mother tongue. The Committee recommended that the State should ensure effective implementation of the relevant laws and further consider amendments to its legislation to allow and encourage the teaching of languages traditionally used in Turkey.

The Committee observed that Article 4 of CERD, which requires States to combat propaganda and groups that promote racial hatred, discrimination and ideas about racial superiority, is not self-executing but requires the adoption of specific legislation. The Committee noted that Article 216 of Turkey's Penal Code, prohibiting incitement of enmity or hatred on the grounds of social class, race, religion, sect or regional difference, is limited to acts constituting a clear and imminent danger to public order and therefore excludes, inter alia, acts of expression that incite hostility but do not amount to danger to the public order. The Committee recommended that the State should adopt legislation to ensure full and adequate implementation of Article 4, and ensure that

<sup>2</sup> See Articles 38 - 44 of the 1923 Treaty of Lausanne. The full text of the treaty can be found at [http://www.lib.byu.edu/index.php/Treaty\\_of\\_Lausanne](http://www.lib.byu.edu/index.php/Treaty_of_Lausanne) (last accessed 3 June 2009).



Article 216 of the Penal Code is interpreted and applied in conformity with CERD. Furthermore, the Committee called on Turkey to make necessary changes to domestic criminal legislation to include a specific provision ensuring that the motives of ethnic, racial or religious hatred are taken into account as aggravating circumstances in criminal proceedings.

The Committee expressed concerns over the fact that Turkey maintains a geographical limitation to the 1951 Convention relating to the Status of Refugees and has not yet ratified its 1967 Protocol, reducing the protection offered to refugees from non-European States and paving the way for discrimination against them. In particular, the Committee expressed concern at reports of deportation and refoulement of refugees recognised under the mandate of the United Nations High Commissioner on Refugees (UNHCR), as well as of persons registered with the UNHCR as asylum seekers, and called upon the State to refrain from this practice.

The Committee also raised concerns regarding recent amendments to Article 301 of the Turkish Penal Code, which previously criminalised denigration of ‘Turkishness’ but has now been changed to cover denigration of ‘the Turkish nation’. The Committee argued that this, along with other amendments to the same article, still allowed scope for prosecutions of persons for exercising the rights guaranteed in CERD, and called upon Turkey to ensure that Article 301 is interpreted and applied in conformity with CERD.

The Committee noted the lack of information provided by Turkey on the practical application of criminal and other legislation aimed at eliminating racial discrimination, and urged the State to investigate why there had been no complaints or court decisions in civil or administrative proceedings concerning acts of racial discrimination during the reporting period. The Committee recommended that the State should verify that the lack of reporting was not the result of a lack of effective remedies; victims’ lack of awareness of their rights, fear of reprisals, or lack of confidence in the police and judicial authorities; or the authorities’ lack of attention or sensitivity to cases of racial discrimination. The Committee requested that Turkey’s next periodic report include further information on such complaints and relevant court decisions. The Committee also requested that the State’s next periodic report include detailed information regarding the work of the Minority Issues Assessment Board, as well as updated information on the status of the establishment of the Ombudsman and the National Human Rights Institution (NHRI).

Whilst welcoming extensive training provided for judges, prosecutors, lawyers and police officers on human rights in general, the Committee encouraged Turkey to strengthen its efforts to provide trainings to increase the awareness of the specific content and importance of CERD at the national level.

The Committee also invited Turkey to make the declaration provided for in Article 14 of CERD and recognize the competence of the Committee to consider communications from individuals or groups claiming to be victims of violations by the State.

The Committee recommended that Turkey should take account of all the relevant parts of the Durban Declaration and Programme of Action, adopted in September 2001 by the World

Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance<sup>3</sup> when implementing CERD in its domestic legal order, particularly with respect to Articles 2 through to 7.<sup>4</sup> The Committee also urged Turkey to include more specific information in its next periodic report on measures taken to implement the Durban Declaration and Programme of Action at the national level.

The Committee recommended that Turkey's periodic reports and the Committee's observations in respect to these reports should be available to the public in Turkey in the official language and other languages traditionally used in Turkey. It requested that the State provide, within one year, information on the way it has implemented or adjusted laws based upon the Committee's recommendations.

## Hunger strike, language bans and ill-treatment in Turkey's Erzurum prison

A hunger strike was launched by several inmates in a prison in the eastern province of Erzurum, Turkey, on 27 February 2009 as a result of alleged mistreatment of detainees and continuing restrictions on the use of the Kurdish language in prisons. Supporting strikes subsequently began in at least three other prisons.

Conditions at the Erzurum prison were reported to have declined as an indirect result of the killing of a political activist in another detention centre in Istanbul. Engin Çeber, 29, was arrested in September 2008 while protesting an incident the previous year in which another activist had allegedly been shot by police whilst selling a left-wing journal. Two weeks after being taken to a prison in Istanbul, Çeber was admitted to hospital in a coma. He later died from a brain haemorrhage, with an official medical report recording evidence of severe head injuries. Dozens of prison guards, police officers and other officials subsequently faced trial in connection with his alleged torture and ill-treatment. As a consequence of the case, many officials from the prison where Çeber was held were transferred to the prison in Erzurum. Detainees there claimed that this caused conditions to go from bad to worse.

3 A/CONF.189/12, chap.I, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/cb95dc2388024cc7c1256b4f005369cb/\\$FILE/N0221543.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/cb95dc2388024cc7c1256b4f005369cb/$FILE/N0221543.pdf) (last accessed 3 June 2009).

4 Articles 2 to 5 provide for the specific obligations of State Parties to eliminate and prevent any kind of racial discrimination within its jurisdiction, and to provide all of its citizens and non-citizens with equality before the law and other important political and civil rights. Articles 6 to 7 provide for the State obligation to provide effective protection and remedies through its tribunals and other institutions and to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, 'with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups...'

## Human Rights Foundation of Turkey publishes findings on violations of the right to life

On 1 January 2009 the Human Rights Foundation of Turkey (HRF) published a report evaluating violations of the right to life in Turkey over the past eight years. In that period, HRF recorded 130 'murders by unknown assailants', 383 deaths by 'extrajudicial killings, stop warning and random firing', and 306 deaths 'under detention or in prison'.

In 2008, 37 people reportedly died as a result of extra-judicial killings, stop warning and random firing incidents, compared with 24 in 2007. In the same period there was an even greater increase in the number of people killed by unknown assailants. The year 2008 saw 34 such deaths, the highest number in the last eight years, compared to just two killings by unknown assailants in 2007. The report likened the number of killings by unknown assailants in 2008 to that witnessed during the State of Emergency in the 1990s.

According to the report, 45 people died in detention or in prison in 2008. This figure represents a dramatic rise from the figures for 2005, 2006 and 2007, when the number of recorded deaths in detention were 16, 11 and ten respectively.

The report urges Turkey to ratify key international human rights instruments including the United Nations Optional Protocol to the Convention against Torture (OPCAT), which provides for a system of regular visits by independent international and national bodies to places where individuals are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

## ECJ upholds Turkish citizens' access to Germany

On 19 February 2009 the highest court of the European Union, the European Court of Justice (ECJ), ruled that Turkish business people providing services in Germany were free to enter the country without having to obtain visas (Soysal and Others [Application No.s 54461/00, 54579/00 and 55922/00]). The implications of the verdict are not yet known but it may pave the way for Turkish businessmen and exporters to freely travel to other EU countries.

The case was brought by two Turkish truck drivers, Mehmet Soysal and İbrahim Savatlı, who worked for a Turkish company engaged in the international transport of goods. Both were denied the right to enter Germany without a visa. The complainants argued that the visa requirement was in violation of Article 41 of the Additional Protocol of the Association Agreement signed in 1970 between Turkey and the European Union, which was known at the time as the European Economic Community (EEC).

The Protocol stipulates that EEC States and Turkey will refrain from introducing any new restrictions on entry. The aim was to strengthen trade and economic relations between the contracting States. In spite of the agreement, Germany changed its legislation and from 1 July 1980 required nationals of non-member countries, including Turkish nationals, to obtain a visa

in order to conduct business within Germany. They Court ruled that this move was at odds with the Additional Protocol.

## Head of Turkey's Human Rights Committee says police protect their own

The head of the Turkish Parliament's Human Rights Committee has expressed frustration at difficulties he encountered whilst attempting to investigate allegations of police abuse.

Zafer Üskül was exploring claims made by Mehmet Şah Araş and his son, who were detained by police in late October 2008 in the Beyoğlu area of Istanbul and were allegedly beaten. Mr Üskül contacted the police chief of Beyoğlu, Yusuf Yüksel, on the day the case came to light in the daily *Radikal*. However, he reportedly had to wait for over a week for a response. When he eventually replied, Mr Yüksel apparently claimed that he had been unable to identify the officers responsible. There followed a further two months of back-and-forth correspondence between Mr Üskül and the Beyoğlu Police, with no tangible results. The police station argued that it had assigned two chief inspectors to investigate the case in early December, but when Mr Üskül asked the Ministry of Interior for a copy of their report, he was told that the investigation had not yet been completed.

The Beyoğlu Police Station previously came under the spotlight following the death in February 2008 of Festus Okey, a Nigerian migrant who died after being hit by a bullet allegedly fired by a Beyoğlu police officer.

## Ergenekon investigations continue in Turkey

January 2009 saw yet another high-profile detention in connection with the ongoing investigation into 'Ergenekon', a shadowy, clandestine ultra-nationalist network accused of attempting to overthrow the government. Retired Brigadier-General Levent Ersöz, a former military police chief in Şırnak province, was arrested in a hospital in Ankara as he prepared to undergo surgery for prostate cancer. He was charged with 'trying to overthrow the government of the Turkish Republic by force' and 'founding and leading an armed organisation'.

Others arrested in the course of the investigation have included retired generals from both the army and the gendarmerie, as well as journalists, academics and businessmen. Prosecutors allege that members of the network intended to use violent methods to foment chaos and create conditions for a military coup. Ergenekon is alleged to have been part of a so-called 'deep state', a term used to describe various actors within the military and security establishment who act clandestinely outside of the law to further what they perceive as Turkey's national interest.

In the same month as the arrest of Gen. Ersöz, former Colonel Abdülkerim Kırca of the Gendarmerie Intelligence and Counter-Terrorism Organisation (JİTEM), a clandestine unit established by key Ergenekon suspect Veli Küçük, committed suicide at his home in Ankara. JİTEM was particularly active at the height of the State's conflict with the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK) in the 1990s and according to Abdülkadir Aygan, a former PKK fighter turned state informant, most of the unsolved murders that reportedly occurred during the height of the conflict

can be attributed to the unit. Aygan named Colonel Abdulkerim Kırca as being responsible for a series of atrocities at the height of the conflict. Up until his death, Kırca was standing trial for three murders committed in the Kurdish regions.

On 9 March 2009, prosecutors in Şırnak province organised a series of excavations which unearthed bone fragments and clothing believed to belong to victims of ‘deep state’ atrocities.

Key dates in the Ergenekon investigation, which began in June 2008, include the following:

**June 2008:** A 2,455-page indictment is made public, blaming Ergenekon for a series of assassinations over the past two decades, as well as attempting to mount a coup against the *Adalet ve Kalkınma Partisi* (Justice and Development Party, AKP) government.

**July 2008:** 86 people, including retired generals Hurşit Tolon and Şener Eruygur, are arrested in connection with the discovery of an arms cache in a house in İstanbul the previous year. They are formally charged under Article 313 of the Turkish Criminal Code with ‘inciting armed revolt against the government’.

**20 October 2008:** Hearings begin in Silivri, outside İstanbul, in the trial of 86 people accused of membership of Ergenekon.

**January 2009:** Gendarmerie Colonel Abdulkerim Kırca commits suicide following claims by ex-PKK fighter and former state informant Abdülkadir Aygan about his alleged role in a series of extra-judicial killings.

**9 January 2009:** An Ergenekon ‘hit-list’, including various intellectuals and Kurdish politicians, is discovered in the town of Sivas.

**14 January 2009:** Retired Brigadier-General Levent Ersöz is arrested in Ankara whilst attempting to undergo prostate surgery.

**24 January 2009:** The pro-Kurdish DTP presents a motion in Parliament calling for an investigation into JİTEM.

**18 February 2009:** Prosecutors accept a complaint by human rights activists to include an investigation into the Güçlükonak massacre – where 11 Kurdish civilians lost their lives in an atrocity originally blamed on the PKK – as part of the wider Ergenekon investigation.

**24 March 2009:** Former commander of the Kayseri Provincial Gendarmerie, Cemal Temizöz, is arrested by order of a court in Diyarbakır following the discovery of human remains in wells in Şırnak province. A former Mayor, Kamil Atak, is also arrested alongside Temizöz, in connection with five murders that reportedly took place between 1993 and 1997.

## EU Parliament passes resolution on European Commission progress report for Turkey

On 12 March 2009, the European Parliament passed a resolution on the European Commission's latest report on Turkey's progress towards European Union accession, which was published the previous November.<sup>5</sup> Whilst acknowledging that 2008 had been characterised by extreme political tensions in Turkey, the resolution noted that by failing to instigate a consistent and comprehensive agenda for political reform, the government had failed to reverse the continuous slowdown of the reform programme since its inauguration in 2005.

The Parliament urged the development of cross-party consensus on an active reform process based on respect for human rights and the rule of law. It called on Turkey to resume the process of drafting a new constitution, and to include all political parties, ethnic and religious minorities, and civil society entities in this process. In addition, the Parliament noted that immediate reform is needed to ensure the impartiality and professionalism of the judiciary.

Turkey was also called upon to probe deeper into potential links between the ultra-nationalist Ergenekon network and a large number of unsolved murders committed at the height of the State's conflict with the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK) in the mid-1990s. Turkey's pursuit of the Ergenekon investigation is widely viewed as a key litmus test of its willingness to implement the social and political reforms required under the Copenhagen Criteria.

The resolution emphasised that freedom of expression and freedom of the press are still not sufficiently protected in Turkey. In this regard, it called for reform of the Turkish Penal Code, and particularly the repeal of Article 301, which criminalises denigration of 'the Turkish nation' and has been used to prosecute individuals for their expression of non-violent opinions.

The Parliament also expressed grave concern that torture and ill-treatment remain commonplace in Turkey, particularly in connection with public demonstrators, and noted that criminal proceedings relating to alleged police abuse are often dropped by the prosecution.

The Parliament made specific reference to the treatment of minorities within Turkey. It reiterated that respect for pluralism and diversity are central to the ethos of the EU, and that the endemic violence and hostility shown towards minorities in Turkey remains intolerable. In particular, the Parliament called for concerted efforts to improve Kurdish citizens' cultural rights.

## First visit to Iraq by Turkish head of state in over 30 years

In March 2009, President Abdullah Gül became the first Turkish head of state to visit Iraq in over 30 years. During his visit, Iraqi President Jalal Talabani announced that the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK) needed to lay down their arms or leave the country.

<sup>5</sup> The European Parliament motion for resolution is available at [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/re/748/748541/748541en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/re/748/748541/748541en.pdf) (last accessed 3 June 2009).

President Talabani agreed to more cooperation against the PKK, whilst also strongly urging Turkey to provide more cultural freedom to its Kurdish citizens. There has been speculation that a major Kurdish conference due to take place in northern Iraq later this year will result in a call for the PKK to end its struggle against Turkey. Further motives behind the meeting between the Turkish and Iraqi heads of state included US plans to withdraw from Iraq and the strengthening of ties in relation to the sale of oil to Turkey and the sale of domestic goods to Iraq.

## Scores face execution in Iraq six years after invasion

Up to 130 people face imminent execution in Iraq six years after US and allied forces deposed Saddam Hussein, according to a recent report from Amnesty International. Capital punishment was suspended in the immediate aftermath of the invasion by the then head of the Coalition Provisional Authority Paul Bremer. However, it was reinstated on 8 August 2004 and hundreds of death sentences have been handed down and scores of executions have been carried out since. Amnesty reports that at least 285 death sentences were issued and 34 executions were carried out in 2008, an increase on the 199 death sentences and 33 executions witnessed in 2007. There are currently no official statistics relating to the number of prisoners awaiting execution.

## Report focuses on excessive use of force by Armenian police

The government of Armenia has failed to hold police accountable for their excessive use of force during clashes with protesters last year which ended in at least ten deaths, according to a report by Human Rights Watch. The report, 'Democracy on Rocky Ground: Armenia's Disputed 2008 Presidential Election, Post-Election Violence and the One-Sided Pursuit of Accountability', which was released on 25 February 2009, focuses on ill-treatment of protesters detained during the violence and the subsequent lack of accountability within the justice system.

The demonstrations in question related to presidential elections in February 2008, which were won by Serzh Sarkisian. The result was disputed by opposition candidate Levon Ter-Petrossian and protestors subsequently began daily rallies in Yerevan's Freedom Square. Amid clashes between police and demonstrators, outgoing President Robert Kocharian declared a 20-day state of emergency banning strikes and public gatherings, and significantly restricting media freedoms.

The report urged the new government to thoroughly investigate allegations of excessive force, torture and ill-treatment and, where evidence of this is obtained, to prosecute those responsible. More than 100 were arrested during the state of emergency and some face charges of arson, organising mass disorder and pogroms. Four individuals face charges which may result in a sentence of ten years' imprisonment.

## EU issues criticism of Iranian human rights record

On 19 March 2009, the European Union formally criticised the human rights situation in Iran ahead of the 33rd anniversary of the International Covenant on Civil and Political Rights (ICCPR), to which Iran is a signatory.

The statement noted that ‘the European Union has witnessed a worrying trend of the increasing constraints on Iranian citizens’ freedom of expression and association. Human rights defenders, journalists, students, trade unionists and others who peacefully express their views or opinions are often charged under the vague auspices of public security’.

In particular, the EU called upon Iran to release imprisoned women’s rights activists Alieh Aghdam-Doust and Ronak Safarzadeh, and to drop charges against Nafiseh Asad for their part in the ‘One Million Signatures Campaign’, which calls for greater gender equality in Iran. The EU also urged Iran to reopen the Tehran-based Centre for the Defence of Human Rights operated by Nobel Prize winner Shirin Ebadi and to drop a series of charges made against students of Shiraz University for participating in peaceful demonstration on National Student Day.

In response, the Iranian Foreign Ministry formally summoned the Czech chargé d’affaires in Tehran to protest that the EU was applying double standards and making unfounded statements.

## Kirkuk and Kurdish regions stand aside as Iraqis go to polls

On 31 January 2009, Iraqis went to the polls in provincial elections held in 14 of the country’s 18 provinces, which were regarded by external observers as a crucial test of the stability of its fragile democracy. Voting took place amid noticeable improvements in the wider security situation, although in a congratulatory message sent following the vote, UN Secretary-General Ban Ki-Moon observed that Iraq still had a long way to go before it achieved ‘genuine freedom and security’.

Provincial election legislation approved by the Iraqi parliament in September 2008 delayed voting in the three provinces of the Kurdistan, Iraq region -Dohuk, Arbil and Sulaymanya. Voting was also delayed in Kirkuk province, which is embroiled in longstanding disputes between Kurds, Sunni Arabs and Turkomans.

Following the January elections, voting was due to take place in Iraq’s remaining provinces in May 2009. However, this deadline was missed and at the time of writing regional parliamentary and presidential elections are due to take place in Kurdistan, Iraq in late July 2009. Voting in Kirkuk has been postponed indefinitely, and a report due to be produced by a parliamentary commission tasked with resolving outstanding issues surrounding the staging of elections in the disputed province has been repeatedly delayed.

In the elections held throughout the rest of the country, the governing coalition of Prime Minister Nouri al-Maliki won 38 per cent of the vote in Baghdad and made large gains in the predominantly Shi’ite areas of southern Iraq, securing 37 per cent in Basra, Iraq’s second city.

## Turkey contemplates whether to end Öcalan’s confinement

The Turkish Government stated on 15 December 2008 that it will make a decision in 2009 on whether to end the ten-year solitary confinement of the founder of the *Partiya Karkeren Kurdistan* (Kurdistan Workers’ Party, PKK) Abdullah Öcalan.



The then Justice Minister Mehmet Ali Şahin said construction of new accommodation was underway on İmralı Island, where Öcalan is currently detained as the sole occupant. He said it was expected that a number of other detainees would be sent there, though a final decision had not yet been made.

Öcalan, a KHRP-assisted applicant before the European Court of Human Rights, was captured in 1999 and was sentenced to death for treason and separatism. However, the punishment was commuted to an aggravated life sentence following a State Security Court decision in 2002 to abolish the death penalty.

The European Committee for the Prevention of Torture (CPT) and other international organisations have repeatedly recommended that measures should be taken to improve the conditions of Öcalan's detention.

The latest such report published by the CPT on 6 March 2008 stated that Öcalan's isolation is seriously harming his mental health, which has deteriorated as a result of 'chronic stress and prolonged social and emotional isolation' and a 'feeling of abandonment'. At the time, the CPT concluded that, 'The Turkish authorities are now at a crossroads: either they make no changes in the prisoner's situation (which is the course they have deliberately and knowingly chosen since 1999, with the consequences described above), or they take the decision to review Abdullah Öcalan's situation allowing him, in particular, the possibility of maintaining basic social and emotional ties.'

## Syria's 'kangaroo court' resumes prosecutions despite calls for abolition

Human Rights Watch (HRW) reported on 27 March 2009 that Syria's Supreme State Security Court (SSSC) was set to resume prosecutions following an eight-month suspension, despite repeated calls from international human rights groups for its abolition.

HRW has described the SSSC as a 'kangaroo court' and 'one of the main pillars of repression' of human rights in Syria, particularly freedom of expression. The SSSC replaced military courts that were established under emergency laws in 1963. However, the original processes and authority remain intact. It has jurisdiction over 'all persons, civilian or military, whatever their rank or immunity' in cases relating to the state and public order. It is exempt from due process safeguards which apply in Syria's criminal courts and HRW has labelled the role of defence lawyers before the court as 'largely ceremonial'. SSSC proceedings are mostly kept secret and the court is reported to routinely rely on confessions obtained under torture.

The SSSC is said to have prosecuted at least 153 defendants since January 2007, including ten bloggers, 16 Kurdish activists and eight people accused of 'insulting the Syrian President in private conversation'.

The majority imprisoned by the SSSC are held in Sednaya prison, and it was rioting at this facility that originally resulted in the suspension of the court. Security forces are reported to have used

excessive force in their efforts to quell the unrest. The authorities later imposed a complete information blackout and have yet to release any details on the incident.

## Kurdish cultural rights still threatened in Turkey

Radio Dünya and its broadcasting editor Mehmet Arslan have faced legal action on the basis of charges of ‘incitement to hatred and hostility’ for playing Kurdish music. Mr Arslan was acquitted of charges brought against him for playing the song ‘Keçe Kurdan’, by Aynur Doğan. His lawyer, Kenan Karavil, argued that translations of the song had distorted its meaning, and that the true translation did not convey any hatred, hostility, or ‘criminal’ element. However, there remains a charge pending against the radio station for playing ‘Mihemendo’, by Şivan Perwer, despite the fact that a non-Kurdish radio station has played the same song without consequences.

## Iran targets individuals with global connections

The number of arrests of political prisoners with suspected ties to other countries or international organizations has increased over the past few months in Iran. They include Iranian-American journalist Roxana Saberi and the internationally known HIV/AIDS physicians, Drs. Kamiar and Arash Alaei.

Saberi, the Tehran bureau chief for Feature Story News (FSN), was detained on 30 January 2009 for allegedly purchasing alcohol over a year ago. She was subsequently detained in Tehran’s notorious Evin Prison, where political prisoners are often held, and in April was sentenced to eight years in jail for espionage. The following month, her punishment was reduced to a two-year suspended sentence and she was finally allowed to leave Iran.

Drs. Kamiar and Arash Alaei, who are internationally recognized for their HIV/AIDS education and training initiatives, are charged with attempting to overthrow the Iranian government. Iranian judiciary spokesperson Ali-Reza Jamshidi has said that they are connected to the CIA and supported by the US Department of State. The brothers have been deprived of the opportunity to adequately defend themselves.

These cases are among a larger trend of arrests that single out Iranian-Americans and Iranians with close ties to international organizations. At least three other dual citizens have been arrested recently and held without charge. Iranian authorities claim that these individuals threaten to undermine national security.

## Kurdish children continue to face arbitrary detention in Turkey

The Turkish authorities have pressed ahead with unlawful and arbitrary arrests, detentions and prosecutions of Kurdish children in recent months, with many such cases associated with unfair trial procedures and alleged ill-treatment.

Human rights organisations report that some 500 children between the ages of 12 and 18 have been detained and tried since the start of 2008 in connection with protests in the provinces of Diyarbakır, Şırnak, Cizre, Batman and Adana. They have been charged with offences punishable with over 20 years in prison. Children accused of throwing stones at security officials during such demonstrations, for instance, have faced charges of committing crimes on behalf of a terrorist organisation.

Former Turkish Justice Minister Mehmet Ali Şahin has stated that 724 children faced terrorism charges in 2006 and 2007. During the same period, another 413 children were accused of membership of an armed organisation.

Under Turkish anti-terror legislation, children between the ages of 15 and 18 can be tried as adults. Most children are kept in adult prisons and abuses such as beatings are reported to be common.

## Iraqi editor fined for 'defaming' President Talabani

In March 2009, the former editor-in-chief of the newspaper Hawlati, Abid Aref, was fined 3 million dinars (approximately 2,590 US dollars) for his translation of an article which criticised Iraqi President Jalal Talabani. The newspaper itself was also fined 10 million dinars (approximately 8,653 US dollars).

Originally written by Michael Rubin of the American Enterprise Institute for Public Policy Research, the article accused the Kurdistan Regional Government (KRG) of corruption and undemocratic practices, focusing particularly on personal fortunes allegedly amassed by Talabani and Massoud Barzani, president of the KRG and of the Kurdistan Democratic Party (KDP).

Aref was sentenced under Article 9 of the KRG's new press law, which came into force in September 2008. Aref reported that he was threatened with a two-year jail term should he fail to pay the fine. The newspaper claimed it would struggle to pay the fine, especially as it faced 17 other lawsuits, largely filed by government officials and representatives of the two main Kurdish parties, the Patriotic Union of Kurdistan (PUK) and the KDP. Under the new press law, journalists are less likely to be imprisoned on serious 'national security' related charges, but can nevertheless face substantial fines if found guilty of 'defamation'.

Media freedom has faced a series of pressures in Kurdistan, Iraq in recent months. Allegations of corruption at government level and within the security forces have often brought forth severe threats and reprisals, as demonstrated by the murder of Soran Mama Hama, a reporter with the Sulaymanya-based *Livin* magazine, in July 2008. In February this year, Shwan Muhammad, editor of *Awene* newspaper was ordered to pay a 3 million dinar fine for an article – originally published in 2006 – which 'defamed' a tribal leader. His newspaper faces seven other lawsuits.

## Turkish court sentences Kurdish parliamentarian to prison

On 5 February 2009, Aysel Tuğluk, a deputy from the pro-Kurdish *Demokratik Toplum Partisi* (Democratic Society Party, DTP), was sentenced by a Diyarbakır court to 18 months in prison on charges of spreading terrorist propaganda.

The case related to a speech she gave at a DTP congress in the south-eastern province of Batman on 16 May 2006. At the congress, she explained her party's objection to labelling the PKK a terrorist organisation and was reported as saying, 'Those people you consider terrorists are heroes for some.'

The Diyarbakır 4th Higher Criminal Court had initiated legal action against Tuğluk after the DTP congress, but the trial process was suspended since Tuğluk has parliamentary immunity under Article 83 of the Constitution. The immunity of a deputy is generally lifted by a majority vote in parliament. However, in this case the Supreme Court of Appeals, going against established legal precedent, overruled the suspension of the case and Tuğluk's trial was resumed.

Tuğluk was expected to appeal the ruling against her.

## Turkish lesbian, gay, bisexual and transgender solidarity organisation wins appeal against ban

The Turkish lesbian, gay, bisexual and transgender (LGBT) association *Lambda İstanbul* has won its appeal against moves to close it, in a Supreme Court of Appeals decision communicated on 20 January 2009.

A local court in İstanbul had previously ordered the closure of the society on 29 May 2008, following a complaint by the İstanbul Governor's Office that the organisation's aims and objectives were against Turkish 'moral values and family structure'.

The Supreme Court rejected the court of first instance decision on the grounds that the reference to LGBT people in the name and statute of the association did not constitute an interference with Turkish moral values. The Court also held that it recognised the right of lesbian, gay, bisexual and transgender individuals to form organisations. The case was referred back to the local court, which was expected to affirm the Supreme Court of Appeals decision.

## European Court of Justice rules in favour of Greek Cypriot man in holiday home property dispute

On 30 April 2009, the European Court of Justice (ECJ) ruled in favour of a Greek Cypriot in his fight to win back land in northern Cyprus from which he was forced to flee when Cyprus was partitioned in 1974.

Meletios Apostolides claimed ownership of the land upon which a British couple, David and Linda Orams, had built a holiday home. The ECJ affirmed an earlier decision by a court in the

Cypriot capital Nicosia which found that the building of the second home was illegal and ordered the Orams to pay compensation to Mr Apostolides. In December 2008, the Advocate-General of the ECJ had issued an advisory opinion which ruled that the decision of the Nicosia court was enforceable in Britain.

The British couple had purchased the land from a Turkish Cypriot third party. The Apostolides took their case to the District Court of Nicosia in the Republic of Cyprus, which delivered a judgement ordering the Orams to vacate the area and to pay compensation in the form of 'rent' – for the total amount of time they had occupied the land. Significantly, the ruling stated that the decision of a Cypriot court in Nicosia was applicable in the north, even though the Republic of Cyprus does not control the area.

Cyprus joined the EU in 2004. EU law was suspended in the north of the country for the purpose of Cyprus' accession. However, lawyers successfully argued that the Apostolides' civil case still falls within the scope of EU regulations. The decision provides that, even if the ECJ ruling cannot be enacted because the land is under Turkish Cypriot control, Mr Apostolides will be able to pursue a claim for compensation in a UK court. The implication is that hundreds more Greek Cypriots could seek restitution through civil cases for properties they fled.

Despite the fact that the Turkish Republic of Northern Cyprus (TRNC) is not recognised by any country other than Turkey, it has become an increasingly popular destination for tourists and property developers. Many properties and plots of land formerly owned by Greek Cypriots have been sold by Turkish Cypriots to foreign parties. The legal status of the land remains uncertain, and such property disputes are one of the key obstacles to a successful resolution of the long-running Cyprus dispute.

## Congolese warlord faces International Criminal Court in historic first trial

A Congolese warlord accused of conscripting child soldiers became the first person to stand trial before the International Criminal Court (ICC) on 26 January 2009. Thomas Lubanga Dyilo, the former leader of the Union of Congolese Patriots (UPC), a militia which operated in the north-eastern Ituri region of the Democratic Republic of Congo (DRC), is charged with forcibly recruiting children under the age of 15 and using them as participants in active combat between September 2002 and August 2003. UPC forces are also accused of the widespread rape, torture, and killing of civilians as part of the ethnic conflict which raged throughout the Ituri region from 1999 to 2005.

## Serbia passes anti-discrimination law

On 26 March 2009 the National Assembly of the Republic of Serbia voted to approve an Anti-Discrimination Bill submitted by the Government, marking the end of an eight-year process which had begun with a first draft of the Bill in 2001. The new law prohibits discrimination based on race, religion, sexual orientation, gender or other grounds, provides for a special state representative to monitor possible discrimination, and outlines punitive measures.

The Ministry of Human and Minority Rights, and the Coalition against Discrimination – an alliance of NGOs – were responsible for drafting the final version of the Bill which was due to be discussed in the National Assembly in early March 2009. At the time, pressure by religious and conservative groups regarding issues such as religious conversion and ‘free expression of sexual orientation’ forced the Government to temporarily withdraw the Bill from the legislative agenda. This step drew international concern, including from the Council of Europe. The National Assembly subsequently restored the Bill to the legislative agenda and voted to adopt it with a slim majority of 127 votes in favour to 59 against - one more vote than was needed for its passage in the 250-member parliament.

The law is part of reforms intended to align national legislation and policies with EU standards, and to fill gaps identified by the European Commission’s 2008 progress report on Serbia.

## Fujimori gets 25 years for human rights crimes

On 7 April 2009, the Peruvian Supreme Court found former president Alberto Fujimori guilty for his role in the massacres of 25 people in 1991 and 1992. A three-judge panel sentenced him to 25 years in prison. Fujimori, a Japanese national, was elected president of Peru three times from 1990 to 2000. In his first term he launched a presidential coup with military support to dissolve the Peruvian Congress. He was convicted in connection with two separate massacres by military intelligence officers as part of counterinsurgency operations against Maoist Shining Path rebels. The slayings were carried out by the Colina unit, a specialised squad of intelligence officers whose members received orders from the highest levels of the military, which were completely under Fujimori’s control. While Fujimori denies ordering the slayings, judges found that he authorized the creation of the Colina unit. He was also convicted of the kidnappings of journalist Gustavo Gorriti and businessman Samuel Dyer in 1992.

## Section 2: Articles

The opinions expressed in the following articles are those of the authors and do not necessarily represent the view of KHRP.





Declan O’Callaghan

## Article 8 ECHR – The Protection of the Right to a Family Life in Expulsion Cases<sup>1</sup>

### Abstract

*This article looks at the approach of the European Court of Human Rights in the determination of cases involving violations of Article 8 of the Convention, the right to respect for private and family life, when this right is interfered with by reasons of immigration control or expulsion. In particular the Article sets out the various factors considered by the Court when determining whether a violation has occurred.*

The European Convention on Human Rights (ECHR) is a living instrument, designed in its nature to be interpreted in the light of present day conditions.<sup>2</sup> It was created at a time when it was inconceivable that a flight from Istanbul to London would cost less than a train journey from London to Manchester. The development of air travel and the significant reduction in the costs of travel have led not only to closer commercial ties between countries but also created the means of greater mass movement of persons between the continents.

The notion of the Convention being a living instrument has been tested in many regards as new events and issues have arisen over the last five decades, many of which may have been unforeseeable when the Convention was being drafted. The European Court of Human Rights has responded to such development by observing that ‘...the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.’<sup>3</sup>

It is appropriate to observe that it is for these reasons that a migrant does not enjoy the right to a fair hearing in matters concerning either his admission or expulsion. As the Grand Chamber observed in *Maaouia v. France*<sup>4</sup> the State Parties in drafting the Convention were aware that Article 6(1) would not apply to procedures for the expulsion of aliens. This led to the Grand Chamber determining that:

...the proceedings for the rescission of the exclusion order, which form the subject-matter of the present case, do not concern the determination of a ‘civil right’ for the purposes of Article 6(1). The fact that the exclusion order incidentally had major repercussions on the applicant’s private and family

1 The author is a Barrister at 36 Bedford Row and a member of the KHRP Legal Team. This article is based upon a lecture that was presented by the author on behalf of the Kurdish Human Rights Project at the Norwegian Legal Training Board (Juristenes Utdanningscenter) conference ‘The European Convention on Human Rights in Immigration Matters’, Oslo, 17 October 2008.

2 *Marckx v. Belgium*, Application no. 6833/74.

3 *Johnson v. Ireland*, Application no. 9697/82.

4 *Maaouia v. France*, Application no. 39652/98 (Grand Chamber).

life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6(1) of the Convention.

The existence of a family life between a national of a Member State and a national of a non-Member State was envisaged at the outset of establishing Convention rights. The notion that a person may marry someone from a different culture, tradition and religion has long been understood. In such circumstances, the protection of the right to a family life has had to develop with regard to both the ease of travel to a State and also the ease of returning to the country of origin. Such development has not led to the existence of a 'family' life as constituting a trump card in expulsion matters. The Court has been consistent in asserting that not all migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of Article 8.<sup>5</sup>

The Convention established, by way of Article 8, a protection for the right to establish and develop relationships with other human beings and the outside world<sup>6</sup> and also to permit the embracing of an individual's social identity<sup>7</sup>. These private law rights lead to an acceptance that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of Article 8. Regardless of the existence or otherwise of a 'family life', therefore, the Court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the 'family life' rather than the 'private life' aspect.

Therefore, migrants who have entered a country unlawfully, married and had children may have established family and private life rights under Article 8. The same may be said for those who have entered a country lawfully and remained there lawfully without obtaining citizenship of that country. They remain foreign national citizens potentially at risk of being required to return home but holding ties in the host State. Over time, all migrants are capable of integrating into the society of their chosen home, developing personal and employment ties of varying nature. It can often be the case that the migrant will over time identify more with their country of residence than with the country they left many years ago. Such identification can be marked to those second-generation migrants, the children of those who took the decision to travel, who themselves were born in the host State and have progressed through the educational system of that country. Their friends and their experiences are often deeply rooted in the host State, with stories of the family history often being their only connection with the country of their citizenship. It is often the case that the expulsion of second-generation migrants results in a person being required to leave the only country that they have ever truly known to be home and being required to travel to a country which feels in many respects to be alien. In such circumstances, the Court has confirmed that the Convention does not guarantee the right of an alien to enter or to reside in a particular country. However, it has observed that the removal of a person from a country where close members

5 *Uner v. The Netherlands*, Application no. 46410/99 (Grand Chamber).

6 *Pretty v. the United Kingdom*, Application no. 2346/02.

7 *Mikulic v. Croatia*, Application no. 53176/99.

of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1).<sup>8</sup>

Article 8 establishes that everyone has the right to respect for their private and family life. There is no qualification that such respect is limited to the national of the State. The second limb of Article 8 qualifies such respect, namely:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## EXPULSION

The proportionality of requiring a non-national to leave a State is a vexed question where the non-national has established family ties in that State but has committed criminal offences. Article 8(2) provides that the prevention of disorder or crime may constitute a legitimate reason for the expulsion of a convicted offender yet it provides no clear guidance in establishing how the nature of the offences are to be balanced against the strength of the ties.

The Court has taken the steps of detailing useful guidance to aid in determining whether expulsion is proportionate in cases involving criminal convictions, i.e. whether the expulsion is 'necessary in a democratic society'. The guidance was detailed in *Boultif v. Switzerland*<sup>9</sup> and amplified by the Grand Chamber in *Uner v. The Netherlands*<sup>10</sup> as requiring the following criteria to be considered in the balancing exercise:

1. The nature and seriousness of the offence;
2. The length of the applicant's stay in the country from which he is to be expelled;
3. The time elapsed since the offence was committed and the applicant's conduct during that period;
4. The nationalities of the various persons concerned;
5. The applicant's family situation such as the length of the marriage and other factors expressing the effectiveness of a couple's family life;
6. Whether the spouse knew about the offence at the time when he or she entered into a family relationship;
7. Whether there are children of the marriage, and if so, their age;
8. The seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
9. The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled;

8 *Moustaquim v. Belgium*, Application no. 12313/86.

9 *Boultif v. Switzerland*, Application no. 54273/00.

10 *Uner v. The Netherlands*, Application no. 46410/99 (Grand Chamber).

10. The solidity of the social, cultural and family ties with the host country and with the country of destination.

In *Boutif*, the Applicant was an Algerian national who entered Switzerland with a tourist visa in December 1992. In March 1993 he married a Swiss citizen. On 27 April 1994 the Applicant was convicted of the unlawful possession of weapons. The following day he attacked a man in the early hours of the morning, threw him to the ground, kicked him in the face and robbed him of 1,201 Swiss francs. The Applicant was sentenced to two years' imprisonment for robbery and damage to property. In its judgment the domestic court considered that the Applicant had been particularly ruthless and brutal, and that his culpability was severe. Subsequently, the relevant authorities refused to renew his residence permit permitting him to reside in Switzerland.

The Applicant's wife complained of being expected to follow her husband to Algeria. While admitting that she spoke French and so could communicate to some people in Algeria, she claimed that she would have no work in that country and no money. She found it most shocking that a married couple was being separated in such circumstances.

The Government submitted that the Applicant's conviction justified the refusal to renew his residence permit. Sixteen months after having entered Switzerland he had committed a serious offence and had also been convicted for the unlawful possession of weapons. This particularly serious breach of public order in itself warranted non-renewal of the Applicant's residence permit. It further argued that:

37. ...the applicant had grown up in Algeria where a large part of his family lived. He had left the country mainly on economic grounds. Before travelling to Switzerland he had lived in Italy for seven years. There was no indication that he had any ties with Switzerland, where he had been unemployed since October 1994. He had only been living with his wife for a short time. She was born in Switzerland, where she had spent all her life and was, at the time when the application was filed, employed. She did not therefore depend on her husband from an economic point of view. While she would experience some inconvenience if she had to follow her husband to Algeria, she had been able to establish oral contact, thanks to her knowledge of the French language, with the applicant's mother. Moreover, the applicant's family in Algeria would be able to assist her with integration into that country. The couple, who have no children, could be expected to travel to another country. Finally, the applicant was free to visit his wife in Switzerland.

In its judgment, the Court observed that the Applicant was an Algerian citizen who was married to a Swiss citizen. Therefore, the refusal to renew the Applicant's residence permit in Switzerland interfered with the Applicant's right to respect for his family life within the meaning of Article 8(1). The primary concern of the Court was whether the interference was '*necessary in a democratic society*' for whilst Member States were permitted to maintain public order by exercising their right to control the entry and residence of aliens, the action of deporting an alien convicted of a criminal offence had to be proportionate in all of the circumstances. With regard to the notion that such expulsion be necessary in a democratic society, the Court observed that it had to be justified by a pressing social need and proportionate to the legitimate aim pursued.

The Court appears to have been impressed with two particular arguments advanced by the Applicant. Firstly, though he had been convicted of a weapons offence and the assault and robbery offence was so serious that it had led to a term of imprisonment, he had not committed any further criminal offences for six years. The Court observed that his conduct in prison was exemplary and after his release he spent some time employed as a gardener and as an electrician. As a result, whilst the offences of assault and robbery committed by the Applicant may have established genuine concerns that he constituted a danger to public order and security for the future, such fears were mitigated by his post-offence behaviour.

The notion that consideration should be given to post-offence behaviour, which includes the time spent in prison, rather than post-release behaviour is helpful in those States where efforts to expel are taken at the conclusion of a prison sentence as it enables a prisoner to rely upon good behaviour in prison and also upon courses taken and examinations passed in custody.

The weight given to such behaviour has varied both in consideration by the European Court itself as well as in the domestic courts of Member States. Serious crimes have often tended to outweigh subsequent good behaviour.<sup>11</sup> In England, the Court of Appeal has confirmed that 'careful consideration does need to be given to what has happened after release'<sup>12</sup> where someone convicted of robbery had been released four years before the decision to deport and had found employment. Yet elsewhere it has held in the matter of an 18-year-old who had been convicted and sentenced to a term of imprisonment for supplying drugs but had left prison, returned to college and found employment that the accepted limited risk of re-offending, whilst a factor to be weighed in the balance, was not to be considered to be a critical factor.<sup>13</sup>

The Court was also influenced in *Boultif* by the effect of expulsion upon his wife. Whilst it was true that she could speak French, she had never lived in Algeria, had no other ties with that country, and did not speak Arabic. The Court found that she could not be expected to follow her husband to Algeria. The inability of an educated, employed women to be able to secure employment in the country of her husband and to find herself isolated by her inability to speak Arabic presented too great a hurdle for her to reasonably be expected to relocate with her husband to Algeria. In such circumstances the family life rights of the wife underpinned the findings made in favour of the Applicant:

55. The Court considers that the applicant has been subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live his family life outside Switzerland. On the other hand, when the Swiss authorities decided to refuse permission for the applicant to stay in Switzerland, he presented only a comparatively limited danger to public order. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued.

56. There has accordingly been a breach of Article 8 of the Convention.

11 *Bouchelkia v. France*, Application no 23078/93. The conviction in this case was for rape.

12 *Yousuf (Somalia)* [2008] EWCA Civ 394, per Sir Ian Kennedy.

13 *JS (Colombia) v. Secretary of State for the Home Department* [2008] EWCA Civ 1238.

In *Uner*, the Applicant lived in Turkey until he was aged 12. He then travelled to the Netherlands with his mother and two brothers in order to join his father who had already been living there for ten years. He was granted a residence permit, which he was required to renew at yearly intervals until he was aged 19 when he obtained a permanent residence permit. In 1991, when he was aged 22, the Applicant entered into a relationship with a Dutch national. They started living together in or around June 1991 and their son was born in 1992. The relationship experienced difficulties and the Applicant moved out a few months later but remained in close contact with both his partner and his son.

On 16 May 1993 the Applicant was involved in a dispute in a café. He pulled out a loaded gun and shot a man, wounding him in the leg. Outside the café he then got into a fight with a friend of the injured man. He pulled a second loaded gun and shot him in the head. The man died. The Applicant was convicted of manslaughter and assault, and was sentenced to seven years' imprisonment. Whilst serving his prison sentence, the Applicant took courses in computer skills, administration and accounting, and also obtained a retailer's certificate. He took further courses in order to qualify as a sports instructor. His partner and son visited him in prison at least once a week and regularly more often. A second son was born to the Applicant and his partner on 26 June 1996, whom he also saw every week. Both his children enjoyed Dutch nationality and neither his partner nor his children spoke Turkish.

The Dutch authorities deported the Applicant to Turkey in 1998. The matter eventually came before the Grand Chamber. The Applicant argued that the Government has failed to strike a fair balance in his matter. When he had committed the offence that ultimately led to the impugned measures, he had still been very young; being confronted with violent people he had acted in self-defence. He had changed his behaviour leading to his being granted early release from prison, which indicated that he was no longer regarded as posing a danger to society. The Applicant would in any event have preferred to serve a longer sentence if it had meant avoiding deportation and being able to resume his family life in the Netherlands. While the Applicant was in detention, his children had been able to visit him regularly and to develop a normal family relationship with him. According to the Applicant, following his expulsion his partner and children had visited him on a number of occasions during the summer holidays. Each time they had returned to the Netherlands he had sunk deeper into depression.

The Grand Chamber reconfirmed the criteria detailed in *Boultif* but further detailed:

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment:

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.

The Court confirmed that it was mindful of the need to give greater protection to those Applicants who were born in the host country or who moved there at an early age. Indeed, it observed that the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lay in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there.

On the facts of the case in *Uner* the Grand Chamber held that there had been no violation of Article 8. It observed that the Applicant had lived for a considerable length of time in the Netherlands, the country that he moved to at the age of 12 together with his mother and brothers in order to join his father, and where he held a permanent residence status. Moreover, it noted that he subsequently went on to found a family there. In these circumstances, the Court did not doubt that the Applicant had strong ties with the Netherlands. That said, it determined that it could not overlook the fact that the Applicant lived with his partner and first-born son for a relatively short period only, that he saw fit to put an end to the co-habitation, and that he never lived together with his second son. In such circumstances, the disruption of their family life would not have the same impact as it would have had if they had been living together as a family for a much longer time. Moreover, while it was true that the Applicant came to the Netherlands at a relatively young age, the Court was not prepared to accept that he had spent so little time in Turkey that, at the time he was returned to that country, he no longer had any social or cultural (including linguistic) ties with Turkish society.

The Court placed into the balance the criminal conviction, which necessarily included the fact that the Applicant had two loaded guns on his person in a public place and that he had previous convictions. Nevertheless, the criminal conviction did not trump all other factors and the Court was concerned as to the impact that expulsion would have upon the Applicant's young children.

64. The Court concurs with the Chamber in its finding that at the time the exclusion order became final, the applicant's children were still very young – six and one and a half years old respectively – and thus of an adaptable age. Given that they have Dutch nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there.

Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the Court considers that in the particular circumstances of the case, the family's interests were outweighed by the other considerations set out above.

65. The Court appreciates that the exclusion order imposed on the applicant has even more far-reaching consequences than the withdrawal of his permanent residence permit, as it renders even short visits to the Netherlands impossible for as long as the order is in place. However, having regard to the nature and the seriousness of the offences committed by the applicant, and bearing in mind that the exclusion order is limited to ten years, the Court cannot find that the respondent State assigned too much weight to its own interests when it decided to impose that measure. In this context, the Court

notes that the applicant, provided he complied with a number of requirements, would be able to return to the Netherlands once the exclusion order had been lifted.

## THE NATURE AND SERIOUSNESS OF THE OFFENCE

As exemplified by the judgment of the Court in *Uner*, the seriousness of the offence will weigh heavily in any determination of whether deportation is necessary in a democratic society.

In *Boughanemi v. France*<sup>14</sup> a Tunisian national had lived in France from the age of eight for 20 years. He had been deported after being convicted of a number of serious criminal offences. He had returned illegally and formed a relationship with a French national whose child he acknowledged to be his. He complained that his deportation was in breach of Article 8. The Commission admitted the complaint saying that, despite the serious nature of the convictions that had led to the deportation, a fair balance had not been struck between the aims pursued and the right to respect for private and family life. The Court took a different view. It said:

41. The Court acknowledges that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences.

However, their decisions in this field must, in so far as they may interfere with a right protected under Article 8(1), be necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. In determining whether the interference was 'necessary', the Court makes allowance for the margin of appreciation that is left to the Contracting States in this field.

42. Its task consists of ascertaining whether the deportation in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

The Court held that there was no violation of the Applicant's rights, despite strong family ties, where he was deported after being sentenced to four years' imprisonment for living on the earnings of prostitution. The Court stated that the 'seriousness of that last offence and the applicant's previous convictions count heavily against him': the victim has been subject to violence and consequent to such pressure worked as a prostitute.

The language of paragraphs 41 and 42 of this decision has been repeated more or less verbatim in many similar cases in the European Court of Human Rights. The Court is therefore applying a 'fair balance' test and it has clearly stated that the issue is for it to determine whether the deportation strikes a fair balance between the relevant interests. That is what proportionality requires and the striking of a fair balance lies at its heart. In *Sporrong v. Sweden*<sup>15</sup> the Court said at paragraph 69:

14 *Boughanemi v. France*, Application no. 22070/93.

15 *Sporrong v. Sweden*, Application no. 7151/75; 7152/75.



...the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights... The search for this balance is inherent in the whole of the Convention...

It can be argued that fair balance involves comparing the weight to be given to the wider interests of the community with the weight to be given to an individual's Convention rights. Some rights are regarded as being of especial importance and should for that reason be accorded particular weight. Broadly speaking, the more serious the interference with a fundamental right and the graver its effects upon individuals, the greater the justification that will be required for the interference.

Grave consideration has been given to the rights of those persons facing expulsion who have committed serious offences but have resided in the host State for most, if not all, of their life. This has proven to be an important, but not a determinative, factor. In *Bouchelkia v. France*<sup>16</sup> the Applicant had lived in France since the age of two and was married to a French national with whom he had a child. He was sentenced to five years' imprisonment for aggravated rape. The Court held that its task was to determine whether the expulsion in issue struck a fair balance between the relevant interests, namely the Applicant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. The Court relied upon when the family life was established and the connections the Applicant enjoyed with his country of origin when finding that on the established facts there was no breach of the Applicant's Article 8 rights consequent to his expulsion.

50. Like the Commission, the Court notes that Mr Bouchelkia who was 20 years old, single and had no children when the deportation order was executed, maintained links at the material time with his country of origin of which he was a national and where close relatives of his lived. Neither the finding of the Colmar Court of Appeal in 1993, nor the fact that the applicant now has a family life which did not exist in 1990, leads the Court to consider that the situation obtaining in 1990 should have been assessed otherwise at the relevant time.

51. Furthermore, the Court attaches great importance to the nature of the offence which gave rise to the deportation order. While it is true that the applicant was a minor aged 17 when he committed the serious crime of aggravated rape, that fact, the main relevance of which was to the Juvenile Court's decision as to sentence, does not in any way detract from the seriousness and gravity of such a crime.

52. The authorities could legitimately consider that the applicant's deportation was, at that time, necessary for the prevention of disorder or crime. The fact that, after the deportation order was made and while he was an illegal immigrant, he built up a new family life does not justify finding that the deportation order made and executed in 1990 was not necessary.

53. Having regard to the above, the Court finds that a fair balance was struck between the relevant interests and that the decision to deport the applicant was not disproportionate to the legitimate aims pursued.

There has therefore been no violation of Article 8.

However, as the assessment of proportionality is made by way of a balancing exercise, even serious offences may be outweighed by other factors.

In *Moustaquim v. Belgium*<sup>17</sup> the expulsion of a Moroccan national who had lived in Belgium since the age of one and who was found to have committed a large number of offences during adolescence was held to contravene his right to respect for private life. The Court took into account the fact that there was a four-year gap between the last offence and the deportation order, during which time the Applicant had spent 16 months in detention but 23 months at liberty. The Court also had regard to the fact that the Applicant's family was resident in Belgium and that he had spent almost his whole life there.

44. Mr Moustaquim's alleged offences in Belgium have a number of special features. They all go back to when the applicant was an adolescent. Furthermore, proceedings were brought in the criminal courts in respect of only 26 of them, which were spread over a fairly short period - about eleven months -, and on appeal the Liège Court of Appeal acquitted Mr Moustaquim on 4 charges and convicted him on the other 22. The latest offence of which he was convicted dated from 21 December 1980. There was thus a relatively long interval between then and the deportation order of 28 February 1984. During that period the applicant was in detention for some sixteen months but at liberty for nearly twenty-three months.

45. Moreover, at the time the deportation order was made, all the applicant's close relatives - his parents and his brothers and sisters - had been living in Liège for a long while; one of the older children had acquired Belgian nationality and the three youngest had been born in Belgium.

Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French.

His family life was thus seriously disrupted by the measure taken against him, which the Advisory Board on Aliens had judged to be 'inappropriate'.

46. Having regard to these various circumstances, it appears that, as far as respect for the applicant's family life is concerned, a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued. Accordingly, there was a violation of Article 8.

It is to be observed that Mr Moustaquim's offences related primarily to theft and robbery. It may be argued that the Court did not attach such significance to these offences, as opposed to murder or drugs offences, when balancing them against family ties to the host State. The strong stance taken by the Court towards deportation orders made against drug trafficking offenders even where there has been the most serious interference with Article 8 rights can be observed in the judgment of *Caglar v. Germany*.<sup>18</sup> The Applicant was a Turkish national. He was 55 years of age and had spent 30 years living in Germany. He was convicted of a heroin-related offence and was sentenced to seven years' imprisonment and then made the subject of an expulsion order to Turkey. It was accepted

17 *Moustaquim v. Belgium*, Application no. 12313/86.

18 *Caglar v. Germany*, Application no. 62444/00

that his wife was suffering from serious psychiatric problems, that she needed his presence, and could not be expected to follow him to Turkey. In the usual way, the court said that its task was to determine whether 'the measure in issue struck a fair balance between the conflicting interests, namely, on the one side, the applicant's right to respect for his private and family life, and, on the other, the prevention of disorder or crime.' The court then held:

The offence indisputably constituted a serious breach of public order and undermined the protection of the health of others. In view of the devastating effects of drugs on people's lives, the Court appreciates why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (see the *Dalia v France* judgment of 19 February 1998). Although the applicant's removal from Germany would involve considerable hardship, the Court considers, in the light of the foregoing, and taking into account the margin of appreciation left to the Contracting States in such circumstances (see the *Boughanemi v France* judgment of 24 April 1996), that the decision to expel the applicant was not disproportionate to the legitimate aims pursued. There is therefore no appearance of a violation of Article 8.

Such an approach can be contrasted with that taken in the matter of *Nasri v. France*<sup>19</sup> where both the Commission and the Court found that despite a number of convictions for very serious offences, including gang rape, the expulsion of an Algerian national who was both deaf and dumb and lived with his parents in France, would constitute a violation of Article 8.

43. Above all it is necessary to take account of Mr Nasri's handicap. He has been deaf and dumb since birth and this condition has been aggravated by an illiteracy which was the result in particular of largely inadequate schooling, even though this was to a certain extent attributable to the applicant since on account of his bad behaviour he was expelled from the establishments that he attended. Like the Delegate of the Commission, who relied on the expert reports concerning the applicant, the Court is inclined to the view that, for a person confronted with such obstacles, the family is especially important, not only in terms of providing a home, but also because it can help to prevent him from lapsing into a life of crime, all the more so in this instance inasmuch as Mr Nasri has received no therapy adapted to his condition.

44. It should also be stressed that the applicant has always lived with his parents - except for certain periods when he lived with his sister. He moved with them when they moved house and never severed his links with them. In this respect the fact that he spends a lot of time out with 'gangs' makes no difference.

The applicant's parents arrived in France with their children in 1965 and have never left the country since. In the meantime six of his nine brothers and sisters have acquired French nationality. As regards the applicant himself, the meager schooling that he was given was all received in France.

45. The Court accepts as credible Mr Nasri's affirmation that he does not understand Arabic, which was not contested. Admittedly he mixes with the North African community, but it is a well-known fact that there is an increasing tendency among the younger members of that community not to speak the language of their country of origin, and this would be particularly likely in the case of a deaf-mute.

19 *Nasri v. France*, Application no. 19465/92.

46. In view of this accumulation of special circumstances, notably his situation as a deaf and dumb person, capable of achieving a minimum psychological and social equilibrium only within his family, the majority of whose members are French nationals with no close ties with Algeria, the decision to deport the applicant, if executed, would not be proportionate to the legitimate aim pursued. It would infringe the right to respect for family life and therefore constitute a breach of Article 8.

It can be difficult to equate the paternal approach the Court took to the Applicant in *Nasri*, to the extent of limiting the significance of the rape conviction, to the harsh approach taken to the innocent wife of Mr Caglar whose personal circumstances were equally deserving of sympathy.

With regard to the decision in *Nasri* the authors van Dijk and van Hoof have observed:

In the *Nasri* Case the Court again showed its preparedness independently to review a deportation order for its proportionality and its impact on the applicant's family life. The special circumstances in this case make it difficult to draw specific conclusions as to the permissibility for a deportation, other than a willingness of the Court actively and intensely to assess the balance between the reasons leading to the deportation order and the (harsh) consequences for the individual concerned.<sup>20</sup>

The Court has also been influenced by the age at which the offences occurred and appears to be influenced by whether or not violence formed a part of the offence. In *Jakupovic v. Austria*<sup>21</sup> the Applicant was a national of Bosnia and Herzegovina who was born in 1979. In February 1991 he arrived in Austria to join his mother who was already living and working there. Subsequently his mother remarried and had two children. The Applicant's family in Austria consists of his mother, his stepfather, a brother and two half sisters. In 1995 the Applicant was convicted of burglary and sentenced to five months' imprisonment suspended for a probationary period of three years. The authorities issued a ten-year residence prohibition, finding that the Applicant's further stay in Austria would be contrary to the public interest. Later that year, he was again convicted of burglary and sentenced to a further term of imprisonment suspended for a probationary period of three years.

The European Court of Human Rights considered that very weighty reasons had to be put forward to justify the expulsion of a young person (16 years old), alone, to a country which had recently experienced a period of armed conflict and when there was no evidence that he had close relatives living there. The Court could not find that the Applicant's two convictions for burglary - even taking into account a further set of criminal proceedings which were discontinued after the victim had been compensated by the Applicant - for which the Austrian courts had only imposed conditional sentences of imprisonment, could be considered particularly serious, as they did not involve violence. The only element, which might indicate any tendency of the Applicant towards violent behaviour, was a prohibition to possess arms issued in May 1995. Although the seriousness of such a measure should not be underestimated, it could not be compared to a conviction for an act of violence, and there was no indication that such charges were ever brought against the Applicant. There had been a violation of Article 8.

20 Van Dijk, Pieter, Fried van Hoof, Arjen Van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> edition), Intersentia, 2006.

21 *Jakupovic v. Austria*, Application no. 36757/97.

## THE LENGTH OF THE APPLICANT'S STAY IN THE COUNTRY FROM WHICH HE IS TO BE EXPELLED

This charged factor incorporates some of the most difficult factual scenarios existing when migrants are expelled. A pertinent observation as to the effect of being a child migrant or a second-generation migrant and the subsequent ties that exist with the host country was made in *Lamguindaz v. United Kingdom*<sup>22</sup> which was a case concerning the proposed deportation on conducive grounds of a Moroccan youth who had lived in the UK since the age of seven. In his concurring opinion, Judge Schermers observed:

Even independent of human rights considerations I doubt whether modern international law permits a State which has educated children of admitted aliens to expel those children when they become a burden. Shifting this burden to the State of Origin of the parents is no longer so clearly acceptable under modern international law

There is a concern that to all intents and purposes, children educated in the host State who turn to criminality, adopt the criminal nature established in that country, whether it be drugs, violence and/or gang related, and when returned to a country with which they have very limited previous contact, their chances of lawful re-settlement are limited. In such circumstances, they turn to their criminal knowledge to survive. Many States outside of Europe have decried the perceived 'dumping' of problem persons upon them, particularly when they often have limited resources to address such behaviour. Professor Bernard Headley of the University of the West Indies raised an example of such concern in the *Jamaican Gleaner*:

The deporting countries are resolute about evicting Jamaicans whom they deem unfit (for whatever reason) to continue residing in their respective countries. We simply have to accept it and 'get over it'. The one essential thing to talk about then is: What opportunities can we now create for the resettlement and reintegration of some extremely damaged people? We need to carefully think and plan this out before today's badly damaged deportees become more of tomorrow's worsening crime problem.<sup>23</sup>

In *Mehemi v. France*<sup>24</sup> the Applicant was an Algerian national who was born in Lyons in 1962. He lived in France until he was deported to Algeria in February 1995. His parents had lived in France for about 40 years and continued to reside there after his deportation. His two brothers and two sisters lived in France. The Applicant went to school in France until the age of 17. He worked in the construction industry for three years and thereafter as a self-employed taxi-driver. He was the father of three children of French nationality, all of whom were minors when he was deported. He was sentenced to six years' imprisonment for the importation of 142 kilograms of hashish from Morocco. The Lyons Court of Appeal ordered Mr Mehemi's permanent exclusion from French territory as 'public-policy considerations preclude the presence within French territory of an alien engaged as a principal in the offence of drug trafficking.'

22 *Lamguindaz v. United Kingdom*, Application no. 16152/90.

23 Professor Bernard Headley, 'Criminal Deportees: What We Know and Don't Know', *Jamaican Gleaner*, 14 July 2008.

24 *Mehemi v. France*, Application no. 25017/94.

Mr Mehemi emphasised that he had been born in France, had lived there until 28 February 1995 (the date on which the exclusion order was enforced) and had received all his schooling there. His four brothers and sisters – two of whom possessed French nationality – and his parents lived there. He was the father of three French children. Though he had separated from their mother, and despite the ensuing difficulties caused, he had always endeavoured to keep in touch with his children.

The Government submitted that the Applicant's links with his parents and his brothers and sisters should not be taken into account for the purpose of assessing whether he had a firmly established family life in France, given that the Applicant had attained the age of majority by the time his permanent exclusion from French territory was ordered. Nor could Mr Mehemi validly plead his marriage, as he did not live with his wife. Consequently, if there had been any interference at all in the Applicant's private and family life, too much should not be made of it. The Government further asserted that Mr Mehemi had maintained links with his country of origin other than just his nationality, since he had made a number of trips to North Africa in the years preceding his arrest and had been a member of a network of traffickers mainly composed of Algerians and Tunisians.

The Court expressed its opinion that in view of the destructive nature of drugs on people's lives, it understood why the authorities wished to show great firmness with regard to those who actively contributed to the spread of this scourge. The fact that the Applicant had participated in a conspiracy to import a large quantity of hashish counted heavily against him, but was not determinative. The Court noted that the Applicant was born in France, received all his schooling there and lived there until the age of 33, before the permanent exclusion order was enforced. It also noted his family ties to France. Importantly, it disagreed with the French Government's assertion that the Applicant continued to have strong ties with Algeria:

Moreover, it has not been established that the applicant had links with Algeria other than his nationality. It appears from the file that he did indeed make a number of trips to North Africa before he was deported, but to Morocco not, with the exception of a brief visit, to Algeria. Furthermore, the Government's assertion that Mr Mehemi was a member of a trafficking network 'mainly composed of Algerians and Tunisians' is not based on any real evidence; on the contrary, it appears from the file on the domestic proceedings that the applicant's eight co-defendants included four French nationals, one Portuguese, one Franco-Tunisian, one Tunisian and one person born in Algeria of unspecified nationality.

The Court weighed the seriousness of the offence with the Applicant's personal and family ties with France and held:

37. ...in view of the applicant's lack of links with Algeria, the strength of his links with France and above all the fact that the order for his permanent exclusion from French territory separated him from his minor children and his wife, the Court considers that the measure in question was disproportionate to the aims pursued. There has accordingly been a breach of Article 8.

## WHETHER THE SPOUSE KNEW ABOUT THE OFFENCE AT THE TIME WHEN HE OR SHE ENTERED INTO A FAMILY RELATIONSHIP

This factor has been considered to be one of significance. A spouse aware of the criminal activity of their partner when they entered into their relationship would struggle to assert that his or her family rights should outweigh expulsion. This can also be argued with regard to those people who are aware of their partner's criminal proclivities at an early stage of their relationship. However, a national of the host State entering into a marriage before the criminal behaviour of their partner commences can arguably assert that their rights and the rights of their children to enjoy a family life should not be interfered with lightly.

The Court in *Sezen v. The Netherlands* gave close consideration to this issue.<sup>25</sup> The Applicant entered the Netherlands and soon began a relationship with a woman who was lawfully present in the Netherlands. They had a child in 1990 and were married soon afterwards. Consequent to the marriage, the Applicant acquired the right to remain in the Netherlands indefinitely. After two years of marriage, the Applicant was arrested and subsequently convicted of a number of offences relating to being in the possession of about 52 kilos of heroin. He was sentenced to four years' imprisonment. Upon his release, he went back to live with his wife and child and found a job. The marriage had problems and the parties separated for a period of time but they resolved their difficulties and a second child was born. The Deputy Minister of Justice then informed the Applicant of her intention to impose a ten-year exclusion order on him by declaring him an undesirable alien.

The Court held:

44. At the time the first applicant was arrested, i.e. on 31 July 1992, he had been residing lawfully in the Netherlands for less than one and a half years, having been granted a residence permit in February 1991. Applying the 'sliding scale' principle, the authorities of the respondent State attached weight to this undeniably short duration of the first applicant's lawful stay in the Netherlands before he committed the offence. It is nevertheless to be noted that, following his conviction on 20 January 1993, it was not until more than four years later, namely on 5 June 1997, that the decision was taken to refuse the first applicant continued residence. Following his early release from prison in April 1995, the first applicant had thus been allowed to build up even closer ties with the Netherlands for a further two years. In addition, it appears that the first applicant has not re-offended and that he has been gainfully employed ever since his release from prison.

...

47. Unlike the first applicant, his wife – the second applicant – may be considered a second-generation immigrant, having moved to the Netherlands at the age of seven and having lawfully resided there ever since. It is submitted, and has not been disputed, that all her relatives are also living in the Netherlands and that she does not have any family in Turkey. Although the parties disagree as to whether the second applicant was aware of the criminal activities of her husband, the fact remains that he had not yet committed the offence at the time they married and she entered into a family relationship

25 *Sezen v. The Netherlands*, Application no. 50252/99.

with him, which is the relevant criterion in this context (see *Boultif*). Furthermore, the couple's two children were born in the Netherlands: Adem in 1990 and Mahsun in 1996. These two children have always lived in the Netherlands and its cultural and linguistic environment, and attend school there. Consequently, they can only have minimal ties, if any, to their parents' country of origin (see *Sen v. the Netherlands*, no. 31465/96) and they do not speak Turkish. In these circumstances, the Court accepts that following the first applicant to Turkey would mean a radical upheaval for the second applicant and in particular for the couple's children (see *Mehemi v. France*, judgment of 26 September 1997, see also Recommendation 1504 (2001) of the Parliamentary Assembly of the Council of Europe on the non-expulsion of long-term immigrants), and it finds that they cannot realistically be expected to do so.

...49. It is true that, in theory at least, the first applicant is entitled to make occasional visits to the Netherlands, due to the fact that the exclusion order that was initially imposed on him was ultimately withdrawn without having been enforced (paragraph 20 above). However, in this context the Court notes that the present case does not concern a divorced father with an access arrangement, but a functioning family unit where the parents and children are living together. The Court has previously held that domestic measures which prevent family members from living together constitute an interference with the right protected by Article 8 of the Convention and that to split up a family is an interference of a very serious order (see *Mehemi v. France (no. 2)*, no. 53470/99). Having regard to its finding at paragraph 47 above that the second applicant and the children cannot be expected to follow the first applicant to Turkey, the effect of the family being split up therefore remains the same as long as the first applicant continues to be denied the right to reside in the Netherlands. In this context the Court notes the Government's submission that the first applicant's criminal record would normally militate against a new residence permit being issued to him for a period of ten years. Although they also argued that Article 8 of the Convention would be taken into account in assessing whether his conviction would still be held against him, the Government failed to indicate when, and under what conditions, such an assessment would lead to a positive decision being taken on any future request for a residence permit being lodged by the first applicant.

50. In conclusion, the Court is of the opinion that, in the particular circumstances of the present case, the respondent State failed to strike a fair balance between the applicants' interests on the one hand and its own interest in preventing disorder or crime on the other.

There has, accordingly, been a violation of Article 8 of the Convention.

## **THE SERIOUSNESS OF THE DIFFICULTIES WHICH THE SPOUSE IS LIKELY TO ENCOUNTER IN THE COUNTRY TO WHICH THE APPLICANT IS TO BE EXPELLED**

In *Beldjoudi v. France*<sup>26</sup> the deportation to Algeria of a man born in France and married to a French woman, on account of numerous criminal convictions, was found to violate his right to respect for family life. The Court attached particular importance to the fact that the Applicant's wife could not be expected to follow him, that neither of them spoke Arabic and that the Applicant had sought French nationality and had lived in France all his life. The Court confirmed that there

26 *Beldjoudi v. France*, Application no. 12083/86.



has to be a *proper* balance, particularly when a foreign national has spent their formative years in a country, surrounded by their family and has had little contact with their country of origin.

A recent decision of the Court has signified that a harsh approach may be taken in such circumstances. The matter before the Court concerned a matter that did not originate with a criminal deportation, but rather with the ability of a spouse to rely upon the genuineness of the marriage in seeking to establish that expulsion would be disproportionate. The key issue was whether there was an insurmountable obstacle to the spouse travelling to their partner's country of origin. If no insurmountable obstacle existed, then there was no interference by the Government in the family life, only a decision by the married parties to live separately as one would not follow the other who was required to leave the country.

In *Darren Omoregie v. Norway*<sup>27</sup>, the Applicant was a Nigerian national who had initially entered Norway as an asylum-seeker. Seven months later, he began cohabiting with a Norwegian national and a daughter was later born. The asylum application was refused and the Applicant was ordered to leave the country. He failed to do so and later married his partner. He applied for a work permit on the grounds of family reunification, but was refused for lack of the ensured means of subsistence and of strong human considerations warranting an exception to that requirement. He was ordered to leave, and then expelled for five years for repeated breach of immigration law and defiance of the order to leave, although he was to be allowed to apply for re-entry after two years. The State maintained that the marriage had been contracted in breach of domestic law, which required that the parties should be legally resident in the state. The Applicant and his family submitted that his expulsion would lead to the family being split as his wife and daughter could not be expected to follow him there.

The Court again confirmed that a State was entitled to control the entry and residence of aliens within its borders. The Applicant had not been granted lawful residence, and on rejection of his appeal his continued stay was unlawful. The Court accepted that there was no evidence that the marriage was not a genuine one, and the impugned measures did constitute interference in family life. However, such interference had a legal basis and pursued legitimate aims. As to whether it was necessary and proportionate, the state had to strike a fair balance between individual and community interests. There was no general obligation for it to respect immigrants' choice of country of residence and to authorise family reunion in its territory.

Importantly, the Court found that it must have been clear to husband and wife from early in their relationship that their chance of being able to settle as a couple in the state was precarious. Confronting the authorities with the Applicant's presence as a *fait accompli* did not entitle him and his wife to expect a right of residence. The same applied to the birth of their daughter. The Applicant's links with Nigeria were strong and those with Norway were relatively weak. Their daughter was still of adaptable age when the disputed measures were implemented and there were no insurmountable obstacles to the development of the family's life in Nigeria. Accordingly, a fair balance had been struck and the interference could reasonably be seen as necessary.

27 *Darren Omoregie v. Norway*, Application no. 00265/07.

The Court was influenced, in part, by the Applicant's attitude to the State authorities and in particular to the attempted presentation of a *fait accompli*. However, the key factor was the finding that there was no insurmountable obstacle to the Applicant's wife travelling with the Applicant to Nigeria and living with him there whilst he served the time he was barred from returning to Norway. That finding had been made by the domestic High Court and was not overturned by the Court.

In different circumstances, the fact that it would be unreasonable for a spouse to travel to their partner's country of origin is significant. In the United Kingdom, the House of Lords<sup>28</sup> has extended the protection to circumstances where a spouse could not reasonably be expected to travel with their partner and there is a child in the relationship. The child's human rights are to be protected and s/he should not be expected to have to choose between which of their loving parents they were to live with, even if the separation were to be for a relatively short period of time. Baroness Hale noted:

Even if it would not be disproportionate to expect a husband to endure a few months' separation from his wife, it must be disproportionate to expect a four year old girl, who was born and has lived all her life here, either to be separated from her mother for some months or to travel with her mother to endure the 'harsh and unpalatable' conditions in Zimbabwe simply in order to enforce the entry clearance procedures.

In such circumstances, the child's rights demanded that the parent at risk of expulsion be given the opportunity to attempt to regularise their status in-country rather than be required to travel to their country of origin and seek admission through the British Embassy or High Commission.

The wife in *Chikwamba* had a poor immigration history, and it was arguable that she was 'jumping the queue' of those people who were applying from abroad to enter the country lawfully. However, the law required a separation of the couple in circumstances where it was clear that an application to return was likely to be successful as the maintenance and accommodation requirements for entry could be met. Lord Brown observed:

Let me now return to the facts of the present case. This appellant came to the UK to seek asylum, met an old friend from Zimbabwe, married him and had a child. He is now settled here as a refugee and cannot return. No one apparently doubts that, in the longer term, this family will have to be allowed to live together here. Is it really to be said that effective immigration control requires that the appellant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum-seekers remained suspended for more than two years after the appellant's marriage and where conditions are 'harsh and unpalatable', and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the UK to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer.

Lord Scott stridently observed:

28 *Chikwamba v. Secretary of State for the Home Department* [2008] UKHL 40.

The appellant, in her appeal, relies on article 8 of the Convention and, for my part, I regard the decisions of the lower courts as clearly unreasonable and disproportionate. It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it. I would allow this appeal.

For those facing expulsion consequent to criminal convictions, the impact upon their child may be a determinative factor in the balancing exercise. In England, the Court of Appeal recently considered the appeal of a Jamaican national who was subject to a deportation decision.<sup>29</sup> The Appellant married a British citizen within a year of entering the United Kingdom and applied for leave to remain as a spouse. The couple had a son. The Appellant also had a daughter with another woman. He was convicted of conspiracy to supply heroin and cocaine and was sentenced to a term of seven years' imprisonment. Upon the conclusion of his custodial sentence a deportation order was made against him, having belatedly rejected his application for leave to remain. The Court of Appeal held that while it was true that there were no insurmountable obstacles to the Appellant's wife being able to accompany him to Jamaica, that did not answer the question of whether it was reasonable to expect her to do so, which was an important consideration in the question of justification and the overall balance of proportionality. Further, the children would stay in the United Kingdom and there had been no adequate or real consideration of the children's interests in either losing their father or being uprooted from the United Kingdom. Further, whilst the Appellant had been convicted of a serious offence, his wife and children were not responsible for his criminal conduct and were entitled to have their own rights to family life properly considered.

### **THE BEST INTERESTS AND WELLBEING OF THE CHILDREN, IN PARTICULAR THE SERIOUSNESS OF THE DIFFICULTIES WHICH ANY CHILDREN OF THE APPLICANT ARE LIKELY TO ENCOUNTER IN THE COUNTRY TO WHICH THE APPLICANT IS TO BE EXPELLED**

In the important judgment of *Amrollahi v. Denmark*<sup>30</sup> the Court was seized to consider the impact that expulsion would have upon innocent children. The Applicant was an Iranian citizen who deserted the Iranian army and ultimately fled to Denmark. He claimed asylum and was granted a residence and work permit. In 1994, the residence permit became permanent.

In 1992 the Applicant met a Danish woman with whom he firstly cohabited and then married. They had two children and his wife had a child from a previous relationship who lived in the family unit. In 1997, the Applicant was found guilty of drug trafficking and sentenced to three years' imprisonment. He was ordered to be expelled from Denmark with a life-long ban on his return. The Applicant submitted that his wife, his children and the daughter from his wife's previous

29 *AF(Jamaica) v. Secretary of State for the Home Department* [2009] EWCA Civ 240.

30 *Amrollahi v. Denmark*, Application no. 56811/00.

relationship could not be expected to go to Iran. His wife was not a Muslim and the daughter from his wife's previous relationship refused to follow him to Iran. Accordingly, an expulsion would result in the break up of his family life.

The Government submitted that even if the expulsion order interfered with the Applicant's family life, it disclosed no violation of Article 8 of the Convention. Given the seriousness of the offence which the Applicant committed in Denmark the measure of expulsion was called for in the interest of public safety, for the prevention of disorder or crime, and for the protection of the rights and freedoms of others, and was necessary in a democratic society within the meaning of Article 8(2) of the Convention. The Government drew attention to the fact that the Applicant had very strong ties with his country of origin since he was already an adult when he left Iran and had his entire school education in Iran. He mastered the local language, he had served part of his compulsory military service and he had family there. In comparison, the Applicant was said not to have strong ties with Denmark. At the time the expulsion order was made he had resided for only eight years in Denmark. Moreover, in the Government's view, there was no evidence to prove that the Applicant's spouse, the children of the marriage, and the spouse's child of another relationship would not be able to accompany the Applicant to Iran.

The Court determined:

41. The applicant's wife, A, is a Danish national. She has never been to Iran, she does not know Farsi and she is not a Muslim. Besides being married to an Iranian man, she has no ties with the country. In these circumstances the Court accepts even if it is not impossible for the spouse and the applicant's children to live in Iran that it would, nevertheless, cause them obvious and serious difficulties. In addition, the Court recalls that A's daughter from a previous relationship, who has lived with A since her birth in 1989, refuses to move to Iran. Taking this fact into account as well, A cannot, in the Court's opinion, be expected to follow the applicant to Iran.

...

43. Accordingly, as a consequence of the applicant's permanent exclusion from Denmark the family will be separated, since it is *de facto* impossible for them to continue their family life outside Denmark.

44. In the light of the above elements, the Court considers that the expulsion of the applicant to Iran would be disproportionate to the aims pursued. The implementation of the expulsion would accordingly be in breach of Article 8 of the Convention.

Neither *Boultif* nor *Amrollahi* are authority for the proposition that the burden of proof lies on the Government to show that it is reasonable to expect an Applicant's family to accompany him to his own country of origin (where he has a right of residence and where it is probable his country makes provision in its immigration law for family reunion). It is for the Applicant to establish that on balance, it would be unreasonable for their family to accompany them. Requiring a wife to give up her employment or studies and to reside in a country where similar chances are rare could well be said to be unreasonable. Insisting that a child leave school and friends to travel to a country where they would be required to learn a new language could be unreasonable, especially if the

child is of an age where it is unlikely that they could meet upcoming exam requirements. The lack of educational qualifications would have a significant impact upon the child's life.

## THE SOLIDITY OF THE SOCIAL, CULTURAL AND FAMILY TIES WITH THE HOST COUNTRY AND WITH THE COUNTRY OF DESTINATION

In *Boujlifa v. France*<sup>31</sup> the Court identified a failure to seek to change nationality to that of the deporting state as a factor to be taken into account in considering whether there was a violation of Article 8.

44. With regard to Mr Boujlifa's ties, the Court observes that he arrived in France at the age of 5 and has lived there since 1967, except for the period from 5 May 1987 to 5 August 1988, when he was serving a prison sentence in Switzerland. He received his education in France, he worked there for a short period and his parents and his eight brothers and sisters live there (see paragraph 9 above).

On the other hand, it seems that he did not show any desire to acquire French nationality at the time when he was entitled to do so.

The Court notes that the offences committed (armed robbery and robbery), by their seriousness and the severity of the penalties they attracted, constituted a particularly serious violation of the security of persons and property and of public order.

It considers that in the instant case the requirements of public order outweighed the personal considerations which prompted the application.

45. Having regard to the foregoing, the Court considers that the making of the order for the applicant's deportation cannot be regarded as disproportionate to the legitimate aims pursued. There has accordingly been no breach of Article 8.

## BAR UPON RETURN

A number of countries impose a time bar upon an expelled foreign-national returning. In the United Kingdom, a person who is deported is subject to a ten-year bar.<sup>32</sup>

The European Court of Human Rights has not seen a period of delay of limited duration, before an Applicant can be considered for re-admission to the country where he had established family ties, as in itself giving rise to a disproportional interference in a family life on its own account. In *Kaya v. Germany*<sup>33</sup> the Court held that whilst it will find a residence prohibition disproportionate on account of its unlimited duration<sup>34</sup> it will consider the limited duration of a residence prohibition as being a factor speaking in favour of its proportionality.

31 *Boujlifa v. France*, Application no. 25404/94.

32 Paragraph 320(7B)(d)(v), Immigration Rules (as amended).

33 *Kaya v. Germany*, Application no. 31753/02.

34 *Radovanovic v. Austria*, Application no. 42703/98.

## RELEVANT DATE

The relevant date for consideration is the date when the expulsion or residence ban is enforced and not the date when the expulsion notice or residence ban was issued. This was confirmed in *Yıldız v. Austria*<sup>35</sup> where the Applicant went to Austria in 1989 to live with his parents and siblings. As from 1994 he cohabited with his now wife, who was born in Austria and has lived there all her life. They married under Muslim law in April 1994 and under Austrian civil law in March 1997. Their daughter was born on 14 August 1995. The Applicant was over time convicted of a number of theft and driving offences and in 1994 the relevant authorities issued a five-year residence ban. On 16 June 1997 an order to leave Austrian territory was served on the first Applicant, with which he complied on 1 July 1997. He left Austria and returned to Turkey.

The Applicant asserted that the relevant point in time for an assessment of their family life was the date when the residence ban against him was enforced, i.e. 1 July 1997. At that time, the Applicant and his wife had lived together for more than three years and their child was one year and ten months old.

For their part, the Government contended that the relevant time for assessing whether the Applicant had any private and family life in Austria was 27 September 1994, i.e. the date of the issue of the residence ban or, at the latest, 8 February 1995 when the decision of the Public Security Authority was served on the first Applicant. At the first-mentioned date the Applicant had lived for about five years in Austria with his parents and siblings and was cohabiting with his soon-to-be-wife for only a couple of months. Thus, he had established family ties in Austria that were not very intense. Subsequent developments such as the birth of his child were not to be taken into account.

The Court held that the question whether the Applicant had established a private and family life within the meaning of Article 8 must be determined in the light of the position when the residence ban became final:

35. In the present case the relevant date is, thus, 4 December 1996, when the Administrative Court gave its judgment confirming the residence ban. The applicants can, therefore, rely also on the third applicant's birth on 14 August 1995 and not only on the first and second applicants' co-habitation which had commenced in early 1994 before the residence ban proceedings were initiated.

36. Thus, the residence ban, which had the effect of separating the first applicant from his life-companion and their child, constituted an interference with their right to respect for their private and family life

## CONCLUSION

In assessing the proportionality of expelling a foreign-national and thereby potentially interfering with a family life, the seriousness of the crime committed or any other danger to society will have to be considered in the balance with such relevant factors as to how long the foreign national has

35 *Yıldız v. Austria*, Application no. 37295/97.

lived in the country seeking to deport him; the intensity of the links he has in that country and in his country of origin and the harshness of the consequences of expulsion. The later factors can prove to be conclusive, even if the offences committed were serious. However, the greater the seriousness of the offence, the more important a continuing link with the country of origin may be in establishing that expulsion is proportionate.





Peter Carter QC<sup>1</sup>

## The Rule of Law

### Abstract

*This article looks at the concept of the rule of law in domestic and international law in light of the unwritten British constitution, the growing influence of international jurisprudence and the current challenges faced by states at home and abroad. In particular, the article focusses on the difficulty in conceptualising the 'rule of law', the influencing factors and the emergence of a universal rule.*

### INTRODUCTION<sup>2</sup>

It is a paradox that in England, a country subject to the rule of law, we have no written constitution. There is no single document (or even a set of composite documents) that contains the governing principles setting out the relationship between executive, legislature and judiciary; nor between them and the citizens and residents who are affected by what they do. Great Britain bequeathed constitutions to many of its former colonies, while others, such as the USA developed their constitutions as a hallmark of the legitimacy of their new legal order. Lawyers and politicians will claim to support the rule of law. But what is it? Ask any of them and you may have to wait a disturbing time for a coherent answer. Is it a concept like democracy, that we applaud without asking too many questions about inconsistencies in practical application or about some disturbing features of the law itself?

Any concept of law – and the rule of law is a concept – must have a philosophy. The philosophy underpinning the traditional English concept is positivism. That in turn is based upon a sceptical approach to law as being anything other than a set of specific rules. It disavows the idea that law consists of humanitarian principles. Positivism looks at what the law says. For positivists, law is not the same as justice; law is capable of causing injustice and the fact that it may even cause flagrant injustice does not undermine it or require it to be ignored. It sees practical certainty as synonymous with the rule of law. Judges are there to discern what the law is when it is apparently unclear.

What is the law that the judges interpret and apply? Until recently, the answer for English judges was simple – it is the law laid down by Parliament in statute and expressed by the judges when applying the common law. They did not look beyond our own shores. Parliament was the sovereign, whose actions could not be challenged in any court. 'The law' was simply the law of the land. This circular approach was given some kind of intellectual respectability by the philosophers Bentham

1 Peter Carter practices from 18 Red Lion Court chambers. He is the past Chair of the Bar Human Rights Committee and was one of the counsel in the amicus brief on behalf of members of the UK Parliament to the US Supreme Court in *Rasul v. Bush*.

2 I am grateful to Klentiana Mahmutaj for her research and suggestions. She is not of course responsible for any errors.

and Austin in the 19<sup>th</sup> century. It probably owes its origins to Thomas Hobbes (whose name is often invoked). But it means that the letter of the law must be applied however illogical or unfair. It allows for discrimination against minorities – or even majorities. Apartheid South Africa claimed that it upheld the rule of law. But what law!

In the hands of the American Realists like Karl Llewellyn legal theory developed into a panegyric to judicial craftsmanship<sup>3</sup> – forging a rational outcome from material (facts and law) that was inherently ambiguous. While this approach allows intellectual elbow room to innovative judges with an eye to justice, it is in a sense making the best of an inadequate conceptual base. It is founded in the substantive law of the state and in that way is blinkered so as to ignore principles that international, human rights and humanitarian lawyers regard as fundamental. That group of lawyers – once derided by the positivists such as Austin – have recently gained greater ascendancy. The effect on attitudes to law, and a corresponding change in philosophical values, is discussed below. If we are to seek an historical mentor for the new internationalist approach to the rule of law we need to go back to the American Declaration of Independence, and perhaps even beyond, to the then revolutionary ideas of John Lilburne and Gerard Winstanley. Like Hobbes they were philosophers whose ideas were honed in the days of rebellion in the 17<sup>th</sup> century when new ideas flourished. The philosophical ideas at the core of their views have been sadly overlooked in legal theory. It is perhaps time for a re-evaluation. They were people of their times, and so they too were often limited in their ambition for the law – Lilburne in particular did not regard the rights of landless labourers or servants worthy of specific protection. But he did assert that the proper role of law was to serve a purpose beyond the limited perspective of judges and the executive:

If it be not reason, the pronouncement of 10,000 judges cannot make it law<sup>4</sup>

and

... no government can be just or durable but what is founded and established upon the principles of right reason, common and universal justice, equity and conscience<sup>5</sup>

We shall see an echo of that second comment in the American Declaration of Independence.

## JUDICIAL INDEPENDENCE AND THE RULE OF LAW

In *IJCHR v. A-G of Jamaica*<sup>6</sup> Lord Bingham said<sup>7</sup>:

the independence of the judges (or, put negatively, the protection of judges from executive pressure or interference) is all but universally recognised as a necessary feature of the rule of law.

3 He called it 'The Law of the Singing Reason' in *The Common Law Tradition* (1960).

4 *Redintegratio Amoris*; cited in *Free-Born John, the biography of John Lilburne* by Pauline Gregg, Phoenix Press, 2000, at p. 218.

5 *Innocency and Truth Justified, ibid.*

6 Privy Council Appeal No.41 of 2004.

7 At paragraph [12].

In *A v. Secretary of State for the Home Dept*<sup>8</sup> he said:

... the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.

So the rule of law includes the principle that judges must not be subjected to interference from the executive. They must be allowed to be independent. Their independence must also be protected from other forces, such as corruption, or threats. In the UK that is not an issue. In some countries, such as Zimbabwe and Columbia, it is. But even in the UK, independence has been subject to some attack. This is not confined to the critical comments in the media about judges' perceived leniency to criminals, or even the fact that the previous Lord Chancellor had to reign in a Home Secretary who had made unjustified and intemperate remarks about a decision of a judge in the Administrative Court. Executive decisions can make it difficult for judges to apply the law. In *R (on the application of Corner House Research and others) (Respondents) v. Director of the Serious Fraud Office*<sup>9</sup> the House of Lords were faced with a challenge to a decision by the Director of the Serious Fraud Office to discontinue an investigation into an allegation of serious fraud. He did so at the request of the Attorney General who in turn acted on a request from the then Prime Minister. The Prime Minister said he was passing on the views of the Saudi government who were concerned about the implications of the investigation. The views of the Saudi government amounted to a threat to withdraw co-operation on intelligence about terrorism.<sup>10</sup> The House upheld the legality of the Director's decision:

The Director was confronted by an ugly and obviously unwelcome threat. He had to decide what, if anything, he should do. He did not surrender his discretionary power of decision to any third party, although he did consult the most expert source available to him in the person of the Ambassador and he did, as he was entitled if not bound to do, consult the Attorney General who, however, properly left the decision to him. The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 73, per Lord Hoffmann).<sup>11</sup>

It was obviously impossible for the Director of the Serious Fraud Office to insist on investigating for himself the validity of the claimed threat. Matters of national security are customarily regarded by the courts as for the executive not the judiciary to assess. The attitude of our executive – and consequently the information given to the Director which he realistically had to accept and on which he had to act – suggests an uncomfortable willingness to succumb to pressure from unpleasant governments in states that are diplomatically regarded as friendly. Such an impression will damage the image of the UK as a country where the rule of law is supreme. The echoes of

8 [2005] UKHL 71 at paragraph [59].

9 [2008] UKHL 60.

10 *Ibid.* at paragraphs [17], [24] and [36].

11 *Ibid.* at paragraph [41].

that decision were quick to have an effect. Shortly afterwards, the then government in Pakistan sought to prevent a terrorism prosecution in this country. They failed. But the fact that a foreign government thought it even possible suggests that our rule of law is regarded as assailable. Then the US Justice Department co-operated with the English Office of Fair Trading to enable a prosecution in England of defendants for a cartel offence. The co-operation worked well until it came to sentence. The defendants' activities amounted to offences both in the US and in England. The US authorities entered into a plea agreement with them that if they pleaded guilty in the US court they would be free to return to the UK to face prosecution here. Provided they received a sentence of a certain length from the English court, they would not be required to return to the US to serve a further term. The Court of Appeal was unhappy about this, as it felt it could not be sure it was applying the law so as to achieve the appropriate sentence in the face of the *fait accompli*.<sup>12</sup>

More recently, the High Court decided that it ought to order the disclosure of material in the hands of the UK government to lawyers for Binyam Mohamed who was at that time detained in Guantanamo Bay.<sup>13</sup> That decision was in the end precluded by a claim based on national security. One of the issues in the case arose from an allegation that the Applicant was tortured while unlawfully imprisoned overseas. The court would have ordered disclosure had the proceedings against Binyam Mohamed taken place in England. The alternative would have been an order staying such proceedings. The High Court had no power to order a stay of the US proceedings. The Secretary of State refused to disclose the material on the grounds of national security, namely the risk of withdrawal of co-operation by the US authorities. So, an echo of the SFO case. The Court did not feel able to challenge the security assessment. Fortunately, Binyam Mohamed was released and is now at liberty so the question of whether he can properly present his defence in the US has passed. However, the challenge to the rule of law remains a real one. Had the US authorities persisted in the prosecution, Binyam Mohamed would have been prosecuted for an offence overseas, possibly facing the death penalty, when the English courts had found there was material in the possession of the UK security services that was potentially exonerating, but which the UK government refused to make available. A similar situation could be repeated, especially in a case where a foreign state seeks extradition of someone from the UK, or even from another state, in circumstances where the defendant claims that sensitive material is in the hands of the security services that would support his defence or would provide a basis for challenging extradition on the grounds that he would be subjected to torture. The Attorney General has directed that there be an investigation into Binyam Mohamed's allegation of torture. In doing so, she was fulfilling the UK's obligations in international law – an important feature of the rule of law in my view – to investigate allegations of torture. That obligation does not necessarily translate, so the court found, into a private law right for the victim to have access to that material.

So, given that judges are independent to apply the law, what else is included in the rule of law?

<sup>12</sup> *R v. Whittle and Others* [2008] EWCA Crim 2560; and see the article by the prosecuting team led by Mark Lucraft, QC in *Archbold News*, Issue 1, Feb 09 p.7 for a more sanguine view of the proceedings.

<sup>13</sup> *R (on the Application of Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin).

## THE RULE OF LAW IN DOMESTIC PROCEEDINGS

Impunity from the law is inconsistent with the rule of law. Yet the executive has its own impunity in the form of the prerogative. This justifies executive action on matters of state, from signing (or not signing) treaties to invading foreign countries by armed force. Magna Carta in 1215 and 1297 put some limited restraint on the king's powers to do as he wanted. It stripped the monarch of whatever powers he might have exercised of peremptory imprisonment and of seizure of property. The revolution in the 1640s was (at least substantially) motivated by opposition to the way Charles I exercised what he regarded as his extensive prerogative. After one king was executed and another exiled we had the Bill of Rights in 1688 which is a very basic kind of constitution. The prerogative was not abolished; in fact the effect has been to transfer the prerogative from the monarch to the executive based in Parliament.

A particularly cynical approach was identified by Shakespeare in Henry VI, Part 1 when Suffolk said:

I have been a truant in the law  
And never yet could frame my will to it;  
And therefore frame the law unto my will  
[2,vi, 7-9]

Even by 1783 the extent of the sovereign's prerogative powers was in dispute. So was the existence of any remedy for abuse of power by the sovereign. Blackstone<sup>14</sup> stated that the Royal prerogative precluded the monarch from being held to account in any court. That did not mean he was above the law; merely that the law had not yet provided a sufficient remedy to deal with oppressive government. In 1947 the Crown Proceedings Act made it possible to bring civil action against the government, but the prerogative remains an effective bar to judicial scrutiny. In the case of criminal law, the immunity of states from criminal sanction in any foreign court is long-standing and pragmatic. The *UN Convention on State Immunity*<sup>15</sup> from civil proceedings has been strongly criticised.<sup>16</sup> It will have the effect of preventing any proceedings against one state in another forum state. However, state immunity has been authoritatively defended by Lady Fox.<sup>17</sup> At risk of misrepresenting her argument, state immunity leaves intact the liability of individuals to any civil or criminal proceedings, according to the provisions of domestic law, unless protected by diplomatic immunity. That immunity has of course been restricted in UK law by the House of Lords in *Pinochet*,<sup>18</sup> and the Court of Appeal in *Jones v. Ministry of Interior*.<sup>19</sup> Lady Fox also made the point that the genuine efforts made by post-conflict or fragile states to come to grips with the rule of law, e.g. by a process of reconciliation, might be impeded by actions brought in another jurisdiction against the state. My example would be South Africa. Could the courts of any other

14 *Commentaries on the Laws of England*, 1765, revised 1783 pp. 237-273.

15 A/Res/59/38, December 16, 2004

16 See Andrew Dickinson and Lorna McGregor in ICLQ vol. 55 at pp. 411-435 and 437-445 respectively.

17 See ICLQ vol. 55 at pp.399-406 and [2006] E.H.R.L.L. at pp.142-157.

18 *R. v. Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)* [2000] A.C.147.

19 [2004] EWCA Civ 1394.

jurisdiction claim to surpass the South African Constitutional Court? I wonder if a court in another state would have adopted the principle of progressive implementation as that court has done.<sup>20</sup>

Referring back to the 17<sup>th</sup> century constitutional disputes, Aharon Barak, then President of Israel Supreme Court, said in *Barzilai v. Gov't of Israel*<sup>21</sup>:

It is said that there was a dispute between King James I and Justice Coke. The question was whether the king could take matters in the province of the judiciary into his own hands and decide them himself. At first, Justice Coke tried to persuade the king that judging required expertise he did not have. The king was not convinced. Then Justice Coke rose and said: 'Quod rex non debet sub homine, sed sub deo et lege.' The king is not subject to man, but subject to god and the law.

The prerogative is now exercised by the Prime Minister in Cabinet. With what degree of accountability? The Butler report, published on 14 July 2004, dealt with certain aspects of the decision to go to war in Iraq in 2003. It expressed concern about the informality of policy-making and the limited opportunity for collective cabinet discussion. Lord Butler pointed out that serious decisions – the use in short of the prerogative of taking the nation to war – were taken by a small group of ministers around the Prime Minister whose information was either incomplete or misleading.<sup>22</sup> That decisions of such magnitude can be made in that way and apparently without the makers being held to account does not seem consonant with the rule of law. How many people are aware that, unless Parliament passes a vote of no confidence in the government, the Prime Minister has now effectively concentrated in his own hands those powers?

Detention without charge should not be an issue in the UK. Magna Carta and the Bill of Rights surely established that principle as part of our rights described as *habeas corpus*. If anything exemplifies the rule of law in England it is surely *habeas corpus*. But that is to underestimate the executives' power to influence the legislature and persuade it to pass bad laws. Which brings us back to the central question. Are bad laws compatible with the rule of law? The government thought so when Parliament enacted Part IV of the Anti-Terrorism Crime and Security Act 2001, enabling the Home Secretary to order the detention without trial (subject to unsatisfactory judicial scrutiny that was a gesture to the rule of law but in reality a perversion of it) of foreign nationals suspected of involvement in acts of or preparatory to terrorism. A similar process was occurring in the USA, though in an even more unacceptable form – the detention facility at Guantanamo Bay and the military tribunals. There was judicial challenge in the USA. The first was *Rasul v. Bush*<sup>23</sup> – the case about access to federal courts for the Guantanamo detainees. In giving judgment in favour of the Applicants for a right to apply to a court to determine whether they were being lawfully detained, Justice Stevens (with whom 5 Justices concurred and 3 dissented) said:

20 E.g. in the HIV retro-viral case *Minister of Health and Others v Treatment Action Campaign and Others* CCT8/02, 5th July 2002 at [122].

21 40(3) P.D. 505, 623.

22 HC 898, at paragraphs 468 and 606 - 611.

23 542 U. S. 466 (2004), 28 June 2004 at p.6.

As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U. S. custody:

‘Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.’ *Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206, 218–219 (1953) (dissenting opinion).

Part IV of the Anti-Terrorism Crime and Security Act 2001 was also subjected to domestic judicial scrutiny in this country. The House of Lords in *A v. Home Secretary*<sup>24</sup> found it wanting. Their Lordships decided that indefinite detention without trial of foreign nationals on suspicion of terrorism was unlawful. The prerogative was not expressly mentioned, but it indicates that at least in some areas, courts will inquire into areas of policy which the executive regards as its own. In the course of her speech, Baroness Hale said at [237]:

Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities. As Thomas Jefferson said in his inaugural address:

‘Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable . . . The minority possess their equal rights, which equal law must protect, and to violate would be oppression’

Lord Hoffmann said at [97]:

I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

That last sentence shows how weak is our constitution – if Parliament can be pressed into acquiescence, the executive retains its prerogative powers intact despite the court’s ruling. Executive detention without trial has unfortunate echoes of apartheid South Africa’s Internal Security Act and Suppression of Communism Act.

In states with constitutions, the extent of the powers of the executive is identified. Even when the most senior office holder is given a power which is to be exercised as a matter of discretion, this is subject to constitutional review. It was at one stage decided that the power of clemency – traditionally part of the prerogative – was not subject to any judicial challenge.<sup>25</sup> That principle has been overruled, at least so far as it affects capital punishment in those Commonwealth countries

24 [2004] UKHL 56.

25 See *de Freitas v. Benny* [1976] A.C. 239 and *Reckley v. Minister of Public Safety and Immigration* (No. 2) [1996] A.C. 527.

that retain it, in *Neville Lewis and Others v. Attorney General of Jamaica*.<sup>26</sup> The decision is confined to the prerogative of mercy in death penalty cases; but it is an indication that the prerogative is not entirely beyond the reach of the rule of law.

The Constitutional Reform Act 2005 starts with this disappointing provision in section 1, entitled ‘The Rule of Law’:

This Act does not adversely affect—  
(a) the existing constitutional principle of the rule of law

Which does not answer the question – what exactly is that existing constitutional principle? This Act deals at length with the Office of Lord Chancellor and with judicial appointments to the higher courts including the new Supreme Court. It does provide for judicial independence by section 3:

3 Guarantee of continued judicial independence

- (1) The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.
- (4) The following particular duties are imposed for the purpose of upholding that independence.
- (5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
- (6) The Lord Chancellor must have regard to—
  - (a) the need to defend that independence;

Otherwise the Act does nothing to identify what is meant by ‘the rule of law’. Compared with the grand utterances of the 17<sup>th</sup> and 18<sup>th</sup> centuries it is pretty weak; so much so that the Act does not make it into the volume of Halsbury’s Statutes entitled ‘Constitutional Law’.

## THE USE OF INTERNATIONAL LAW IN DOMESTIC PROCEEDINGS

The expression ‘the rule of law’ should be given a broad meaning. It means applying the law in a way that is consistent with international standards by giving effect to rights that are regarded as fundamental. It often requires a balance to be effected between the rights of different individuals and sometimes between different types of right. For example, the right to be free from arbitrary arrest against the right not to be the victim of terrorism, namely the rights to life, security of person and property, freedom of movement, freedom of religion, freedom of expression and freedom of education. The best description of the obligation on the state to have proper regard to the rights of those under its power was set out by Aharan Barak when President of the Supreme Court of Israel. The Court prohibited the use of physical force as an interrogation technique by the security service on an arrested terrorist bomber. There was no doubt about the detainee’s guilt. The Court acknowledged the reality of the terrorist threat faced by Israel:

26 [2001] 2 A.C. 50.



We are aware that this decision does not make it easier to deal with that reality. This is the destiny of democracy – it does not see all means as acceptable, and the ways of its enemies are not before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.<sup>27</sup>

This statement of principle has been adopted by the House of Lords in *A (FC) v. Sec of State*.<sup>28</sup>

That brings us to international law and its role in municipal law. In his Foreword to *Using International Law in Domestic Courts* by Shaheed Fatima<sup>29</sup>, Lord Bingham said:

To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance.

In this country, that is partly the result of the Human Rights Act 1998. That Act incorporated into English law some of the rights in the European Convention on Human Rights. It requires courts to give effect to those rights and provides some remedies for violations. According to Paul Sieghart in *The International Law of Human Rights*<sup>30</sup>:

the Rule of Law is a fundamental principle of human rights law

He might now add that the converse is also true, that human rights are a fundamental part of the rule of law. Courts now increasingly look to international standards and conventions to which the United Kingdom is party to determine rights and responsibilities. Examples are: *Pinochet*<sup>31</sup>; *A v. Home Sec* (detention without trial)<sup>32</sup>; *A v. Sec of State* (the use of torture)<sup>33</sup>; *Sec of State v. MB* (access to evidence)<sup>34</sup>. Another example is the use of lethal force. The law allows use of lethal force in extreme circumstances. Law enforcement officers are placed in a dilemma when they believe a person is armed and prepared to kill to achieve some unlawful end, or to resist arrest. If an armed officer reasonably believes a person is about to detonate a bomb with fatal effects, he is entitled to use lethal force to prevent it; but only if nothing short of lethal force will be effective. By contrast with a citizen acting in lawful self-defence who is excused from criminal liability if his belief is mistaken, provided it is genuine, the state can only kill when it is 'absolutely necessary'.<sup>35</sup> In this

27 Chief Justice Barak giving judgment in *Public Committee Against Torture in Israel v. The State of Israel*, HCJ 5100/94 at [39]. This dictum was endorsed by Lord Woolf when introducing Aharon Barak who gave a lecture at the John Foster Memorial Trust, University College, London on 1 November 2005.

28 [2005] UKHL 71 at [150]

29 Hart, 2005.

30 OUP, 1983 at paragraph #1.11 – some years before there was any prospect of the Human Rights Act

31 *R. v. Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte* (No. 3) [2000] A.C.147.

32 Fn 16 above.

33 [2005] UKHL 71.

34 [2007] UKHL 46.

35 Art 2(2) ECHR.

distinction between individual and state responsibility, English law is compatible with Art. 2 of the ECHR: In *R (Bennett) v. HM Coroner for Inner South London*<sup>36</sup> Collins J reviewed the ECtHR jurisprudence and said:

It is thus clear that the European Court of Human Rights has considered what English law requires for self-defence, and has not suggested that there is any incompatibility with Article 2. In truth, if any officer reasonably decides that he must use lethal force, it will inevitably be because it is absolutely necessary to do so. To kill when it is not absolutely necessary to do so is surely to act unreasonably. Thus, the reasonableness test does not in truth differ from the Article 2 test as applied in *McCann*.<sup>37</sup> There is no support for the submission that the court has with hindsight to decide whether there was in fact absolute necessity. That would be to ignore reality and to produce what the court in *McCann* indicated was an inappropriate fetter upon the actions of the police which would be detrimental not only to their own lives but to the lives of others.<sup>38</sup>

Collins J also referred to guidance issued by the Association of Chief Police Officers:

In the light of the court's approach in *McCann*, it is instructive to consider the guidance issued to the police by the Association of Chief Police Officers. This was amended to reflect the requirements of Article 2 and obliges officers only to use firearms if such use is absolutely necessary, and that is what the trained officer will have to bear in mind at all times when engaged in activities which might lead to the necessity to use a firearm.<sup>39</sup>

How does that fit in with the killing of Jean Charles de Menezes in the immediate aftermath of the terrorist attacks on the London transport system in July 2005? The inquest jury that considered the legality of his death was deprived of the opportunity of considering a violation of Art. 2 because the coroner ruled that Art. 2 was not the relevant test. As a result, a compendium of errors in intelligence and communication potentially amounting in total to such a violation was not considered as part of the jury's verdict. We might bear in mind the comments made by the ECtHR in *Nochova v. Bulgaria*<sup>40</sup>:

1. The Court notes as a matter of grave concern that the relevant regulations on the use of firearms by the military police effectively permitted lethal force to be used when arresting a member of the armed forces for even the most minor offence. Not only were the regulations not published, they contained no clear safeguards to prevent the arbitrary deprivation of life. Under the regulations it was lawful to shoot any fugitive who did not surrender immediately in response to an oral warning and the firing of a warning shot in the air (see paragraph 60 above). The laxity of the regulations on the use of firearms and the manner in which they tolerated the use of lethal force were clearly exposed by the events that led to the fatal shooting of Mr Angelov and Mr Petkov and by the investigating authorities' response to those events. The Court will revert to these matters later.

36 [2006] EWHC 196 (Admin).

37 [1996] 21 EHRR 97.

38 At paragraph [25].

39 At paragraph [24].

40 Applications nos. 43577/98 & 43579/98, judgment 6 July 2005.

2. Such a legal framework is fundamentally deficient and falls well short of the level of protection 'by law' of the right to life that is required by the Convention in present-day democratic societies in Europe.

We can also compare the case of *Bubbins v. UK*<sup>41</sup> in which a police officer shot a man carrying a very realistic imitation firearm after a siege lasting over an hour, during which there had been some attempts at negotiation with him. He had been repeatedly warned to put down the gun as there were armed police officers present. The police believed he was an intruder. He was killed by a single shot by a police marksman who saw the man deliberately aiming the firearm at him through a window. The ECtHR decided that there had been no violation of Art. 2. In reaching that conclusion, they made the following comments about the status of Art. 2:

134. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

136. In determining whether the force used is compatible with Article 2, it may therefore be relevant whether a law enforcement operation has been planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life (*McCann and Others*, cited above, p. 57, § 194, and *Ergi v. Turkey*, judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1776-77, § 79).

But the notion that English law applies the rule of law in the sense of adopting international standards is not the real story. The Human Rights Act has preserved Parliamentary sovereignty by sections 3(2) and 4. If Parliament legislates so as deliberately to violate international law the courts are finally powerless to stop it. In any event, the courts will not introduce international law in all circumstances. In *Jones*<sup>42</sup> the House of Lords refused to allow protesters who sabotaged US bombers about to fly to Iraq to rely upon a defence that they were attempting to prevent an international crime. Their case was that international law should be available as a defence to a charge of damaging property as part of a protest in 2003 against the then imminent invasion of Iraq. The trial judge, the Court of Appeal and finally the House of Lords were invited to rule *ex post facto* on the legality of the invasion of Iraq as a matter of international law. All declined to do so. Defence counsel argued that domestic law should be interpreted so as to recognise the international crime of aggression and consequently to provide a defence in domestic law to actions taken to prevent such an offence. The argument highlighted a paradox in that position. Lord Bingham raised the question whether a prosecution could be brought for such an offence even if it was not recognised in English domestic law. His reasoning is characteristically powerful and elegant. However, I think it gives insufficient weight to the fact that the crime of aggression

41 (*Application no. 50196/99*), 17.3.05.

42 [2006] UKHL 16, 29 March 2006.

was recognised as an international crime in the Nuremberg Tribunal. Consequently, the fact that it has not yet been defined for the purposes of the Rome Statute on the International Criminal Court is immaterial. The paradox identified by Lord Bingham is this: how can there be a defence of acting to prevent a crime of aggression when it has never been recognised in English law, and when to introduce such a crime would violate the rule against retrospectivity in Art. 7 of the ECHR? That paradox is more apparent than real. Art. 7(2) provides:

(2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.

The prohibition of aggression, one of the principal concerns of the UN Charter<sup>43</sup>, is at least arguably such a general principle of law. There is therefore no prohibition on invoking it.

Certain aspects of international law do feature in our domestic law by virtue of specific domestic legislation. The United Nations Act 1946 provides that measures adopted by the UN Security Council under Art. 41 (part of Ch VII which by Art. 39 empowers the Security Council to take measures 'to maintain or restore international peace and security' in response to 'any threat to the peace, breach of the peace, or act of aggression') can be incorporated into English law by Order in Council. Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

There are several examples of UN resolutions being implemented in UK Law, such as The Serbia and Montenegro (United Nations Sanctions) (Isle of Man) Order 1993/1993 No. 1254 incorporated Resolution 820 imposing sanctions on FRY or The Terrorism (United Nations Measures) (Channel Islands) Order 2001 which imposes in the Channel Islands measures against terrorism pursuant to a decision of the Security Council of the United Nations in its Resolution 1373 of 28 September 2001. It prohibits fundraising for, and restricts the making available of funds to or the provision of financial services to terrorists. It also provides powers to freeze accounts of suspected terrorists.

In addition, the UK has made the Rome Statute of the International Criminal Court part of domestic law by the International Criminal Court Act 2001. Anyone (including a member of the government) who was at the relevant time a citizen of or resident in England and Wales can be prosecuted here for a war crime or crime against humanity committed anywhere in the world.

43 Article 1(1) sets out the objects of the UN – 'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'

What if international law appears to restrict rather than enhance domestic human rights values? How do our domestic courts apply the law? In *R (Al-Jedda) v. Secretary of State*<sup>44</sup>, the Applicant, who held dual Iraqi and British citizenship, was detained indefinitely in Iraq for being suspected of various terrorist activities. The High Court effectively held that a Security Council Resolution could displace rights under the ECHR. Mr Justice Moses concluded that UN Security Council Resolution 1546 permitted internment in Iraq where it was 'necessary for imperative reasons of security.... in accordance with Article 78 of the Geneva IV but inconsistent with Article 5 of the ECHR'.<sup>45</sup> Such decision means that the UN, a body created to reflect universal values and safeguard fundamental and inalienable rights ('to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' - Preamble to the UN Charter; and 'the United Nations shall promote: ... c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion' - Art. 55) was found to be in conflict with other human rights treaties but to take precedence over them.

That decision was appealed to the House of Lords who decided<sup>46</sup> that Resolution 1546 clearly permitted the multinational force to 'contribute to the maintenance of security and stability in Iraq', including internment as one of the security measures, without any instructions as to the manner in which such measures were to be enforced. At no point was the validity of this resolution put into question or considered and it was made clear that Security Council Resolutions must prevail over the ECHR. A troubling aspect of this decision is that the primary purpose of the UN in this situation is changed from a humanitarian into a military one. By UNSC fiat, interests of security deprive the victims of coalition troops of the rights that the presence of those troops was supposed to secure.

However, by this reasoning the House of Lords have held that where there is a conflict between (a) a UNSC Resolution and (b) human rights obligations under the ECHR and/or domestic law, the UNSC measure prevails so as to justify the breach and render it lawful. The result seems to indicate that those human rights rights are neither inalienable nor fundamental. This is at odds with the doctrine of the UN's declared "responsibility to protect"<sup>47</sup>. How the rule of law survives conflicts within international law I shall consider later. In particular I shall discuss whether a UNSC Resolution is automatically binding in the way the House of Lords decided, or whether Resolutions need to be interpreted, applied and, if necessary, declared inoperative as themselves in violation of the UN Charter or by some other mechanism of international law.

## THE RULE OF LAW AND TERRORISM

Terrorism is anathema to the rule of law. However, when we look at how terrorism is defined, it raises issues about how that definition chimes with the limited right to use violence in defence of

44 [2005] EWHC 1809 (Admin).

45 At paragraph [ 92].

46 *R v. Al-Jedda* [2008] 1 AC 332.

47 GA Res 60/I, UN GAOR, 60<sup>th</sup> session, (16 September 2005) 30.

international rights. The definition of terrorism for the purposes of English law is contained in s.1 of the Terrorism Act 2000.<sup>48</sup> It reads:

S.1 Terrorism Act 2000

- (1) In this Act 'terrorism' means the use or threat of action where -
  - (a) the action falls within subsection (2)
  - (b) the use or threat is designed to influence the government or an international government organization or to intimidate the public or a section of the public, and
  - (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
- (2) Action falls within this subsection if it -
  - (a) involves serious violence against a person,
  - (b) involves serious damage to property,
  - (c) endangers a person's life, other than that of the person committing the action,
  - (d) creates a serious risk to the health or safety of the public or a section of the public, or
  - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section -
  - (a) 'action' includes action outside the United Kingdom,
  - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
  - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
  - (d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

There is nothing in this definition to exempt from the term 'terrorism' actions using armed force to give effect to a UNSC Resolution; nor actions in furtherance of the right to protect a state from armed aggression in accordance with Art. 51 of the UN Charter; nor actions taken to protect groups from acts of genocide committed by their own government. The allied invasion of Iraq in 2003 was, by this definition, a terrorist act.

How did the UN address the problem of terrorism? The UN has been unable so far to produce an agreed definition of what amounts to terrorism. On 17 February 1995 the UN General Assembly adopted by Resolution A/RES/49/60 its *Declaration on Measures to Eliminate International Terrorism*. It expressed the conviction that suppressing acts of international terrorism (including those in which states are involved) is necessary for peace and security, and the further conviction that those involved should be brought to justice. The Resolution declared:

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States; .....

48 As amended by various subsequent statutes.

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

On 9 December 1999, the UN General Assembly adopted the *International Covenant for the Suppression of the Financing of Terrorism*. In the preamble, it noted the aim of ‘ensuring that there is a comprehensive legal framework covering all aspects of [terrorism in all its forms and manifestations]’. Art. 2 defined the offences of terrorism and funding terrorist organizations:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, **unlawfully and wilfully** provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>49</sup>

The Annex referred to in Art. 2(a) lists a series of Conventions generally concerned with hijacking, internationally protected persons, and terrorist bombings. Art. 2(b) is significant because it reflects the Hague Convention of 1907 and the Geneva Conventions of 1949 and the Protocols of 1977 in distinguishing between those acts which international law recognizes as justified under the law of war, and those which are prohibited.

Immediately following the attacks of 11 September 2001, Security Council Resolution 1373 decided that it was necessary for states to criminalise under their domestic laws the funding and support of terrorism and to increase mutual co-operation between states. It included a declaration at Art. 5:

that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.

This was reaffirmed by Security Council Resolution 1377 in November 2001, which stressed the urgent need to implement Resolution 1373 to deny financial support to terrorists. The language was even stronger: -

The Security Council .....

49 Emphasis added by author.

Reaffirms its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, **wherever and by whomever committed**.<sup>50</sup>

If any confirmation were required, this Resolution makes clear that governments engaging in terrorism are as much to be condemned as are individuals and groups. The involvement of the Security Council under Chapter VII of the Charter indicates that terrorism poses a real threat to international peace. Given the events of September 2001 that assessment is understandable. On 20 January 2003, the Security Council passed Resolution 1456. By then the effects of the 'war on terrorism' (a term now abandoned by both the UK and US governments) was beginning to take its toll. Thousands of people had been taken into custody around the world on the grounds – or sometimes the pretext – of their involvement in terrorism. Many have been tortured or kept in conditions which are in breach of the Geneva Conventions and Art. 5 of the Universal Declaration of Human Rights and Art. 7 of the International Covenant on Civil and Political Rights. Some have disappeared. Humanitarian and human rights law have been belittled.<sup>51</sup> The rule of law seemed cynically cast aside. In this Resolution, the Security Council reaffirmed that:

any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever and by whomever committed and are to be unequivocally condemned, especially when they indiscriminately target or injure civilians.

The Resolution went on [in Art. 1] to call for urgent action to be taken to suppress 'all active and passive support for terrorism'. Significantly, Art. 6 of the Resolution says:

6. States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular under international human rights, refugee and humanitarian law.

The Report for the International Commission of Jurists by the Panel of Distinguished Experts published on 17 February 2009 *Assessing Damage, Urging Action*<sup>52</sup> cites Art. 6 at the outset of the report as providing what should have been a guiding principle in international and national actions to combat terrorism. Detention without trial, rendition (i.e. unlawful kidnapping) and torture have featured as part of the response by certain states engaged in the war on terrorism. They have been counter-productive, the Panel concluded. The fact that the UK government thought it appropriate to instruct counsel to intervene in the ECtHR in *Saadi v. Italy*<sup>53</sup> in order to argue that the prohibition on torture was not absolute and could in certain circumstances be counter-balanced by the needs of security is unacceptable in a state that claims to value the rule of law. This was particularly so after the House of Lords had expressed concern at the proposition

50 Emphasis added by author.

51 For a fascinating account of the role of some lawyers in the US administration who created this result see Professor Phillippe Sands' *Torture Team*, Allen Lane, 2008.

52 Published by International Commission of Jurists (www.icj.org), Geneva, ISBN: 978-92-9037-138-2.

53 (Application no. 37201/06), Grand Chamber 28 February 2008. The Court rejected that argument. This is consistent with other authorities outside the Council of Europe, e.g. the Supreme Court of Appeal of South Africa in *Mthembu v. The State* (64/2007) [2008] ZASCA 51 (10 April 2008).



that evidence obtained by torture overseas could play any part in English proceedings.<sup>54</sup> In that case, Lord Bingham had described himself as ‘startled, even a little dismayed’ that counsel for the Secretary of State could argue that evidence obtained by torture was admissible.<sup>55</sup>

There are of course many examples of states achieving independence by what would now be called acts of terrorism. A striking example is the US Declaration of Independence in 1776 by what were then a group of revolutionary colonists. Congress declared:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just Powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

If we substitute for ‘the pursuit of happiness’ something like ‘the right to live free from violence, fraud and undue restriction’ we have a model for human rights. This could no doubt be construed consistently with the UNSC Resolutions condemning terrorism in that it argues for a concept of legality in the violent overthrow of oppressive regimes. It would not fit with section 1 of the Terrorism Act 2000 which seems to ignore how our own major constitutional developments were achieved by acts of terrorism (Magna Carta, the trial of Charles I, the Bill of Rights) and how many democratic states attained democratic status as a result of violent revolution. In the legitimate concern to combat terrorism, there is the risk that the fundamental role of the UN to secure peace by promoting the protection of human rights from state abuse has been and will be overshadowed.

## THE RULE OF LAW AND CONFLICTS OF INTERNATIONAL LAW

If the UN Security Council passes a measure that is inconsistent with the UN Charter, can anything be done about it? Are states obliged to give precedence to such a Resolution even though it is in conflict with their obligations under other international treaties such as the ECHR or the Rome Statute for the International Criminal Court? The suggestion that UNSC Resolutions can be subject to judicial review is usually met with scepticism. However, I think there is a legitimate argument for saying that certain judicial bodies are entitled to consider the legitimacy of Security Council Resolutions, and may even be required to do so.

The conventional argument is that Art. 103 of the UN Charter requires precedence to be given to Security Council Resolutions. Art. 103 reads:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

54 *A v. Home Sec* [2005] UKHL 71.

55 At paragraph [51].

One of the terms that so prevails is Art. 23:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

The courts that have been invited to consider the issue have generally held that decisions of the Security Council take precedence over other international obligations contained in regional human rights treaties. An example is *R v. Al-Jedda*.<sup>56</sup> In that case Lord Bingham said:

39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.

Lord Rodger, agreeing, said:

115. As Lord Bingham has shown, both state practice and the weight of academic authority support the view that articles 25 and 103 apply where the Security Council, acting under Chapter VII, adopts a resolution, such as Resolution 1546, which 'authorises' rather than requires member states to take military action to meet a threat to international peace. Counsel for the appellant nevertheless submitted that the European Court might well not follow that approach and might, instead, insist on enforcing the obligations of the Contracting States under the Convention. In particular, the court might hold that, in a case such as the present, 'the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order"' in the field of human rights: *Behrami*, at para 145, quoting the decision in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (2005) 42 EHRR 1, 45, para 156.

116. I would reject that submission. As the entire judgment of the Grand Chamber in *Behrami* shows, the court is very concerned, in the context of the operations of forces under a United Nations mandate, to ensure that its position fits into the whole scheme of international law and, in particular, that it does not undermine the work of the Security Council in maintaining international peace and security. At para 122, the court:

'recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine state responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty....'

<sup>56</sup> [2008] 1 AC 332.

It is hard to imagine that, having made that declaration, the court would readily fail to give effect to articles 25 and 103 of the Charter.

117. In fact, there is no need to speculate on the point, since in para 147 of its judgment, in setting out its reasons, the court recalled:

‘as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The court has therefore had regard to two complementary provisions of the Charter, articles 25 and 103, as interpreted by the International Court of Justice...’

The court referred back to para 27 of its judgment where it had cited the judgment of the International Court of Justice in *Nicaragua v. United States of America* [1984] ICJ Rep 392, para 107, to the effect that article 103 means that the Charter obligations of member states prevail over conflicting obligations from another international treaty, regardless of whether the latter treaty was concluded before or after the Charter or was only a regional arrangement. The court had also recalled that the International Court had found that article 25 means that United Nations member states’ obligations under a Security Council Resolution prevail over obligations arising under any other international agreement: *Libyan Arab Jamahiriya v United States of America and Libyan Arab Jamahiriya v United Kingdom* [1992] ICJ Rep 1, p 16, at para 42, and p 113, at para 39 respectively. These judgments deal, of course, with the effect of member states’ ‘obligations’ under the Charter and under a Security Council resolution. Nevertheless, the Grand Chamber would not have referred to those decisions in para 147 of its judgment, if it had not considered that they explained the effect of articles 25 and 103 on the position of a member state whose forces were acting in terms of the authorisation given to KFOR by Resolution 1422. The same would apply to the British forces acting as part of the MNF in terms of Resolution 1546.

118. Had it been necessary to decide the point, I would accordingly have held that, by virtue of articles 25 and 103 of the Charter, the obligation of the United Kingdom forces in the MNF to detain the appellant under Resolution 1546 prevailed over the obligations of the United Kingdom under article 5(1) of the Convention.

Subsequently the Court of Appeal has followed that line of argument in *R (on the application of Al-Saadoon) v. The Secretary of State for Defence*.<sup>57</sup> The Appellants in this case claimed that if they were transferred to Iraq to be tried for war crimes, they would be convicted and suffer death by hanging, in breach of the rights they enjoyed under the ECHR or alternatively free-standing principles of public international law. Although predominantly concerned with the extraterritorial application of the ECHR, the Court of Appeal endorsed the *Al-Jedda* view on the effect of conflicting principles as between the ECHR and UNSC Resolutions:

51 I would accordingly answer the conflict question in the affirmative. The court was obliged to have regard to the United Kingdom’s obligation, arising under international law, to transfer the appellants to the custody of the IHT in deciding whether to grant relief for the purpose of upholding Convention rights.

57 [2009] EWCA Civ 9, see paragraph [41].

The contrary argument involves two alternative propositions. The first is that Art. 23 requires compliance with a Security Council Resolution made ‘in accordance with the present Charter’. What if it is not made in compliance with the Charter, but *ultra vires* the Security Council’s powers, e.g. in violation of one of the fundamental purposes of the UN? The second argument is that Art 103 applies to treaties. It does not affect states’ obligations to uphold and enforce those principles of international law that have achieved the status of *ius cogens erga omnes*. Example of such an obligation are the prohibition on genocide and on torture. Consequently, there is an argument for saying that the Security Council cannot be the judge of its own competence. If not, then who can be? By Art. 92 of the Charter:

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

There is nothing in the Statute to preclude the Court from adjudicating on actions of the Security Council. Indeed, its function as an interpreter of the Charter makes it the obvious forum for any dispute about whether the Security Council has acted *ultra vires*.

There has recently been a decision of the European Court of Justice that has claimed limited jurisdiction to prefer its own regional law to a UNSC Resolution. In *Kadi and Al Barakaat International Foundation*<sup>58</sup> the ECJ emphasised that the protection of constitutional guarantees within the Community as an autonomous entity could not be superseded by international agreements, including a UNSC Resolution. The Court stated that

the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights<sup>59</sup>

This was a case concerning the legitimacy of the sanctions regime introduced by the UNSC and the question whether the European Community could enforce it as part of EC law. As the measure did not predominantly concern international trade, the ECJ held that it was not applicable as part of EC law. In doing so, the Court distinguished between its jurisdiction to review the measure adopted by the Security Council – which, as a general proposition, it did not accept it was its function to undertake – and its jurisdiction to determine the legitimacy of any EC measure purporting to apply it to the EC. On the latter, they decided they did have jurisdiction to determine the legitimacy of the Community measure in the light of the Court’s obligation to uphold fundamental principles of human rights under the EC treaty. The following extracts from the judgment show that, albeit in a limited way, courts can address the legitimacy of measures taken to implement UNSC Resolutions. The measures adopted by the UNSC do not have the inherent impunity from challenge claimed by the UK government in that case. Although the argument turned out to be narrow and technical, the process involved a fundamental evaluation of the nature of the international rule of law.

58 Grand Chamber, 3 September 2008 C-402/05 and C-415/05.

59 Paras 248-285.

276 In the alternative, the United Kingdom maintains that the special status of resolutions adopted under Chapter VII of the Charter of the United Nations, as a result of the interaction of Articles 25, 48 and 103 of that Charter, recognised by Article 297 EC, implies that action taken by a Member State to perform its obligations with a view to maintaining international peace and security is protected against any action founded on Community law. The primacy of those obligations clearly extends to principles of Community law of a constitutional nature.

277 That Member State maintains that, in *Bosphorus*, the Court did not declare that it had jurisdiction to determine the validity of a regulation intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, but did no more than interpret the regulation concerned for the purpose of determining whether a measure laid down by that regulation had to be applied by the authorities of a Member State in a given case. The French Republic essentially agrees with that interpretation of *Bosphorus*.

#### Findings of the Court

278 Before addressing the substance of the question, the Court finds it necessary to reject the objection of inadmissibility raised by the United Kingdom in respect of the line of argument put forward by Mr Kadi in his reply, to the effect that the lawfulness of any legislation adopted by the Community institutions, including an act intended to give effect to a resolution of the Security Council remains subject, by virtue of Community law, to full review by the Court, regardless of its origin.

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

305 Nor can an immunity from jurisdiction for the contested regulation with regard to the review of its compatibility with fundamental rights, arising from the alleged absolute primacy of the resolutions of the Security Council to which that measure is designed to give effect, find any basis in the place that obligations under the Charter of the United Nations would occupy in the hierarchy of norms within the Community legal order if those obligations were to be classified in that hierarchy.

In the light of its conclusion, the Court did not need to consider whether the Resolution itself could be ignored insofar as it was in conflict with the norms of *ius cogens*.<sup>60</sup> That argument, it seems, remains alive for future determination.

## CONCLUSION

The rule of law is an amorphous concept. It is often invoked but less often understood. In its practical application, we can see complex issues of definition. In some cases there is a hierarchy of rules of law. International law – once of limited relevance in domestic procedure – is now an inherent part of the rule of law. Governments and international governmental organisations, including the UN Security Council itself, are now coming within range of an all-embracing concept of the rule of law based upon fundamental rights as the guarantee of stability and security.

60 Paras 327-329.

The next – and constitutional - questions are: who decides who makes the laws and how? But that is political theory.

Tanyel B. Taysi and Sherizaan Minwalla<sup>1</sup>

## Structural Violence against Women in Kurdistan, Iraq

### Abstract

*The 'Other Iraq' as the Kurdistan Region is often referred to, is promoted as a place of growth and prosperity as construction, business and even tourism are expanding. Yet Kurdish women's status remains low while incidences of violence against women appear to be escalating at an alarming rate. Every day women and girls are beaten, raped, killed for honour, coerced to commit suicide, subjected to female genital mutilation, forced into marriages, trafficked into sex work and restricted in their autonomy and mobility. Violence against women occurs at all levels of society and is institutionalized in legal codes and practices that sanction discrimination and gender-based violence. Due to the relative security in the Kurdistan Region, women have found increasing space in which to tackle some of the most egregious forms of violence and to advocate for legislative and policy change. The Kurdistan Regional Government has responded and although real change has been slow to come, steps taken by the government are necessary to improve protections for women and eliminate institutionalized violence. This article draws attention to how violence is manifested in women's lives in the Kurdistan Region, as well as how women are specifically impacted by harmful laws and practices including the continued use of mediation or reconciliation in the informal justice system. This article is intended to contribute to the ongoing efforts to strengthen the rule of law and to address violence against women by highlighting the particular ways women are impacted by the criminal justice system and the family law system through the Personal Status Courts.*

### INTRODUCTION

The inseparable issues of women's human rights and manifestations of violence against women are considered to be pressing areas of concern by international and local human rights actors present in the Kurdistan Region of Iraq.<sup>2</sup> Indeed, violence against women across Iraq is best framed in terms of a lack of women's autonomy and freedom, or as a violation of basic human rights.<sup>3</sup> Women

1 Tanyel B. Taysi is a lecturer in Politics and International Relations at the University of Kurdistan - Hawler, in Arbil, Kurdistan Region, Iraq. She specializes in Gender and Politics, with a focus on gender-based violence in the Middle East. She is also the KHRP Regional Representative in Kurdistan, Iraq. Sherizaan Minwalla is an attorney specializing in gender-based violence and US immigration law. She is currently the Country Director for Heartland Alliance for Human Needs and Human Rights' Iraq Program and is based in Sulemanya, Kurdistan Region, Iraq.

2 United Nations Assistance Mission for Iraq (UNAMI), 'Human Rights Report, 1 July-31 December 2007'; KHRP FFM Report, *A Fact-Finding Mission in Kurdistan, Iraq: Gaps in the Human Rights Infrastructure*, (KHRP, London, July 2008), p. 37.

3 American Bar Association Iraq Legal Development Project (ABA), 'The Status of Women in Iraq: Update to the Assessment of Iraq's De Jure and De Facto Compliance With International Legal Standards', December 2006, p. 56.

in the Kurdistan Region, as with the rest of Iraq, suffer significant abuse of their human rights, and experience a fundamental lack of equality in all domains of life. This leads to a high level of discrimination and violence. Further, when women suffer discrimination and violence the options available to them are limited, and attempts to escape abuse or gain justice are often unsuccessful.

The establishment of the no-fly zone and 'safe haven' of the Kurdish area in northern Iraq in 1991 allowed for the creation of an autonomous zone where the Kurds could exercise a form of practical sovereignty. Responsible for the three northern governorates of Dohuk, Arbil and Sulaymanya, the Kurdistan Regional Government (KRG) is vested with a high level of formal autonomy, guaranteed by the 2005 Iraqi constitution. Since the early 1990s, Kurdish women have actively challenged violence and discrimination and have pushed their leaders to support women's shelters, legislative reform and greater public discourse and awareness about violence against women and women's rights. Positive developments have occurred, opening the space for women to continue to advocate for greater freedoms and improved government responses.<sup>4</sup> Change, however, has been slow and perhaps the greatest impediment to systemic change is the lack of rule of law.<sup>5</sup> Legal institutions are weak and in need of reform, and real change is sometimes dependent on the will and interests of influential personalities. Despite this, to the credit of key persons among the government, security and law enforcement, legal community including the judiciary, tribal and religious leaders and of course women's rights activists, prevention of harm and protection for victims is increasing. The institutionalization of these efforts to promote change that is sustainable must now occur in order to bring about tangible results.

This article examines the barriers to equality that women in the Kurdistan Region of Iraq face as manifested in the multi-faceted nature of structural violence.<sup>6</sup> Specific focus will be placed on illuminating the weakness of the judicial system in responding to acts of violence, as well as elucidating the laws that excuse or provide mitigated sentences for violence against women across Iraq through the subordination of women to men, thus perpetuating violence in the family and community/society.<sup>7</sup> We begin with a discussion of the patriarchal nature of Kurdish, and indeed Iraqi society, and how this affords legitimacy to the acceptance and institutionalization of violence against women at the family, community/society and government/state<sup>8</sup> levels. This is followed by a brief overview of the various manifestations of violence against women in the Kurdistan Region of Iraq. Next, we provide a discussion of structural violence against women at the levels of family, community/society and government/state. We then offer a comprehensive discussion of

4 Begikhani, Nazand, 'Honour-based violence among the Kurds: the case of Iraqi Kurdistan', in *Honour: Crimes, Paradigms and Violence Against Women* (Welchman, Lynn and Sarah Hossain eds.) 2005, p. 217.

5 Taysi, Tanyel, 'Eliminating Violence Against Women: Perspectives on Honor Related Violence in the Iraqi Kurdistan Region, Sulaimaniya Governorate' (ASUDA/UNAMI) 2009, available at <http://www.uniraq.org/documents/asp>. See also KHRP, 'The Increase in Kurdish Women Committing Suicide,' (European Parliament, 2007), pp. 53-55.

6 The concept of structural violence was first forwarded by Johan Galtung in 'Violence, Peace and Peace Research' in *Journal of Peace Research* Vol. 6, No. 3, 1969.

7 ABA *supra* note 3.

8 Recognizing sovereignty issues, we utilize government/state as a descriptor which refers to the Kurdistan Regional Government (KRG) apparatus and the Iraqi central State.



the inadequacies of key criminal and personal status laws as well as in the criminal justice system. Recent cases involving instances of violence against women are presented in order to highlight these shortfalls.

## PATRIARCHY IN KURDISH SOCIETY

Kurdish society, despite some degree of modernization, continues to maintain patriarchal influenced unequal power relations 'in which women are regulated by a complex network of mutually constituted practices that reinforce the idea that women are by nature subordinate to men.'<sup>9</sup> The detrimental influence of patriarchy on the safety and security of women is by no means limited to the Kurdistan Region of Iraq, it has been observed by the United Nations that the 'pervasiveness of violence against women across the boundaries of nation, culture, race, class and religion points to its roots in patriarchy - the systemic domination of women by men.'<sup>10</sup> Thus, patriarchal influenced unequal power relations present in Kurdistan, Iraq and indeed in all parts of the world to varying degrees, have a direct impact on violence against women, as recognized in the United Nations General Assembly's 1993 Declaration on the Elimination of Violence against Women.

With patriarchy comes a devaluing of women, and the relegation of women to the private sphere. It is understood that patriarchy is a major causal factor in violence against women globally, as violence is used in patriarchal systems as a mechanism to maintain control.<sup>11</sup> Research on violence against women in Iraqi Kurdistan indicates that individuals within Kurdish government and society acknowledge the role of patriarchal ideals in contributing to a culture of violence and in providing legitimacy to the institutionalization of violence against women.<sup>12</sup>

As is common in the wider patriarchal Middle East, in Iraq and in Kurdistan, Iraq, family, society and state have been organized in a manner in which women face severe limitations to access to power, and violence against women is condoned by state and societal actors.<sup>13</sup> As Mojab and Hassanpour note in their work on honour killing in Kurdistan, we must recognize the universality of patriarchal violence against women, but also not be afraid to understand that each 'regime of patriarchy is particular'.<sup>14</sup> Thus, it is imperative to explore the particularities of how patriarchy manifests itself in the area context under inquiry, a task that this work sets out to do.

For the purposes of this article, violence against women is defined as 'any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether

9 Taysi *supra* note 5 at 16; see also KHRP *supra* note 5 at 50.

10 United Nations (UN), 'In depth study on all forms of violence against women' (UN document A/61/122/Add.1) Report of the Secretary General, July 2006, p. 28.

11 *Id.* at pp. 28-29.

12 KHRP *supra* note 2 at p. 37; see also Taysi *supra* note 5 at pp. 22-23.

13 ABA *supra* note 3 at pp. 56-83; KHRP *supra* note 5 at p. 65; see also Taysi *supra* note 5 at pp. 16-18.

14 Mojab, Shahrzad and Amir Hassanpour, "Thoughts on the Struggle against "Honor Killing," in *The International Journal of Kurdish Studies*, January 2002, pp. 92-93.

occurring in public or private life.<sup>15</sup> Gender-based violence is seen as ‘a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.’<sup>16</sup>

Reinforcing the effects of patriarchy, Kurdistan, Iraq has been subject to a pervasive atmosphere of instability in which violence has been normalized for several decades. During conflict situations, women become targets of violence, as they are identified as embodying the community or ‘nation’. The legacy of living in an active war zone, under the continuous violent oppression of the Ba’ath regime has destroyed the ‘social, economic and cultural fabric of Kurdish society’ and has ‘unleashed waves of male violence against women.’<sup>17</sup>

## MANIFESTATIONS OF VIOLENCE AGAINST WOMEN

The commonly locally recognized forms of violence against women<sup>18</sup> in the Kurdistan Region include, but are not limited to verbal abuse, physical ‘domestic’ violence (spousal beating, brother/sister beating, parent/daughter beating), rape, preference for males in the family and society, forced divorce, inheritance abuse, polygamy, denial of education for females, compulsory/forced marriage, *jin be jin* marriage,<sup>19</sup> marriage of underage girls, women not being allowed to work outside the home by male family members, home imprisonment, honour killings and honour-related violence, suicides/forced suicides, bias in the law, the turning of a ‘blind eye’ to issues of violence against women by legal authorities, forced prostitution, trafficking and female genital mutilation (FGM). Of these, honour-related violence and FGM have received the most attention by the international community. However, cases of forced prostitution and trafficking appear to be a growing phenomenon across Iraq and Kurdistan, Iraq and are recognized to be of immediate concern.<sup>20</sup>

## STRUCTURAL VIOLENCE

In order to better understand the difficulties facing women in asserting their fundamental human rights of life, equality before the law and physical and mental integrity, we examine the violence and discrimination they are confronted with through the lens of structural violence, as it is recognized

15 UN Declaration on the Elimination of Violence Against Women (GA Res 48/104 of 20 December 1993) Art. 1.

16 Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 19, Violence Against Women (Eleventh Session 1992), (UN Doc A/47/38 at 1) 1993.

17 Mojab and Hassanpour *supra* note 14 at p. 87.

18 Although by no means an exhaustive list, these are the forms of violence against women that are most often cited (during trainings, roundtables and workshops conducted by the authors) by human rights/women’s rights activists in the Kurdistan Region. These examples are utilized as they represent local insight on the subject area.

19 *Jin be jin*, meaning woman for woman is a type of forced marriage in which females are traded—a girl or woman from one family (A) is married into another family (or the same extended) family (B). In return, a girl or woman from family (B) is given in marriage to family (A).

20 Portman, Scott and Sherizaan Minwalla, ‘Human Trafficking in Iraq; Patterns and Practices in Forced Labor and Sexual Exploitation,’ (Heartland Alliance) 2007, available at <http://www.heartlandalliance.org/whatwedo/advocacy/reports> (last accessed 9 June 2009).

that much of the violence against women worldwide results from structural violence.<sup>21</sup> Structural violence can be viewed as entrenched institutions or traditions (including legally sanctioned violence) that deny people access to available economic, political and social opportunities.<sup>22</sup> Unlike direct violence, structural (indirect) violence can be invisible, embedded to such a degree in social and institutional structures that it is seen as normal. Direct and structural violence are justified and legitimized by aspects of culture such as ideology, politics and religion. This legitimization, seen as cultural violence, makes direct and structural violence appear correct.<sup>23</sup> These three forms of violence are mutually reinforcing. In the following sections we illuminate how structural violence grounded in patriarchal views of the value of women is manifested in the family, community/society and by the government/state.

## VIOLENCE IN THE FAMILY

In Kurdistan, Iraq, as is common in the wider patriarchal Middle East, a woman's primary agency is involved in being a wife and mother. In patriarchies, which are 'central to the social organization of almost all Middle Eastern sub-national and national communities'<sup>24</sup> women are addressed as citizens primarily through their positions in these familial roles. Women's recognition as valued members of society is based on these roles, and this agency in the family is the principal means by which women are afforded a level of respect by society. This family role is prioritized, even if they gain positions of public status.<sup>25</sup> Institutionalized patriarchy and structural violence at the community and governmental levels work synergistically to reinforce the idea that a woman's place is in the home, and that decisions concerning the well-being of women should be centred on what is considered best for the family unit, not the woman.

### Male Preference

In Kurdistan, Iraq subordinate gender roles ascribed to women can lead to familial efforts at enforcement of a violent nature.<sup>26</sup> Violence against girls and women begins at home from birth, as unequal treatment between girls and boys in the family lays the foundation for an attitude devaluing women and girls. In the family, boys are favoured over girls and male children are often given power over their female siblings, even if they (the boys) are younger in age. Recent research on honour-related violence in the Sulaymaniyah Governorate of the Kurdistan Region highlights the recognition that this preferential treatment is a form of violence against women, and that it sets the stage for an acceptance of other forms of direct and indirect violence, as women and girls are seen

21 Mazurana, Dyan and Susan McKay, 'Women, Girls, and Structural Violence: A Global Analysis,' in *Peace, Conflict and Violence: Peace Psychology for the 21st Century* (Christie, D.J., Wagner, R.V. Wagner, D.A. Winter, eds.) 2001, pp. 1-2.

22 Galtung *supra* note 6.

23 Galtung, Johan, 'Cultural Violence,' in *Journal of Peace Research* Vol. 27, No. 3, August 1990, p. 291.

24 Joseph, Suad, 'Gender and Citizenship in Middle Eastern States,' in *Middle East Report* 198 January-March 1996, p. 7.

25 *Id.*

26 KHRP *supra* note 5 at p. 50.

and treated as having less value than boys and men.<sup>27</sup> This normalizes discriminatory treatment and a belief that males are of more value than females.

### Physical Domestic Violence

Direct physical domestic violence is known to occur, and is pervasive across all social and educational levels.<sup>28</sup> As a result of exposure to this violence, male and female children grow up viewing violence toward women as a commonplace and indeed inevitable phenomenon. There is little public discussion of the subject. Although spousal violence constitutes cause for divorce and can lead to prosecution of the offending party, suits on these grounds are rare.<sup>29</sup> It is recognized by governmental authorities that women in the Kurdistan Region 'are reluctant to report spousal or domestic abuse for fear of retributive violence, divorce or even murder'.<sup>30</sup> Augmenting this acceptance of physical domestic violence, the 'punishment' of a wife by her spouse is considered a legal right under Iraqi law.<sup>31</sup> Although there are legal and customary limits to this right, legally they are unspecified, and customary limits are undefined.<sup>32</sup>

### Depression and Suicide

Witnessing and being subjected to discrimination and violence in the home can cause severe depression in girls and women. Although under-researched, depression in girls and women appears to be widespread, as girls grow to women weighed down by the sense of inevitability of a life of violence and diminished value. This depression, related to the normalization of violence in the home, recognition of the lack of opportunities for action in the public sphere and at some level, a sense of the extent of the cultural and structural violence they experience is likely to be related to the extremely high level of female suicide in Kurdistan,<sup>33</sup> at least of those that are *bona fide* suicides and not disguised honour killings.<sup>34</sup> Along with this depression, family pressure on girls and women to conform to subordinate gender roles through force and coercion is recognized as a causal factor in suicide and attempted suicide.<sup>35</sup>

27 Taysi *supra* note 5 at pp. 38-39.

28 KHRP *supra* note 2 at p. 37.

29 ABA *supra* note 3 at pp. 63-6; KHRP *supra* note 5 at p. 51.

30 UNAMI *supra* note 2 at p. 16.

31 Iraqi Penal Code Law No. 111 of 1969, Article 41 (1) allows for: 'the punishment of a wife by her husband, the disciplining by parents and teachers of children under their authority within certain limits prescribed by law or by custom'.

32 ABA *supra* note 3 at p. 63.

33 Interview with mental health professional, name withheld, Arbil, March 18, 2009.

34 Self immolation or death by fire is one of the foremost causes of unnatural deaths in the Kurdistan Region. It is believed that many of these 'suicides' are often disguised honour killings.

35 KHRP *supra* note 5 at p. 50.

## Forced Marriage

Despite being illegal under the recently amended Personal Status Law (PSL) in the KRG as well as under Iraqi law,<sup>36</sup> forced marriage is common, and the right to choose a partner freely is rare. In most cases, it is the family that decides the match. If a woman opposes forced marriage, she risks violence or death. The practice of *jin be jin* accounts for a large amount of forced marriages. Forced marriage of girls reinforces women's unequal status in society, reduces their life choices and leaves them vulnerable to violence.<sup>37</sup>

Women and girls who have been forcibly married are often also forced to submit to direct physical violence from their husband. If they seek refuge with their families from this violence, they may be coerced to return, often upon threat of honour killing for attempting to escape an abusive relationship.<sup>38</sup> If a woman is unhappy, she has few options, given the shameful nature of divorce and taboos against living alone that still exist in Kurdish culture. Either she submits to an abusive marriage in which she maintains the small amount of agency in her socially sanctioned acceptable female role as wife and mother, or returns to her father's house (if she is allowed) in the diminished position of failing to live up to acceptable standards of womanhood.

As a woman doesn't hold recognized rights as an individual outside of the family, the final judges of her welfare are her male 'caretakers', in the form of close, or extended family members. 'Family' based decisions such as forced marriage (often under threat of violence, or enforced through violence), the denial of education and the relegation of females to the private sphere mandate female consent to violence and reinforce the subordinate position of women.

## VIOLENCE IN THE COMMUNITY/SOCIETY

Failure to implement rule of law at the governmental level has allowed for social 'tribal' custom to be the regulator of family relations.<sup>39</sup> Thus, much of the violence that occurs within the home or at the hands of family members is condoned by patriarchal norms that are embedded in the structure of tribal or community custom. Family units may face extreme pressure from extended family, tribal or social actors at large to resort to violent means of conflict resolution that are situated as 'informal justice' mechanisms or institutions at the community level.<sup>40</sup> This process will be discussed in detail in the following section of this article.

Further compounding the violence is the reluctance of government/state actors to treat issues of violence against women in a serious manner. As family is given precedence in the law,<sup>41</sup> and there is strong pressure to maintain the family unit and the status quo, courts will often defer to the

36 Iraqi Personal Status Law No. 188 of 1959, Article 9; Act No. 15 of 2008, The Act to Amend the Amended Law No (188) of the year 1959; Personal Status Law, in Iraq Kurdistan Region, Article 9.

37 Amnesty International, Iraq, 'Decades of Suffering, Now Women Deserve Better,' February 2005, available at <http://web.amnesty.org/library/Index/ENGMDE140012005> (last accessed 9 June 2009).

38 KHRP *supra* note 5 at pp. 58-59.

39 KHRP *supra* note 2 at p. 40.

40 Begikhani *supra* note 4 at p. 219.

41 ABA *supra* note 3 at p. 56.

family, meaning the *de facto* rule of local community/tribal leaders and norms of social custom.<sup>42</sup> In much of Kurdistan as well as across Iraq, decision-making and mediation by tribal and religious leaders supersedes formal adjudication of civil and criminal matters.<sup>43</sup> As a result, patterns of violent behavior in the home are reinforced as the government/state defers to community custom that does not recognize women's fundamental right to live a life free from violence.<sup>44</sup>

### Acceptance of/Pressure for Violence

Violence against women is obfuscated through various social configurations such as tradition, religion and tribalism. Actors in society who embody these configurations, such as mullahs, imams and tribal leaders are complicit in perpetuating violence by failing to recognize violence against women as a serious issue, or an issue that requires attention.<sup>45</sup> In some cases, the violence itself is portrayed as tradition<sup>46</sup> or societal/tribal custom, going beyond excusing the violence through benign neglect, to mandating the violence.

Social pressure for violence against women and retribution is widespread in Kurdistan, Iraq. Especially relating to issues of honour-related violence, social pressure is a powerful legitimating and indeed authorizing force behind violent punishments meted out to women who have transgressed perceived norms of honour. Community as a collective entity can be extremely powerful, and there is little respect for individual judgment. For example, in some cases a family may not want to violently punish their female family member, but they face pressure to do so by tribal or very extended family structures, or even members of their wider community. This pressure is manifested in gossip, ostracization, shaming and shunning.<sup>47</sup>

### Lack of Access to the Public Sphere

Lack of access to the public sphere leaving women socio-economically dependent on their male 'caretakers' is a particularly pervasive type of structural violence against women in Kurdistan. In general, women are relegated to the private sphere, and are not accepted in public spaces without a male guardian. Recent data shows that 90 per cent of women in the Kurdistan Region are unemployed and only 4.3 per cent of those employed work in professional categories.<sup>48</sup> Women working outside the home will often be shunned or treated badly.<sup>49</sup> There exist very real limits on personal freedoms, and with this, women's ability to occupy public spaces. For example, many women are subject to severe violence if they 'associate with or even talk to' men outside of their

42 Begikhani *supra* note 4 at pp. 213 and 219.

43 Portman and Minwalla *supra* note 20 at p. 26.

44 KHRP *supra* note 5 at 65; Taysi *supra* note 5 at p. 37.

45 Interview with Dr Sandra Phelps, sociologist, Arbil, March 17, 2008.

46 Mojab and Hassanpour *supra* note 14 at p. 88.

47 Taysi *supra* note 5 at pp. 24-26.

48 World Health Organization Iraq, Ministry of Planning and Development Cooperation and Ministry of Health Iraq, Iraq Family Health Survey 2006/2007, p. 1.

49 KHRP *supra* note 2 at p. 42.

family network.<sup>50</sup> This precludes the possibility of paid employment for many as practically any work environment would require some contact with unknown men.

Even if a woman is not subjected to violence from a male family member for working outside the home (a small but growing minority of husbands/fathers/brothers provide their support and consent), the wider male community often takes it upon themselves to collectively control the freedom of women. This is accomplished by making it as unpleasant as possible for women to be present in public spaces if unaccompanied by a male other than for tasks that are deemed acceptable, such as shopping in a market. In Arbil, men routinely follow lone women who are walking down the street, circling in a predatory manner in their cars while staring at them from rolled-down windows. Other times they will openly proposition unaccompanied women in an unapologetic manner, as if to infer that the only reason a woman would be present in public alone is if she were a prostitute. One female Kurdish civil society activist identified this phenomenon as a type of indirect violence against women she coined 'violence with the eyes.'<sup>51</sup>

### Female Genital Mutilation

Seen as traditional or customary practice in Iraqi Kurdish society,<sup>52</sup> Female Genital Mutilation (FGM) is widespread. In 2007 to 2008, WADI, a German NGO, conducted research across Kurdistan, Iraq to determine the prevalence of FGM. Preliminary findings clearly illustrate that FGM exists in alarming numbers, with 95 per cent of girls and women affected in some areas. Further, this practice exists across Kurdistan, Iraq at a rate of no less than 60 per cent, with the exception of the Dohuk province, where there seems to be only a 10 per cent prevalence rate.<sup>53</sup> It appears evident that there is a high level of community pressure influencing the prevalence rate of this phenomenon.

FGM is performed by a mother, neighbour or local midwife on girls between the ages of four and 12.<sup>54</sup> No anaesthesia is used, and instruments such as barbers' razors and even shards of glass that are not sterile are utilized. Girls can bleed to death or die of infection and most experience trauma from the procedure. Many go on to experience difficulties in pregnancy as a result.<sup>55</sup>

The purpose of FGM is to dampen sexual desire, thus ostensibly decreasing the chances of girls and women engaging in pre- or extra-marital sexual intercourse. Many see it as necessary for

50 Mojab, Shahrzad, 'No "Safe Haven" Violence against Women in Iraqi Kurdistan,' in *Sites of Violence: Gender and Conflict Zones* (Wenona Giles and Jennifer Hyndman eds.) 2004, p. 111.

51 Example provided during a training conducted by Taysi on gender-based violence to civil society activists from the disputed territories of Iraq in Sulemanya, March 2008.

52 It appears that FGM is considerably more prevalent in the Sorani-speaking parts of Kurdistan, Iraq (Arbil and Sulemanya provinces). In Dohuk province, which is primarily Badini-speaking, the rate of FGM is significantly lower according to research conducted by WADI. This problematizes the argument that FGM is a 'Kurdish' tradition.

53 WADI, 'Stopping FGM in Iraqi-Kurdistan: successes, hopes and challenges,' available at <http://www.wadinet.de/projekte/appeal-fgm.htm> (last accessed 9 June 2009).

54 Id.

55 American Free Press, *Iraq's Kurdish areas prepare to ban female circumcision*, November 22, 2008.

the sake of hygiene (food cooked by a woman who has not undergone the operation is often seen as unfit for consumption). Others believe that FGM is obligatory for Muslims. Despite the adverse effects FGM has on the health and well-being of those who undergo it, FGM is not viewed as a harmful practice. As stated previously, it is constructed as a 'traditional' Kurdish or Islamic custom, despite the fact that FGM is practiced in many countries in the Middle East and Africa, and is not inherent to any religion or nation.<sup>56</sup>

FGM is connected to the unequal position of women in the societies where it is practiced. It is recognized as a form of violence against women and a human rights abuse with the purpose of 'socializing girls into prescribed gender roles within the family and community'.<sup>57</sup> Although the perpetrators may include health officials such as midwives, they operate outside the official health system, thus the procedure is treated as a private or social issue outside the scope of the government/state.<sup>58</sup> Although FGM is considered 'assault' under Article 412 of the Iraqi Penal Code (IPC),<sup>59</sup> this provision is not invoked regarding these acts. Further, there are no laws that specifically criminalize FGM.<sup>60</sup>

Towards the end of 2008 a bill was introduced to the Kurdistan Parliament that would have criminalized FGM and imposed fines and jail terms on offenders. However, Parliament was too 'embarrassed' to publicly discuss the bill, and it failed to pass. There is currently public pressure to reintroduce the bill.<sup>61</sup> In Iraqi Kurdistan, FGM, regardless of being viewed as customary, has been a taboo subject. Despite recently becoming the centre of public debate and media attention, it is not examined freely, as to discuss it is seen to be 'shameful'.<sup>62</sup> It appears that this attitude may be changing, as the KRG is, as of April 2009, preparing to implement an awareness-raising campaign concerning this issue, working with, among other institutional entities, the Ministry of Religious Affairs.

## Prostitution/Trafficking

Human trafficking in the form of forced prostitution and labour, although always present in Iraq has increased since the 2003 invasion and the ensuing civil war. Iraq is both a source of trafficking victims and a destination point. The breakdown of social order and rise in violence has led to a sharp increase in trafficking within Iraq, as women and girls are forced into prostitution and

56 Amnesty International, 'Female Genital Mutilation: A Fact Sheet,' available at <http://www.amnestyusa.org/violence-against-women/female-genital-mutilation--fgm/page.do?id=1108439> (last accessed 9 June 2009).

57 Id. See also Paley, Amit R., *For Kurdish Girls, a Painful Ancient Ritual*, Washington Post Foreign Service, 29 December 2008.

58 Id.

59 Iraqi Penal Code Law No. 111 of 1969, Article 412 (1) 'Any person who wilfully assaults a person by wounding or beating him or with the use of force or harmful substances or by committing another unlawful act with intent to cause permanent disability is punishable by a term of imprisonment not exceeding 15 years.'

60 ABA *supra* note 3 at p. 64.

61 WADI *supra* note 53.

62 American Free Press, *supra* note 54.



sexual slavery.<sup>63</sup> Anecdotal evidence appears to point to a major increase in the number of girls and women who are trafficked, or forced by their families into prostitution from the south of Iraq into the Kurdistan Region, where home based neighbourhood brothels are common.<sup>64</sup> Iraq has not passed anti-trafficking legislation, and traffickers operate with impunity. In some cases, women who are victims of trafficking are charged with prostitution, a criminal offence. Research conducted in 2007 indicates that Iraqi girls and women are being trafficked in the following ways: 1) prostitution or other forms of sexual exploitation; 2) forced labour; 3) slavery or practices similar to slavery and 4) servitude.<sup>65</sup> The trafficking of girls and women into forced prostitution is recognized by international human rights organizations such as Amnesty International as one of the most pervasive forms of violence against women. We explore this issue, through the discussion of a recent trafficking case, in a later section of this article.

### Community Advocates

After gaining autonomy in 1991 women began drawing attention to widespread violence and discrimination in Kurdish society; however their efforts were again subverted during the civil war that occurred in Kurdistan in the mid-1990s. After 2003 the number of local NGOs and civil society organizations working on violence against women has proliferated and many NGOs currently existing ostensibly work on issues of violence against women in the Kurdistan Region. These organizations work in a very restrictive environment, making it difficult to push for substantial changes on all levels. While the focus of many Kurdish organizations has been on raising awareness throughout Kurdish society about women's rights, there is a dearth of NGOs providing tangible services to address the immediate needs of women who have suffered or are at risk of gender-based violence. Reasons for this are multifaceted, stemming from a lack of authentic support and funding from the KRG and Iraqi central government, contrasted with financial support without careful vetting from the international community that has motivated many individuals and NGOs to work on violence against women who are not committed to the values and ideals, but are instead drawn to the funding opportunities. Also problematic is the lack of tangible training of staff in women's organizations on how to understand violence against women and how to work with victims in a client-centred manner; instead numerous trainings focusing on international human rights and women's rights conventions have provided community advocates with few essential tools for providing quality services. There is a dearth of opportunities for professionalization and the few NGOs providing direct legal and social services tend to reinforce patriarchal understandings of women's roles and position in the society, maintaining the status quo and further institutionalizing structural violence. Often, focus on keeping the family unit together, rather than the physical well-being of the at-risk woman, takes precedence. Due to the lack of professionalism and government oversight and monitoring of women's shelters there have been reported incidences of abuse of residents inside women's shelters.<sup>66</sup>

63 Portman and Minwalla *supra* note 20 at p. 4.

64 Multiple interviews with women's human rights activists and professionals, names withheld, Kurdistan Region, Iraq 2008.

65 Portman and Minwalla *supra* note 20 at p. 4.

66 Saadi, Salam, *Su'ad Reveals the Nasty Aspect of the Kurdish Community*, Media No. 295, June 26, 2007. In 2007 the Mali Khanzad (Khanzad House) was shut down when it was alleged that the Director and her husband abused and trafficked female residents.

## Mediation and Informal Justice

Mediation has deep roots in Iraqi culture and in the Kurdish areas as a traditional method of achieving reconciliation (*solih*) between individuals, families and tribes in conflict. This tribal-based process is run by elderly (male) religious, political and influential tribal leaders who hear disputes from their community and assume responsibility for making and enforcing decisions. There is widespread reliance on this system or structure (*komelayeti*).

Mediation to achieve *solih* is widely believed by Kurds to be a necessary process to prevent endless bloodshed between rival groups. Yet to achieve *solih*, particularly between powerful tribes or families, the perpetuation of violence against women through forced marriage, *jin be jin*, the selling of women for debt resolution and the killing of women to satisfy powerful groups can occur.<sup>67</sup> The *komelayeti* have a vested interest in intervening in cases involving honour and shame in order to rid the community of gossip which can provoke future killings.<sup>68</sup> In the KRG both political parties (Kurdistan Democratic Party and Patriotic Union of Kurdistan) maintain social bureaus which mediate cases. These bureaus have been criticized for intervening in the legal system<sup>69</sup> and for promoting reconciliation that is rooted in traditional outcomes that undermine the interests and well-being of women. Males may also be killed to achieve reconciliation, for example in cases of suspected sexual relationships *solih* might be achieved by requiring that both the man and woman be killed by their families to prevent further bloodshed.<sup>70</sup>

Mediation to achieve *solih*, if practiced in a woman friendly, client-centred and gender sensitive manner, has the potential to save Kurdish women's lives. Kurdish women have adapted traditional forms of conflict resolution to promote rather than subordinate the interests of women.<sup>71</sup> Mediation may be conducted through a women's organization that maintains a shelter, or less formally by individual actors. There are no professional standards or protocols, however some women have become very skilled at using this technique to resolve extremely difficult cases without sacrificing the well-being of women; they are changing the rules from traditional mediation to a more gender-focused approach to dispute resolution. It is important to note that the standpoint taken by women's rights advocates to mediation stands in marked contrast to more commonly utilized forms of mediation, in which anti-woman patriarchal norms are internalized, and women can end up losing their lives.<sup>72</sup> Although there is much room for improvement, there are observable changes that are worth noting.

Women's rights advocates practice mediation from a different approach that places the needs and interests of the woman above those of the family and tribe. Traditionally men mediate; however

67 Begikhani *supra* note 4 at p. 219; see also Taysi *supra* note 5 at p. 32.

68 Begikhani *supra* note 4 at p. 220.

69 Abdulrahman, Shara, 'KRG Minister of Justice Faruq Jameel: Party Officials Intervene in Judicial Power', Daily Rozhnama Newspaper, 12 March 2009.

70 Begikhani *supra* note 4 at pp. 219-220.

71 Minwalla, Sherizaan 'Mediating to Prevent Violence Against Women in Iraq', Manual developed with the support of the United Nations Development Fund for Women for Heartland Alliance for Human Needs and Human Rights, 2008, at p. 31.

72 *Id.*

many Kurdish women have gained important skills and experience conducting mediation in the context of gender-based violence. Through women's organizations and other human rights organizations, Kurdish women in Iraq play a central role in bringing together parties in dispute, and advocating for their clients through the mediation process. Another important difference is found in the terms used to reach a solution. In a gender-focused approach to mediation, unlike traditional mediation, women are not sold, exchanged or killed to resolve inter-family or tribal conflict. Instead many problems are solved with time and money. Some cases may take weeks, months or over a year to resolve, and often result with paying money to the 'injured' party.<sup>73</sup>

A skilled mediator can resolve extremely complex cases with some creativity. In a case in Sulemanya that took nearly two years to solve, social workers protected a woman (who was also a second wife), who was threatened with honour killing through mediating with her husband. The woman was suspected of adultery when she returned home from a visit to the hospital alone in a taxi. When her family learned that people in the village were gossiping, they worried that her husband might kill her and contacted the police who referred her to a women's shelter. After ten months social workers convinced the husband to permit their five children and his first wife to join his second wife in the shelter. Ultimately the case was solved when the taxi driver agreed to pay money to the husband as compensation for driving his wife to the village alone when it was clear this could lead to problems, and the husband and his wives and children were reunited. However the family was forced to move to another village because the rumours and gossip would have made it impossible for the family to remain in the village.<sup>74</sup>

Mediation is not necessarily the best solution, but in the absence of strong legal protections it is often the only available method of protecting women from honour killing, forced marriage, domestic violence and other forms of violence. Mediation, even when conducted by those with a stated interest in promoting women's rights, is not always performed from a gender-sensitive approach and can be detrimental to women's interests as *solih* is accomplished in a context in which women lack real political and socio-economic power. Women mediating in the interests of women work within a patriarchal framework that is reinforced by a legal system which perpetuates violence against women and is ill-equipped to protect women.<sup>75</sup> In a forced marriage case involving an agreement for a rapist and victim to marry, the social worker at the women's shelter 'solved' the case through mediation by convincing the defendant's family to pay \$8,000 to the victim's family in exchange for dropping the legal case; the defendant also agreed to marry the victim.

One of the main concerns is that the equality rights of women, especially those in abusive relationships, are not respected in this process. At the outset, the woman is disadvantaged by her gender which in turn weakens her bargaining power leading her to compromise and give up important legal rights. Mediation is usually a private procedure without a public record of the process or outcome. It does not require that women's legal or equality rights be explained or

73 Id.

74 Interviews conducted with social worker and second wife, names withheld, April 2006 and August 2006.

75 Taysi *supra* note 5 at pp. 36-37.

respected. Often, the abuse within the relationship is perpetuated through the mediation itself with the unwitting and unintentional complicity of the mediator.

While woman-friendly mediation has a potentially important place in ensuring that women are protected, it should not take the place of formal justice mechanisms. In order to strengthen rule of law, it is important that 'informal justice' mechanisms do not supersede the formal. Indeed, it has been noted, due to the inherent weakness in informal justice systems that:

International human rights expert opinions and jurisprudence in a variety of jurisdictions have therefore favored hybrid or parallel systems in which decisions taken by informal justice institutions can be challenged in state courts and will be ruled invalid if they violate human rights.<sup>76</sup>

## GOVERNMENT/STATE LEVEL VIOLENCE

The idea that the state is by nature biased in favour of males is not limited to societies with a non-liberal history.<sup>77</sup> While the male-bias of the government/state is not only a Kurdish, Iraqi, or Middle Eastern problem, the Kurdistan and Iraqi governments and machinery of the state have consistently acted in a way that can be construed as against the interests of women. This is operationalized through a high level of structural violence in the form of legislation that excuses or provides mitigated sentences for many acts of violence against women as well as the non-enforcement of legislation ostensibly designed to protect women.<sup>78</sup> The result of governmental entities failing to hold perpetrators accountable intensifies the subordination of women who have faced violence and sends a message to families and communities that male violence against women is acceptable and to be expected.<sup>79</sup> Indeed, in Kurdistan:

Human rights abuses against women continue to occur with the 'active support or passive complicity of state agencies, armed groups, families and communities.' Decisions taken by informal institutions such as the household or the community that might, in other contexts, be modified or contested through recourse to state laws are, more often than not, underwritten and endorsed by formal institutions such as law enforcement.<sup>80</sup>

From 1994 to unification in 2006, the KRG was divided along institutional party lines in which the two main political parties maintained their own governments. After an internal fratricidal war ended in 1996, the Kurdistan Democratic Party (KDP) administration controlled the Arbil and Dohuk provinces, and the Patriotic Union of Kurdistan (PUK) administration controlled Sulaymanya. The formal process of unifying both governments has progressed and is nearly complete.

76 Taysi *supra* note 5 at p. 11.

77 See MacKinnon, Catharine A., *Toward a Feminist Theory of the State*, 1989.

78 ABA *supra* note 3 at pp. 56-83.

79 UN *supra* note 10 at p. 29.

80 KHRP *supra* note 5 at p. 65.

Not until 2007, spurred on by the international outcry over the stoning death of Du'aa Khalil in Ba'ashiqa in the northern Nineveh governorate, an area under *de facto* control of Kurdish authorities, did the KRG begin addressing the issue of violence against women as a serious issue. Until this time, governmental actors are widely thought to have at best ignored or downplayed the severity of violence against women; at worst to have perpetuated or encouraged violence through discriminatory laws and practices. In 2007 the KRG established Directorates to Follow-Up Violence against Women in the three northern provinces under the Ministry of Interior.<sup>81</sup> These directorates are charged with gathering statistics on violence against women, overseeing and monitoring cases in the courts and providing services to victims through mediation or through referrals to outside organizations. That same year the KRG Prime Minister Nechirvan Barzani also established a Commission on Violence against Women comprised of eight ministries and other entities to address violence against women at the policy level and to track and coordinate information on gender-based violence.<sup>82</sup> Further, there are now police bureaus designated specifically to deal with cases of violence against women. Establishing these institutions has been critical, but on closer examination it is clear that there is often a gap between their stated objectives and the practices or services provided which again tend to reinforce traditional power structures and subjugate women's needs and interests to those of the family and community.

### KRG Legislative Authority

According to the 2005 Iraqi Constitution, the KRG is authorized to pass legislation that does not conflict with the exclusive authority of the federal government.<sup>83</sup> Prior to the 2005 Constitution the Kurdistan Parliament was vested with legislative authority based on Law 1, which was created to fill the void left by the creation of a no-fly zone separating the Autonomous Region of Kurdistan from the rest of Iraq in 1991. There were elections in May 1992 which formalized the creation of the KRG, and Kurdistan Regional laws from 1992 stated that Iraqi laws had to be endorsed by Parliament before they were valid in order to assist in filtering out anti-Kurd laws passed by Saddam's regime.<sup>84</sup> Since all laws of the KRG are affirmed by Parliament, this provision is still considered in force. As matters involving personal status and criminal law are not the exclusive domain of the federal government, Parliament is authorized to pass legislation amending Iraqi laws including the Iraqi Penal Code (IPC) and the Personal Status Law (PSL).<sup>85</sup>

Since gaining autonomy, Kurdish lawmakers have enacted several notable legal amendments aimed at reducing violence against women and increasing women's legal rights in marriage and divorce. In the past year there has been a flurry of proposed legal reforms on issues impacting women in the KRG. In November 2008 Parliament amended the PSL, agreeing to several demands by women's rights activists. Not all expectations by women's rights advocates were met; polygamy remains legal albeit with greater restrictions on when it is legally permissible to take another wife.

81 Taysi *supra* note 5 at p. 12.

82 *Id.*

83 Iraqi Constitution, Article 116 (October 2005) (Granting regional authorities with executive, legislative and judicial authority). Article 108 enumerates the exclusive powers of the federal government, and Article 112 outlines shared powers between the regional and federal authorities.

84 Kurdistan Parliament, Law No. 1, Art. 56 (1992).

85 Iraqi Constitution, Articles 108 and 116 (October 2005).

Towards the end of 2008 a bill was introduced to ban FGM, and while it failed to pass, advocates are campaigning to push for its passage when the bill is reintroduced.<sup>86</sup> Another key piece of legislation is pending which includes a draft domestic violence law that would establish special courts for victims of domestic violence. If passed, it will address issues of protection during legal proceedings, as well as financial and medical/psychosocial support for victims.<sup>87</sup>

There has been criticism on the part of some women's rights advocates that KRG efforts to address violence against women are superficial and merely a reaction to outside criticism, yet even if true, these governmental measures have value. The creation of the high-level governmental committee concerned with addressing violence against women, the Ministry of Interior directorates to combat violence against women and police bureaus dealing specifically with violence against women lend legitimacy to the struggle to eliminate violence against women and create greater space in which men and women can advocate for greater awareness, legislative and policy reform and direct services. While the Government of Iraq in Baghdad overwhelmingly fails to acknowledge the need to respond to the problems of violence against women, the KRG facilitates widespread public discourse followed by tangible steps that can be improved upon. However, it must be noted that despite assurances from KRG officials that they were committed to improving investigation and prosecution, it appears that 'investigators continue to claim inability to bring to justice alleged perpetrators, and courts continue to practice leniency in honour-related crimes'.<sup>88</sup>

Concerted efforts by the government and civil society are essential as the scope of violence against women is significant, pervades all levels of the society and is reinforced by the law and legal system. Parliament must continue the process of legislative reform and strengthening the rule of law in order to move away from traditional informal justice mechanisms that reinforce violence against women. The following discussion illustrates some of the often-hidden ways in which the legal system fails to adequately protect victims and continues to condone violence against women.

The Iraqi Constitution guarantees women equality under the law,<sup>89</sup> yet women continue to face legally sanctioned violence and discrimination, particularly in the areas of criminal and family law. There are several salient laws that encourage domestic violence, rape and honour killing, reinforcing traditional patriarchal beliefs about the importance of maintaining male honour through the subjugation of women and the extreme control of female sexuality.<sup>90</sup> Also problematic are legal and non-legal practices that discount women's histories of gender-based violence when linked to alleged criminal activity or as a basis for obtaining legal rights. An analysis of the IPC and PSL expose laws that are facially discriminatory in a gendered manner or that explicitly encourage violence against women. A related issue is the absence of sufficiently protective laws or the under-utilization of existing laws that could be applied to protect women but are widely ignored by lawyers and courts. To fully unpack the ways in which women and victims of gender-

86 WADI *supra* note 53.

87 Taysi *supra* note 5 at p. 44.

88 UNAMI, 'Human Rights Report 1 January-20 June 2008', at p. 16.

89 Iraqi Constitution, Article 14 (October 2005). 'Iraqis are equal before the law without discrimination because of sex, ethnicity, nationality, origin, colour, religion, sect, belief, opinion or social or economic status.'

90 ABA *supra* note 3 at pp. 56-83.

based violence are negatively affected by the criminal justice system, it is imperative to examine the barriers that render women vulnerable to criminal arrest and prosecution, and make it difficult for women to secure legal protections to which they are entitled under Iraqi law.

While it is true that the KRG has implemented legislative reform aimed at the protection of women and expanding women's legal rights, the necessary implementation has been slow to follow for several reasons. There is confusion in the legal community about the status of amendments made to the IPC by the separate PUK and KDP administrations prior to 2006. Also problematic is selective enforcement of the law or the outright disregard for the law by lawyers, prosecutors and judges when they disagree with legal amendments. Another area of concern is the lack of training for law enforcement on gender-based violence, and the failure of police and prosecutors to adequately investigate cases involving violence against women. Therefore, although passage of these laws both before and following unification was an important step towards improving the status of women in Kurdistan, equally necessary are unequivocal efforts to assure and monitor their implementation.

### **Language and the Law**

A closely linked issue of language relative to law and practice is proving to be problematic within the overall legal system in the KRG. In general, Kurds are increasingly unable to read, write or converse in Arabic, in part due to Kurdish nationalistic attitudes that reject Arabic as the language of the former oppressive regime. However, the law is written in Arabic and recent law school graduates who are unable to read, write or even understand Arabic rely on law school lectures and notes as well as the translation of some laws into Kurdish in order to practice law.<sup>91</sup> Arabic and Kurdish are very different languages; with regard to laws, where precise language is paramount, significantly different meanings emerge depending on the language used. Unlike Arabic, Kurdish lacks legal terminology and must be supplemented with Arabic. In addition, pronouns in Kurdish are gender neutral and therefore gendered laws, particularly in the area of personal status, fail to distinguish – at the most basic level – how they would be applied differently to men and women.<sup>92</sup> Parliament continues to issue new laws in Arabic which are then translated into Kurdish, leading to confusion in interpreting and understanding the law. Future judges with language constraints will be unable to read and apply the law in Arabic.<sup>93</sup>

### **Influence of Family/Community**

The ability of the courts to punish perpetrators of violence against women or to uphold laws intended to protect women from harm is frequently undermined by the influence of the family. As discussed previously, the family institution is one of the most powerful among the Kurds, and family members widely utilize mediation or reconciliation strategies to pressure women who confront legal issues and the judges that adjudicate such matters. Mediation is one of the most common non-legal means of resolving disputes or issues between parties. Some level of mediation

91 Interview with Dr Zuber Mustafa Hussain, Dean of the Sulemanya College of Law, Sulemanya, June 2008.

92 Comments of Arabic, Kurdish and English translator Hadi Muhammad Ahmad, 21 March, 2009.

93 Interview with Judge Sheikh Latif, Sulaimaniya, 19 January 2009.

is permitted under the law and usually requires the involvement of the judge overseeing the case. However given the integral role mediation plays in the culture, judges are often willing to accept the results of a mediation conducted outside of court when issuing decisions and during sentencing.<sup>94</sup> Families of perpetrators of violence against women frequently pressure the victim and her family to reconcile in order to bring about a favourable verdict or reduced sentence. Successful mediation efforts are possible due to the need of the victim and her family to minimize drawing attention to the violence which is viewed as shameful for the victim rather than the perpetrator.<sup>95</sup> Through this process victims of violence find themselves pressured to compromise their rights in the interest of preserving family honour.

### **Failure to Investigate**

Police and investigators are an integral part of the legal system who tend to reinforce traditional customs and values which place the needs and interests of the family, tribe and community above those of individuals generally, and in particular women who are deemed shameful.<sup>96</sup> They are often uninformed about changes to the law and may have wide latitude interpreting laws that are not clearly defined in the legal codes.<sup>97</sup> A study conducted in the Sulemanya courts showed that police often fail to appear in court to testify despite being summoned by a judge.<sup>98</sup> The willingness on the part of the police or investigators to gather facts and evidence during criminal investigations is often diminished in cases involving violence against women.

### **Confusion Over Legal Status and Selective Enforcement of the Law**

Before 2006, both the PUK and KDP administrations issued laws that applied to their respective areas of control. Following unification, however, the legal status of some of these decrees or legislative amendments remain unclear and unresolved.<sup>99</sup> The result is that members of the legal community either do not know the law or selectively enforce controversial legal amendments. For example, Decree No. 59 issued by the PUK administration in 2000 to amend the IPC to eliminate reduced sentences is perceived differently by members of the legal community in Sulemanya. Some lawyers view the decree as having amended the IPC, whereas others state that it has no legal effect.<sup>100</sup>

Judges continue to selectively apply or disregard laws in a manner that justifies, condones and reinforces violent acts against women. This may be explained by traditional attitudes and bias within the legal community, as well as the result of outside influences that undermine the effectiveness of the legal system. The KRG Minister of Justice Faruq Jameel recently expressed concern about the

94 Interview with Judge Sheikh Latif, Sulemanya, 19 January 2009.

95 Begikhani *supra* note 4 at p. 214.

96 Taysi *supra* note 5 at pp. 36-37.

97 *Id.*

98 Amnesty International, 'Trapped by Violence: Women in Iraq', March, 2009, available at <http://www.amnesty.org/en/news-and-updates/featurestories/trapped-violence-women-iraq/20090420> (last accessed 9 June 2009).

99 Interview with Judge Sheikh Latif, Sulemanya, 19 January 2009. See also Taysi *supra* note 5 at p. 44.

100 Interview with Judge Sheikh Latif, Sulemanya, 19 January 2009.



interference of party officials in judicial matters: ‘party officials talk about judicial independence in the press on the one hand and intervene in the courts’ affairs on the other.’<sup>101</sup> In an honour killing case in Sulaymanya in 2005 a three-judge panel reduced the defendant’s sentence because two judges refused to acknowledge the legality or applicability of Decree No. 59.<sup>102</sup> Both judges also stated their belief that the defendant had the right to defend his honour and that this justified a reduced sentence. In a recent case in Arbil, judges stopped legal proceedings against a man who confessed to rape once he agreed to marry the 14-year-old victim. Although the IPC encourages marriage between a rapist and his victim by terminating legal proceedings if certain conditions are met, the judges allowed the girl to marry despite the fact that she was younger than the legal minimum age permitted for marriage which is 16-years of age. Both cases demonstrate how the law was ignored in order to preserve family honour even if it excuses or encourages violence against women.<sup>103</sup>

## LEGALLY SANCTIONED DISCRIMINATION AND VIOLENCE IN THE LAW

Violence against women is not only condoned but encouraged by laws and practices that treat perpetrators of violence leniently. Although there have been efforts to address some of the most egregious provisions, there remain laws in effect that essentially institutionalize domestic violence and rape. Moreover the IPC does not criminalize extreme forms of cruelty such as FGM which is widespread throughout the KRG.

### Illegal Consensual Sex

Under the IPC, sex outside the confines of a heterosexual marital relationship is not only shameful and immoral, but illegal. Although the law is gender-neutral it is gendered in its application and negatively impacts women to a greater extent. In addition, while men may be prosecuted under this provision, other areas of the law encourage and promote male sexuality and allow men greater leeway to pursue pre- and extra-marital sexual relationships. For example, polygamy is still widely practiced and although legally restricted, one of the legal grounds on which a man can take another wife is if his current wife cannot serve his sexual needs.<sup>104</sup> Unlike women, men can commit adultery as long as it is committed outside the home,<sup>105</sup> and the law on prostitution punishes pimps and prostitutes but not men who solicit prostitution.

101 Abdulrahman *supra* note 65. According to a survey conducted for the article, 27 per cent of judges, 46 per cent of lawyers and 42 per cent of court employees do not believe that the courts are independent or free from outside intervention.

102 Interview with Judge Sheikh Latif, Sulaimaniya, 19 January 2009.

103 Act No. 15 of 2008, The Act to Amend the Amended Law No. (188) of the year 1959; Personal Status Law, in Iraq Kurdistan Region, Article 5.

104 Act No. 15 of 2008, The Act to Amend the Amended Law No. (188) of the year 1959; Personal Status Law, in Iraq Kurdistan Region, Article 1(b). ‘Marrying more than a woman is not allowed unless ... the [first] wife is afflicted with a medically proven chronic incurable disease that prevents her from having sexual intercourse, or if the wife is infertile.’

105 Iraqi Penal Code, Law No, 111/1969, Article 377 (1).

The laws that govern social, sexual and relational interactions between individuals are often vague and ambiguous. For example, a person may be arrested for engaging in behaviour that is 'immodest' under Article 401 of the IPC:<sup>106</sup>

Any person who commits an immodest act in public is punishable by a period of detention not exceeding six months plus a fine not exceeding fifty dinars or by one of those penalties.

'Immodest' behaviour or conduct is not legally defined and may vary regionally and over time based on general community standards and perceptions. Although young unmarried couples can walk freely inside larger cities without fear of arrest, they risk being arrested if they are discovered travelling outside the city together.<sup>107</sup> Police have broad discretion to interpret and apply these laws based on their beliefs of what is appropriate behaviour,<sup>108</sup> and violators can be fined and sentenced to up to six months in jail.<sup>109</sup>

Although adultery is illegal for both men and women, women are at greater risk of facing criminal charges due to their subordinate social status and the discrimination inherent in society as well as the law. As previously mentioned, extra-marital sex is illegal for women regardless of where the act occurs but men may face criminal charges only when they engage in adultery inside the home<sup>110</sup> or when they have sex with a married woman with the knowledge that she was married.<sup>111</sup> Although many cases do not make it to court for different reasons – the couple reconciles, divorces, or the woman is killed – the existence of the law provides a way for men to rely on the adultery law to intimidate and abuse women by threatening to contact the police. A woman currently residing in a protective shelter stated that her husband accused her of committing adultery in order to obtain a divorce.<sup>112</sup> In addition to the criminal consequences of committing adultery, women face the very real threat of being killed either by their husband or another male relative once they are released from detention. Sometimes the husband of a detained woman will 'forgive' her and withdraw the complaint but once a case reaches this stage the woman is usually killed either by someone in her husband's or her natal family.

There is widespread condemnation throughout Kurdish society of women who commit adultery and tacit acceptance in society and in the law that killing such women is justified.<sup>113</sup> Indeed, even people who condemn honour killing in other contexts agree that it is justified if a woman commits adultery.<sup>114</sup> Police or security who are often first responders to a crime scene tend to

106 Iraqi Penal Code, Law No. 111/1969, Arts. 400 and 401. Article 400 covers acts committed without the other person's consent while Article 401 includes those acts to which both parties consent.

107 Interview with Judge Sheikh Latif, Sulemanya, 19 January 2009.

108 Interview with Judge Sheikh Latif, Sulemanya, 19 January 2009.

109 Iraqi Penal Code, Law No. 111/1969, Art. 400. A person can be sentenced to up to one year in prison if he or she commits an immodest or shameful act to a person without their consent.

110 Iraqi Penal Code, Law No. 111 of 1969, Article 377 (1).

111 Id.

112 Interview (intake) conducted by lawyer in undisclosed women's shelter, January 2009.

113 Iraqi Penal Code, Law No. 111 of 1969, Article 409.

114 Statement made at conference on self-immolation by Mullah Omer who agreed that killing women for honour is not acceptable 'except in adultery cases.' Conference on Suicide, Arbil, November 2007.

exacerbate tensions that in turn contribute to increased risk of violence against women. When a case is mishandled and becomes publicized the community pressure to shed blood is powerful.<sup>115</sup> In 2007 in a mid-size city in the Sulaymanya Governorate a young married woman was discovered in her house with her lover. When her husband's brother realized that there was a man in the house, he called her family and the police, and the security forces (*Asayish*) appeared despite the lack of any apparent security issues. The resulting commotion attracted the attention of the entire neighbourhood and caused the family significant embarrassment and shame. The police arrested the woman and interrogated and abused her at the police station; they also showed her husband text messages to convince him that his wife had a sexual affair. Before each court appearance the police threatened the woman at the police station to push her to confess her crime to the judge. The judge actually wanted to prevent further harm to the woman by trying to reason with her father, who vowed to kill her even if it meant losing everything he owned and going to jail.<sup>116</sup> The judge saved this woman's life by sending her to a protective shelter rather than releasing her into the custody of her family.

## Rape

According to the IPC Article 397 it is illegal to sexually assault a minor, defined as a boy or girl under the age of 18 years. However pursuant to Article 398, a rapist may avoid criminal liability if he marries his victim:

If the offender mentioned in [Article 397] then lawfully marries the victim, any action becomes void and any investigation or other procedure is discontinued and, if a sentence has already been passed in respect of such action, then the sentence will be quashed.

A criminal complaint can be reinstated if the offender divorces the victim 'without justification' within three years of the termination of legal proceedings.<sup>117</sup> The underlying reason for the law is ostensibly to provide a way for the family to restore its honour which has been lost with the loss of the victim's virginity while ensuring that the girl will also not lose the opportunity to marry, even if it is to her rapist.<sup>118</sup> While reinforcing traditional patriarchal notions of honour the law institutionalizes rape by placing the victim in the home of her rapist where she risks continued abuse.

Although the law is silent as to whether the consent of the victim to marry her rapist is required, judges may insist that the victim convey her agreement to marry prior to the termination of legal proceedings. Yet securing a rape victim's consent to marry is likely to be less a reflection of her will or choice and more of an indication of family and societal pressures that attach significant

115 Taysi *supra* note 5 at pp. 25-26.

116 The identities of the individuals in this case remain anonymous to protect their safety.

117 Iraqi Penal Code, Law No. 111 of 1969, Article 398. The law does not specify what justifications are deemed legal and valid in this context.

118 Preserving female virginity until marriage is of paramount importance in Kurdish society, evidenced in part by the fact that the law does not provide a mechanism to end legal proceedings against a rapist of a male minor. Solving the loss of female virginity either due to rape or consensual sex is primarily done by resorting to marriage. For example, according to Article 355 of the IPC, a man can be detained for inducing a woman to have sexual intercourse with the promise of marriage if he subsequently refuses to marry her.

importance to male/family honour over the well-being of girls. There are other factors at play including lack of empathy for the victims, the tendency to blame victims<sup>119</sup> and the difficulty with securing convictions in rape cases.<sup>120</sup>

Recently, a 13-year-old girl from a town in the Arbil Governorate was raped first by a relative and then again by a labourer who broke into her family's house when she was alone several months later. The victim's mother filed a claim in the criminal court and both men were arrested. Meanwhile, the victim, pregnant as a result of the latter rape, was placed in a protective women's shelter because she was at risk of being killed by her father and other male relatives. Two criminal trials ensued. The labourer denied the rape and was found to be not guilty despite the fact that the victim testified against him and that her pregnancy coincided with the date on which she claimed he raped her.<sup>121</sup> The relative, also charged with rape, confessed to the crime but avoided punishment by marrying the victim.<sup>122</sup>

Rape is also institutionalized in the forced marriage provision of PSL Article 9(1):

No relative or non-relative has the right to force marriage on any person, whether male or female, without their consent. The contract of a forced marriage is considered void *if the marriage is not yet consummated*. (Emphasis added)

The sentence for rape by first-degree relative is less than that for others, yet another example of how the law treats violence within the family unit with greater acceptance than when committed by others.<sup>123</sup> Forced marriage is widespread throughout Kurdistan as a way of preserving kinship ties and maintaining control over female sexuality. A woman or girl who chooses her marriage partner may arouse suspicion in her family that she has engaged in illicit sexual behavior. Marriage between cousins is common, and girls are often forced to marry much older men. When a forced marriage is 'consummated' it is predominantly if not always by rape, which the woman is sometimes continually subjected to throughout her marriage.

119 Interview with Judge Sheikh Latif, Sulaimaniya, 19 January 2009. Rape victims may be charged with adultery or, in the case of male victims, homosexuality.

120 Law on Criminal Proceedings, Law with Amendments. No. 23 of 1971, Decree No. 230, Article 213(b). One witnesses testimony is insufficient to support a conviction.

121 Between five to six months lapsed between the first and second rape. However, the judge stated that the pregnancy did not support a guilty verdict since the victim could have had sex with other men. The girl's child was placed in an orphanage after s/he was born.

122 Interview conducted by lawyer in undisclosed women's shelter, January 2009.

123 Personal Status Law No. 188 of 1959, Article 9(2). A first degree relative who breaches the provisions of paragraph 1 of this article shall be sentenced to no more than three years imprisonment and charged with a fine of a specified amount. If the person who breaches this provision is not a first degree relative, he shall be sentenced to an imprisonment term varying from a minimum of three years to a maximum of ten years.

In November 2008, the KRG amended several provisions of the PSL, including Article 9, as follows:

No relative or non-relative has the right to force marriage on any person, whether male or female, without their consent. The contract of a forced marriage is considered void if the marriage is not yet consummated. *Even if the marriage is consummated, the contract shall be suspended.*<sup>124</sup> (*Emphasis added*)

This amendment, in effect, provides women with another legal basis on which to obtain a divorce if the marriage was forced and then later consummated. Divorce is a legal right under the PSL, but it varies depending on whether the couple are engaged or married, and there must be grounds. Even if a forced marriage is not consummated, if there is a marriage contract the woman will have to pursue legal proceedings to terminate the engagement. However by voiding a forced marriage the courts make it easier to terminate the marriage contract, whereas validating the marriage when it is consummated, most commonly through rape, the legal process is more complicated.<sup>125</sup>

Even if the change to the law clearly voided a forced marriage that was consummated, these cases rarely make it to the courts due to considerable family pressure as well as the lack of awareness among young women that they have the right to refuse forced marriage, the risk of honour killing for refusing forced marriage, the lack of access to legal representation in filing claims and the lack of sustainable long-term options in terms of these girls' ability to be socio-economically independent. Child betrothal of girls or *gawra ba bichuk* (literally 'big to small') is more common in the northern part of the KRG in and around Dohuk where girls are promised in marriage soon after their birth. In 2007, an 18-year-old challenged her betrothal to a much older man by taking her case to court. The judge agreed that she should not be forced to marry, yet her community's religious leader (*mullah*) supported the marriage and challenged the authority of the court. With the assistance of a lawyer the case was finally resolved when the girl's family paid \$4,000 to the man to agree to cancel the promise of marriage.<sup>126</sup>

### **Honour-Related Violence/Suicides**

Iraqi law sanctions killing women for honour-related motives by permitting judges to issue lenient sentences in murder cases if the defendant establishes that the preservation of family honour was the motive behind the murder, thereby reinforcing widely held societal views that men are justified in reclaiming their honour through the intentional killing of women. The KRG has addressed this issue by amending the IPC to eliminate legal justifications for reducing sentences in honour killing

124 Act No. 15 of 2008, The Act to Amend the Amended Law No. (188) of the year 1959; Personal Status Law, in Iraq Kurdistan Region, Article 6(1). The penalties for violating this provision were also increased. *Id.* at (2).

125 Interview with Razaw Ahmed Sharif, Kurdish women's rights lawyer, 31 March 2009.

126 Initially the man insisted on a much higher pay off but the amount was lowered after considerable mediation efforts.

cases.<sup>127</sup> Yet there have been questions about the limited implementation of these laws as well as the status of these laws, which were issued prior to the 2006 unification. There are also questions about the interpretation of these laws.<sup>128</sup>

According to Article 409 of the IPC, if a man catches his wife in the act of committing adultery and kills her and her lover, he cannot be sentenced to more than three years in jail. Although Article 409 received considerable attention from women's rights activists seeking harsher penalties for honour killings, there are other provisions in the IPC that defendants continue to rely on as pretexts for lower sentences in honour killing cases.

Pursuant to Article 128(a) of the IPC, a court may reduce or exempt a person from penalty if the judges determine that the defendant had a legal excuse for committing the alleged crime. Judges have considerable discretion in determining what constitutes a 'legal excuse'; a 1973 Supreme Court decision stated '[i]t is legally excused for anyone who commits murder for the purification of shame'.<sup>129</sup> Additionally, Articles 130 to 132 address when and how a legal excuse or extenuating circumstances might permit a mitigated sentence.<sup>130</sup> Article 405 can also be used to reduce a death sentence to a life sentence in cases of intentional murder.<sup>131</sup>

A study of criminal court cases between 1991 and 2000 in Dohuk and Sulemanya revealed that lawyers regularly relied on Articles 128, 130, 131 and 405 to argue that defence of honour justified killing women.<sup>132</sup> The study revealed that Article 409, which specifically refers to killings committed for honour, was relied upon less as a defence compared with Articles 130 to 132, which allow broader discretion for courts to reduce sentences on the basis of 'honourable motives'.<sup>133</sup>

The legal reforms instituted by Kurdish leadership were the result of efforts by Kurdish women to reform the laws which encouraged killing of women for honour.<sup>134</sup> On 12 April 2000, the PUK administration amended Articles 130 and 132 of the IPC by issuing Decree No. 59:

Lenient punishment for killing women or torturing them with the pretext of purifying shame shall not be implemented. The court should not apply articles 130 and 132 of the Iraqi Penal Code no. 111 of the year 1969 to reduce the penalty of the perpetrator.

127 PUK Decree No. 59 and KDP parliamentary amendment.

128 Begikhani *supra* note 4 at p. 217.

129 *Id.* at p. 213 (citing 1973 Supreme Court Decision Number 2147).

130 *Id.* at pp. 212-13. Article 130 provides the degree to which a court might issue a lenient sentence, Article 131 regulates reduced sentences in misdemeanour cases and Article 132 permits a court further discretion to reduce a sentence based on the facts and circumstances.

131 Iraqi Penal Code Law No. 111 of 1969, Article 406 provides for the death penalty if the killing is committed for specifically enumerated cases and Article 405 provides another way to reduce the penalty if the court believes the murder is justified.

132 Begikhani *supra* note 4 at p. 213.

133 *Id.*

134 Begikhani *supra* note 4 at p. 215. In 1992, 30,000 Kurdish women signed a petition that was presented to the Kurdistan Parliament demanding the elimination of laws that sanctioned honour killing and calling for wider reforms of the Personal Status Law and the Penal Code.

In 2002, the KDP passed Law No. 14 to amend the IPC:

Crimes against women with the pretext of 'honourable motivation' will not be legally liable for lenient punishment and Articles 128, 130 and 131 of the Iraqi Penal Code no. 111 of the year 1969 will not be implemented.

The language of both laws is different and each administration amended different articles of the IPC. One of the criticisms of Decree No. 59 is that it is ambiguous because it includes the word 'pretext' which does not adequately address cases where the girl or woman is perceived by the community as dishonourable.<sup>135</sup> As stated above, however, it has remained unclear since 2006 whether both laws continue to apply to different jurisdictions or whether one or the other is in effect throughout the KRG. Following the 2006 unification, a committee was formed to review pre-existing laws to unify them through Parliament. However, Decree No. 59 and Law No. 14 have yet to be reviewed and considered or debated by the committee.<sup>136</sup> This ambiguity is illustrated by interviews with lawyers and judges who all have varying views on the legal status and applicability of these laws.

There are indications that these amendments to the IPC are having a positive impact, yet this effect is limited, particularly as some judges choose to completely disregard these changes to the law. In 2003, the Arbil Supreme Court increased the sentence of a man convicted of killing for honour from a one-year to a 15-year sentence after the Dohuk criminal court issued a reduced sentence.<sup>137</sup> In other cases, however, judges simply ignore the law and issue reduced sentences, reflecting deep-seated attitudes among the judiciary that maintaining male honour is more important than saving women's lives.<sup>138</sup>

The escalating female suicide rate, mostly by burning, indicates a disturbing trend that some attribute to greater efforts by law enforcement and the courts to investigate and prosecute honour killing cases more seriously.<sup>139</sup> There is concern among women's groups that families are increasingly pressuring women and girls to commit suicide by self-immolation for honour-related reasons to avoid criminal liability of male family members.<sup>140</sup> Although existing statistics on the issue vary considerably, and in no way represent an accurate reflection of the true number of cases, it is apparent that self-immolation is a significant cause of death from women and girls in the Kurdistan Region. According to official statistics gathered by the KRG, in the first half of 2007, 195 women died from burn injuries; and in the first quarter of 2008 alone, 136 women died of 'unnatural causes', the vast majority of these from burn injuries.<sup>141</sup>

135 Begikhani *supra* note 4 at p. 217.

136 Interview with Kurdish women's rights lawyer Razaw Ahmed Sharif, January 10, 2009. See also Taysi *supra* note 5 at p. 44.

137 Begikhani *supra* note 4 at p. 216.

138 Interview with Judge Sheikh Latif, Sulaimaniya, 19 January 2009.

139 UNAMI *supra* note 2. See also Taysi *supra* note 5 at pp. 31-32.

140 Begikhani *supra* note 4 at p. 217 (citing Faraj and Shwan, 2003).

141 Taysi *supra* note 5 at p. 31.

A young woman in Arbil was handed a match by her brother when she threatened to commit suicide because of abuse in her home.<sup>142</sup> In a recent case, a young woman fled from her family to a women's shelter to escape enduring pressures by her father and brothers to burn herself.<sup>143</sup> The 30-year-old woman was denied permission to marry someone she loved and was instead forced to marry her cousin. She divorced her cousin and was forced to become the second wife of a much older man. When she had an extra-marital sexual relationship, her husband filed a criminal complaint against her and her lover, but later withdrew the claim after the wife's lover paid money to her husband. The woman's family took her back to the family home and secluded her in a room where she was prevented from having contact with anyone, including her sisters. She stated that her father wanted her brothers to kill her, but they hesitated because they feared being arrested.<sup>144</sup>

Studies indicate that there is a strong link between female suicide and violence against women in Kurdistan, and that many of these women are pressured to commit suicide by their families for allegedly honour-related reasons.<sup>145</sup> Existing data on suicide is unreliable either because investigations fail to identify the coercive or even murderous actions behind these deaths, and because women who survive may be reluctant to disclose the truth due to fear of retaliation and shame.<sup>146</sup> Many women who survive long enough to be questioned by law enforcement are extremely reluctant to report that they were pressured to commit suicide or that a family member tried to kill them.<sup>147</sup> However other women, particularly those who know they will not survive long enough to return home, are willing to talk about the underlying violence. In one interview conducted by the Women's Media and Education Centre, a victim of severe domestic violence who burned herself said that if she survived she would try to kill herself again until she died, leaving behind four children. Part of the problem is the reluctance of the government to identify and document these cases, with poor investigations conducted by the police which fail to discover underlying violence and coercion which are often present.

Coercing someone to commit suicide is illegal under Article 408 of the IPC and can lead to a jail term of up to seven years:

Any person who incites a person to commit suicide or assists him in any way to do so is punishable by a term of imprisonment not exceeding 7 years if that person commits suicide on the basis of such incitement or assistance. The penalty will be detention if the person does not commit suicide but attempts to do so.<sup>148</sup>

142 Comments by burn victim, Conference on Suicide and Burning, Arbil, November 2007.

143 Specific identifying information about this case is withheld to protect the identity of the victim and of those assisting her.

144 Interview with woman, name withheld, during legal screening for Heartland Alliance's legal program, February 2009.

145 KHRP *supra* note 5 at p. 9

146 UNAMI *supra* note 2 at p. 17.

147 Interview with health official, name withheld, Sulemanya, June 2008.

148 Iraqi Penal Code Law No. 111 of 1969, Article 408(1). Attempting suicide however is not considered illegal. IPC Article 408(3).



Cases involving coerced suicide are even less likely to make it to the courts than honour killing cases, and the cases are often deemed accidental deaths or are considered justified for reasons of purification of shame.<sup>149</sup> A source at the Arbil Emergency Management Centre that treats burn victims stated ‘the victim is typically shot at her home and left to die before her body is moved elsewhere.’<sup>150</sup> However sometimes they are prosecuted. Currently there is an ongoing case in Sulaimaniya involving the prosecution of a girl’s relative for pressuring her to kill herself.<sup>151</sup>

Addressing the problem of honour-related violence against women requires that the government tackle the issue on multiple levels, starting with improving how cases are investigated in order to better distinguish whether the suicide may actually be a coerced honour-related suicide or an intentional honour killing. Many of these cases do not reach the courts and stop at the police and investigation level.<sup>152</sup> Investigative tools and training to analyze evidence are weak, and perhaps too much emphasis is placed on the need for modern forensic tools to properly investigate these cases. Instead, strategies such as proper interviewing techniques and credibility determinations can also be relied upon to prosecute these cases. A major weakness in prosecutions is the limited use and value attached to testimonial evidence. According to Iraq law, one person’s testimony such as that of the victim is *per se* insufficient evidence to obtain a conviction.<sup>153</sup> Police do not necessarily separate family members when questioning them to determine whether their versions of events coincide or conflict, and statements given to police are not always compared with testimony given during an investigation or trial to determine consistency.<sup>154</sup>

Rather than investigating possible causal factors such as family history and violence in the home, the focus of the police and legal investigators is often on the victims and their behavior; hymen testing for evidence of virginity is routine at burn units both for those who survive as well as in post-mortem cases.<sup>155</sup> A Sulaimaniya physician succinctly summed up the issue, ‘honour is very complex in our society and is reflected in the hymen.’<sup>156</sup>

The IPC does not criminalize domestic violence, although claims may be brought in serious cases under regular assault and battery laws. However the PSL permits men to discipline their wives and children who are disobedient. Rather than eliminating the requirement that wives obey their husbands, the Kurdistan Parliament amended the law to require that husbands also obey their

149 UNAMI *supra* note 2 at p. 17.

150 *Id.*

151 Interview with Judge Sheikh Latif, Criminal Court Judge, Sulaimaniya (19 January 2009).

152 Begikhani *supra* note 4 at p. 217.

153 Law on Criminal Proceedings No. 23 of 1971, Article 213.

154 In a trafficking case during which a victim consistently provided testimony that she was forced to engage in prostitution, the trial judge disregarded the police file, stating that this is not evidence and that they do not trust information gathered by the police. Interview with Juvenile Court Judge, Sulaimaniya, February 2009.

155 Interview with health official, name withheld, Sulaimaniya, June 2008. See also Begikhani *supra* note 4 at p. 215.

156 Interview with health official, name withheld, Sulaimaniya, June 2008.

wives. Disobedience may include leaving the home without permission, failing to properly carry out marital duties with the purpose of harming the spouse, or preventing the spouse from entering the home without a legitimate reason.<sup>157</sup>

## FEMALE CRIMINAL DEFENDANTS AND GENDER-BASED VIOLENCE

Women's histories of abuse are relevant and should be considered in criminal cases to ascertain whether there is a basis or justification to mitigate a sentence. Judges may mitigate or enhance sentences based on whether there are certain compelling factors to warrant such a decision, such as in cases where honourable motives may provide a legal excuse. These provisions reveal important values and beliefs of the society; reducing sentences for reasons relating to honour illustrates the value placed on male honour while devaluing women's lives. In the KRG, as is the case globally, violence against women continues to provide a basis for mitigated sentences while the reverse rarely applies to excuse violence committed by women in retaliation or response to male violence. Thus while the IPC permits a reduced sentence for perpetrators of honour-related violence, it does not afford the same treatment towards victims of severe domestic violence who kill abusive husbands.

Women who are caught up in the criminal justice system have often experienced a history of violence against them (gender-based violence), or they face an imminent threat of harm, both of which may be linked to their criminal cases. Contextualizing women's lives and histories to identify links between gender-based violence and suspected or actual criminal activity provides greater insight into how and why women commit crimes or are considered perpetrators when in fact they are victims. For example two teenage sisters from Kirkuk were convicted of murdering their grandmother who they alleged failed to protect them from their uncle who sexually abused them for years.<sup>158</sup> There are several women who are incarcerated and serving life sentences for murdering abusive husbands. In these cases a history of severe sexual, physical and psychological abuse did not provide a justification for killing. Women who are arrested for committing adultery may have a history of forced marriage in which they experience rape, domestic violence and servitude, and women and girls found guilty of prostitution may have been trafficked into sex work.

Forced marriage is common and girls are frequently married off at a young age, preferably to men from the extended family, tribe or clan.<sup>159</sup> This system 'is a form of control through which male domination is upheld, women's segregation enforced, and traditional and tribal norms and values preserved'.<sup>160</sup> In cases where women are arrested for committing adultery it is not uncommon to find an underlying forced and abusive marriage. Yet law enforcement and the courts do not

157 Act No. 15 of 2008, The Act to Amend the Amended Law № (188) of the year 1959; Personal Status Law, in Iraq Kurdistan Region, Article 10 amending Article 25.

158 UNAMI *supra* note 2 at p. 17.

159 Begikhani *supra* note 4 at p. 218. This endogamous system is central to maintaining patriarchal structures and to ensuring a patrilineal system of transmitting power and property.

160 *Id.* at p. 219.

inquire into whether there is a history of forced marriage and abuse that might help to explain why a woman commits adultery, or do not identify the presence of prior criminal activity since forced marriage is illegal.<sup>161</sup>

There is evidence that judges can be persuaded to account for women's histories of abuse in the criminal context. However lawyers need to advocate on behalf of their clients to illustrate the connection between gender-based violence and alleged criminal activity. In some cases a defendant's history of abuse can provide a defence to criminal allegations, for example if she was forced to engage in a criminal act and is therefore not criminally liable under Article 62 of the IPC:

Any person who is compelled to commit an offence by force or under threat so that he is unable to resist is not criminally liable.

In a case in Arbil a criminal court held that a female defendant established a defence to criminal activity based on the fact that she was forced to commit the crime by her abusive husband. In this case, the woman's husband forced her to assist him in luring their neighbour's daughter to their home where the husband raped her. When his wife refused to comply, her husband beat her and threatened to send her home to her family where she had been threatened with an honour killing because she lost her virginity when she was raped at the age of nine. The judges handled the case in a sensitive manner, questioning the woman outside the presence of her husband and permitting her to present testimony to establish that she was abused. The three (male) judge panel found her history of abuse a valid explanation to show that she was forced and released her from detention while her husband was sentenced to 15 years in jail.

Lawyers have a responsibility to advocate on behalf of their clients to present factual histories of abuse, however quality legal representation for criminal defendants is limited<sup>162</sup> and defendants deemed shameful are marginalized to a greater extent. Presenting a defence to criminal activity on the grounds that a woman was coerced to engage in criminal activity and is therefore not criminally liable exists in the law but is underutilized due to bias and attitudes that blame victims and evidentiary barriers. The 'Case of Bahar', presented below, illustrates this and other problems that recur in cases involving violence against women.

Evidentiary legal requirements similarly fail to consider the nature of gender-based violence and are unrealistic. According to Article 213 of the Law on Criminal Proceedings, the testimony of one witness is insufficient to support a conviction and must be substantiated by a confession or other significant evidence:

161 Act No. 15 of 2008, The Act to Amend the Amended Law № (188) of the year 1959; Personal Status Law, in Iraq Kurdistan Region, Article 6(1).

162 US Department of State, Bureau of Democracy, Human Rights and Labor, *2008 Human Rights Report: Iraq*, 25 February 2009. 'An accused person is considered innocent until proven guilty and has the right to privately-retained or court-appointed counsel. One of the significant challenges facing the criminal trial courts, however, was insufficient access to defense attorneys. Defense attorneys were provided, but detainees rarely had access to them before the initial judicial hearing. Many detainees met their lawyers for the first time during the initial hearing.'

One testimony is not sufficient for a ruling if it is not corroborated by other convincing evidence or a confession from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed.

In cases involving gender-based violence, the testimony of the victim might be the only available evidence because the nature of the violence is often hidden; victims may delay reporting violence due to fear of retaliation and shame and/or at the time of an investigation there may no longer be physical scars. Obtaining a conviction in a rape case, for example, in which the only witness against the alleged rapist is the victim appears legally impossible. Interestingly, in the criminal case in Arbil the court accepted the female defendant's testimony as sufficient proof that she was forced by her husband to engage in criminal activity without additional corroborating evidence or confession by her husband. As is more often the case however, proving coercion or force is difficult or impossible for many criminal defendants. As discussed in the 'Case of Bahar' below, victims of human trafficking encounter barriers to establishing that they were forced into prostitution if the only available evidence of force is their testimony.

### **Case of Bahar<sup>163</sup>**

Bahar is an 18-year old woman who was recently convicted of prostitution in Sulemanya despite consistent, credible testimonial evidence that she was a victim of sex trafficking. Bahar came from an abusive home where she lived with her father, step-mother and siblings. Her step-mother contacted the police when she discovered the defendant was being sexually molested by her brother, reporting them both for engaging in immoral behaviour. A criminal complaint was never filed, however Bahar's father forced her out of the house and into a women's shelter.

One of the employees, a night monitor at the shelter, recruited Bahar into trafficking by persuading Bahar that she could have a better life if she left the shelter and moved in with the employee's family. Shortly after leaving the shelter Bahar was raped at gunpoint and forced into prostitution. Bahar was sold twice to different traffickers who psychologically and physically abused her and forced her to have sex with men in exchange for money – which was never given to Bahar. She finally managed to escape and sought assistance from a neighbour and then the police. The police placed Bahar in detention; records indicate that she was detained for protection which sometimes happens in the KRG when shelters are unavailable or are not a viable option as in this case.

A criminal investigation ensued during which Bahar was interviewed by a prosecutor, investigation judge and also a social committee comprised of social workers and a psychiatrist. The social committee report stated that they believed Bahar to be a victim of abuse, that the shelters were poorly managed and that the government failed to provide any oversight. Yet the investigation court believed that there was sufficient evidence to refer the case for trial, and the judge found Bahar guilty of engaging in prostitution.<sup>164</sup>

This case raises a number of procedural and evidentiary issues that highlight how victims of gender-based violence are disadvantaged in the criminal justice system. First, the court's decision was

163 The defendant's name and other identifying information is altered to protect the individual's identity.

164 Bahar was tried in Juvenile Court since she was a minor when the offence was allegedly committed.

apparently based solely on the defendant's confession.<sup>165</sup> Specifically, the judge stated that since the defendant admitted that she had sex with multiple men, she admitted to engaging in prostitution according to Article 4 of the Law of Eradication of Prostitution, No. 8 of 1988. Pursuant to Article 4, three elements must be established to justify a finding of guilt – the defendant must: 1) engage in sexual activity, 2) with more than one person, and 3) in exchange for money. The third element in this case was not met. Although money was paid for sex, it was paid to the men who trafficked the defendant and she testified that she did not receive any payment. However the judge stated that the third element was established as she received indirect benefits in the form of food and clothing.<sup>166</sup>

Biased attitudes towards victims of violence negatively inform the outcome of legal proceedings and are illustrated in comments made by the judge following the termination of legal proceedings. The judge stated that he believed that if the defendant was forced, she would have asked for help at a checkpoint when she was being transported between cities, indicating his lack of understanding about the coercive tactics used by traffickers to intimidate and threaten victims, and implying that she did not want to escape but was there by choice. This also displays a lack of recognition of the fact that a woman such as Bahar faced retaliation if she was not believed by law enforcement or by her family if they were contacted, and discovered that she was no longer a virgin. The judge also stated that he believed the victim only ran away when she did because she faced the threat of sex with multiple men at one time.<sup>167</sup> Despite the availability of circumstantial evidence to support a defence that the victim was forced into prostitution and therefore not criminally liable, the judge found her guilty.

The defendant was unable to meet the high threshold for proving that she was forced. Specifically, during legal proceedings the judge stated that to prove she was forced, she had to provide 'direct evidence' - meaning the men who trafficked her. In other words it was the responsibility of the defendant, a detained teenager, to find the men who abused and threatened her and forced her into prostitution in order to bring them to the court to testify. There was no effort by the police to find those who were really responsible for committing the crime. Although the names of the men who trafficked Bahar were unknown, the police did not visit the house that she ran away from when she escaped from one of the traffickers. There was no investigation into the women's shelter and there was no effort to apprehend the employee who first recruited Bahar into trafficking.

The decision of the court to disregard circumstantial evidence, and to assess the credibility of the defendant through testimony, foreclosed any chance she had of establishing that she was forced to commit a crime. Yet there was one additional legal matter that should have disallowed the judge from relying solely on the defendant's confession as a basis for finding that she was guilty. Pursuant to Section 219 of the Law on Criminal Proceedings, a judge may accept a partial confession *unless* it is the only piece of evidence in the case:

165 Interview with Juvenile Court Judge, Sulemanya, February 2009, who stated that the confession is the 'highest form of evidence'.

166 Interview with Juvenile Court Judge, Sulemanya, February 2009.

167 Interview with Juvenile Court Judge, Sulemanya, February 2009.

It is permissible for the court to divide the confession up, accept the part which it believes to be correct and reject the rest. It is not however permissible to interpret the confession or divide it into parts if it is the only piece of evidence in the case.

In Bahar's case the judge accepted the part of the confession that indicated guilt, and disregarded the part that could have absolved her of criminal liability.

Women like Bahar usually have access to legal representation in name only as lawyers do not provide the sort of legal advocacy necessary to defend criminal defendants, particularly those charged with honour-related crimes. Important efforts to promote and strengthen the rule of law in the KRG include the application of existing laws in an objective manner and without outside interference. There are a number of laws that, if applied, would protect many victims from violence and would ensure that perpetrators of gender-based violence can no longer act with impunity or be treated leniently. Lawyers need to be trained to advocate on behalf of their clients to ensure that these cases are brought to court and given a fair hearing.

## CONCLUSIONS

Given the clearly identified mutually constituted multi-level nature of violence against women in the Kurdistan Region, it is evident that responses to this phenomenon must occur in a way that acknowledge and address the structural violence present in Kurdistan, Iraq. However for this to be successful, change must occur on multiple levels.

When gender-based violence is dealt with in a public manner through legal institutional channels, there is a greater likelihood that women's rights will be protected. Thus, rule of law must be implemented. Parliament is well-positioned to take the lead to continue the process of reviewing and improving laws to eliminate provisions that are discriminatory or that condone violence against women. Also important are the roles of law enforcement to detect and investigate cases involving violence against women in a thorough and professional manner. Further, the promotion of a truly independent and impartial judiciary that is strong enough to apply the rule of law notwithstanding powerful outside influences is key.

Civil society, human rights and especially women's rights organizations can serve as watchdogs to ensure that the government lives up to its obligations, yet they must also improve their own standards and performance to genuinely take on this responsibility. Further, they play a potentially powerful role through the provision of shelters as well as acting as woman-friendly mediators, who can work in tandem with formal justice actors to ensure that women's rights are protected, and that rule of law prevails.

Finally, positive change concerning the treatment of girls and women must occur within the family, as it is here that future generations can be taught to stop the cycle of violence before it begins. It is in the family home that the future police officers, investigators, lawyers and judges are first exposed to structures and norms that teach them that discrimination and violence against women are normal. Until this is changed, it will be difficult to come back to that individual later in life and convince him or her that violence against women is unacceptable, and that it is his/her duty

as a law enforcement officer to take it seriously. Thus, the only way that a reduction in violence against women can be achieved is if actors in the family, society and government all do their part to challenge the structures, institutions and norms that normalize and condone discrimination and violence against women.





Kerim Yıldız, Tigran Ter-Yesayan and Saadiya Chaudary<sup>1</sup>

## Freedom of Expression in Armenia Following the Meltex Case<sup>2</sup>

### INTRODUCTION

On 17 June 2008 the European Court of Human Rights (ECtHR) gave its long-awaited decision in *Meltex Ltd and Mesrop Movsesyan v. Armenia* (Application no. 32283/04)<sup>3</sup>, a case brought jointly by the Yerevan-based Forum Law Centre and the London-based Kurdish Human Rights Project (KHRP). This was only the second judgment to address Armenia's infringement of its citizens' rights to freedom of expression since its accession to the Council of Europe in 2001.

The judgment has been celebrated as a triumph for freedom of expression in Armenia, where recent events have highlighted the state's systematic abuse of its people's fundamental freedoms. The right to freedom of expression, to receive and impart information and ideas, is protected under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Armenia's accession to the Council of Europe brought with it obligations to observe all 66 Convention articles, and a duty to follow case law of the ECtHR.

Since its inception in 1959, the European Court has repeatedly emphasised that guaranteeing the right to freedom of expression characterises a democratic society. It is 'one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man'. Protecting the freedom to impart and receive information and ideas permits free criticism of government authorities, which is the main indicator of a free and democratic government. The Meltex Case brings the question of democracy and freedom of expression in Armenia to the forefront of debate in Europe. In the wake of the judgment, Armenia's role in the Council of Europe and its questionable approach to human rights is coming under increased scrutiny.

### THE BACKGROUND

Despite Armenia's membership of the Council of Europe since 2001, its human rights record, particularly with regard to freedom of expression, remains poor. The majority of Armenia's population relies on television and radio for news and information since newspaper circulation is limited. According to the 2008 US State Department Human Rights Report, although Armenia's

1 Kerim Yıldız is the Executive Director of the Kurdish Human Rights Project (KHRP), Tigran Ter-Yesayan is the Director of Forum Law Centre and Saadiya Chaudary is the Acting Legal Officer at KHRP.

2 An earlier version of this article was published in the September 2008 issue of *Socialist Lawyer*.

3 Full judgment available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Meltex&sessionid=24203447&skin=hudoc-en> (last accessed 8 June 2009).

constitution provides for freedom of expression and freedom of the press, in practice these rights were not respected, with continued reports on incidents of intimidation, violence and self-censorship.<sup>4</sup> While most of Armenia's 42 television stations are privately operated, most are also owned by government politicians or pro-government businessmen. Journalists find themselves compelled to engage in self-censorship. Major broadcasters commonly express pro-government views and television and radio stations avoid editorial commentary or reporting critical of the government.

Violence and harassment of the media is also common. Past years have seen distributors of politically-motivated leaflets repeatedly indicted, newspaper editors frequently charged for participating in opposition marches and broadcasting stations critical of the government threatened or closed down. Arbitrary tax audits have been used to impose indirect restrictions on freedom of the press. Like Meltex Ltd, independent broadcaster Gala TV experienced threats and physical abuse, coming under intense scrutiny from government authorities attempting to shut down the station or bring the content of its programmes in line with state-controlled media. Gala TV has also experienced problems in finding and retaining advertisers who the station's owner alleges have been forced to stop doing business with Gala.

Media independence in Armenia is sorely lacking. In his Ad Hoc Report commissioned in response to the outbreaks of violence that followed the March 2008 presidential elections, the Human Rights Defender of the Republic of Armenia (a public official), Armen Harutyunyan, condemned the 'heavy political bias of television stations' whose campaigns aimed at isolating opposition candidate Levon Ter-Petrossian and his supporters from society.<sup>5</sup> The report was published under Article 17(2) of Armenia's Law on the Human Rights Defender under which, in addition to an annual report on the state of human rights in Armenia, the Human Rights Defender could deliver unscheduled public reports '[i]n cases that produce widespread public response, or in cases of flagrant violations of human rights or mass occurrence of non-elimination of the violations.' The report on the presidential elections highlighted the insufficient protection afforded to freedom of expression by the Armenian authorities and asserted the need for media pluralism if there was to be a free society in which authorities exercised self-restraint. Calling for the reform of television and radio legislative provisions, it established an atmosphere of debate about freedom of expression and media independence that the *Meltex* case has brought right to the fore.

Armen Harutyunyan's report is in no way unique in highlighting the need for reform for the Armenian media. In Yerevan on 8 July 2008 a conference was held on 'media diversity in Armenia', organised by the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE) and Yerevan Press Club. Twenty days later, the OSCE representative on freedom of the media, Miklos Haraszi, released a report, declaring that limited pluralism in the broadcasting sector remained a serious and major problem. It too called for legislative change. In this atmosphere of

4 US State Department Human Rights Report for Armenia available at <http://www.state.gov/g/drl/rls/hr-rpt/2008/eur/119066.htm> (last accessed 8 June 2009).

5 Full report is available at <http://ombuds.am/main/en/10/31/1389/> (last accessed 8 June 2009).

media control and restriction, the *Meltex Ltd* judgment brings to a head both internal and external pressure on the government to bring about effective changes in observance of the fundamental right to freedom of expression.

## THE IMPACT

Besides its legal impact, the judgment's political impact is huge. European demands on Armenia to address the issue of media plurality, specifically referring to A1+, Meltex Ltd's subsidiary, have been long-standing. Explicit references to the television company first appeared in the Parliamentary Assembly of the Council of Europe (PACE) Resolution 1361 of 2004<sup>6</sup>, in which PACE expressed concern and 'serious doubts as to pluralism in the electronic media'.

On 17 April 2008 the Assembly approved Resolution 1609 (2008); 'the functioning of democratic institutions in Armenia', the original draft of which highlighted the judgment in *Meltex Ltd and Mesrop Movsesyan v. Armenia* and unequivocally required Armenia to 'grant a broadcasting licence to A1+ TV station [...] without further delay'.

After debates at the 2008 ordinary session of PACE in June this year, paragraph six of the resolution was amended, taking out the specific demand to grant A1+ a licence. Instead reference was made to the judgment only in so far as to call for 'an open, fair and transparent licensing procedure, in line with the guidelines adopted by the Committee of Ministers of the Council of Europe on 29<sup>th</sup> March 2008 and with the case law of the European Court of Human Rights'.

That the reference to A1+ remained in the resolution is telling. For the international community and Armenian civil society alike, the television company has become the standard-bearer for reform that Armenia's constitution needs if it is truly to operate within Convention standards and be seriously considered as a member of the Council of Europe.

At the time of the judgment Armenia has failed to fulfil its obligations under Resolution 1609, the deadline of which was set for 25 June 2008. In mid-January 2009 *ad hoc* visits were carried out by PACE to Yerevan to observe whether any progress has been made in the realisation of obligations under Resolution 1609. Following this visit PACE decided to extend the deadline for Armenia to comply with the resolution requirements until April 2009. PACE has indicated in the past that it would consider suspending the voting rights of the Armenian delegation to the Assembly if the requirements were not met. In complementation to the actions of PACE, the judgement not only serves as a reminder of the state's obligations under the Convention, but is also a timely assertion of the ECtHR's unwillingness to tread softly around Armenia's rights abuse.

## THE CASE

The case itself is one of three brought against Armenia by Mr Mesrop Movsesyan, chairman of independent broadcasting company Meltex Ltd. The company was established by Mr Movsesyan in 1995, one year after he had launched A1+, the first politically independent television company

6 Para. 19 PACE Resolution 1361 of 2004. Available at [http://www.coe.am/en/docs/pace/resolution\\_1361.pdf](http://www.coe.am/en/docs/pace/resolution_1361.pdf) (last accessed 8 June 2009).

in Armenia. A1+ collected, produced and disseminated news and information throughout all districts in Armenia as well as to foreign broadcasters via satellite, becoming a subsidiary of Meltex Ltd.

From as early as 1995, A1+ experienced harassment from state authorities who criticised the contents of its programmes as attacks on government policy. During the run-up to the 1995 presidential elections A1+ had refused to censor itself and broadcast only pro-government material. A1+ was informed that broadcasting frequencies were distributed for the purpose of defending and furthering state interests, not for criticising government authorities, and the broadcaster first had its state operations suspended in 1995.

Later that year Mr Movsesyan established Meltex Ltd as an independent broadcaster, intended to be outside of state control. Meltex was granted a five-year broadcasting licence in 1997. It was widely recognised as one of the few independent sources of well-processed news and analysis in television in Armenia.

In October 2000 the Armenian *Television and Radio Broadcasting Act* established the National Television and Radio Commission (NTRC) as a regulatory body for the activities of private television and radio companies. The NTRC's implementation of a new points-based licensing procedure resulted in A1+ losing its broadcasting licence in 2002 and failing at seven subsequent attempts to gain a licence for the remaining broadcasting frequencies in Armenia. Observers at the time believed the licence denials to be politically motivated and this was supported by the practice whereby all appointments to the regulatory body were made by the President and the Armenian Parliament.

After fruitless correspondence with the NTRC, Meltex Ltd lodged a total of four applications in the Armenian Commercial Court between September 2003 and March 2004, seeking *inter alia*, a declaration that the NTRC had acted unlawfully in refusing to give reasons for the licence refusals, and an order obliging it to provide such reasons. Each submission was dismissed as unfounded, as was the company's subsequent appeal on points of law to the Court of Cassation in April 2004.

Mr Movsesyan eventually brought the case to the ECtHR in 2004 assisted by lawyers from KHRP and the Armenian Forum Law Centre.

## GROUNDINGS OF COMPLAINT

Meltex Ltd's principle claim relied on Article 10 of the ECHR, which guarantees freedom of expression, one of the essential foundations of a democratic society. The article's two paragraphs deal alternately with the scope of the right itself and limitations that states may make on that right, so far as are 'necessary in a democratic society'. Cases brought upon Article 10 grounds commonly focus on whether interference by the respondent state is 'prescribed by law' and 'necessary in a democratic society', whereas *Meltex Ltd and Mesrop Movsesyan v. Armenia* surrounds a relatively unexplored element of Article 10: 'this Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. Before questioning whether Armenia had followed prescribed domestic licensing law, the ECtHR sought to establish whether that domestic

law conferred sufficient protection of Article 10 rights on citizens, by Convention standards. It reasoned that Armenia had followed domestic licensing legislation, but, crucially, that legislation did not meet Convention standards.

Pursuant to Article 10, states are permitted to regulate broadcasting systems with the imposition of licensing rules, but in the interests of legal certainty and to avoid arbitrary interference by public authorities with the rights guaranteed by the Convention, such rules must be clear, specific and reasonable (*Rotaru v. Romania*, 28341/95, 4 May 2000, *Hasan and Chaush v Bulgaria*, 30985/96, 26 October 2000).

The rule of law demands that any power exercised by government authorities must not exist unfettered. It must be clearly defined and pursue a legitimate aim if it is genuinely to protect citizens and facilitate just government.

The Parliamentary Assembly of the Council of Europe had already pointed to the 'vagueness' of Armenian media legislation in its resolution of 27 January 2004. Imprecision in national legislation resulted in the NTRC being given 'outright discretionary powers' which provided for no legal certainty, it asserted.

In its judgment in *Meltex v. Armenia* the ECtHR saw no improvement in the indistinct nature of national licensing legislation since its resolution in 2004. The Court observed that although the criteria for granting a broadcasting licence as set out in section 50 of Armenia's Broadcasting Act were sufficiently precise, no reasons were given by NTRC on their decisions to grant one company a licence over another company and no reasoning was given in relation to the application of the section 50 principles. In final assessment, the Court considered that 'a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression.'<sup>7</sup>

Armenia had not breached its Convention obligations by acting disproportionately and unnecessarily within domestic legislation, as is commonly the case. More significantly, domestic legislation, part of the integral fabric of government and the state, breached Convention standards of lawfulness. This finding has weighty constitutional implications for Armenia.

The ECtHR emphasised that guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting domain, call for open and transparent application of the regulations governing the licence procedure, specifically recommending that 'all decisions taken... by the regulatory authorities... be... duly reasoned' and 'made available to the public'.

Convention standards require that licence applicants like Meltex Ltd be given thorough reasons for application decisions. The ECtHR's key criticism of the Armenian authorities' conduct was their failure to provide A1+ with such reasons for repeatedly denying it a licence. The absence of transparent reasoning makes adherence to the law impossible. Unsuccessful applicants are unable to challenge refusals. Bias and unfairness in the procedure cannot be definitively discounted, particularly when the procedure is points-based.

7 See paragraph 83 of judgment.

In short, a system exercising the power to interfere with an individual's rights based on conditions and criteria will be inadequate unless it provides an explanation of those conditions and criteria. Clarity is a predicate of justice, ensuring accountability, public confidence and fairness in the application of the law.

While Armenian domestic law requires that 'an applicant shall be informed in writing of the reasons for the refusal of a licence within ten days from the date of the decision', the NTRC's interpretation of 'reasons' fell foul of the ECtHR's interpretation of 'reasons'. A1+ was provided with the total score it had achieved and informed that it had scored fewer points than other competitors, but it received no explicit explanation for the failure of seven successive licence bids. The NTRC's notifications did not amount to a reasoned decision within Convention standards.

Four years after their first submission the Applicants received judgment. The ECtHR held that the failure of the NTRC to apply licensing criteria in a manner compatible with Article 10 of the ECHR, on ten occasions, to applications by the television company, and its failure to give any reasons for its repeated denial of the company's bids, constituted a breach of Armenia's obligations under Article 10 of the ECHR. Further, it acknowledged that the NTRC's actions caused frustration and uncertainty to the company's management team which could not be compensated by a finding of a violation alone. Compensating Meltex Ltd for non-pecuniary damage, the ECtHR recognised that the significance of Armenia's infringement of the company's Article 10 right bore far more consequence than a mere loss of profits.

The judgment came out on 17 June 2008 amidst great anticipation and an unprecedented and extremely tense atmosphere on the streets of Armenia. This judgment was heralded by civil rights activists and figures in the press as a long-overdue victory for free speech. There had been a period of violent clashes between police and demonstrators on 1 March 2008, resulting in ten deaths and injuries to 200 people, following the February 2008 presidential elections. The government subsequently imposed a 20-day state of emergency in the capital Yerevan, including a ban on any potentially anti-government media reporting. The opposition soon sought permission for a demonstration, which the government refused. The judgment immediately gave an incentive to the opposition, who were adamant in their decision to proceed with their demonstration, and on the evening of 17 June 2008 crowds gathered to celebrate the judgment in North Avenue, Yerevan, where informal demonstrations normally prohibited by the state are held.

Unsurprisingly, opinions on the decision differed. While celebrations filled the streets of Yerevan, the Ministry of Justice announced in a press conference on 18 June that, 'the Republic of Armenia does not think the decision of the ECtHR was targeted at the Republic of Armenia. Neither did it mark A1+'s victory.' However, Armenia's Deputy Minister of Justice and representative to the ECtHR, Gevorg Kostanyan, later asserted that the decision will compel the NTRC to properly reason its decisions in the future.

Under Armenian law and the principle of *stare decisis* the judgments of the ECtHR are binding on all Armenian Courts. Armenia has shown willingness to observe the ECtHR's decisions in previous cases; *Misha Harutyunyan v. Armenia* (36549/03, 5 July 2005) saw a first instance judge subjected to disciplinary proceedings after the ECtHR found that his decision constituted a violation of

Article 6 of the Convention. European jurisprudence has increasing influence in domestic judicial procedure – according to the American Bar Association the Armenian judiciary refers more and more to ECtHR judgments in making decisions.

However, the judgment in *Meltex Ltd* goes further than providing an important authority for the Armenian judiciary in future cases of freedom of expression. Secretary General of the Council of Europe Terry Davis stated that the decision: ‘is a victory for freedom of expression. It should also serve as a lesson to all governments inclined to arbitrary interpretations of Article 10 of the ECHR, which guarantees this essential freedom’. The Committee of Ministers has underlined that respect for the judgments of the ECtHR is a condition *sine qua non* for membership of the Council of Europe.

For Mr Movsesyan himself the decision does not replace lost rights, nor does the compensation remedy six years’ lost profits. That it does in principle provide grounds for the station to bid on available broadcast frequencies in future is a real victory. However, recent acts by the Armenian government indicate that it is set on a course to prevent Meltex Ltd from obtaining a broadcasting licence. Since this judgment was promulgated on 17 June 2008, the Armenian government and courts have made questionable decisions about the application of Armenian Laws on Television and Radio and the application of the ECtHR judgment on the decision of the Court of Cassation made in 2004. In light of the judgment of the ECtHR, Meltex Ltd filed a lawsuit in the Court of Cassation to reverse the verdicts reached by that court in February and April 2004. On 19 February 2009, the Court of Cassation denied this appeal on the basis that the ECtHR judgment referred to a violation which arose through NTRC’s failure to provide reasons for its decision in refusing licences. The court stated that the fault therefore lay with the NTRC and an amendment of the law was being undertaken to address this.

On 10 September 2008, seven days before the Meltex Ltd Judgment of the ECtHR became final, the Armenian Parliament voted on passing legislative amendments to the Armenian Law on Television and Radio. These amendments have introduced a moratorium on the granting of broadcast licences for a period of two years, allegedly due to a planned digital switchover. However, this amendment once again effectively prevents Meltex from obtaining a broadcasting licence and returning to the air, and speculation is rife that the amendments have been driven forward for this purpose. The National Assembly passed this amendment in an unannounced evening session and without prior notification or consultation with interested parties. Further, the moratorium was passed shortly before a call for bids for several television frequencies, including a band that traditionally belonged to Meltex Ltd, which were about to become available. The amendment also gives existing stations the right to extend their licences until January 2011. In view of this amendment and the approach of the Court of Cassation to the appeal filed by Meltex Ltd, what will now be crucial is the active involvement of the Council of Europe in monitoring the implementation of the ECtHR’s Judgment in *Meltex Ltd and Mesrop Movsesyan v. Armenia*. Armenia still has a long way to go in securing the right to freedom of expression. However, the Meltex judgement is an important step towards creating a space for democratic discussion of this issue there.





## Section 3: Case Summaries and Commentaries



## A. ECHR Case News: Admissibility Decisions and Communicated Cases

### Discrimination and peaceful enjoyment of possessions

*Yildiz and Others v. Turkey*  
(37959/04)

**European Court of Human Rights:** Communicated on 12 November 2008

*Protection of property - prohibition of discrimination - Article 1 of Protocol No.1 and Article 14 of the Convention*

This is a KHRP assisted case.

#### Facts

The 24 Kurdish Applicants are the owners of plots of land in Turkey known as Kaledibi/Dağgöl Mahallesi/Hakkari Merkez, which is described as plot 47.

On 11 August 1998, Nejdet Yıldız, the eleventh Applicant, uncovered historical ruins on plot 47 whilst digging to build a new house and notified the Governor's Office of Hakkari on the same day. The authorities arranged excavations of plot 47, confirming the existence of cultural and historical ruins. The excavations left the Applicant's land and property in a dangerous state of disrepair.

By decree No. 2275, dated 11 November 1999, plots 47, owned by the Applicant, and the neighbouring plot 48, were registered as a 1<sup>st</sup> Degree Archaeological Protection Site Area by the Ministry of Culture, Diyarbakır Board for Protection of Cultural and Natural Assets.

On 30 May 2000, by a letter No. 199, Governor Orhan Işın wrote from the Governor's Office of Hakkari to the Ministry of Culture confirming that plots 47 and 48 had been registered as 1<sup>st</sup> degree Archaeological Protection Site Areas. He requested the Ministry of Culture to launch the required expropriation process in line with the relevant legislation ('the expropriation offer'). The launch of the expropriation process of plots 47 and 48 was approved on 17 July 2000 by letter No. 3405 from the Minister of Culture.

By judgment No. 2000/430 dated 19 September 2000, the Governor's Office of Hakkari, Directorate of Provincial Administration Board, pursuant to Article 5 of the Exploitation Law No. 2942 and in response to the request by the Ministry of Culture regarding plots 47 and 48, determined the plots were 1<sup>st</sup> Degree Protection Site Areas. The expropriation decree was signed and stamped by Governor Orhan Işın.

Following the Report of the Commission for Price Assessment submitted by Hakkari's Governor's Office, the expropriation compensation payment for plot 48 was fixed at 37,149,600,000 Turkish

Lira. The Ministry of Culture paid the owners of Plot 48 by a payment order No. 13775 dated 14 December 2001. The Commission for Price Assessment submitted by the Hakkari Governor's Office fixed the expropriation sum for plot 47 at 125,196,800,000 Turkish Lira. This sum was not paid to the Applicants.

An undated memo from Dr Alpay Pasinli, General Director of the Ministry of Culture, addressed to 'Mr Minister,' stated that the launch of the expropriation process of plots 47 and 48 was approved by approval letter No. 3405. He wrote that as a result of work carried out the value of the 'mentioned immobile' was fixed at 162,346,400,000 Turkish Lira. He went on to state that, 'Since the budget of the financial year 2000 is insufficient and it has already been distributed, the completion of the expropriation process couldn't be possible. We will try to evaluate this issue in the forthcoming years.'

The Applicants, who lived in a house on plot 47, sought to challenge the expropriation of their land without compensation.

On 7 November 2002, Dr Alpay Pasinli replied to a letter from the Office of a Legal Consultant dated 16 October 2002. The letter confirmed that plots 47 and 48 had been registered as archaeological sites and that expropriation was offered and launched on 17 July 2000. He confirmed that the compensation for plot 48 had been paid. He confirmed that an expropriation compensation price had been fixed for plot 47. However, he concluded that the expropriation process could not be executed due to the 'insufficiency of allocation' and further stated that there is no actual confiscation of plot 47.

At a date subsequent to the expropriation decree, the Applicants who continued to live in plot 47 applied to the Ministry of Culture for permission to undertake building works in order to restore their land to its former safe and habitable state, as the excavations had exposed dangerous holes in the ground. The Ministry of Culture refused all work on plot 47.

By a petition dated 19 September 2002 the Applicants lodged a claim in a Hakkari Civil Court of First Instance against the Ministry of Culture, challenging the expropriation without compensation. They argued that since their land had been registered as a 1<sup>st</sup> degree archaeological site they were prevented from making full use of the property as true legal owners, as they had been able to do previously. They obtained an expert report dated 3 December 2002, that found that the appropriate compensation to be paid for plot 47 was 341,522,885,917 Turkish Lira.

In a written defence to the civil claim by the Applicants, Ercan Akyüz, the Treasury Lawyer, wrote to the Hakkari Civil Court requesting that the Applicants' case be refused. He argued that plot 47 had not in fact been confiscated by the Ministry of Culture, and that the Applicants retained their proprietary rights over the plot of land. He furthermore stated that the sum was too high and was not acceptable.

On 21 January 2003, the Civil Court of First Instance dismissed the Applicants' case. The court held that as there was not actual confiscation with the aim to own the property by the administration, the case would be refused.

The Applicants appealed this decision to the 5<sup>th</sup> Civil Chamber of the Court of Appeals. On 15 December 2003, the Court of Appeals approved the decision of the Civil Court, finding it was an appropriate judgment according to the evidence and the case file.

Subsequently, the Applicants sought a correction of the Civil Court's and Appeal Court's decisions from the directorate of the 5<sup>th</sup> Civil Chamber of the Court of Appeals. The Applicants submitted detailed pleadings stating in essence that the decisions should be overruled as the actions breached their right to property and the basic principles of law and justice. Grave restrictions had been placed on their proprietary rights by the registering of the land as an archaeological site and this essentially prevented the Applicants from exercising their rights, since all alterations to the land were prohibited by Law No. 2863. The law provided a custodial sentence and a heavy fine for anyone who builds or alters the land without the requisite permission, which in this case had been denied.

#### Complaints

The Applicants claim that their right to property under Article 1 of Protocol No. 1 to the Convention has been violated. The Applicants' land has been expropriated without payment of compensation, which is a constitutional right. They argue that the cultural protection registration of the property, which has subjected them to the operation of Article 5 of the Cultural Assets Law, has interfered with their property rights to such an extent as to render them wholly useless; although they remain able to live on the property, ownership is deemed to have been transferred to the State by operation of the law and they are subject to an absolute prohibition on undertaking building and other work. Thus, the Applicants submit that their property was subject to *de facto* expropriation without compensation and have accordingly been denied peaceful enjoyment of their property. The Applicants submit that the means taken to achieve the aim of public interest of preserving cultural sites were disproportionate. The Applicants have been subjected to an expropriation procedure that has failed to conform to any of the significant laws applicable in the Applicants' situation, most notably the *de facto* taking of property without compensation.

The Applicants also allege a violation of Article 14 of the Convention, the right not to be discriminated against, in conjunction with Article 1 of Protocol No. 1 to the Convention. The Applicants submit that the violation of their right to protection of property has been inflicted upon them on account of their ethnicity, language, religion and social origin.

#### Held

The case was communicated to the Government for observations on 12 November 2008.

## Right to a fair trial

*Kirakosyan v. Armenia (no. 2)*  
(24723/05)

**European Court of Human Rights:** Communicated on 23 January 2009

*Prohibition of torture - right to liberty and security - right to fair trial - right to an effective remedy - prohibition of discrimination - Articles 3, 5, 6, 13, and 14 of the Convention*

### Facts

The Applicant, Mr Lavrenti Kirakosyan, is an Armenian national born in 1960. The Applicant lived in the village of Karaket, Armenia and since 1995 has been a member of an opposition political party, the National Democratic Union. From 1997 he has headed the party's local offices in the Baghramyan area. In March and April 2004, a series of protest rallies were organised in Yerevan by opposition parties voicing criticism of alleged irregularities in the presidential election of February and March 2003, in which the Applicant participated.

On 10 April 2004, the Applicant was arrested and taken to a police station. Administrative proceedings were initiated against him for disobeying the lawful orders of police officers. On the same day, the Armavir Regional Court sentenced the Applicant to ten days' administrative detention in accordance with Article 182 of the Code of Administrative Offences.

On 20 April 2004, the Armavir Regional Court examined and granted an investigator's motion, which sought to have the Applicant's home searched. A warrant was issued allowing police to search for a weapon they believed to be hidden in one of the Applicant's homes. The alleged weapon was related to criminal proceedings from an incident on the 27 March 2004 in which residents of the Myasnikyan village allegedly inflicted violence on representatives of the authorities.

It was stated that the warrant could be contested within 15 days before the Criminal and Military Court of Appeal. The Applicant alleges that on 20 April 2004, several hours before the expiry of his administrative sentence, he was transferred from the Ejmiatsin detention facility to the Baghramyan Police Department, and was subsequently escorted home by ten police officers.

The record states that a search took place from 5.10 pm to 6.55 pm by seven police officers of the Baghramyan Police Department. Additionally two neighbours, G.G. and M.S., were asked by the head of the police team to participate as attesting witnesses. The Applicant was asked to surrender the illegal weapon allegedly hidden in his house; he stated that he had no illegal objects in his house. The police found a plastic bag containing a cannabis-like herb in the boiler. The Applicant refused to sign the search record.

According to the Applicant's statements from two attesting witnesses, the search was conducted in the following manner. Upon his return the Applicant found his pregnant wife in a critical condition, apparently suffering a miscarriage, and his one-year-old son crying beside her. The Applicant's wife fainted on seeing him, a doctor was called and a number of female neighbours

came to help. At that point the head of the police team informed the Applicant that they were going to search his home, without showing him the search warrant. The Applicant alleges that the two attesting witnesses G.G. and M.S. were asked to participate only after the search had begun. G.G. was a severely disabled war veteran who had suffered concussion, whilst M.S. was 74 years old. Having not found anything in the house, the police started searching the yard and adjacent buildings. The Applicant alleges that during the search of the outside premises, the front door was left open and people including police officers, were coming and going. Moreover a group of police officers were standing by the front door while the others continued the search. Despite G.G. objecting, having found nothing from the exterior search, the police announced they would search the interior again. Following the additional search the police officers found the above-mentioned plastic bag. The attesting witnesses claim that their objections were omitted from the search record and that they were persuaded and bullied by the police officers to sign the search record.

The Applicant further alleges that he was kept at the police station overnight. He was given a meal, including a hamburger. About 15 or 20 minutes after having eaten the meal he felt sick, started vomiting and lost consciousness, an ambulance was called and he was given some injections. The Applicant alleges his meal was laced with a drug.

On 21 April 2004, criminal proceedings were instituted against the Applicant under Article 268(2) of the Criminal Code on account of illegal drug possession. On the same date, at 11.18 pm the Applicant was formally arrested. The investigator decided to subject the Applicant to a forensic toxicological examination. The Applicant alleges that he did not receive a copy of this decision. He was taken to the Republican Centre for Narcotics where a urine sample was taken.

On the same day, the Applicant was questioned and a lawyer was engaged. The Applicant continued to deny the drug possession allegations.

On an unspecified date, the plastic bag and the herbal substance was examined by a forensic expert and was found to be cannabis. On 23 April 2004, the Applicant was formally charged with illegal drug possession and detained by court order. On the same date the toxicological expert found traces of cannabis in the Applicant's urine sample.

The Applicant's lawyer on the same date filed a motion with the Armavir Regional Prosecutor seeking to stop the prosecution on the ground that the search conducted violated numerous procedural protocols. A similar complaint was launched on 27 April 2004. The Applicant alleges that on an unspecified date his lawyer requested a further examination of the cannabis and plastic bag by a forensic expert, which was rejected.

On 7 May 2004, the Applicant's lawyer applied to the Armavir Regional Prosecutor, challenging the investigator's impartiality and asserting that the search of his home was conducted in an illegal manner. The Applicant alleged that the bag containing cannabis had been planted by the police officers conducting the search. On 9 June 2004, the Applicant's lawyer made an application to the Regional Prosecutor stating that the search warrant lacked proper grounds and had been conducted with numerous procedural violations. The lawyer argued that the investigator had failed to obtain any evidence when investigating these irregularities, via questioning the neighbours or

doctors and attesting witnesses. On an unspecified date, the Applicant's case was brought before the Armavir Regional Court.

In the proceedings before the Regional Court, the Applicant filed a motion to exclude the results of the search as unlawfully obtained evidence. The court did not appear to make any decision on this motion. On 22 June 2004, the court found the Applicant guilty and sentenced him to one and half years' imprisonment. In reaching its decision, the court relied upon the testimonies of police officers who had conducted the search and two attesting witnesses, as well as the results of the analysis of the Applicant's urine sample.

The Applicant alleges that he was not given proper food in prison and that his family were forced to bring food to prevent him from starving.

On 29 June 2004, the Applicant's lawyer lodged an appeal arguing that the search of the Applicant's home had been conducted with significant procedural violations and that the obtaining of evidence through these means could not be used against a defendant. The Applicant further argued that the search warrant by the court had been authorised based upon fabricated evidence and therefore lacked any valid grounds. The Regional Court failed to take account of the submissions of the attesting witnesses, which confirmed allegations of irregularities.

On 10 August 2004, the Criminal and Military Court of Appeal upheld the Applicant's conviction, finding that no significant procedural violations had taken place in this case. No appeal was lodged in the statutory ten-day time limit.

On 6 September 2004, the Applicant was released on parole. On 15 November 2004, an appeal was lodged on the points of law on behalf of the Applicant against the final judgment of the Court of Appeal. On 10 December 2004, the Court of Cassation examined the appeal on its merits and dismissed it.

### Complaints

The Applicant complains under Articles 3 and 13, that his meal at the police station was laced with a drug and that no effective investigation of this was carried out. Furthermore, he complains that the degrading prison conditions, in particular the lack of food, amount to ill-treatment under Article 3.

The Applicant complains under Article 5(2) that the reasons for his arrest from 20 to 23 April 2004 were not made clear to him until the court issued an order to detain him on the latter date.

The Applicant complains under Article 6(1), that his right to a fair trial was violated. In particular he alleges that a member of the police had planted the cannabis at his home, that the search was conducted with numerous procedural violations, and that the courts had failed to even examine the unlawfulness of the evidence obtained by the search. Additionally, the Applicant alleges that during the investigation the two attesting witnesses were put under pressure by the police not to attend confrontations with him. Under Article 6(3)(b), the court's refusal of the Applicant's



request to examine the plastic bag and cannabis by a forensic expert deprived the Applicant of adequate time and facilities to gather evidence and to prepare his defence.

The Applicant complains that his right to private and family life was violated under Article 8. He argues that the search of his family home was conducted in violation of procedural law, and moreover, was founded on false premises and did not pursue a legitimate aim. Additionally, he complains that the forensic examination of his urine sample was not conducted in accordance with law, and thus, the evidence obtained as a result of the examination was inadmissible.

Finally, the Applicant complains under Article 14 that he has been discriminated against on the grounds of his political opinion, arguing that the criminal proceedings and conviction were imposed because of his political involvement with the opposition party.

### Held

On 23 January 2009 the case was communicated to the Government and the Court requested observations on the matters raised by the Applicant on their rights under Article 8 and Article 6(1) of the Convention.

## **Right to liberty and unlawful detention**

*Ali Ümit Alkes v. Turkey*

(16047/04)

**European Court of Human Rights:** Communicated on 2 February 2009

*Right to liberty – right to a fair trial – retroactivity - Articles 5, 6 and 7 of the Convention*

### Facts

The Applicant is a Turkish national, Ali Ümit Alkes, who was born in 1980 in Kocaeli. On 28 March 1998, Mr Alkes was taken into police custody following allegations of membership of a party known as the *Devrimci Kuvvul Hareketi* (DKH). On 2 April 1998, the İstanbul State Security Court ordered Mr Alkes's detention for the duration of the length of the proceedings against him. An indictment was filed on 15 April 1998 charging the Applicant with membership of the DKH and armed robbery.

On 28 March 2001, Mr Alkes was convicted by the Security Court of crimes under the former Criminal Code Articles 168(2) and 497(2). The Applicant was sentenced to 20 years imprisonment. The court stated that Law No. 4616 was to be applied to Article 497(2) conviction. Law No. 4616 determined conditional release, the suspension of proceedings and execution of offences in respect to certain offences committed before 23 April 1999.

The Applicant appealed the decision on an unspecified date. On 29 April 2002, the Court of Cassation quashed the Security Court's judgment based upon erroneous classification of the offences. The Court found that the Applicant's rights with respect to the length of sentence had to be safeguarded in a new judgment rendered by the Security Court.

On 24 January 2003, the Security Court convicted the Applicant under Article 497(1) for attempting to undermine the constitutional order. The Applicant was sentenced to 16 years and eight months' imprisonment. The judgment referenced the fact that the Applicant's concerns of sentence length were preserved in light of receiving a lower sentence, from 20 years to 16 years.

The Applicant appealed the judgment on 23 October 2003, claiming amongst other things, that his rights were not considered in respect of the length of the sentence. Since there was a partial application of Law No. 4616 under his first conviction, had the Applicant not appealed the first sentence he would have received a lower sentence than his second, thus, the Applicant's rights had not been protected.

On 2 December 2003, the Court of Cassation upheld the Security Court decision. The Applicant requested a rectification of the Court of Cassation decision, but the request was dismissed.

### Complaints

The domestic courts failed to consider the *reformatio in peius* principle under the old Code of Criminal Procedure when the courts decided the Applicant's appeal to his detriment, triggering violations of Articles 6 and 7 of the Convention.

The Applicant contended that the second judgment was an unjustified deprivation of his liberty which constituted a violation of Article 5 of the Convention.

### Held

The case was communicated to the Government for observations on several points. The Government was asked to address whether the Security Court had observed the rights brought to its attention by the Court of Cassation and to provide information on Law No. 4616, and what effect it would have had on the first conviction of the Applicant had this judgment not been quashed by the Court of Cassation. The Government was also asked to provide observations on whether the Court of Cassation had acted arbitrarily in quashing the initial judgment. The Court requested that the Government provide similar domestic case examples in its observations on the application or Article 326 of the former Code of Criminal Procedure.

## **Territorial control and respect of human rights**

### *Al-Skeini and Others v. United Kingdom*

(55721/07)

**European Court of Human Rights:** Communicated on 12 December 2008

*Obligation to respect human rights - right to life - prohibition of torture - Articles 1, 2 and 3 of the Convention*

### Facts

The Applicants, Mr Mazin Jum'aa Gatteh Al-Skeini, Ms Fattema Zabun Dahesh, Mr Hameed Abdul Rida Awaid Kareem, Mr Fadil Fayay Muzban, Mr Jabbar Karim Ali, and Colonel Daoud Mousa are Iraqi nationals who live in Basra.

The military operations by the United Kingdom in Iraq, in which British troops formed part of a United States-led coalition, were codenamed 'Operation Telic' and divided into three phases: planning and deployment, major combat operations, and stabilisation and reconstruction. Major combat operations in Iraq were declared complete on 1 May 2003.

In the post-conflict period that followed, British forces remained in Iraq, operating under a joint command MND(SE), comprising the provinces of Al Basrah, Maysan, Thi Qar and Al Muthanna, with a population of approximately 4.6 million. There were 8,150 British troops deployed in the region. It was accepted by the Secretary of State that in the area covered by MND(SE), between 1 May 2003 and 28 June 2004, ('the relevant period'), the United Kingdom became an occupying power under the relevant provisions of the regulations annexed to the 1907 Hague Convention and the 1949 Fourth Geneva Convention. During the relevant period the British forces were responsible for maintaining security (re-establishing Iraqi security forces, including the Iraqi police, carrying out patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure) and supporting the civil administration in Iraq.

The death of the first six Applicants' relatives occurred in southern Iraq during the relevant period, when the United Kingdom was an occupying power.

The first Applicant's brother, Mr Hazim Jum'aa Gatteh Al-Skeini, was shot dead on 4 August 2003 by a member of a British military patrol in Basra. Very different accounts were given by the first Applicant and his witnesses and British Military witnesses.

The second Applicant's husband, Mr Muhammad Abdul Ridha Salim, was fatally wounded on 6 November 2003 when British troops raided a house in Basra. He received medical attention but died on 7 November 2003. There was a radical divergence between the respective parties' accounts of this incident.

The third Applicant's wife, Mrs Hannan Mahaibas Sadde Shmailawi, was shot and fatally wounded on 10 November 2003 in the Institute of Education in Basra. The British military account reflected that she was shot unintentionally during an exchange of fire between a British patrol and a number of gunmen. The third Applicant accepts that the shooting of his wife was not intentional. It appears that she may have been a very unfortunate bystander, and the Secretary of State does not accept that the fatal shot was fired by a British soldier rather than a gunman.

The fourth Applicant's brother, Mr Waleed Sayay Muzban, was shot and fatally injured on the night of 24 August in Basra. He was driving a people-carrier when he was shot, and he died the next day. The shooting occurred, according to the patrol, while a British Military patrol was carrying out a perimeter check; the vehicle initially stopped but then drove away, appearing to be a threat.

The fifth Applicant's son, Mr Raid Hadi Sabir Al Musawi, was shot and fatally wounded by a member of a British military patrol in Basra on 26 August 2003. He died nine weeks later on 6 November 2003. The parties' respective accounts of what happened are radically divergent.

The sixth Applicant's son, Mr Baha Mousa, was employed as a receptionist at a hotel in Basra and while working there on the morning of 14 September 2003 British troops entered the hotel. He was seized, detained and taken to a British military base in Basra, where he was brutally beaten by British troops and died of injuries inflicted on the night of 15 September 2003.

On 26 March 2004, the Secretary of State for defence decided, in connection with the deaths of 13 Iraqi civilians, including the above six deaths: (1) not to conduct independent inquiries into the deaths; (2) not to accept liability for the deaths; and (3) not to pay just satisfaction. The Applicants applied for judicial review of these decisions, seeking declarations that both the procedural and substantive obligations of Article 2 and (in the case of the sixth Applicant) Article 3 of the Convention had been violated as a result of the deaths and the Secretary of State's refusal to order any investigation.

On December 14 2004, the Divisional Court rejected the claims of the first five Applicants but accepted the sixth Applicant's claim, holding that there were exceptions to the principle of territoriality.

The first five Applicants appealed and the Secretary of State cross-appealed. On 21 December 2005, the Court of Appeal dismissed the appeal and the cross-appeal. It held that none of the victims in the first five Applicants' cases were under the actual control and authority of British troops at the time they were killed and that it was impossible to hold that the United Kingdom was in effective control of that part of Iraq or that it possessed any executive, legislative, or judicial authority outside the limited authority given to its military forces there. Save for the sixth Applicant's claim, the United Kingdom did not have jurisdiction under Article 1 of the Convention.

The Applicants appealed and the Secretary of State cross-appealed to the House of Lords, which gave judgment on 13 June 2007, finding that the United Kingdom did not have jurisdiction over the deaths in the case of the first five Applicants.

### Complaints

The Applicants allege that their relatives were killed by the acts of the British Armed Forces while within the jurisdiction of the United Kingdom under Article 1 of the Convention. They complain under Articles 2 (and additionally, in the case of the sixth Applicant, Article 3) in respect of the failure to carry out a full and independent investigation into the circumstances of each death.

### Held

The case was communicated to the Government on 12 December 2008. The Court requested observations from the Government on whether the Applicants and their deceased relatives were within the UK's jurisdiction within the meaning of Article 1 of the Convention at the relevant time, and if so, whether there was a breach of Articles 2 and 3 of the Convention.

## Freedom of expression

*Duman v. Turkey*  
(15450/03)

**European Court of Human Rights:** Communicated on 16 February 2009

*Right to a fair trial - freedom of expression and association - Articles 6, 10, 11 and 14 of the Convention.*

### Facts

The Applicant, Mr Müdür Duman, is a Turkish national who was born in 1956 and lives in İstanbul.

The Applicant was the director of the Eminönü district branch of *Halkın Demokrasi Partisi* (People's Democracy Party, HADEP) in İstanbul at the time of the events giving rise to the application. On 24 June 2000 a number of trade unions organised a demonstration in İstanbul. During the demonstration, some participants carried signs and chanted slogans in support of Abdullah Öcalan. These demonstrators were identified by the police as members of HADEP.

On 26 June 2000, the public prosecutor applied to the İstanbul State Security Court for a warrant to search the offices of four branches of HADEP to obtain incriminating evidence concerning the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK) (an illegal organisation). On the same day the İstanbul State Security Court issued a search warrant. That evening, police officers from the İstanbul police headquarters conducted a search of the Eminönü branch of HADEP. The search protocol, which was signed by the Applicant, indicated that illegal publications and flags and symbols of the PKK had been found there, together with pictures, articles and books by Mr Öcalan.

The Applicant was then taken to İstanbul police headquarters for questioning. The police officers allegedly informed the Applicant of his rights under Article 135(3) of the former Code of Criminal Procedure to request a lawyer. The Applicant did not ask for a lawyer. In his statement, the Applicant contended that, although he was the director of the Eminönü district office of HADEP, he was not always present at the office and that he had not been aware of the existence of the pictures and symbols regarding Mr Öcalan and the PKK found in the office. He similarly denied responsibility for the illegal publications and books which were found on the premises, which he claimed had been brought in by publishers or other persons visiting the office without his knowledge. He claimed that whenever he came across similar pictures and symbols, he requested their removal. This statement was signed by the Applicant.

On 27 June 2000, the Applicant was questioned by the İstanbul public prosecutor, to whom he repeated the statement he had previously made to the police. He apparently waived his right to request a lawyer. On 30 June 2000 the İstanbul public prosecutor filed a bill of indictment against the Applicant, charging him with praising and condoning acts punishable by law under Article 312(1) of the former Criminal Code.

On 15 June 2001, at a second hearing, the İstanbul public prosecutor presented his opinion to the first-instance court in the absence of the Applicant. The İstanbul Criminal Court convicted the Applicant as charged at the end of the hearing, and sentenced him to six months' imprisonment and a fine of 91,260,000 Turkish lira. The Applicant appealed against this judgment. He claimed that he had not been duly reminded of his right to request a lawyer under Article 135 of the Code of Criminal Procedure during his interrogations, and that the first-instance court had taken its decision in his absence without giving him the opportunity to defend himself against the allegations of the public prosecutor.

On 5 June 2002 the Court of Cassation quashed the fine imposed, but upheld the remainder of the judgment.

### Complaints

The Applicant complained under Article 6(1) of the Convention that he had not been duly reminded of his rights under Article 135(3) of the former Code of Criminal Procedure to request a lawyer, and that he had not been provided with the assistance of a lawyer during his interrogation by police officers at the İstanbul police headquarters, by the public prosecutor or before the criminal court.

He further maintained under Article 6(3)(b) of the Convention that he had not had adequate time and facilities for the preparation of his defence as the first-instance court had delivered its decision without giving him the opportunity to submit his defence on the merits and to reply to the allegations of the public prosecutor presented to the court. The Applicant alleged under Article 6(3)(d) of the Convention that the public prosecutor and the first-instance court had failed to conduct an additional investigation (*tevsi-i tahkikat*) into the case or to collect evidence or summon witnesses in his favour. He contended that under Article 10 of the Convention, his conviction and sentence under Article 312(1) of the former Criminal Code on account of certain pictures and other materials found in HADEP's Eminönü office had interfered with his right to freedom of expression and to impart and share information. The Applicant further maintained that even the classification of his offence as 'praising an act punishable by law', rather than the mere possession of illegal publications, was sufficient to find a violation of Article 10.

The Applicant complained that his conviction as the Eminönü branch director of HADEP was one of many oppressive measures aimed at the dissolution of HADEP, which was a breach of the right to association under Article 11. Lastly, the Applicant contended under Article 14 of the Convention that, like all Turkish citizens of Kurdish origin, he was being discriminated against in the exercise of his human rights and freedoms.

### Held

The case was communicated to the government on 16 February 2009. The Court requested observations on whether the Applicant had been afforded adequate time and facilities to prepare his defence and to respond to the public prosecutor's opinion on the merits of the case, and whether the Applicant's conviction constituted an interference with his freedom of expression within the meaning of Article 10 of the Convention.

***MGN v. United Kingdom***

(39401/04)

**European Court of Human Rights:** Communicated on 22 October 2008

*Right to respect for private and family life - freedom of expression - Articles 8 and 10 of the Convention*

Facts

The Applicant is the publisher of the United Kingdom national daily newspaper *The Daily Mirror* (formerly known as *The Mirror*).

On 1 February 2001, *The Daily Mirror* (*Mirror*) newspaper carried as its lead story an article titled, 'Naomi: I am a drug addict'. The article was supported on one side by a slightly indistinct picture of a relaxed Ms Campbell with the caption, 'Therapy: Naomi outside meeting'. The story continued inside, with a longer article over two pages titled, 'Naomi's finally trying to beat the demons that have been haunting her'. The article made mention of Ms Campbell's efforts to rehabilitate herself, and that one of her friends said she was still fragile but 'getting healthy'. The article gave a general description of Narcotics Anonymous (NA) therapy, and referred to some of Ms Campbell's recent publicised activities. These included an occasion when Ms Campbell was rushed to hospital and had had her stomach pumped. She claimed it was an allergic reaction to antibiotics and that she had never had a drug problem, but 'those closest to her knew the truth'. In the middle of the double page spread, amongst several innocuous pictures, was a dominating picture of Ms Campbell in the street on the doorstep of a building as the central figure in a small group. Standing on the pavement was a board advertising a named café. The photographs were taken covertly by a freelance photographer employed by the newspaper specifically to do the job, who was concealed in a parked car some distance away.

On the same day as the articles were published, Ms Campbell commenced proceedings against the Applicant. The newspaper's response was to publish further articles, this time highly critical of Ms Campbell. On 5 February 2001, the newspaper published an article headed 'Pathetic'. Below was a photograph of Ms Campbell with the caption 'Help: Naomi leaves Narcotics Anonymous (NA) meeting last week after receiving therapy in her battle against illegal drugs'. The text was headed as 'After years of self-publicity and illegal drug abuse, Naomi Campbell whinges about privacy'. Elsewhere in the same edition, an editorial article with the heading 'No hiding Naomi' concluded with the words, 'If Naomi Campbell wants to live like a nun, let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it.' Two days later, on 7 February 2001, the *Mirror* returned to the attack, with an article headed 'Fame on you, Ms Campbell', that referred to her plans to 'launch a campaign for better rights for celebrities or "artists" as she calls them.' The article included the sentence, 'As a campaigner, Naomi's about as effective as a chocolate soldier.'

Ms Campbell claimed damages for breach of confidence and compensation under the Data Protection Act 1998. The article of 7 February 2001 formed the main basis for a claim of aggravated damages. Morland J, ([2002] EWHC 499 (QB)), upheld Ms Campbell's claim. The judge found that

the information detailing Ms Campbells' treatment by regular attendance at NA meetings were clearly confidential. The details were obtained surreptitiously when Ms Campbell was engaged in 'low key and drably dressed' private activity of therapy to advance her recovery from drug addiction. Publication was to her detriment. Viewed objectively, the information was likely to adversely affect her attendance and participation in therapy meetings and caused 'significant distress'. Article 8 was thus triggered and required striking a balance with Article 10. Ms Campbell was entitled to a remedy of a modest award of GBP 2,500 plus GBP 1,000 in aggravated damages.

The Applicant appealed. The Court of Appeal unanimously allowed the appeal and discharged the judge's order. The Court of Appeal was not prepared to accept that the information about Ms Campbell receiving therapy from NA was to be equated with disclosure of clinical details of the treatment of a medical condition. The court was of the view that the publication of the information was insufficient in significance to shock the conscience and thus did not amount to a breach of the duty of confidence owed to her. It thereby accepted the respondent's argument that disclosure of these details was peripheral.

Ms Campbell appealed to the House of Lords. On 6 May 2004, the House of Lords allowed Ms Campbell's appeal by a majority of 3-2 and restored the orders made by the trial judge.

The case gave rise to a competition between the rights of free speech and privacy, which are of equal value in a democratic society; a balancing exercise to determine whether the means chosen to limit the Article 10 right were rational, fair and not arbitrary. While the impugned publication had the potential to cause harm to Ms Campbell, it was hard to see any compelling need for the public to know the name of the organization she was attending for therapy or other details in the publication. Lord Hope of Craighead concluded that any person in Ms Campbell's position would have seen the publication of these photographs as a gross interference with her right to respect for her private life which would outweigh the right to freedom of expression. Baroness Hale of Richmond observed that the examination of an action for breach of confidence began from the 'reasonable expectation of privacy' test inquiring whether the person publishing the information knew or ought to know that there was a reasonable expectation that the information in question would be kept confidential. This was a threshold test that brought the balancing exercise between the rights guaranteed by Articles 8 and 10.

Such cases required looking at the comparative importance of the rights being claimed in the individual case, then at the justifications for interfering with or restricting each of those rights, and applying the proportionality test to each. Lord Hoffman observed that the fact that the pictures were taken without Ms Campbell's consent did not amount to a wrongful invasion of privacy. The pictures were not demeaning or embarrassing, as they showed Ms Campbell dressed and smiling among a number of other people. They added nothing to what was said in the text and carried the message that the *Mirror's* story was true. The decision to publish the pictures was within the margin of editorial judgment that the *Mirror* was entitled to and Lord Hoffman dismissed the appeal.

The Applicant was requested to pay legal costs, in addition to their own, and an award of damages of GBP 3,500. On 21 February 2005, the Applicant sought a ruling of the House of Lords Appeal



committee that it should not be liable to pay any part of the success fees on the grounds that such a liability was so disproportionate as to infringe their right to freedom of expression under Article 10.

On 20 October 2006, the House of Lords dismissed the Applicant's petition. On 28 November 2005, the Applicant was ordered to pay Ms Campbell's costs of the second petition of appeal. For the appeal to the House of Lords, Ms Campbell retained solicitors and counsel pursuant to a conditional fee agreement which provided that if the appeal succeeded, solicitors and counsel should be entitled to success fees of 95 per cent and 100 per cent of their respective base costs respectively. At a hearing on March 8 2006, before the Judicial Taxing Officers in the House of Lords, the Applicant sought to challenge the level of the 95 per cent success fee claimed by Ms Campbell in respect of their profit costs of the second petition. On 3 April 2006, the Taxing Officers held that 'there can be no doubt that the success fees claimed of 95 per cent and 100 per cent were appropriate,' however, when examining them for proportionality they concluded that the costs claimed 'did have the appearance of disproportionality.' As a result, the solicitors and counsel fees were reduced.

On May 5 2006, the Applicant presented a petition to the House of Lords in respect of the decision of the Taxing Officers. No further information was provided.

#### Complaints

In its original application the Applicant complained that it had suffered a disproportionate interference with its rights protected by Article 10, that it was in the public interest to publish the fact of Ms Campbell's drug addiction in light of her previous false statements, and that it was for the editor to decide how much detail to publish to ensure the credibility of the story as he was publishing information on issues of public interest, was acting in good faith, and on an accurate factual basis.

By further submissions of 18 April 2006, the Applicant also complained under Article 10 that the requirement to pay success fees to Ms Campbell did not, under the circumstances, pursue a legitimate aim and that the costs were unnecessary and disproportionate. The result of having to pay Ms Campbell's excessive costs, double the reasonable and proportionate costs incurred by her in protecting her right to respect for her private life, did not, in the circumstances, pursue a legitimate aim; the success fees were neither necessary nor proportionate.

#### Held

The case was communicated to the Government for observations on whether there has been a violation of the Applicant's right to freedom of expression, contrary to Article 10 of the Convention.

**Gutierrez Suarez v. Spain**

(16023/07)

**European Court of Human Rights:** Communicated on 27 November 2008

*Right to a fair trial - freedom of expression - Articles 6 and 10 of the Convention*

Facts

On 18 December 1995 the Applicant, a journalist at the daily national paper *Diario 16*, at the time the director of facts, published on the front page information related to the seizure of 4,638 kilograms of hashish in Algesiras, hidden in the bottom of a truck of the company Domains Royaux. The company is owned by the royal family of Morocco and is dedicated to the export of citrus and tropical fruits. The truck had departed from Tangier and its destination was the central market of Madrid. The article was printed on the first page titled, 'A company of the family of Hassan II implicated in narcotics trafficking.'

On page 12, there featured a longer article with the title '5 tonnes of hash discovered in a cargo of a company of Hassan II'. The text of the article mentioned articles published in *El Mundo*, *Le Monde*, and the *Herald Tribune* that made reference to narcotics trafficking as the principal source of revenue of Morocco and implicated certain political persons close to the monarchy.

The king of Morocco considered that the implication of his family and familial enterprises in narcotics trafficking was completely false and constituted an illegitimate infringement upon his honour. On 31 May 1996, the king of Morocco Hassan II demanded protection of his honour against the company editor of the daily *Diario 16*, the Applicant, the director, and the journalist who authored the contentious article.

In a judgment of 25 November 1997, the judge of the first authority N. 61 of Madrid accommodated the demand, declaring that there had been an illegitimate interference with King Hassan II's fundamental right to respect. The judgment concluded that the information, with regards to the implication of the company Domains Royaux in narcotics trafficking or that the company was complicit in its use for said trafficking, was untrue. The published information served to convey a pejorative view of the company linked to the king. The defendants were ordered to pay damages to be determined.

The Applicant, along with the others condemned, appealed against the judgment at the *Audiencia Provincial* of Madrid. The *Audiencia Provincial* rejected the appeal and confirmed the earlier judgment.

The Applicant and the journalist who authored the article invoked Article 20(1) (freedom of expression and information) of the Constitution. The Supreme Court rejected the invocation, noting that the articles' titles provided the reader with the belief that the Moroccan Royal Family was complicit in the illegal trafficking of hashish. The Applicant and the author of the article then instigated an *amparo* proceeding, alleging the violation of their Constitutional right to freedom of

information guaranteed under Article 20(1)(d). In a decision of 15 November 2006, the supreme jurisdiction rejected the argument on the grounds that the exercise of freedom of information was subject to the maximum constitutional protection as long as the information was based on true facts in the interest of the public.

### Complaints

In invoking Article 6, the Applicant complained that he was unable to use all the means of proof necessary for the preparation of his defence. Under Article 10, the Applicant complained that he had been condemned, in violation of his right to freedom of expression and the freedom to communicate information, even though the information published was true. Likewise, the Applicant complained that under Article 14 he had been condemned as the director of the newspaper where the information had been published, even though he was neither the author of the information, nor the legal representative, administrator, or owner of the newspaper in question. He referenced the pre-constitutional law of the press of 1966.

### Held

The case was communicated to the Government on 27 November 2008 for observations on issues raised under Article 10 of the Convention.

## **Right to a fair trial**

*Benjamin Nersesyan v. Armenia*

(15371/07)

**European Court of Human Rights:** Communicated on 4 February 2009

*Right to a fair trial - Article 6 of the Convention*

### Facts

The Applicant is a Canadian national. He was born in 1954 and has lived in Canada since 1993. On 2 August 2006 the Applicant instituted a civil case in Armenia against his brother for the annulment of multiple documents granting his brother inheritance of their father's estate and the right to be recognised as an heir. The Applicant claims the father had named both him and his brother as heirs. In March 1999, the notary, negating the requirements of the law, issued an inheritance certificate without confirming the circumstances.

The district court of Yerevan examined the claim but dismissed it as unsubstantiated. The court found that since the Applicant had been aware of the death and thus was aware that inheritance procedures would be undertaken, he had missed the six-month time limit to stake a claim in the inheritance. The Applicant appealed on an unspecified date.

The Civil Court of Appeals upheld the decision on 13 December 2006. The Applicant lodged an appeal with the Court of Cassation on 22 December 2006 raising various substantive law violations. Namely, that the decision would have grave consequences on his interest in property and

a significant impact on the uniform application of the law, as the Court of Appeal had contradicted another Court of Cassation decision.

The Court of Cassation returned the appeal on 15 January 2007 after finding shortcomings in the submission, specifically a failure to raise admissibility grounds. The court did not set a deadline for resubmitting the appeal after correction of the shortcomings.

### Complaints

The Applicant asserted that the Court of Cassation denied him access to the court in violation of Article 6 of the Convention, by returning his appeal without providing a reasoned decision. Further, the Applicant contended that his rights under Article 1 or Protocol 1 had been violated.

### Held

The case was communicated to the Government on 4 February 2009 for observations on the Applicant's claims under Article 6 of the Convention. In particular the court requested observations on whether the Applicant had received adequate access to the court in light of the Court of Cassation sitting *in camera* and then deciding his to return his appeal without sufficient reasoning.

## B. Substantive ECHR Cases

### Freedom of assembly and association

*Amiryan v. Armenia* (31553/03), *Sapeyan v. Armenia* (35738/03) and *Gasparyan v. Armenia* (35944/03)

**European Court of Human Rights:** Judgments dated 13 January 2009

*Right to a fair trial – respect for private and family life – freedom of assembly and association and prohibition of discrimination – Articles 6, 8, 11 and 14 of the Convention*

These are KHRP-assisted cases.

### Facts

All the Applicants are Armenian nationals. In 2003, a presidential election was held in Armenia with its first and second rounds taking place on 19 February and 5 March 2003 respectively. Following the first and second rounds of the election, there were a series of protest rallies organised in Yerevan by opposition parties. The Applicants participated in the demonstrations.

The Applicants were charged with participation in unauthorised demonstrations and were sentenced to 15, ten and ten days' administrative detention respectively. The Applicants appealed to the President of the Criminal and Military Court of Appeal which decided to change the sentences

to administrative fines (1,000, 1,000 and 2,000 Armenian drams, respectively). The Applicants were released after serving several days of their detention.

### Complaints

The Applicants complained that the Criminal and Military Court of Appeal failed to adopt a reasoned decision, contrary to Article 6(1) of the Convention (right to a fair hearing), and that their convictions had unlawfully interfered with their right to peaceful assembly guaranteed by Article 11.

Two of the Applicants (Amiryan and Sapeyan) further alleged that the interference with their protected rights was not prescribed by law.

Additionally, Amiryan and Gasparian relied on Article 14 (prohibition of discrimination) and Amiryan also relied on Article 8 (right to family life) on the basis that he was denied correspondence with his wife whilst in detention.

### Held

#### *Article 6*

The Court held that the Applicants' claims under Article 6(1) were manifestly unfounded and must be rejected in accordance with Articles 35(3) and (4) of the Convention. The Applicants were convicted for their participation in an unauthorised demonstration and this reasoning was stated in the Court of Appeal's decision.

#### *Article 8*

The Court held that the Applicant's claim was manifestly ill-founded. It noted that there was no evidence in the case file that the Applicant (Amiryan) was denied correspondence with his wife throughout his detention.

#### *Article 11*

The Court held, in all three cases, that there had been a violation of Article 11 of the Convention.

#### *Article 14*

The Applicants' allegations under Article 14 were rejected as the Court stated that there was no evidence to suggest that the Applicants were subjected to penalties by virtue of their political opinions.

#### *Article 44*

In all three cases the Court awarded compensation for non-pecuniary damage and costs and expenses.

## Right to peaceful enjoyment of property

*Nicola v. Turkey* (18404/91), *Michael v. Turkey* (18361/91), *Kyriakou v. Turkey* (194707/91), *Ioannou v. Turkey* (1864/91), *Evagorou Christou v. Turkey* (18403/91), *Sophia Andreou v. Turkey* (18360/91), *Economou v. Turkey* (18405/91), *Nicolaidis v. Turkey* (18406/91)

**European Court of Human Rights:** Judgment dated 27 January 2009

*Protection of Property - right to respect for private and family life - right to effective remedy - prohibition of discrimination - just satisfaction - Articles 8, 13, 14 and 41 of the Convention and Article 1 of Protocol No. 1*

### Facts

The Applicants on all eight cases are Cypriot nationals. The cases involved the initial displacement of the Applicants from the region where they possessed land and their subsequent inability to occupy this land. The initial displacement occurred during Turkey's military intervention into northern Cyprus in 1974 when Turkish troops evicted the Cypriot nationals from their land and homes. Each Applicant owned various sized plots of lands and some plots comprised of the family residence. On 9 December 1990, the Applicants, now refugees, were denied access by Turkish troops, through refusal of entry at checkpoints, to enter the Turkish-occupied region of Cyprus.

Applications were lodged with the European Commission on Human Rights in 1991 under the former Article 25 of the Convention, and were submitted to the Court only in 1998 to 1999 when Protocol No. 11 to the Convention came into force.

### Complaints

Each case at the very least asserted a violation of Articles 8 and 41 of the Convention and Article 1 of Protocol No. 1. In the six cases where an Article 8 violation occurred, the Applicants not only asserted a denial of access to their plots of land, but also that the plot of land comprised of a residence which the Applicants held as their home (*Nicola v. Turkey* (18404/91), *Michael v. Turkey* (18361/91), *Kyriakou v. Turkey* (194707/91), *Ioannou v. Turkey* (1864/91), *Evagorou Christou v. Turkey* (18403/91), *Sophia Andreou v. Turkey* (18360/91)).

Additionally, *Economou*, *Kyriakou*, *Nicola*, and *Nicolaidis*, relied on Article 13 (right to effective remedy) and Article 14 (prohibition of discrimination). Likewise, *Evagorou*, *Kyriakou*, *Nicola*, and *Nicolaidis*, relied also on the obligation to respect human rights under Article 1.

### Held

The Court held that there had been a violation of Article 1 of Protocol No. 1 in each of the cases on at least one of the grounds asserted. However, only in six cases did the Court determine that a violation of Article 8 occurred. With respect to Articles 1, 13 and 14, the Court determined that it was not necessary to consider these grounds due to either the finding of a violation of Article 1 of Protocol No. 1 or the Article 8 findings. With respect to Article 41, the Court held unanimously that the issue was not ready for a decision. Thus, the Court invited the respective parties to file further submissions (within three months) and reserved the question in whole.

*Ali Kemal Uğur and Others v. Turkey*

(8782/02)

**European Court of Human Rights:** Judgment dated 3 March 2009

*Right to a fair trial - right to respect for private and family life - just satisfaction - protection of property - Articles 6, 8 and 41 of the Convention, and Article 1 of Protocol No. 1*

Facts

The Applicants' ancestors immigrated to Anatolia and were given usufructuary rights to land, due to the inability to buy land. In 1926, a new law was established by the new Turkish Republic which allowed individuals to own land. During the period of 1924 to 1926, a prominent individual in the community, Mr Ali Saip Ursavaş, decided to remove villagers and the Applicants' ancestors from the land and register the plots in his own name. In the 1950s there was a court case challenging Ursavaş' entitlement to and registration of the land. In 1964 the ancestors moved to intervene in the Kadirli Title Deeds Registration Court case ('Kadirli Court'), but were overruled. The Court of Cassation upheld the ancestors' appeal. In 1983 the proceedings, which the ancestors were now parties to, in the Kadirli Court, ended in favour of the ancestors and the Applicants (14 years later). The Ursavaş' family and Treasury appealed to the Court of Cassation, which quashed the Kadirli Court's decision and denied the Applicants' motion to revise.

New proceedings were instituted in the Kadirli Land Registry Court where the case continued for nine years, ending unfavourably for the Applicants' claims regarding plots 1 to 3. Plots 4 to 6 were severed from the original proceedings. The Applicants of plots 1 to 3 appealed the decision to the Court of Cassation, which rejected their claims but quashed the earlier decision in favour of other persons participating in the proceedings. A new request for revision was rejected (making the decision final with no further recourse) and proceedings continued for the other persons laying claim to the plots 1 to 3.

Proceedings began anew for plots 4 to 6 within the Kadirli Land Registry Court. Claims regarding plot 4 were rejected and the Applicants appealed. The Court of Cassation quashed the earlier decision and determined that plots 4 to 6 should be joined with plots 1 to 3; thus ending all Applicants' ability to further participate in future proceedings.

Complaints

The Applicants alleged violations of Article 6(1) and Article 8 of the Convention, and Article 1 of Protocol No. 1. Under Article 6, the Applicants asserted that the length of time of the proceedings was unreasonable and that the Court of Cassation had committed a procedural error. Further, the Applicants asserted that they were denied access to their homes under Article 8 of the Convention and Article 1 of Protocol 1.

Held

By unanimous decision the Court found that those Applicants whose names did not appear on the original court filing documents could not bring a claim. This decision eliminated 19 of

the 21 Applicants. The eliminated Applicants had failed to comply with the request to supply documentation to tie them or their ancestors to the proceedings regarding the land in question.

#### *Article 6*

With respect to Article 6, the elements to be considered when determining whether the domestic courts complied with the reasonable time requirement were: the complexity of case; the conduct of the Applicants and the relevant authorities; and what was at stake for the applicants in the dispute (referencing *Frydlender v. France*, 30979/96). The Court held that the government had failed to supply compelling reasons for the case's longevity. Thus, for the Applicants that were not dismissed, Mr. Ali Kemal Uğur and Mr. Ömer Lütfi Uğur, the Court found a violation under Article 6 and awarded each one of them 19,200 Euros.

#### *Article 8 of the Convention and Article 1 of Protocol No. 1*

The claim relating to a procedural mistake in the Court of Cassation occurred prior to Turkish law recognising the right of individual petition and thus could not be considered. Therefore both Article 8 and Article 1 of Protocol No. 1 were inadmissible. The Court supported its findings by stating that it would not settle the dispute over the plots and did not find any indication that the domestic courts ruled arbitrarily; plots 1 to 3 could not claim 'possession' as defined under Article 1 of Protocol No. 1 and thus were inapplicable; plots 4 to 6 were still pending and thus no definitive conclusion could occur.

#### *Article 41*

The Court awarded 19,200 Euros in respect of non-pecuniary damage to Mr Ali Kemal Uğur and Mr Ömer Lütfi Uğur.

## **Right to liberty and security**

### ***Böke and Kandmir v. Turkey***

(71912/01, 26968/02 and 36397/03)

**European Court of Human Rights:** Judgment dated 10 March 2009

*Prohibition of torture - right to liberty and security - right to a fair trial - no punishment without law - right to respect for private and family life - right to effective remedy - just satisfaction - Articles 3, 5, 6, 7, 8, 13 and 41 of the Convention*

#### Facts

On 14 February 2001, a shooting occurred on a bus and two persons were injured. The gunman exited the bus. The Aydın police received information that the suspect was in a red car. The police subsequently arrested one of the Applicants on a traffic control operation. The police further arrested four others, including the Applicant's brother (also an Applicant, whose case was joined by the ECtHR and are discussed together in the Judgement as well as this summary) who was in a different car. Mobile telephones, five firearms, and two cars were then confiscated. The Applicants were taken into custody on the same day as the apprehension. The next day, three police officers



drafted a report, and detailed the mobile telephone numbers found on the Applicants' phones and the phone of another suspect. Five days after the arrest, a Magistrate judge extended the custody for an additional three days. The Applicants' statements were taken the same day. Based upon the statements provided, the Applicants and others were accused of forming a criminal profit-making organisation.

A document was produced which purportedly contained full confessions by the Applicants. The Applicants were examined on three occasions by Aydın State Hospital doctors who reported no signs of ill-treatment. A Magistrate judge, on 21 February 2001, ordered the Applicants' detention, despite the Applicants' protestations claiming, among other things, inaccuracies in police reports and coerced confessions. On 22 March 2001, the weapons found in the car underwent ballistic testing and one of the guns was linked to the bus shooting. Furthermore, testing for gunpowder residue on the Applicants' hands occurred on an unspecified date and one of the Applicants' hands allegedly had gunpowder residue. In April 2001, the Applicants and 19 other individuals were indicted based on the original allegation of forming a criminal profit-making organisation. From June 2001 to November 2001 the İzmir State Security Court held four hearings in which the Applicants continually denied the confessions, the medical reports of no signs of ill-treatment, the veracity of the police reports and the overall accuracy of the evidence. The Court refused to release the Applicants due to the seriousness of the charges. An additional four hearings were held between December 2001 and May 2002. On 14 May 2002, the Applicants were convicted as charged, taking into consideration the information collected, the statements taken and the tests performed.

The Aydın Criminal Court determined that there was insufficient evidence to find the Applicants guilty of the charge of causing grievously bodily harm to third persons.

The allegation of ill-treatment and the request for a medical examination was first made on 26 February 2001. The Applicants claimed that they have been hung by their arms and subjected to other kinds of ill-treatment. On 2 March 2001, the Applicants' representative filed a request for examination and the Aydın Public Prosecutor, the same day, sent a letter to the Prison Administration requesting that the Applicants undergo a medical examination at the State Hospital. The representative warned that the signs of ill-treatment were dissipating and the examination needed to occur immediately. The examination occurred on 29 March 2001 at the Aydın Governor's Office. The doctor stated that there were no signs of ill-treatment, but suggested that the Applicants undergo a neurological examination. On 30 March 2001, the Applicants were sent to the State Hospital for a neurological examination which also resulted in a finding of no ill-treatment.

### Complaints

The Applicant, Rifat Böke, asserted a violation of Article 3 of the Convention, specifically 'Palestinian Hangings', and of Articles 6 and 13 due to ineffective investigation by domestic authorities into the allegation. Both Applicants asserted violations under Articles 5(3) and 5(5), Articles 6(1), 6(2), 6(3)(b), (c) and (d), Article 7, Article 8 and Article 1 of Protocol No. 1.

With regard to Article 5(3), the Applicants alleged being held in police custody for seven days without being brought before a judge. The Applicants asserted that under Article 6(3)(c) lack of access to a lawyer during custody violated their defence rights. The Article 8 and Article 1 assertions related to the Applicants' deprivation of property, including mobile phones and cars, and the unlawful wiretapping of phone conversations. The Applicants also claimed the right to compensation for custody and detention, the lack of independence and impartiality of the tribunal, the lack of access to lawyers, illegal wiretapping of telephone conversations, and insufficient evidence thereby constituting an unlawful conviction.

### Held

The claims were admissible in respect of the length of detention and the lack of legal assistance while in custody for both Applicants, and with regard to Rıfat Böke, the allegations of ill-treatment and ineffective investigation. The remainder of the applications were dismissed. The ECtHR found there was a violation of Article 3 under the procedural limb, but no violation under substantive limb. The Court also found violations of Article 5(3) and Article 6(3)(c) of the Convention.

### *Article 3*

Under Article 3, the Court determined that a link could not be drawn between the Applicant's subsequent anti-inflammatory cervical collar, which he alleged was due to the torture—particularly the 'Palestinian hanging'—he had been subjected to in police custody, and the government's refusal to submit specific reports such as X-rays and hospital records. However, within the procedural arm of Article 3, the Prosecutor's investigation was ineffective and untimely. The fact that it took three weeks to provide the applicant with a medical examination, in light of his allegations of torture and ill-treatment, did not comply with the 'promptness' requirement. Further, the Court noted that the medical reports fell exceedingly short of the standards recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment due to the lack of detail.

### *Article 5*

In determining the violation of Article 5(3) in respect of custody, the Court drew upon the case *Brogan and Others v. the United Kingdom* (11209/84; 11234/84; 11266/84 and 11386/85), where the detention lasted four days and six hours. The Court did not see the detention of the Applicants for seven days as necessary in light of precedent set in *Brogan*. Likewise in respect of detention the Court referred to *Karatay and Others v. Turkey* (11468/02) and *Bayam v. Turkey* (26896/02). However, due to the seriousness of the crimes indicted, the decision to detain the Applicants was not ill-founded.

### *Article 6*

The Court found the Applicants' claim with respect to violation of Article 6(3)(c) in conjunction with Article 6(1) paralleled that in *Salduz v. Turkey* (36391/02) and thus a violation had occurred.

### *Article 41*

The State was ordered to pay 6,500 Euros to Rıfat Böke and 1,500 Euros to Halil Kandemir for non-pecuniary damage.

***Elğay v. Turkey***  
(18992/03)

**European Court of Human Rights:** Judgment dated 20 January 2009

*Right to liberty and security - Article 5 of the Convention*

Facts

The Applicant was born in 1983 and lives in İstanbul, Turkey. On 10 July 2002 the Applicant was stopped at a road check when police officers saw a photograph of Abdullah Öcalan and the slogans 'Biji Serok Apo' ('Long live President Apo') and 'Biji Kurdistan' ('Long live Kurdistan') on the Applicant's mobile telephone screen. The Applicant was subsequently arrested and detained in the anti-terrorist branch of the İstanbul police headquarters.

On the same day, the Applicant made statements to the police and to the Gebze Magistrates' Court, which subsequently ordered his detention on remand, having regard to the state of the evidence, the Applicant's statements to the police and the nature of the alleged offence, namely membership of the illegal organisation the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK).

On 11 July 2002, the Applicant lodged an objection to the remand order; however no decision was taken regarding the objection. The Gezbe public prosecutor issued a decision on the same day stating that he lacked jurisdiction. The investigation file was therefore transferred to the public prosecutor's office at the İstanbul State Security Court. The İstanbul public prosecutor on 1 August 2002 charged the Applicant with membership of an illegal organisation, under Article 168(2) of the former Criminal Code.

On 12 August 2002, the İstanbul State Security Court ordered the Applicant's continued detention, due to the nature of the alleged offence, the state of the evidence and the date of the initial order for the Applicant's detention. On 25 October 2002, the State Security Court held the first hearing. The Applicant's representative requested the first-instance Court to release the Applicant on bail. The Court accepted the request and ordered the Applicant's release pending trial. On 5 September 2003, The İstanbul State Security Court acquitted the Applicant of the offence of membership of an illegal organisation.

Complaints

The Applicant complained that there had been no effective domestic remedy by which to challenge the lawfulness of the first-instance court's decision regarding the extension of his remand in custody according to Article 5(4) of the Convention.

Additionally, the Applicant complained under Article 5(5) of the Convention that he had no right to compensation provided for in domestic law for the alleged violation of his right as guaranteed by Article 5(4) of the Convention. He submitted that the remedy provided for by Law No. 466 was ineffective in providing redress for the alleged violation.

Held

*Article 5*

The Court held that there had been a violation of Article 5(4) of the Convention. The Court observed that at the outset the Applicant had unsuccessfully requested to be released pending trial before the State Security Court. It held therefore that the Court had the opportunity to end the Applicant's detention on remand and to avoid the alleged breach of the Convention (see *Acunbay v. Turkey*, 61442/00). Moreover it noted that on 11 July 2002 the Applicant filed an objection against the order of 10 July 2002 for his continued detention, to which no response or decision was taken by the domestic courts. Furthermore, the Court reiterated that it has already found that the remedy provided for by Articles 297 to 304 of the Former Code of Criminal Procedure, whereby Applicants could object to decisions ordering their continued detention, offered little prospect of practical success and did not provide for a procedure which was genuinely adversarial for the accused (see *Kosti and others v. Turkey*, 74321/01). The Court could not find any element in the case which would require it to depart from previous findings. It therefore concluded that there was no remedy in domestic law, within the meaning of Article 5(4), by which the Applicant could have challenged the lawfulness of his detention.

The Court also held that there had been a violation of Article 5(5). The Court reiterated that Article 5(5) obligations were complied with when it was possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs (1), (2), (3) or (4) (see *Wassink v. the Netherlands*, 12535/86). The right to compensation laid down in paragraph 5 thus presupposes that a violation of one of the preceding paragraphs of Article 5 has been established by either the European Court of Human Rights (ECtHR) or domestically. As the Court had already found an Article 5(4) violation, it follows that Article 5(5) of the Convention was applicable. The Court observed that the Applicant had the possibility of a compensation claim under Section 1(6) of Law No. 466 as the criminal proceedings against him had ended in his acquittal. However, it noted that, in awarding compensation under this provision, the domestic courts based their assessment solely on the fact that there had been an acquittal. Therefore, the redress for compensation flowed as a result of an automatic consequence of an acquittal and did not amount to the establishment of a violation of Article 5(1) to (4).

Consequently, Law No. 466 did not provide the Applicant with an enforceable right to compensation for the breach of his right under Article 5(4) of the Convention, as required by Article 5(5).

## Right to liberty and security – minors

*Oktay Güveç v. Turkey*  
(70337/01)

**European Court of Human Rights:** Judgment dated 20 January 2009

*Prohibition of torture - right to liberty and security - right to a fair trial - right to an effective remedy - prohibition of discrimination - Articles 3, 5, 6, 13 and 14 of the Convention.*

### Facts

The Applicant Oktay Güveç is a Turkish national born in 1980 and is currently residing in Belgium.

On 29 September 1995, another individual, Mr Özcan Atik, was arrested at the age of 15 on suspicion of membership of the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK). On 30 September 1995, the Applicant was arrested in İstanbul on the basis of information allegedly given to the police and signed by Mr Atik, an informant, stating that the Applicant was a member of the PKK. The Applicant was then placed into police custody.

On 5 October 1995, a written statement prepared by the police was signed by the Applicant which stated that he was an admitted member of the PKK and that he had had meetings with Özcan Atik and several other PKK members. Also contained within the statement was a description of an incident where Özcan Atik told the Applicant that he had asked Menderes Koçak to provide financial assistance to the PKK, but that Mr Koçak had refused. Özcan Atik then asked if the Applicant could aid him in setting fire to Mr Koçak's vehicle. The plan had been carried out one evening with the aid of two other persons. Furthermore, the Applicant's statement reflected that had he not been arrested, he would have taken part in further PKK activities.

On 7 October 1995, Mr Koçak identified Mr Atik and another person as the persons who asked him to contribute money to the PKK. He was unsure whether it had been the same two persons who had subsequently set fire to his vehicle and shop.

On 12 October 1995, the Applicant and 21 other persons (a product of the same police operation) were examined by a doctor at the Forensic Medicine Institute. According to the medical report written on the same day, the Applicant's body had no signs of ill-treatment.

On the same day, the Applicant was taken to the İstanbul State Security Court where he was questioned by a prosecutor and then by a judge. The judge ordered his detention pending criminal proceedings against him. When questioned by the police, by the judge, and prosecutor, the Applicant was not represented by a lawyer.

On 27 November 1995, the prosecutor filed an indictment with the İstanbul State Security Court, charging the Applicant and 15 others with the offence of carrying out activities intended to bring

about the secession of part of the national territory. According to Article 125 of the Criminal Code, which was in force at the time, the punishment for the offence was the death penalty.

The İstanbul State Security Court held a series of hearings in December 1995 and February and March 1996 in which the Applicant was unrepresented. The Applicant told the trial court that whilst in police custody, he had been given electric shocks and had been beaten with a truncheon, sprayed with pressurised water and beaten on the soles of his feet. The Applicant's repeated requests for release were rejected. Throughout the Applicant's custody, he was subjected to a limited visiting regime in the prison and was denied the opportunity to have open visits with his family.

On 17 October 1997, the trial court found the Applicant guilty of membership of an illegal organisation and setting fire to a motor vehicle. He was sentenced to nine years, eight months and ten days of imprisonment. The Applicant appealed. On 12 March 1998, the Court of Cassation quashed the Applicant's conviction. The case was remitted to the trial court for retrial. Eight hearings were held between 27 October 1998 and 30 December 1999. The Applicant's lawyer only attended one, whereas the Applicant attended two.

On 18 November 1999, a police chief informed the trial court that, contrary to the allegations and previous findings, no vehicle belonging to Mr Koçak had been set on fire. At the ninth hearing on 21 March 2000 at which the Applicant was present, Mr Koçak gave evidence before the court stating that his vehicle had not been burned and that no one had asked him to give money to the PKK. At the same hearing, the Applicant reiterated that he did not know Mr Koçak and had not set fire to any vehicle. He pointed out that he had been arrested when he was 15 years old with no evidence against him and he asked to be released. The request for release was rejected by the trial judge.

The Applicant attended the tenth hearing without his lawyer. On the eleventh hearing on 25 July 2000, in the absence of the Applicant's lawyer, the trial judge was presented with a letter from the Applicant's cell mates, stating that the Applicant was unstable and had serious psychiatric problems making it impossible for the Applicant to attend that day's hearing.

According to a medical report prepared by the prison doctor, attached to the cell mates' letter, the Applicant had been taken to a psychiatric hospital on 2 June 2000 and returned to prison on 11 July 2000. During the same hearing, the prosecutor asked the trial court to acquit the Applicant of the charge of arson, but to convict him of membership of an illegal organisation. The Applicant remained imprisoned but was referred by the court to a psychiatric hospital in order to establish whether at the time of the offence he had the requisite mental capacity needed to commit the crimes.

A medical report on the 7 August 2000 from the prison doctor confirmed that the Applicant had psychiatric problems; the Applicant had tried to commit suicide in both June and August 1999; he had taken an overdose and set himself on fire suffering serious burns and had spent three months in hospital for treatment of these injuries. During this time, he had also received treatment for depression. The report further set out that on 2 June 2000, the Applicant's psychological health had further deteriorated and he was hospitalised for a month and a half. On return from hospital,

his health deteriorated even further and he refused to speak. The prison doctor concluded that the Applicant needed to spend a considerable time in a specialised hospital.

At the twelfth hearing on 10 October 2000, Ms Mükrimе Avcı, who began representing the Applicant at that time, submitted observations highlighting that the Applicant was only 15 at the time of the arrest and that as Turkey was party to the United Nations Convention on Rights of the Child (UNCRC), under Article 40(3) UNCRC, the State was under an obligation to have specific procedures and institutions for children charged with criminal offences. Despite the obligations under UNCRC, Turkey's domestic law prevented the Applicant from being tried by a juvenile court. Had the Applicant been tried as a juvenile, he would not have been in police custody for 12 days, would have been provided with a lawyer, and his case concluded within a shorter time. Therefore, Ms Avcı argued that the ill-treatment the Applicant was subjected to in police custody and the long detention in prison was too much for a child of his age to bear. The trial court ordered the Applicant's release from prison on bail.

In its sixteenth hearing on 22 May 2001 the trial court acquitted the Applicant of the arson charge, but found him guilty of membership of an illegal organisation and sentenced him to eight years and four months' imprisonment. The court reiterated the same reasoning provided in the first conviction in finding the Applicant guilty in the second trial.

The Applicant appealed. On 13 March 2002, the prosecutor at the Court of Cassation submitted his written observations to the court and asked for the Applicant's conviction to be upheld. The submissions were not communicated to the Applicant or his lawyer. On 20 May 2002, the Court of Cassation upheld the Applicant's conviction.

### Complaints

The Applicant complained of violations to his rights protected by Article 3, 5, 6, 13 and 14 of the Convention.

### Held

#### *Article 3*

The Court held unanimously that there had been a violation of Article 3, that the Applicant had been subjected to ill-treatment. The Court noted that the Applicant's detention in an adult prison had been in contravention of the applicable regulations in Turkey at the time and of the country's obligations under international treaties. Furthermore, it noted that, according to the medical report of April 2001, the Applicant's psychological problems had begun and deteriorated further during detention in prison.

The Court additionally highlighted the fact that at only 15 years old, the Applicant had spent five years of his life detained with adult prisoners. They also noted that for the first six and a half months of that period he had no access to legal advice, and that, even once he was appointed legal representation, his lawyer for the remainder of that time failed to provide adequate representation. The Court considered that these aspects of the Applicant's detention had undoubtedly caused his psychological problems, which, in turn, had tragically led to attempts to take his own life. Holding,

that not only had the national authorities been directly responsible for the Applicant's problems, but had also manifestly failed to provide adequate medical care for him. Consequently, taking into account the Applicant's age, the length of his detention with adults, the failure of the authorities to provide adequate medical care and steps to prevent his repeated suicide attempts, the Court had no doubts that this amounted to inhuman and degrading treatment.

*Article 5*

The Court held there had been a violation of Article 5(3). The Court recalled three previous judgments concerning Turkey, where it had previously found violations of Article 5(3) for considerably shorter detention periods than the time spent by the Applicant in this case. Thus, the Court found that the length of detention on remand had been excessive, finding that it violated the reasonable time allowed under the Convention.

With regards to the Article 5(4) complaint, the Court, referring to previous case law, found that no real possibility for challenging the lawfulness of pre-trial detention existed in Turkey at the relevant time, and therefore held that there had been a violation of Article 5(4).

*Article 6*

The Court found a violation of Article 6(1) in conjunction with Article 6(3)(c). The Court noted that the Applicant had not been able to effectively participate in the trial, given that he had not attended at least 14 of the 30 hearings. The Court looked at the entirety of the criminal proceedings against the Applicant when reaching the decision and highlighted the shortcomings in the proceedings, notably the lack of legal assistance for most of the proceedings.

*Article 13 and 14*

The Court held there was no need to examine separately the complaints under Articles 13 and 14, in view of the other violations found.

*Article 41*

The Court held that the respondent State is to pay the Applicant 45,000 Euros in respect of non-pecuniary damage and the sum of 4,150 Euros in respect of costs and expenses.

Commentary

Despite the fact that this particular arrest took place in 1995, arrest and detention of children on criminal law charges is an ongoing concern. On 5 February 2009, Ethem Açıklan, the Adana branch director for the Human Rights Association, told Bianet that 17 children had been convicted of similar offences in the last two months. Among those convicted, a 15-year-old was sentenced to three years in prison by the 6<sup>th</sup> High Criminal Court of Adana for ties to a terrorist group, the PKK, following his attendance at a street protest. Amendments made to Turkey's Criminal Law in 2006 provide that teenagers between the ages of 15 and 18 years can now be tried in an adult court and as adults. Amidst this background of large numbers of children being arrested, detained and sentenced contrary to Turkey's obligations under the UNCRC, this judgment can be seen as timely and extremely important for securing the protection of children's rights in Turkey.



## Right to a fair trial

*Colak and Tsakiridis v. Germany*  
(77144/01 and 35493/05)

**European Court of Human Rights:** Judgment dated 5 March 2009

*Right to life - right to a fair trial – right to respect for private and family life - Articles 2, 6, and 8 of the Convention*

### Facts

The Applicant, a Turkish national residing in Germany, had been infected with HIV by her companion. The Applicant had consulted the same physician who had treated her companion and had known about her companion having Aids. The physician had not revealed the companion's information to the Applicant. The Applicant pursued legal action against the physician. The Wiesbaden Regional Court refused the action on the basis that the physician was not required to reveal the information. The court espoused that the doctor only had a responsibility when the doctor thought that revealing the information would prevent infection. The court did not see a tenable link to the contraction of HIV with the doctor's silence. The Frankfurt Court of Appeal dismissed the Applicant's appeal. However, the court went on to say that the doctor overestimated the duty of confidence and owed a higher duty of care to the Applicant. Such findings did not compel the court to rule that the physician acted with gross error, the standard required for a guilty verdict. The Federal Court of Justice refused to hear the Applicant's case based upon low probability of success. Likewise, the Federal Constitutional Court refused to hear the case on any constitutional grounds. The criminal prosecution was not pursued further due to a finding that the evidence could not prove beyond a reasonable doubt that the Applicant contracted the infection after the physician knew and consulted with the Applicant.

### Complaints

The Applicant alleged a violation of Article 2 and Article 6 of the Convention. Under Article 2, the Applicant asserted that the government failed to create clear guidelines for physicians when encountering situations such as hers and that the existing legal provisions were inadequate to deal with such a situation. The Applicant also argued that the Court of Appeal failed to construe 'gross error in treatment' in par with Article 2.

Under Article 6(1), the Applicant raised issues concerning the fairness of the trial due to her case being dealt with summarily, based upon broadly construed principles and statistics, rather than considering the case's specific details.

### Held

#### *Article 2*

The Court determined with regard to Article 2 that the basis of the Applicant's claim was the right to life. The Court noted that the legal system must provide a mode for a remedy but that stricter rules were impossible due to the complexity of the subject area. The Court also found that the Applicant had not exhausted all domestic remedies. In light of the interpretations of the rules

and the rules in place, the Court held that the government had sufficient consideration for the Applicant's right to life.

#### *Article 6*

In response to the Applicant's Article 6 claim, the Court highlighted that it did not consider whether facts or law were misapplied, unless such errors result in violation of rights and freedoms protected by the Convention. The equality of arms issue was complied with; the Applicant was provided a reasonable opportunity to present her case under conditions that were similar to her adversary's. Thus, a violation of Article 6 did not occur.

## **Prohibition of torture and inhuman and degrading treatment**

### *Salmanoğlu and Polattaş v. Turkey*

(15828/03)

**European Court of Human Rights:** Judgment dated 17 March 2009

*Prohibition of torture - right to a fair trial - freedom of expression - prohibition of discrimination - just satisfaction - Articles 3, 6, 10, 14 and 41 of the Convention*

#### Facts

The Applicants Salmanoğlu and Polattaş were 16 and 19 respectively, during the incidents leading to the application. They currently reside in İzmir and Switzerland respectively.

On 6 March 1999 at 2 am, Salmanoğlu was taken into custody by the Anti-Terrorist Branch of the İskenderun police headquarters as a suspected member of the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK). On the same day, at 3am, she was taken to the hospital along with two others. The doctor reported no signs of physical violence. The doctor's report was contained in a police headquarters report and listed the names of three detainees. Salmanoğlu was examined further that day to determine her virginity status and whether she had had recent sexual relations. The report concluded she was still a virgin and no recent sexual relations had occurred.

On 8 March 1999 at 11.30 am, Fatma Deniz Polattaş was arrested by the same police branch for the same reasons as provided for Salmanoğlu's arrest. Polattaş also underwent the same testing to ensure her virginity and lack of recent sexual relations. She too passed.

On 9 March 1999, a doctor noted Polattaş's sensitivity to palpitation to scalp and lumbar regions but did not note any physical signs of violence. On 12 March 1999, the women were taken to undergo virginity testing for the second time, but both refused. On the same day, a general practitioner examined them for signs of violence and reported none. The two went before a judge who ordered their custody and subsequently charges were brought against them.

On 26 March 1999, Polattaş asserted that she had been subject to mental and physical torture while in custody and asked for a gynaecological examination. On a date not specified, the prosecutor

began an investigation into the allegations. On 6 April 1999, Polattaş was examined and the doctor determined there had been no sign of intercourse in the anal region.

On 14 May 1999, the prosecutor determined there was a lack of jurisdiction into Polattaş' complaint, and transferred the case to İskenderun District Administrative Council ('Council'). The Council determined, in light of the medical reports, that no charges could be brought against the officers who Polattaş' claimed to have perpetrated unlawful acts against her person. Meanwhile, on 1 June 1999, Salmanoğlu stated she had been subjected to ill-treatment while in custody.

On 19 July 1999, the Turkish Medical Association (TMA) issued an opinion based upon previous examinations without examining the Applicants. Polattaş submitted to the TMA that she had a tooth broken and had suffered sexual abuse, rape and beatings. Salmanoğlu submitted that she had been subjected to threats, sexual abuse and beatings. The TMA concluded that the women should undergo several medical examinations. The TMA further found that the examinations that the women underwent after release were not reliable due to not following the typical protocol, and noted that the examinations while in custody had shortcomings as well. Specifically, the custodial examinations lacked the necessary detail, did not observe the psychological aspect of the patient, and had not acquired consent for the virginity testing. In essence, the TMA found that the virginity testing had been performed merely to humiliate the women.

On 9 November 1999, Applicants' lawyers requested a full investigation of the medical doctors who examined the Applicants and the police officers in contact with Applicants. On 24 November 1999, a doctor from the Adana Forensic Medicine Institute examined the women. The doctor found that Polattaş complained of pain in the previously described areas and suggested ten days off of work. In regards to Salmanoğlu, the doctor noticed a 1.5cm bruise on her back and suggested three days off of work.

On 14 December 1999, the prosecutor determined not to prosecute any parties for ill-treatment as alleged by the Applicants. On an unspecified date, the Applicants objected. On 26 January 2000, the President of the Hatay Assize Court quashed the prosecutor's decision, noting inadequacies in investigating the claims, and determined that criminal proceedings should be brought under Article 243 of the Criminal Code.

On 18 February 2000, the prosecutor filed an indictment charging four police officers with torture of the Applicants under Article 243 of the former Criminal Code. A series of hearing were held between April 2000 and September 2004 during which the prosecutor requested that the court order further reports to be drawn by the Trauma Centre due to inconsistencies between the drafted report and earlier preliminary reporting. On 23 September 2004, all reports from experts in the fields of sexual violence, physical violence, and psychiatrics were filed. The court further requested that the Plenary Assembly of the Forensic Medicine Institute (FMI) file a final report opining whether the Applicants had been victims of physical violence. The court also requested that the parties submit final observations on the merits of the case.

The Trauma Centre reports found the women to have suffered from post-traumatic stress disorder. Polattaş was further diagnosed with major depressive disorder. Both underwent psychotherapy, and

Polattaş also had drug therapy. The Trauma Centre concluded that the Applicants had experienced a traumatic event, and Polattaş had experienced an aggravated traumatic event. The claim of anal rape could not be supported or denied from a rectal examination due to the elapsed time between incident and examination. The FMI majority report found the Applicants were not suffering from post-traumatic stress and that there was nothing to support the Trauma Centre findings.

On 22 April 2005, the court acquitted the officers, finding insufficient evidence to convict them of criminal charges. The Applicants appealed the decision on 7 June 2005, noting, along with other contentions, that the virginity tests had been a sexual assault. The Court of Cassation quashed the judgment of 22 April 2005, but noted that the prosecution of the officers was time barred.

With regard to the criminal proceedings against Applicants, on 24 March 1999 a bill of indictment was filed against the women and five others for membership of an illegal organisation and for throwing Molotov cocktails. On 2 November 1999 the Applicants were convicted of the charges and were sentenced to eight years and four months and 12 years and six months' imprisonment respectively.

### Complaints

The Applicants asserted that their rights had been violated under Articles 3, 6 and 14 of the Convention. The Applicants stated they had been subjected to ill-treatment while in custody, including rape and sexual abuse. The Applicants also claimed that the prosecution against the police officers was not executed in a timely and proper manner. The length of time taken for the prosecution was not reasonable and the conclusion that the claims were time barred was erroneous.

With regard to Article 14, the Applicants asserted that by being subjected to a gynaecological examination they were discriminated against on the basis of their sex.

### Held

#### *Article 3*

The Court held that there had been a violation of Article 3 and that the Applicants were subjected to ill-treatment. The Court noted that the consistency of the women's statements, their ages at the time of the events, and the seriousness of the allegations, along with the Trauma Centre medical reports, supported reasonable suspicion of ill-treatment. The Court directed attention to the European Committee for the Prevention of Torture (CPT) as well as the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), affirming that medical examinations should be performed with a duty of care to the patient. Examinations should also occur outside the eyesight and preferably hearing of officers.

The doctor carrying out the examinations did not use template forms to record medical findings, even though the Ministry of Health circulated the forms. None of the Applicants' statements were recorded on the medical records and only a mere statement of no observation of physical violence was recorded. With respect to the virginity tests, the Government had not provided consent forms for these tests, nor provided any legal relevant standard or statute to show the tests were compliant.

Furthermore, the tests were performed prior to any claim of sexual assault and thus, there was no justification for such an intrusive examination. Therefore, the Court concluded that there was an inherent failure to ensure the proper functioning of the medical examination system and dismissed the initial medical reports prepared on 6, 8, 9 and 12 March and 6 April 1999.

With regard to further medical reports, the Court held that since the TMA and FMI reports only reviewed the file and did not have direct contact with the Applicants, they were immaterial on the basis of the preceding reasoning. The Trauma Centre reports were based on both review of the medical record and examination of the Applicants. However, the examinations occurred eight to five years after the alleged incidents. The Court found these reports to be the most veritable and the Government offers no refutation of the findings. In light of these findings, the Court determined that a violation of Article 3 had occurred.

In respect of a proper investigation of the claims, the Court was unanimous in finding a breach under the substantive limb of Article 3.

#### *Article 14*

Due to the findings under Article 3, both substantive and procedural, the Court determined it unnecessary to address the issue raised under Article 14.

#### *Article 41*

The Court awarded 10,000 Euros for non-pecuniary damages and Euros 5,000 for costs, less 850 Euros for legal aid grant.

### ***Demirbaş and Others v. Turkey***

(50973/06, 8672/07 and 8722/07)

**European Court of Human Rights:** Judgment dated 9 December 2008

*Prohibition of torture - right to liberty and security - right to a fair trial - right to an effective remedy - Articles 3, 5, 6, and 13 of the Convention*

#### Facts

The Applicants, Cem Demirbaş, born in 1977, and Haydar Ceylan and Binnaz Demirbaş, born in 1974, are Turkish nationals who lived in İstanbul.

On the 18 and 19 April 1999, the Applicants were arrested on suspicion of membership of an illegal organisation, the Communist Party of Turkey/Marxist Leninist-Workers' and Peasants' Liberation Army of Turkey (TKP/ML-TKKO), and were placed in custody. On 3 June 1999, at the İstanbul Security Court, the Public Prosecutor filed an indictment against the Applicants and they were charged with attempting to undermine the constitutional order under Article 146(1) of the former Criminal Code.

On 25 August 1999, the first of a total of 13 hearings was held on the merits of the case. The actions of the court were limited to reading out the indictment in open court, obtaining copies of the Applicants' birth certificates and criminal records. A request by the Applicants to widen the scope of the investigation, by the inclusion of witnesses was rejected by the trial court. On 22 May 2002, the first-instance court found the Applicants guilty and sentenced them to death. The sentence was subsequently reduced to a life sentence.

The Applicants appealed and on 17 April 2003, the Court of Cassation quashed the Judgment. On 2 June 2003, the public prosecutor resumed the case against the Applicants. On 16 June 2003, by Law No. 5190, the State Security Courts were abolished; consequently, the case was transferred to the İstanbul Assize Court.

On 14 February 2007, the Applicants were released pending trial. Up until this point, despite several requests, the court had justified refusal of the release of the Applicants on account of the 'nature of the offence of which they were accused, the evidence in the file, and the continuing risk of escape'.

Mr Ceylan further alleged that he was subjected to ill-treatment, while in police custody. He asserted that he had been punched, kicked, subjected to *falaka* (beating on the soles of the feet), hosed with water, and forced to remain standing for long periods, and that the authorities had failed to punish those responsible.

Haydar Ceylan's arrest report of 18 April 1999 stated that he was arrested because he looked 'suspicious' and that he had refused to sign the report. On the same day, the Applicant also refused to sign a second report based on a full body search. A third undated report, again without the Applicant's signature, was drawn up and signed by three officers, which stated that the Applicant resisted the body search and attempted to jump out the window, and that in order to prevent him from doing so the officers had used physical force.

Three medical reports on 19, 22 and 25 April 1999, before Applicant's referral to the public prosecutor, noted bruising and cuts to his eyebrow, left shoulder and on the left side of his nose. On 25 April 1999, Mr Ceylan made submissions before the İstanbul Security Court that he had been subjected to torture whilst in custody, in particular being suspended by his arms, forcibly being given water and being beaten. On 3 March 2000 and 22 May 2002, he made further detailed submissions to the Security Court of his subjection to torture. On 6 June 2002, the Applicant lodged an official complaint with the Fatih Public Prosecutors Officer against the police officers who had allegedly subjected him to the ill-treatment. On receipt of complaint, the Fatih Public Prosecutor initiated an investigation into the allegations. On 26 August, the Public Prosecutor took statements from Mr Ceylan, who maintained the allegations. On 28 November 2002, the Public Prosecutor took statements from H.I., one of the police officers who had arrested the Applicant. H.I. stated that the injuries detailed on the medical reports occurred when the Applicant tried to escape out of the window and denied allegations of torture. On 17 February 2003, a statement from the second arresting officer M.O. was taken, who told the same story.

On 25 August 2003, the Public Prosecutor filed a bill of indictment with the Fatih Criminal Court against H.I. and M.O., charging them with subjecting the Applicant to ill-treatment under Article 245 of the former Criminal Code. Between this date and the 26 March 2006, there were several hearings and postponements of the case, and the case was accepted to the Assize Court with the Applicant intervening in the proceedings as a Civil Party. On the 26 March, the public prosecutor re-asserted the accusations of the Applicants as torture under Article 243 of the former Criminal Code. The Fatih Criminal Court transmitted the case to the Assize Court following a non-jurisdiction ruling. On the 1 December 2006, following a procedural hearing, the İstanbul Assize Court held that the criminal proceedings against the police officers should be discontinued on the grounds that the prosecutions were time-barred.

### Complaints

Haydar Ceylan complained under Article 3 (prohibition of inhuman and degrading treatment) that he had been subjected to ill-treatment whilst in police custody and that the authorities had failed to punish those responsible. The Applicants complained under Article 5(3) of the Convention that the length of their detention had been excessive. Further, they alleged that under Article 5(4) of the Convention there had been no effective domestic remedy to challenge the lawfulness of their detention. Finally, relying on Article 5(5) of the Convention, they complained that they had no enforceable rights to compensation for their excessively long detention.

Additionally, the Applicants, relying on Article 6(1) (right to a fair trial within a reasonable time) and Article 13 (right to an effective remedy), complained of the excessive length of criminal proceedings against them, asserting that the period of nine years and seven months was not reasonable.

### Held

#### *Article 3*

In respect of Haydar Ceylan, the Court found a violation of Article 3 of the Convention on the basis of the actual ill-treatment suffered (substantive limb) and the failure of the authorities to conduct an effective investigation (procedural limb).

The Court, when discussing the substantive violation, reiterated the importance of Article 3 stating 'that it enshrines one of the most fundamental values of democratic societies, making no provisions for exceptions, and no derogation from it permissible under Article 15(2) of the Convention' (*Selmouni v. France*, 25803/94). It noted that where a person was taken into custody in good health, but by the time of release was injured, the burden of proof shifts to the State to provide a plausible explanation for the causation of the injuries and to produce evidence to cast doubt on the veracity of the Applicant's allegations; this was particularly so if the allegations were supported by medical records.

The government made submissions that the Applicant had sustained the injuries whilst attempting to escape from police custody, that Mr Ceylan's statements to the national court and this Court were inconsistent, thus the Applicant could not prove 'beyond reasonable doubt' the allegations. Considering the evidence, the Court noted that in these circumstances, especially in cases where the events in issue lie largely within the exclusive control of the authorities, it was sufficient to reach

the required standard of proof to have 'adequately strong, clear and concordant inferences or of similar un-rebutted presumptions of fact' (see *Hacı Özen v. Turkey*, 46286/99). After promulgating the said standard and in light of the circumstances, the Court concluded that the state had the obligation to account for injuries and the absence of a plausible legitimate explanation for the injuries, coupled with the absence of the date or signature from the Applicant on the report, that the injuries from the medical reports were the result of ill-treatment.

With regards to the breach of the procedural aspect of Article 3, the Court reiterated its previous position that the authorities were obliged to investigate allegations of ill-treatment when they were 'arguable' and 'raise a reasonable suspicion' (see *Ay v. Turkey*, 30951/96). The investigation should be independent, impartial and subject to public scrutiny. Additionally, it should be capable of identifying and punishing those responsible (*Assenov and Others v. Bulgaria*, 24760/94). The Court noted that it was implicit and essential that the investigation be prompt to maintain public confidence and the rule of law. On the facts, the investigation did not meet the criteria, and the authorities did not act with sufficient promptness or diligence. In coming to the decision, the Court pointed to the three-year period before proceedings were initiated and the subsequent delays in filing the indictment of one year and three months, the two and half years for the courts to issue a non-jurisdiction decision, and finally a discontinuation due to the case being time-barred.

#### Article 5

In respect of all Applicants, the Court found that there had been a violation of Articles 5(3), 5(4), 5(5), 6(1) and 13 of the Convention.

The Court cited previous case law (*Bahçeyaka v. Turkey*, 74463/01) in finding there were no domestic effective remedies under Turkish law to challenge the length of detention. The court dismissed the Government's primary objection based on the non-exhaustion of domestic remedies, by noting that Articles 297 to 304 of the former Criminal Code offered insufficient prospect of success and the previous case law did not provide adequate procedures, which was 'genuinely adversarial' for the Applicants (see *Kosti and Others v. Turkey*, 74321/01).

With regard to Article 5(3), the Court held that the length of detention on remand was excessive. In coming to the decision the Court noted that, 'when calculating the period to be taken into consideration, the multiple, consecutive detention periods of the Applicants should be taken as a whole' and 'a global evaluation of the accumulated periods of detention under Article 5(3) of the Convention' should be made. The Court applied this standard and deducted the period the Applicants were detained after conviction, between 22 May 2002 and 17 April 2003. Subject to Article 5(1) of the Convention, the Court calculated the period of detention without trial was in excess of six years and 11 months. Having regard to all the material submitted and previous case law (see *Gökçe and Demirel v. Turkey*, 51839/99), the Court found that the Applicants were entitled to a trial within a reasonable time, and consequently found a violation of Article 5(3) of the Convention. This was notwithstanding the Government's arguments that there had been a reasonable suspicion that the Applicants had and would partake in further terrorist activities throughout proceedings, and that it was reasonable due to risk of absconding.



#### Article 6

The Court found that the length of the proceedings was excessive and failed to come within the 'reasonable time' requirement. Regarding Article 6(1), the Court examined all the material submitted to it and reiterated the fact that the reasonableness of the length of proceedings must be examined in light of all the circumstances and with particular regard to the complexity of the case and the conduct of the Applicants and relevant authorities.

#### Article 41

The Court awarded Haydar Ceylan 17,500 Euros in respect of non-pecuniary damages. It further awarded Cem Demirbaş and Binnaz Demirbaş 7,500 Euros each under this head.

The Court awarded 1,250 Euros to Haydar Ceylan, as well as 1,000 Euros to Cem Demirbaş and Binnaz Demirbaş, for costs and expenses.

## Conditions of detention

*Kirakosyan v. Armenia* (31237/03), *Mkhitarian v. Armenia* (22390/05) and *Tadevosyan v. Armenia* (41698/04)

**European Court of Human Rights:** Judgments dated 2 December 2008

*Prohibition of torture - right to liberty and security - right to a fair trial - right to respect for private and family life - freedom of expression - freedom of assembly - right to an effective remedy - prohibition of discrimination - right to appeal criminal matters - right to free elections - Articles 3, 5, 6, 8, 10, 11, 13 and 14 of the Convention, Article 3 of Protocol No. 1, and Article 2 of Protocol No. 7 of the Convention*

These are KHRP-assisted cases.

#### Facts

Three judgments were handed down by the ECtHR on 2 December 2008 in the cases of *Kirakosyan v. Armenia* (31237/03), *Mkhitarian v. Armenia* (22390/05) and *Tadevosyan v. Armenia* (41698/04).<sup>1</sup>

The three Applicants were arrested due to their participation in rallies that were part of nationwide demonstrations against irregularities in the 2003 presidential elections in Armenia. The Applicants were charged under Article 182 of the Code of Administrative Offences (maliciously disobeying the lawful order of a police officer) and were sentenced to detention.

The Applicants were placed in small cells (7.5 m<sup>2</sup>) with several other individuals, without sufficient natural light (only a very small window with metal bars), beds or bed linen. The cells were infested

<sup>1</sup> All cases were derived from the same set of circumstances and are thus combined here for the sake of brevity.

with pests and insects and the water was dirty. The Applicants were given little or no food whilst in prison and they were not represented by lawyers in any of the domestic proceedings.

### Complaints

Each case asserted the violation of Article 3, Article 5(1), (3) and (4), Article 6(1) and (3), Article 10, Article 11, Article 13 and Article 14 of the Convention, as well as Article 2 of Protocol No. 7 and Article 3 of Protocol No. 1.

In the cases of *Tadevosyan v. Armenia* (41698/04) and *Mkhitaryan v. Armenia* (22390/05), the Applicants also asserted violation of Article 8.

### Held

#### *Article 3*

The Court held that there had been a violation of Article 3 in each of the cases. In *Tadevosyan v. Armenia*, the Court also noted that although the detention was relatively short, brevity in itself did not exclude the possibility of a breach, and that although there was insufficient proof to link health problems of the Applicant to the treatment suffered, this was by no means a prerequisite for the finding of a breach (see also *Mkhitaryan v. Armenia*, 22390/05).

#### *Article 5*

The Court rejected the claims under Article 5 due to the fact that the detentions were legally imposed under Article 5(1)(a).

#### *Article 6 of the Convention and Article 2 of Protocol No. 7*

With regard to Article 6(3), the Court observed that it had already examined similar facts and complaints in number of cases against Armenia and found a breach of Article 6(3) and Article 2 of Protocol No. 7.

#### *Article 41*

In all three cases the Court awarded compensation for non-pecuniary damage and cost and expenses.

The Court declared the remainder of the applications inadmissible as being manifestly ill-founded due to lack of sufficient supporting evidence.

## **Right to participate in free elections**

### *Tănase and Chirtoacă v. Moldova*

(7/08)

**European Court of Human Rights:** Judgment dated 18 November 2008

*Right to free elections - prohibition of discrimination - Article 3 of Protocol No. 1 and Article 14 of the Convention*

### Facts

The Applicants, Alexandra Tănase and Dorin Chirtoacă, were Moldovan and Romanian nationals who were born in 1971 and 1978 respectively and live in Chişinău. Both were well-known Moldovan politicians. Mr Chirtoacă was Vice-President of the Liberal Party and Mayor of Chişinău, and Mr Tănase Vice-President of the Liberal Democratic Party and a member of the Chişinău Municipal Council.

The Republic of Moldova is situated on territory which used to be part of Romania before World War II. That territory's population lost its Romanian citizenship after annexation by the Soviet Union in 1940. Following Moldova's Declaration of Independence on 27 August 1991, a new law was adopted on Moldovan nationality. All those who had lived in the territory of the former Moldavian Soviet Socialist Republic, before annexation on 28 June 1940, were proclaimed citizens of Moldova. As descendants of those persons, both Applicants obtained Moldovan nationality.

In 1991 the Romanian Parliament also adopted a new law on citizenship, whereby former Romanian nationals and their descendants who had lost their nationality before 1989 were allowed to re-acquire Romanian nationality. The Applicants subsequently requested and obtained Romanian nationality, following the restriction on Moldovan nationals holding other nationalities having been repealed on 5 June 2003. According to the Citizenship amendment, holders of multiple nationalities have equal rights to those only holding Moldovan nationality, without exception.

On 10 April 2008, the Moldovan Parliament reformed the electoral legislation, notably by introducing a ban on those with dual or multiple nationalities from becoming members of Parliament (Law No. 273). Other important amendments included the increasing of the electoral threshold from four per cent to six per cent and a ban on all forms of electoral blocs and coalitions. Those amendments entered into force on 13 May 2008. However, this provision was not applicable to persons living in the Independent Republic of Transdnistria.

It is estimated that between 95,000 and 300,000 Moldavians had obtained Romanian nationality between 1991 and 2001. In February 2007, some 800,000 Moldavians had applications pending for Romanian nationality, with the President of Romania claiming in an interview that it expected this number to rise to 1.5 million out of a total Moldovan population of 3.8 million. The most popular second nationality after Romanian is Russian. The Russian Ambassador to Moldova had stated that there were approximately 120,000 Moldavians with Russian passports.

The Council of Europe's Commission against Racism and Intolerance (ECRI) on 29 April 2008 made public a report dated 14 December 2007, expressing concern at the amendments to the Electoral Code relating to dual and multiple nationalities. On 23 October 2008, the Venice Commission also made public a report concerning the Electoral Code. In particular, both bodies pointed out that the provisions of the new law were incompatible with the European Convention on Nationality, ratified by Moldova in November 1999. Additionally, the Venice Commission noted that this restriction could be a violation of Article 14 of the European Convention on Human Rights and Article 3 of Protocol No. 1.

The next legislative elections in Moldova were scheduled for spring 2009. Mr Chirtoacă declared to the press that he would actively participate in those elections but, although it was impossible under Moldovan legislation to hold a dual mandate, he would not give up his position of mayor of Chişinău even if he was elected. His intention was to help his party gather votes at the elections, but various statements made to the press on different occasions stressed that he was not actively seeking the position itself. Mr Tănase had made it clear that he would stand and take his seat if elected, but that he had no intention of renouncing his dual nationality.

### Complaints

The Applicants' alleged that the new Electoral Law (No. 273) breached their right to stand as candidates in free elections and take their seats in Parliament, if elected, in contravention to Article 3 of Protocol No. 1 of the Convention. The Applicants submitted that Law No. 273 was inaccessible and the effects unforeseeable. Accordingly it was alleged that the measures were anti-democratic and disproportionate. They also complained under Article 14, taken together with Article 3 of Protocol No. 1, that they had been subjected to discrimination in comparison with other Moldovan nationals not holding dual nationalities and those living in Transdnistria, referring to Article 17 of the European Convention on Nationality.

### Held

#### *Article 3 of Protocol No. 1*

Under Article 3 of Protocol No. 1, the Court held, by a majority, that the application in respect of Mr Chirtoacă was inadmissible. The Court noted that Mr Chirtoacă had been quite clear in his statements to the press that he did not intend to cumulate the functions of Mayor and MP. Therefore, he was not prejudiced by Law No. 273. On the other hand, Mr Tănase was directly affected by the new electoral law because, if elected, he would have to make the difficult choice between sitting as an MP and renouncing his dual nationality. The Court therefore unanimously held the application admissible in respect of Mr Tănase. The Court held unanimously that there had been a violation of Article 3 of Protocol No. 1 to the Convention and awarded the Applicant 3,860 Euros in respect of costs and expenses.

#### *Article 14*

Under the Article 14 claim, the Court held that due to the above findings there was no need to consider separately Mr Tănase's complaint under Article 14 in conjunction with Article 3 of Protocol No. 1.

The Court first emphasised the importance of Article 3 of Protocol No. 1, which enshrined a characteristic principle of an effective democracy and was accordingly of prime importance in the Convention system. The rights guaranteed under this article were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (*Yumak and Sadak v. Turkey*, 10226/03). The main issue in this case was whether the interference was proportionate to the legitimate aim of securing the loyalty of MPs as held in *Yumak and Sadak v. Turkey*, where the contracting States were free to rely on an aim not listed to justify a restriction, provided that the compatibility of that aim was within rule of law principles, and the general objectives of the Convention were proven in the particular circumstances of a case.

In holding that the State had breached its obligations under Article 3 of Protocol No. 1, the Court noted that Moldova was apparently the only European country which allowed individuals to have multiple nationalities but prohibited them from being elected to Parliament. The Court stressed that in a democracy, loyalty to a State did not necessarily mean loyalty to the actual government of that State or to a particular political party. There were other methods available to the Moldovan Government to ensure loyalty of MPs to the nation, such as requiring them to take an oath, and such measures had been adopted by other European countries.

Indeed, the ECRI and the Venice Commission highlighted the incompatibility between certain provisions of Law No. 273 and the undertakings that Moldova accepted when ratifying the Council of Europe's European Convention on Nationality (which guarantees to all those holding multiple nationality and residing on the territory of Moldova equal treatment with other Moldavians who hold exclusively a Moldavian nationality).

Moreover, the Court was struck by the fact that in 2002 and 2003, the Moldovan Parliament had actually adopted legislation allowing Moldavians to hold dual nationality and that at that time the authorities did not have any concerns about the loyalty of those opting for dual nationality. As a consequence, a large section of the Moldavian population had obtained dual or multiple nationalities in the legitimate expectation that their existing political rights would not be curtailed. In the specific context of Moldova's political evolution, the Court was not satisfied that Law No. 273 could be justified, particularly in view of the fact that such a far-reaching restriction had been introduced approximately a year or less before the general elections. Such practice was at odds with the recommendations by the Council of Europe's Venice Commission concerning the crucial nature of the stability of the law for the credibility of the electoral process. Those in favour of the electoral reform had even categorically rejected the opposition's proposal to have the draft submitted to the Council of Europe for expertise. Nor had the government reacted in any way to the unequivocal concern expressed by the Council of Europe.

The Court therefore concluded that the means employed by the Moldovan government for the purpose of ensuring loyalty of its MPs to the State had been disproportionate and in violation of Article 3 of Protocol No. 1.

## **Freedom of thought, conscience and religion**

*Dogru v. France*  
(27058/05)

**European Court of Human Rights:** Judgment dated 4 December 2008

*Right to education - freedom of thought, conscience and religion - Article 2 of Protocol No. 1 and Article 9 of the Convention*

### Facts

The Applicant, Belgin Dogru, is a French national who was born in 1987 and lived in Flers, France. The Applicant, a Muslim aged 11 at the material time, was enrolled in the first year of a state secondary school in Flers for the 1998 to 1999 academic year. From January 1999 she wore a headscarf to school.

On seven occasions in January 1999, the Applicant went to physical education lessons wearing her headscarf and refused to take it off, despite repeated requests by the teacher to do so. The teacher sent two reports dated 22 January 1999 and 8 February 1999 to the headmaster. On 11 February 1999, the school's disciplinary committee decided to expel the Applicant from school for breaching the duty of assiduity, for her failure to participate actively in physical education classes. The Applicant's parents appealed against the decision to the appeal panel.

On 17 March 1999, after obtaining the opinion of the appeal panel the Director of Education for Caen upheld the decision of the school's pupil disciplinary committee.

On 28 April 1999, the Applicant's parents applied to the Caen Administrative Court to have the decision set aside. On 5 October 1999, the court rejected the application. The court held that by attending physical education classes in dress that would not enable her to partake in the classes in question, the Applicant had failed to comply with the duty to attend classes, and the Applicant's attitude had created an atmosphere of tension within the school. On the basis of these factors, her expulsion from the school was justified, regardless of the proposal made in January to wear a hat instead of her headscarf.

Subsequently, on 31 July 2003, the decision was appealed. The Nantes Administrative Court dismissed the appeal on the same grounds as the lower court, finding that the Applicant had overstepped the limits of the right to express and manifest their religious beliefs on the school premises.

Finally, on 29 December 2004, following an appeal on points of law to the *Conseil d'Etat*, the Applicant's case was declared inadmissible. Following expulsion, the Applicant had continued her schooling by correspondence classes.

### Complaints

The Applicant claimed that exclusion from school due to wearing of a headscarf deprived her of the right to education, within the meaning of the first sentence of Article 2 of Protocol No. 1 which states that 'no one shall be denied education'.

The Applicant alleged that the expulsion from school for the refusal to remove her headscarf constituted an infringement of her rights guaranteed by Article 9 of the Convention, the right to freedom of thought, conscience and religion. She claimed that the restrictions imposed on her regarding the wearing of the headscarf amounted to an infringement of the right to practice her religion. The Applicant alleged that the interference in question had not been prescribed by law, stating that it had mainly taken the form of an opinion of the *Conseil d'Etat*, ministerial circulars, and judicial interpretations of the case-law, none of which had a binding status of a law or a regulation on the Courts. The Applicant argued that religious freedoms were essential freedoms that

could only be restricted by provisions that were legally binding and that the French Government, well aware that the opinion of the *Conseil d'Etat* lacked this authority, thus considered it necessary to enact legislation to fill this gap in the law on 15 March 2004.

Additionally, the Applicant claimed that the restrictions in question had not pursued a legitimate aim that was necessary in a democratic society with reference to Article 9(2). She alleged that she had not failed to comply with her duty of assiduity, but had been confronted with the teacher's refusal to allow her to take part in the class. Despite her proposal to wear a hat or balaclava instead of a headscarf, she had continually been refused permission to partake in physical education classes, on grounds of safety. However, when the teacher was asked at the pupil disciplinary committee on how wearing the headscarf or a hat was dangerous, the teacher refused to answer the question. Furthermore, the government had also not provided any explanation. The Applicant therefore claimed that expelling her for wearing the headscarf amounted to an interference with her religious freedom that did not satisfy the criteria set out in Article 9(2) of the Convention.

### Held

The Court held that there was no need to examine the complaint based on Article 2 of Protocol No. 1, as no separate question arose—the circumstances were the same as under Article 9 of the Convention.

### *Article 9*

The Court held unanimously there was no violation of Article 9 of the Convention, concluding that the interference in question had been prescribed by law and pursued the legitimate aim of protecting the rights and freedoms of others and public order, and that the interference was proportionate to the aim pursued and was thus necessary in a democratic society.

The Court, relying on *Leyla Şahin v. Turkey* (44774/98), accepted that the present ban on the wearing of the headscarf and expulsion for refusal to remove it constituted a 'restriction' on the exercise of her right to freedom of religion. This was undisputed by the parties. Such interference would only infringe the Convention if it did not meet the three requirements in Article 9(2).

The Court noted that the term 'prescribed by law' required that the impugned measure had sufficient basis in domestic law, that it should be accessible to the persons concerned and formulated with sufficient precision to enable them to reasonably foresee in the circumstances the consequences that a given action may entail (*Maestri v. Italy*, 39748/98). Whilst accepting the fact that there was no specific legal provision at the time prohibiting pupils from wearing headscarves during physical education, the Court relied on *Kruslin v. France* (11801/85 (176-A)) providing that the concept of 'law' must be understood in its 'substantive' sense, not in the 'formal' sense. Thus, the substantive law includes everything that goes into making up the written law, including the *Conseil d'Etat*-confirmed case law and ministerial circulars that supplemented the legislative provisions (namely Section 10 of the Education (General Principles Act 1989). In the circumstances of this case, the Court concluded that the interference had been sufficiently 'prescribed by law'. The relevant rules were reasonably foreseeable as they consisted mainly of published provisions and confirmed case law of the *Conseil d'Etat*, and the Applicant had notice under the internal rules of the school that failure to remove the headscarf was liable to result in expulsion from school.

The Court, having regard to the circumstances of the case and the reasoning of the domestic courts, accepted that the interference complained of mainly pursued the legitimate aims of protecting the rights of freedoms of others and protecting public order.

In terms of proportionality, the Court noted that the purpose of the restriction on the Applicant's right to manifest their religious conviction was to adhere to the requirements of state secularism in state schools; as interpreted by the *Conseil d'Etat* in its opinion on 27 November 1989, subsequent case-law, and various ministerial circulars on the subject. Additionally, the Court noted with regard to its margin of appreciation that in France, as in Turkey and Switzerland, secularism is a constitutional principle, to which the entire population adhered, and the protection of which appeared to be of prime importance in schools. The Court reiterated, having regard to the margin of appreciation afforded to France, that the decision of the national authorities that the wearing of the headscarf was incompatible with sports classes for health and safety reasons was not unreasonable. It accepted that by refusing to remove the headscarf, the Applicant had overstepped the limits on the right to express and manifest religious beliefs on the school premises, and that the penalty imposed was merely the consequence of this refusal, and not of their religious convictions.

With regards to the choice of the most severe penalty, the Court highlighted its supervisory function, stating that the domestic disciplinary authorities are best placed to evaluate the local needs and therefore, the issue of wearing a hat instead of a headscarf and the severity of the penalty falls squarely within the State's margin of appreciation. The Court thus accepted that the penalty did not appear disproportionate and was 'necessary in a democratic society', noting that the Applicant was able to continue her schooling by correspondence classes.

Accordingly, having regard to the circumstances of the case and the narrow margin of appreciation left to the state in this domain, no violation of Article 9 of the Convention was found.

## Right to education

*İrfan Temel and Others v. Turkey*  
(36458/02)

**European Court of Human Rights:** Judgment dated 3 March 2009

*No punishment without law - freedom of thought, conscience and religion - freedom of expression - right to education - Articles 7, 9, 10 and Article 2 of Protocol No. 1 of the Convention*

### Facts

The Applicants were students at Afyon Kocatepe University in Afyon, Turkey, and were studying various subjects at the time of the events. The Applicants petitioned, on various dates between 27 December 2001 and 4 January 2002 to the University Rector's Office for Kurdish language classes to be introduced as an optional module unit. Other university students submitted similar types of petitions throughout different universities within Turkey.



On 18 January 2002, the Administrative Board of the Applicants' University heard their defences, but relied on Regulation 9(d) of the Disciplinary Regulations of Higher Education Institutions and suspended them from University for a period of two terms, with the exception of Mr Pulat whose punishment was commuted to one term for showing remorse.

The Applicants, upon notification of the disciplinary sanctions, lodged separate actions with the Denizli Regional Administrative Court, claiming a stay of execution of the disciplinary decisions followed by an annulment. The Denizli Regional Administrative Court rejected the Applicants' applications on different dates, but each Applicant did not receive any further elaboration on what legal grounds they had failed to meet. The court upheld the University's decision on the grounds that none of the Applicants' arguments were sufficient to set aside the first-instance court decision.

In the same period, a similar case was brought before the İstanbul Administrative Court, which held on 9 May 2002 that the disciplinary sanction should be suspended. In coming to its decision, it examined the content of the petition and the disciplinary sanction. The İstanbul Administrative Court found that the sanction was unlawful, and that its application would cause irreparable damage to the Applicants.

On 24 October 2002, the Denizli Administrative Court examined the merits of the case and dismissed them. In its decision, the court noted that the University Rector's Office had received intelligence from the Afyon Governor's office about a new *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK) strategy of action, including petitioning for education in Kurdish. The administration considered that since the petitions were similar in many ways - filed at around the same time as each other and persistent and threatening in their requests - the parties involved were part of a planned organised action contrary to the regulation above.

In December 2003, the Supreme Administrative Court quashed the convictions and remitted the case to the first-instance court. The Denizli Administrative Court on 12 May 2004 annulled the disciplinary sanctions against the Applicants. It noted that under Section 74 of the Constitution, citizens had the right to petition the authorities in matters concerning their own public interest. Therefore, pursuant to Constitutional authority and the aims sought by higher education under Section 4(a) of the Higher Education Law, the Applicants' petitions for optional Kurdish language courses could not be construed as acts that give rise to polarization on the basis of language, race, religion or denomination under the aforementioned regulation. Additionally, criminal proceedings brought against the Applicants had ended with their acquittal on charges of aiding and abetting an illegally armed organisation, namely the PKK.

### Complaints

The Applicants, relying on Articles 7, 9 and 10 of the Convention, and Article 2 of Protocol No. 1, complained that the suspension for petitioning the university authorities to provide optional Kurdish language courses violated their rights under the Convention. They submitted that the imposition of a disciplinary sanction for petitioning for a Kurdish language course, a democratic and legitimate request pursuant with the aims of higher education and the Constitution, had been

unjustified and disproportionate and had ultimately denied them the right to education for one year.

#### Held

##### *Article 2 of Protocol No. 1 and Article 10*

The Court considered that these complaints should only be examined under Article 2 of Protocol No. 1, read in the light of Article 10 of the Convention.

The Court reiterated basic principles laid down in Article 2 of Protocol No. 1 case law as in *Leyla Şahin v. Turkey* (44774/98). Furthermore, it reaffirmed that access to any institution of higher education is an inherent part of the right to education as set out in Article 2 of Protocol No. 1. The Court observed that the Applicants' suspension from the university constituted a restriction on their right to education.

In its assessment of the alleged violation, the Court accepted that there was a legal basis for the sanction, namely the aforementioned Regulation 9(d), which was sufficiently accessible. The Court noted, however, that it had serious doubts whether the application of the Regulation in the present case served any legitimate aim, but deemed it unnecessary to determine this question and stated that the key issue in this case was proportionality.

The Court observed that in respect of proportionality, the Applicants were subjected to suspensions for merely submitting petitions; they had not committed any reprehensible act. The Court held, in view of the information before it, that the Applicants had not breached or attempted to breach the peace or order in the university. The Court therefore decided that the Applicants were sanctioned because of the views expressed in their petitions and that neither the views or form of expression could be viewed as an activity which would lead to polarisation on the basis of language, race, religion or denomination within the meaning of Regulation 9(d). The Court then stressed the importance of freedom of expression as one of the essential foundations of a democratic society.

The Court observed that the right to education is not absolute, in that it does not exclude disciplinary sanctions, such as suspension from an educational institution to ensure compliance with its internal rules. In this case, however, the Court held that the suspension of the Applicants for an exercise of their freedom of expression was disproportionate, as the regulation injured the substance of the right to education and conflicted with the Applicants' right to freedom of expression. Whilst the Court observed that the administrative courts subsequently annulled the sanctions, the decision failed to redress the Applicants' grievances for the loss of one year of their right to education; as the Applicants had already missed one or two terms of their studies. Therefore, the Court held there had been a violation of Article 2 of Protocol No. 1 of the Convention.

#### *Article 41*

With regards to the just satisfaction claim, the Court held that the Applicants may have suffered from a certain amount of frustration and distress from the situation and therefore awarded 1,500 Euros to each Applicant, but not the 10,000 Euros claimed by the Applicants.

The Court made no awards for the Applicants' claims of 75,000 Euros lawyers' fees and 2,000 Euros costs and expenses, as there was no substantiation of their claims, as required by Rule 60 of the Rules of Court.

### Commentary

The Court has underlined in this decision that peacefully petitioning for Kurdish language classes is a fundamental human right. Additionally, it acknowledged that disciplinary sanctions applied to restrict freedom of expression through means of peaceful petitioning for certain educational courses is a breach of the right to education.

In conjunction with the decision, Bilgi University has launched Turkey's first Kurdish language course, thus hopefully encouraging other universities in Turkey to launch Kurdish language and literature courses.

## **Right to life**

### ***Beker v. Turkey***

(27866/03)

**European Court of Human Rights:** Judgment dated 24 March 2009

*Right to life - right to a fair trial - Article 2, Article 6 within the meaning of Article 13, and Article 41 of the Convention*

### Facts

The Applicants live in Ankara. The first Applicant is the mother, and the remaining three Applicants are the brothers and sister of Mr Mustafa Beker, who was born in 1977 and worked as an expert corporal (a paid employee of the army) in the special teams of the gendarmerie in Tunceli.

At around 9.20am on 8 March 2001, Mr Mustafa Beker allegedly committed suicide by shooting himself in the head in the dormitory of the military barracks where he was stationed. A pistol was found some distance away from the place where Mr Beker had fallen, but the exact distance was not specified. It was established that the pistol belonged to one of Mr Beker's colleagues.

Four expert sergeants questioned by the military investigator, and subsequently by the military prosecutor, stated that they saw Mr Beker with a pistol in the dormitory and that they had heard him cock the pistol before they heard two gunshots within a second of each other. None of them had actually seen Mr Beker shoot himself or had heard him talking or arguing with anyone before the shooting. Nor had they observed anyone running away from the scene afterwards. A number of Mr Beker's colleagues told the military prosecutor that he had been feeling low for the last couple of months before the event and had been drinking a lot as he had fallen in love with a girl, but his mother opposed their marriage.

The pathologist investigating Mr Beker's body concluded that the shooting had occurred at point-blank range. The bullet entry hole was approximately two centimetres above the left eyebrow. The exit hole was next to the right ear. No alcohol was found in Mr Beker's blood. Residue of gunpowder was found on the outside of Mr Beker's right hand. According to his colleague, Mr Beker was right-handed and had always used his right hand when shooting during their military training.

On 10 March 2001, the military investigator concluded his investigation. In a one-sentence conclusion, the military investigator stated that Mr Beker had 'committed suicide as a result of a sudden bout of depression'.

On 13 March 2001, Özgür Beker, who is one of the Applicants, and a brother of Mr Beker, asked the office of the military prosecutor for copies of the documents from the investigation file as the family had 'suspicions surrounding his death'.

On 12 April 2001, the lawyer for the Applicants wrote to the office of the Elazığ military prosecutor and repeated the family's request. Another letter was sent to the Ministry of Defence on 9 January 2002.

On 8 November 2002, the military prosecutor in Elazığ decided to close the investigation. He concluded that Mr Beker had shot himself in the 'right temple and at close range' because his mother had opposed his marriage to his girlfriend. On 9 December 2002, the Applicants lodged an objection to the military prosecutor's decision to close the investigation. The objection was rejected by the Military Court on 16 December 2002.

On 18 March 2003, the Applicants wrote to the Elazığ military prosecutor's office and asked for the investigation to be reopened. They argued that the case file should be sent to the Forensic Medicine Institute in order to obtain that Institute's opinion on whether it was possible for Mr Beker to commit suicide by shooting himself in the left side of the head with his right hand. They pointed out that the pistol used in the incident had been a semi-automatic, meaning that the trigger had to be pulled for each shot and, as such, it would not have been possible for Mr Beker to shoot himself a second time after a bullet had already entered and exited his head. The Applicants also argued that the pistol and the wood stick allegedly used to smash the padlock on the locker in the dormitories in order to obtain the pistol had not been examined for fingerprints and further the family had not been consulted nor interviewed during the investigation.

The Applicants did not receive any information about the outcome of their application for a reopening of the investigation.

### Complaints

The Applicants complained under Article 2, that Mustafa Beker's right to life had been violated either intentionally or due to negligence. The Applicants submitted that the authorities had failed to take a number of crucial steps in their investigation into the death. As a result, suspicions surrounding the death had not been eliminated.

Relying on Article 6, the Applicants argued that the investigation into the death had not been fair and that they had been deprived of an effective remedy within the meaning of Article 13.

### Held

#### *Article 2*

The respondent State was under an obligation to account for Mr Beker's death, as the State bears the burden of proving plausible explanations for injuries and deaths that occur in its custody. The judgment adopted in the case of *Akkum and Others v. Turkey* (21894/93), held that an obligation to investigate and explain injuries or deaths occurs not only in custody, but also in areas within the exclusive control of the authorities of the State. In both cases, the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities.

The Court observed that no attempt appeared to have been made by the military investigator or the military prosecutor to explain the fact that the gun at issue had been fired twice, with a third attempt to fire. Even if it one assumed that Mr Beker missed with the first shot, it followed logically that he must have been successful on the second attempt since he is deceased—yet according to the findings, another attempt was made to fire the gun. This issue was not examined by the Military Court when it dismissed the Applicants' objection to the prosecutor's decision.

The second serious and inexplicable aspect of the investigation was the military prosecutor's conclusion that Mr Beker had shot himself in the right side of the head when the post-mortem reports showed—and the government agreed—that he had in fact been shot in the left side of the head.

Thirdly, the pistol which was found next to Mr Beker's body was not forensically examined for fingerprints with a view to establish whether or not it had been handled by him. Similarly, the locker from which Mr Beker allegedly took the pistol was not examined for fingerprints.

Fourthly, the Court was struck by the statements made by the four expert sergeants, who were present in the room when Mr Beker allegedly killed himself and who stated that they had not seen the incident. The Court found it wholly unconvincing that four trained military officials present in the same room, where two shots were fired from a pistol, did not see the incident or that they covered their faces in shock. Nevertheless, no attempt was made by the investigating authorities to press these expert sergeants with a view to discovering the truth.

Fifthly, in the opinion of the Court, the failure of the authorities to involve the Applicants in the investigation or even to provide information – for which failure the government had not offered any explanation – deprived the Applicants of the opportunity to safeguard their legitimate interests. The same failure also prevented any scrutiny of the investigation by the public.

In view of the above, the Court considered that the investigation, which had been carried out at the domestic level, was clearly inadequate and left so many obvious questions unanswered that it was unable to accept the conclusion that Mr Beker committed suicide.

In the light of the foregoing, the Court considered that no meaningful investigation had been conducted at the domestic level which was capable of establishing the true facts surrounding the death of Mustafa Beker. Consequently, the Court concluded that the government had failed to account for this death and was in violation of Article 2.

*Article 6 and 13*

The Court held that in regard to the complaints concerning Articles 6 and 13, although they may be admissible, it was unnecessary to examine them separately on the merits due to the findings above.

*Article 41*

The Court awarded the first Applicant the sum of 16,500 Euros as compensation for her loss of financial support provided by her son and another 20,000 Euros in respect of non-pecuniary damage. The Court also awarded the sum of 5,000 Euros to each of the other Applicants in respect of non-pecuniary damage. In addition, 2,000 Euros were awarded in regard to general cost and expenses.

Commentary

The European Court of Human Rights requires domestic courts to conduct a full investigation into suspicious deaths or injuries that occur when an individual is in the State's custody. The wholly inadequate investigation into the suspicious circumstances of Mr Beker's death was insufficient to meet the standards required by the Court. In this case the Court outlined at length the specific factors which rendered the investigation inadequate, in particular commenting on the fact that there were several corporal sergeants purportedly in the same room as the deceased who claimed not to have witnessed the suicide, despite two shots being fired, and the fact that the deceased was right-handed, but allegedly shot himself on the left-side of his head. This clearly should have created speculation in the minds of the investigators and compelled them to investigate further and in full performance of the obligations under Article 2.

***Halis Akın v. Turkey***

(30304/02)

**European Court of Human Rights Chamber:** Judgment dated 13 January 2009

*Right to life - freedom of assembly and association - Articles 2 and 11 of the Convention*

Facts

The Applicant was born in 1953 and lives in Van. According to the Applicant, on the evening of 17 June 2001, around 6 pm, he was bringing his flock of sheep down to the pasture of the village of Yukarı Tulgalı when he heard a few shots being fired and was hit. He saw gendarmes and cried out to them that he was a villager and not a smuggler. Grievously injured, he was transported to the civil hospital of Van.

According to the government and documents in the dossier, the incident took place on 18 June 2001, at 9.30 pm, in the context of smuggling in the region. The Applicant had loaded cans on his horse and had taken the route towards the Iranian village of Tevrek with four other people. The group was discovered by thermal surveillance cameras in a military zone level 1, where access is prohibited. They attempted to stop them, first verbally and then with shots. The gendarmes shot in their direction towards the horses' legs and the Applicant was hit. The rest of the group fled. Four empty cans were seized at the scene.

The Applicant was taken to the emergency department at the civil hospital of Van where he arrived at 10.50 pm and underwent surgery of the thorax. Inquiries were opened and on 3 August 2001 the officer of the gendarmerie who was charged with the investigation of the complaint against the officers submitted a report recommending that the case be dismissed.

In its decision of 6 August 2001, the administrative council of the district followed the recommendation and dismissed the case. The decision, referring to many depositions of villagers and gendarmes, concluded that F.C. and N.O. (the gendarmes implicated) had reacted in accordance with Law No. 1918 article 11(3) on the prevention and control of contraband material and regulating the use of firearms in a border zone. On 21 December 2001, the appeal by the Applicant against this decision was rejected by the criminal court of Erciş.

During the interval, the Applicant was accused of smuggling in the correctional tribunal of Özalp, where he was acquitted on 6 November 2001 on the basis of lack of evidence.

### Complaints

Invoking Article 2 of the Convention, the Applicant denounced Article 11(3) of Law No. 1918 on the prevention and control of contraband material. He complained that this gave the authorization to fire, whether or not he was in possession of a firearm, and that it did not require proportionality of the measure employed. He also complained that the gendarmes had grievously injured him despite having the means to stop him without resorting to the use of firearms.

### Held

#### *Article 2*

The court observed that with regard to the degree of force utilised, independent of the question of knowing whether the gendarmes intended to kill the Applicant, he was the victim of an attack that put his life in danger, even if he finally survived. Article 2 was thus found to be applicable.

The court noted the positive obligations to protect under Article 2 and found that the national authorities had not offered the level of protection required to reduce the real and immediate risk to life, which was susceptible because of the military operations. The court therefore found a violation of Article 2 of the Convention.

The court awarded 10,000 Euros in national currency for non-pecuniary damage and 1,100 Euros in legal costs.

## Right to respect for private and family life

### *Şerife Yiğit v. Turkey*

(3976/05)

**European Court of Human Rights Chamber:** Judgment on 20 January 2009

*Right to respect for family life - Article 8 of the Convention*

#### Facts

The Applicant was born in 1954 and resides in Gaziantep. In 1976, she married Ömer Koç (Ö.K.) in a religious ceremony (*imam nikah*) and they subsequently had six children. Her husband died on 10 September 2002.

On 11 September 2003, the Applicant introduced an action in her name and in the name of her youngest daughter Emine, in front of the administrative tribunal in Islahiye, seeking to have Emine entered in the civil register as Ö.K.'s daughter and to have her marriage with Ö.K. recognised. The administrative tribunal allowed Emine to be registered but refused to recognise the marriage.

The Applicant further applied to the retirement pension fund to have Ö.K.'s retirement pension and health insurance benefits transferred to her and Emine. The benefits were granted to Emine but not to the Applicant, on the grounds that her marriage to Ö.K. had not been recognised. The Applicant appealed unsuccessfully against that decision.

#### Complaints

The Applicant relied on Article 8 complaining of the domestic court's refusal to transfer her deceased partner's social security benefits to her.

The government maintained that the national law did not recognise religious marriage and that only civil marriage was legitimate. It was further contended that Article 8 could not be interpreted as imposing the obligation to establish a special regime for a particular category of illegitimate marriage.

#### Held

The Court noted that the Applicant, her partner and their children constituted a family, as Şerife Yiğit had married Ö.K. in a religious ceremony, had lived with him until his death and had had six children with him, the first five of whom had been entered into a civil register as his children.

The Court observed that the decisive element was whether or not a commitment had been entered into involving contractual rights and obligations. The Court noted that under Turkish law a religious marriage ceremony performed by an imam did not give rise to any commitments towards third parties or the State. The Court, considering it not unreasonable for protection to be afforded only to civil marriages in Turkey, reiterated that marriage remained an institution widely recognised as conferring a particular status on those who entered into it.



In the Applicant's case, the Court considered that the difference in treatment between married and unmarried couples, with regard to survivors' benefits, was aimed at protecting the traditional family based on the bonds of marriage. Thus, the requirement to register with the state was legitimate and justified. Accordingly, the Court held that there had been no violation of Article 8.

Three judges expressed a joint dissenting opinion.

### ***S and Marper v. United Kingdom***

(30562/04 and 30566/04)

**European Court of Human Rights:** Judgment dated 4 December 2008

*Right to respect for private and family life - prohibition against discrimination - Articles 8 and 14 of the Convention*

#### Facts

The Applicants, Mr S. and Mr Micheal Marper, were born in 1989 and 1963 respectively, and live in Sheffield.

The first Applicant, Mr S., was arrested on 19 January 2001 for armed robbery. His fingerprints and DNA profile were taken. He was acquitted of the offence on 14 June 2001.

The second Applicant, Mr Marper, was arrested on 13 March 2001 and charged with harassment of his partner. Fingerprint and DNA samples were taken. Before a pre-trial interview, he and his partner had reconciled and the charge was dropped. On 11 June 2001, the Crown Prosecution Service served a discontinuance notice on the Applicant's solicitors, and the case was formally discontinued on the 14 June 2001.

Both Applicants requested that their fingerprint and DNA profiles be destroyed. However, the police refused both requests. The Applicants applied for judicial review of the decision not to destroy the records. On 22 March 2002, the Administrative Court rejected their applications. On 12 September 2002, the Court of Appeal upheld this decision by a majority of two to one.

On 22 July 2004, the House of Lords dismissed an appeal by the Applicants. Lord Steyn, in the lead judgment, noted that the legislative background of Section 64(1A) of the Police and Criminal Evidence Act of 1984 (PACE) (to retain fingerprints and DNA profiles) was preceded by public disquiet on a previous law that provided the destruction of the records when a person's criminal proceedings are discontinued or they are acquitted. Examples of cases included a 1999 case where DNA had been wrongly attained but led to the conviction of 'T' for rape. The conviction would perhaps not have been possible without the wrongly obtained DNA.

Additionally, Lord Steyn utilised statistical evidence to note the retention value of the samples, finding that almost 6,000 DNA profiles were linked with crime-scene stain profiles, which would

have been destroyed under the former provisions. Lord Steyn further purported that the mere retention of fingerprints and DNA samples did not constitute an interference with Article 8 of the Convention, and that any interference was very modest indeed. Lastly, he stated that even if there was an interference with private life, retention was necessary for the prevention of crime and the protection of rights of others to be free from crime, and were prescribed by law as required by Article 8.

### Complaints

The Applicants alleged that the retention of their fingerprints, cellular samples, and DNA profiles interfered with their right to respect for private life under Article 8. Since each item retained was inextricably linked to the individual's identity and contained a type of personal information which was entitled to be kept within the individual's sole control.

Further, the scope for the government's use of the samples was too wide, notably for 'purposes related to the prevention or detection of crime'. The purposes were too vague and open to abuse, and too few procedural safeguards were in place against abuse or misuse of personal information. Additionally, the accessibility of the Police National Computer (PNC) database was too widely available, being accessible to 56 non-police bodies including some private groups, for instance British Telecom. Furthermore, the PNC was linked to the Europe-wide 'Schengen Information System'. Consequently, the Applicants submitted that retention involved a substantial interference.

The Applicants also complained that they were subject to discriminatory treatment, triggering an Article 14 violation. The Applicants submitted that it was improper and prejudicial to differentiate and retain materials of persons who are acquitted (and thus maintain the presumption of innocence) and others whose charges were dismissed.

### Held

#### *Article 8*

The Court held unanimously that in the case of both Applicants, there has been a violation of Article 8 of the Convention.

#### *Article 14*

In light of the finding of an Article 8 violation, the Court held that it was unnecessary to examine separately the complaint under Article 14 of the Convention.

#### *Article 41*

The Court held that the finding of a violation in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the Applicants. Additionally, the Court held that the respondent State is to pay the Applicants 42,000 Euros in respect of costs and expenses.

### Commentary

In respect to the Article 8 violation, the Court held that the retention of all three forms of data – the fingerprints, cellular samples and DNA profiles – interfered with the Applicants' right to private life. In its decision, the Court first considered whether the data came within the ambit of private

and family life. It noted that at the outset that all three categories of personal information retained by the authorities in the cases constituted personal data within the meaning of the Data Protection Convention. Noting the Court's broad interpretation of 'private life', it expounded that previous case law is not an exhaustive list. The Court found that previous Court decisions, in various guises, addressed questions relating to the retention of personal data of these types. It emphasized the importance of nature and scope of the information contained in order to determine whether the information retained came within the scope of Article 8. The Court reiterated the distinction between, and the need to examine separately, fingerprints on the one hand, and cellular samples and DNA profiles on the other, in view of a higher potential for the future use of cellular samples and DNA (*Van der Velden v. the Netherlands*, 29514/05).

Firstly, the Court considered cellular samples and DNA profiles. It stated that it could not find sufficient reason to depart from its finding in *Van der Velden* that systematic retention of that material was sufficiently intrusive to disclose interference with the right to respect for private life. The Court seemingly used the Convention as a living instrument by reasoning that with the technological advances in genetics and information technology, the Court could not discount the possibility in the future that the private life interests bound with genetic material may be adversely affected. Additionally, the Court then reflected on the highly personal nature of the information, and concurred with Baroness Hale's opinion (as submitted by the Applicants), that as unique genetic codes, these two types of personal information contain much more sensitive information about the individual and their family than fingerprints.

Secondly, the Court considered fingerprints, noting that they do not contain as much information as cellular samples or DNA profiles. When dealing with fingerprints, the scope and nature of the interference needed to be more substantive to interfere with the private life, compared with DNA or cellular samples. Accordingly, the Court stated that, 'the retention of fingerprints on the authorities' records in connection with an identified or unidentifiable individual may, in itself give rise, notwithstanding their objective and irrefutable character, to important private life concerns.' The Court considered that whilst it may be necessary to distinguish between the collection, use, and retention of fingerprints on the one hand, and samples and profiles on the other, the retention of fingerprints reaches the threshold scope to constitute an interference with the right to respect to private life.

The Court looked into whether the interference substantively breached the Applicants' right to respect for private life. The Court noted the broad interpretation of 'in accordance with law', but felt that it was unnecessary to decide on whether the wording of PACE Section 64 comes under the definition, as in this case, the issues were linked more closely to the issue of whether it was necessary in a democratic society. The Court considered that the retention of fingerprints and DNA information pursued the legitimate aim of detection, and therefore prevention of crime by assisting in identification of future offenders. However, it found that in this instance the interference by the respondent State was disproportionate to the purpose of crime prevention and protection, and overstepped authority by any acceptable margin of appreciation.

In coming to this decision, the Court noted the fact that the UK (England, Wales and Northern Ireland, excluding Scotland) appears to be the only jurisdiction within the Council of Europe to

allow indefinite retention of fingerprints and DNA material of any person, of any age, suspected of a recordable offence (Scotland has put strict time limits on how long the State can retained fingerprints and for what offences). The Court concluded that the blanket and indiscriminate nature of the retention powers for fingerprints and DNA material for those suspected but not convicted of offences (as in this Applicant's case) failed to strike a fair balance between competing public and private interests.

## C. UK Cases

### Court of Appeal (Civil Division)

*SH (Iraq) v. Secretary of State for the Home Department, Unreported*

**Court of Appeal:** Judgment dated 30 March 2009

*Asylum seeker - internal relocation – Iraq - undue harshness*

#### Facts

This case concerned an appeal against the ruling of the Asylum and Immigration Tribunal that an Iraqi of Kurdish descent could be safely relocated in Iraq. S entered the UK and claimed asylum. He claimed that whilst living in Kirkuk, his brother and he had set fire to a religious shrine. They then fled the region. S's brother later returned and was killed. The Secretary of State refused S's claim.

The immigration judge accepted S's account that he would face prosecution if returned to Kirkuk. However, the judge decided that S could be relocated safely within Iraq. On application, the case was reconsidered and a senior immigration judge reached the same decision. The judge relied on *SM and others (Iraq) (CG)* ([2005] UKAIT 00111), and *SI (Iraq) v. Secretary of State for the Home Department (CG)* ([2005] UKAIT 00094), which found that it was safe to relocate Kurds within Iraq and thus that S could be safely relocated from Kirkuk.

#### Complaints

S claimed that the immigration judge erred on five grounds. Specifically, the immigration judge (i) improperly merged the test for undue harshness with the test for fear of persecution; (ii) placed too much reliance on previous cases; (iii) failed to properly consider the evidence revealing the difficulty in relocating from northern Iraq to central or southern Iraq; (iv) did not regard all the evidence from the expert with respect to the difficulty of relocating; and (v) failed to consider the steps that needed to be undertaken for S to enter Baghdad.

#### Held

The Court dismissed the appeal. In respect to the issues raised, the court dealt with them in order. The court found that the immigration judge had considered all the issues and had not elided the

tests. The previous precedent was applicable and pertinent to the present case. The practical aspects of relocating to Baghdad had previously been considered within the past precedents. A judge could accept some statements by experts and not others. Likewise, the court found that removal directions had not been established and the issue of S's return was not a ripe issue; therefore, any examinations of the logistics for S's return were untimely and useless.

***MH (Syria) v. Secretary of State for the Home Department***

[2009] EWCA Civ 226

**Court of Appeal:** Judgment dated on 24 March 2009

*Refugees – terrorism – exclusion in Article 1F(c) Convention relating to Status of Refugees 1951 (United Nations) – Relevance of principles of criminal liability*

Facts

KHRP's Mark Muller assisted the appellant in this case. This case concerns the relevant standard to be applied in respect to Article 1F(c). It also reflects on the Gurung continuum and where this case fits.

The appellant is a Syrian Kurd who claimed asylum in March 2006. At a young age, her parents were stripped of their Syrian nationality and subsequently became stateless Kurds. The family suffered constant harassment by the Syrian authorities. In 1993, at the age of 13, the appellant joined the *Partiya Karkeren Kurdistan* (Kurdistan Workers' Party, PKK) and that year she carried a banner in support of El Assad during a rally organized by the PKK. As a result, military forces beat her and she went into hiding. She was then removed from the area and transferred to a refugee village in Iraq. During transport she volunteered to be armed, this was the first time she had held a weapon. Her initial duties at the refugee camp were to resolve disputes. She then was trained as an assistant nurse and provided care for the wounded. On one occasion she went with an envoy to strengthen ties between guerrillas in the mountains and the refugee camp. During the journey, Turkish troops ambushed and she was caught in the fighting. MH stepped on a land mine and had to have her leg amputated.

After five months of recovery, MH asked to teach school children Kurdish. In 2003, she requested to leave the PKK, but was denied. In 2004, the PKK granted her request to absolve their ties with her. An uncle told her that Syrian security forces continued to look for her so she could not return home. MH sought refuge in the UK.

MH's asylum application was refused and her appeal on asylum, human rights and humanitarian grounds was also dismissed. The first stage of reconsideration found that the initial immigration judge had made a material error in law in respect of the risk of MH's return to Syria. During the second stage of reconsideration, the tribunal found that MH was excluded from refugee status under Article 1F(c) of the Refugee Convention on the basis that she had performed acts that were contrary to the purpose and principles of the United Nations. This finding was based upon MH's participation in and support for a listed terrorist organisation.

The lower tribunal relied on *Gurung [2002] UKIAT 04870* which established that mere membership of an organisation is insufficient to fall under Article 1F(c). However, the tribunal pointed to two additional principles. Firstly, proof need not show that the individual actually participated in acts contrary to Article 1F(c). Secondly, membership of an organisation required full understanding of the aims, methods, and activities that were contrary to Article 1F(c). Mitigating factors of membership may include duress, self-defence against superior orders, lack of moral choice, the nature of the organisation and the social context in which it operates. The *Gurung* tribunal found that there was no internationally accepted definition of terrorism and Article 1F(c) was not to be equated with an anti-terrorism clause; each case was unique and the facts and circumstances had to be considered to determine where the case fell on the continuum.

The tribunal did however grant MH's human rights appeal on the basis that her return to Syria would be in violation of Article 3 of the Convention.

The appellant appealed against the finding of exclusion from refugee status under Article 1(F)(c) of the Refugee Convention and the Secretary of State cross-appealed in respect of the human rights appeal.

### Complaints

The appellant raised three issues on appeal. First, the tribunal had erred in finding that providing humanitarian nursing assistance to an organisation constituted a terrorist or criminal act. Secondly, the tribunal wrongly found that MH's acts were sufficient to exclude her from refugee status. Lastly, the tribunal failed in applying the correct standard, in both criminal and humanitarian law, in assessing complicity.

With regard to the first two issues, the appellant referred to the 1949 Geneva Conventions and other support to show the recognised status of non-combatants and the special measures in place protecting medical personnel. Thus, nursing was protected and could not be criminalised nor used to show a violation of Article 1F(c).

In relation to the third issue, the Applicant contended that the requirement that actual participation be shown is based upon criminal law standards. Further, the tribunal had failed to give sufficient attention to the *Gurung* continuum, in addition to the various mitigating factors applicable to MH, such as culture, age and individual circumstances.

In the cross appeal, the Secretary of State for the Home Department claimed that the decision that MH's return would violate Article 3 was inapposite of the evidence, wholly inadequate and should not have been accepted uncritically. The Secretary of State argued that the evidence relied upon by the Applicant was hearsay and attenuated at best and in particular, that the documents showing the PKK profile of MH's family were not as extensive as MH claimed.

### Held

There have been subsequent legislative provisions in respect of Article 1F since the *Gurung* case including the enactment of Section 54 of the Immigration, Asylum and Nationality Act 2006 (IANA) and Section 1 of the Terrorism Act 2006. Both relate to acts that can be considered as

terrorism. Section 54 of the IANA references Article 1F, and thus Article 1F must take into account the particular acts listed within Section 54.

In respect of the appellant's appeal, the court held that acts do not have to be crimes in order to fall under Article 1F and a criminal standard of proof is not required. Section 54 IANA, elucidates that Article 1F includes committing acts of terrorism or encouraging or inducing others to commit terrorism. Furthermore, although the status of nurse does not automatically exclude the Applicant from the provisions of Article 1F, acting as a nurse does not appear to constitute acts that cause an individual to fall within Article 1F exclusions.

The court found that the points raised by the appellant were unnecessary and that the only emphasis needed was on the facts. Although the tribunal failed to refer to Section 54 of the IANA in its application of *Gurung*, as this statute was not drawn to its attention by the parties, the absence of any reference to the statute did not cause an error in law in the case. Similarly the Court found that as the special position of nursing under international humanitarian law was not brought to the tribunal's attention by the parties, non-consideration of this also did not constitute an error of law. Where the tribunal had erred in law, however, was in failing to sufficiently deal with the question of 'voluntary' membership of the PKK.

The tribunal's assessment of the facts in considering Article 1(f) was inadequate and the conclusion that the case fell within the Article 1(f) exclusions was unreasonable. In particular, the court emphasized that the age of the appellant was highly relevant, alongside the overall nature of the PKK (despite being proscribed as a terrorist organisation) and its place on the *Gurung* continuum, and MH's overall role in the PKK. In light of this finding, the Court of Appeal granted the parties time to provide further submissions before it ruled on the asylum appeal.

In relation to the Secretary of State's cross-appeal, the court found there was no error in law with respect to Article 3. In spite of the concern of hearsay, and even double-hearsay, the tribunal was allowed to accept the statements and give considered weight upon the said statements. Further, the tribunal relied on the fact that MH is an amputee and has shrapnel shards in her head, and that information received by MH suggests the Syrian authorities are looking for her. Accordingly, the tribunal did not err in law and its decision was not perverse.

## Administrative Court (High Court of Justice Queen's Bench Division)

*Secretary of State for the Home Department v. GG; Secretary of State for the Home Department v. NN*

[2009] EWHC 142 (Admin); 2009 WL 364285

**Administrative Court:** Judgment dated on 12 February 2009

*Control orders - curfew orders - detention - disclosure - right to fair trial - right to liberty and security*

### Facts

GG and NN are Kurds from Iraq who settled in the UK. They were put on control orders whilst in the UK due to suspicion of involvement in terrorist activities. GG and NN were two of five individuals the police arrested on 8 October 2005 in an operation that was codenamed KNOP. GG had applied for indefinite leave to remain and NN had applied for further leave to remain in the UK, both applications were put on hold pending the result of the current issues raised by the appellants in this appeal.

Multiple control orders were instituted and renewed from November 2005 to the present appeal. Changes in the control orders were based on a House of Lords review of the application of Article 5 of the European Convention on Human Rights (ECHR) to the length of control orders and other constraints.

GG's curfew was initially for 14 hours and was then extended to 16 hours. Conditions of his control also prohibited visitors if certain measures were not followed. GG's control order removed him from Derby, where he has previously lived, to Chesterfield. However, his wife and stepchildren remained in Derby. NN's curfew hours had been reduced to 13 hours before the current review.

In addition to GG and NN, a third individual, HH, who was apprehended in the same operation, was also under a control order that was continually renewed from which he absconded.

NN had links to GG, Jutiar Ali, and Sawara Mahmud (the two remaining individuals arrested in the same operation). He associated with all three individuals on a frequent basis. Sawara Mahmud is NN's cousin and was closely tied to the Ansar Al-Islam group. NN undertook a trip to Manchester, Doncaster and Derby and it was suggested that this was done in an attempt to evade surveillance. NN also attempted to obtain an Iraqi passport. For the last three years NN has been under a custody order, but has since married and now has a small child.

GG made substantial statements where he changed his story multiple times and attributed his initial untruthfulness to being scared. Mullah Halgurd, GG's contact in Iraq who he transferred money to, was considered to be a leading Ansar Al-Islam member. Prior to his arrest in the KNOP operation, GG had been arrested and questioned on two other occasions. After the KNOP arrest, and upon discovering that the Secretary of State could not remove him to Iraq, GG was put on a control order. The original control order required 18 hours of curfew but this was quashed by Sullivan J. as the number of hours of control were considered to be in violation of ECHR Article 5.



The control orders were renewed pending a review by the House of Lords and the initial 18 hours of curfew were reduced.

### Complaints

The subjects appealed the renewal of the control order, and specifically, certain stipulations contained within the control orders. GG contested the ability of the officers to search his person, his continued stay in Chesterfield, and the prohibition on providing religious advice. Likewise, the appellants sought the court to find that the control orders were a deprivation of liberty. Lastly, GG raised the issue of whether or not such orders can be renewed in light of procedural justice concerns and his right to a fair trial. GG believed that more information should be disclosed in order to comply with Article 6 as thus far the Court had imposed a control order without full disclosure.

### Held

The court refused to determine the issue of whether Article 6 imposes the restriction on a judge to premise their decision on undisclosed material as the House of Lords was due to consider the subject later in the term.

However, the court found that the power to impose an order is not necessitated on proof, but rather reasonable grounds of suspicion that the individual is or has been involved in terrorist-related activities. The court found Lord Carlile's view most instructive - that in most cases after two years of a control order, an individual's usefulness to a terrorist organisation has substantially decreased and their activities are typically disengaged. Thus, the Court found that in the particular circumstances of NN, a renewal of the control order was unnecessary. However the court held that GG's control order was still permissible and can be continued so long as evidence exists that shows the individual as a danger.

With respect to the deprivation of liberty claim, the court reflected that the curfew cannot be viewed in isolation. The past and current control orders did not violate Article 5, although the past Derby control orders on GG were close to doing so. The significant issue is the degree of social isolation. Such impositions did not occur concurrently in GG's case, and thus resulted in a lower degree of social isolation and accordingly did not constitute a deprivation of liberty.

In respect of personal searches carried out on GG, the court found that this was not supported by any statutory provision and that it constituted a trespass when unauthorised.

The court held that the move to Chesterfield was lawful. However, under the circumstances the court found that better accommodations could be made so that GG, his wife and children could live under one roof and not in different cities. Likewise, since GG is now married, Article 8 considerations applied.

Further, the court concluded that the imposition of disallowing religious advice is too vague and was not a narrowly tailored restriction. The breach of any prohibitions in a control order can require up to five years of imprisonment, and thus such orders containing prohibitions must be concise and clear. The court advised that the imposition may be continued; however, the clause must be re-written so that more clarity and direction is provided.





“Over the past decade the BHRC has had great pleasure in working with the KHRP. No organisation has had more impact both in Strasbourg at the European Court of Human Rights, and in Turkey’s political-legal configuration. The BHRC is proud of its close association with the KHRP.”

Stephen Solley QC, *Former Bar Human Rights Committee President*

“KHRP can count many achievements since its foundation ten years ago, but among these its contribution to the fight against torture and organised violence has been one of the most important. Through its litigation strategies, notably at the European Court of Human Rights, its reports and public advocacy, KHRP has helped expose continuing abuse against both Kurds and others, particularly in Turkey, and to raise hopes that victims and survivors of torture and other state violence may obtain recognition of their ordeal, compensation and justice.”

Malcolm Smart, *Director of Amnesty International’s Middle East and North Africa Programme*

“KHRP’s work in bringing cases to the European Court of Human Rights, seeking justice for the victims of human rights violations including torture and extra-judicial killings, has been groundbreaking. In many of these cases the European Court of Human Rights has concluded that the Turkish authorities have violated individual’s rights under the European Convention on Human Rights. Amnesty International salutes the work of this organisation over the last 10 years in defending human rights.”

Kate Allen, *Director Amnesty International UK*

“For more than a decade after the military coup, governments in Turkey committed the gravest of human rights abuses while blandly denying that the violations were taking place. By pioneering the use of the personal petition to the European Court of Human Rights in Turkey KHRP helped to make those violations a matter of record in the form of court judgments. This has added valuable leverage in the continuing struggle to bring abuses such as ‘disappearance’, forced displacement, torture and repression of free speech to an end.”

Jonathan Sugden, *Turkey Researcher*

“In my opinion, for a view on the KHRP one should ask the ancient cities it has saved from submersion, the villagers it has represented whose houses had been burnt and destroyed, prisoners of conscience and those who had been tortured, for they know the KHRP better.”

Can Dunder, *Journalist in Turkey*

Kurdish Human Rights Project  
11, Guilford Street, London WC1N 1DH, England  
Tel: +44 (0)20 7405 3835 Fax: +44 (0)20 7404 9088  
E-mail: [khrp@khrp.org](mailto:khrp@khrp.org) Website: [www.khrp.org](http://www.khrp.org)  
Registered charity (No. 1037236)  
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