



Institut für Föderalismus
Institut du Fédéralisme
Institute of Federalism

IFF Working Paper Online No 9

Self-Determination of the Kurdish People: Undermining the Unity of the «Turkish Nation»?

IEVA VEZBERGAITE

July 2015

This paper was written in the framework of the IFF's Summer University on Federalism, Decentralization and Conflict Resolution and edited in 2015. The research of this work was supported by the graduate scholarship programme of Scientific and Technological Research Council of Turkey (TÜBİTAK).

Citation: Vezbergaite, I., Self-Determination of the Kurdish People: Undermining the Unity of the «Turkish Nation»? , IFF Working Paper Online No 9, Fribourg, July 2015.

<https://doi.org/10.51363/unifr.diff.2015.09>

University of Fribourg
Institute of Federalism
Av. Beauregard 1
CH-1700 Fribourg

Phone +41 (0) 26 300 81 25

www.federalism.ch



UNIVERSITÉ DE FRIBOURG FACULTÉ DE DROIT
UNIVERSITÄT FREIBURG RECHTSWISSENSCHAFTLICHE FAKULTÄT

The IFF Working Paper Online series and other publications of the Institute of Federalism, Fribourg are available on the IFF website www.unifr.ch/federalism/en/research/.

© IFF, 2015

Institute of Federalism, University of Fribourg
Avenue Beauregard 1
1700 Fribourg
Switzerland
federalism@unifr.ch



This work is published under a Creative Commons Attribution 4.0 International License (CC BY 4.0): <https://creativecommons.org/licenses/by/4.0>.

Author: Ieva Vezbergaite

The papers are published in the name of the author. Her/his view does not necessarily reflect the view of the Institute of Federalism.

DOI: <https://doi.org/10.51363/unifr.diff.2015.09>

ISSN: 2813-5261 (Online)

Table of Contents

Introduction	3
1. Right to self-determination of peoples and the Kurds	4
1.1. Right to self-determination	4
1.2. Definition of a «people»	5
1.3. The «Kurdish question» in Turkey	7
2. Unity of «Turkish nation».....	8
2.1. Constitutional status of the «Turkish nation»	8
2.2. Dissolution of pro-Kurdish parties.....	9
2.3. National unity vs. self-determination.....	12
3. Impediments for conflict resolution.....	13
Conclusion.....	14
References	15

Abstract

The right to self-determination is an essential norm of international law recognized to all peoples. The Kurds of Turkey qualify as people for the purposes of self-determination, but Turkey does not recognize the right to self-determination for Kurds. This happens because of a peculiar interpretation of «Turkish nation» in the constitutional doctrine. The constitutional law of Turkey establishes a contradiction with principle of self-determination of peoples enshrined in international law. As a result, any conflict resolution options for «Kurdish question», such as federalism, devolution of power, territorial autonomy, multiculturalism or minority rights regime are deemed unconstitutional. The paper proceeds by presenting the theoretical framework of right to self-determination of peoples and bringing the «Kurdish question» into the context. Further, the constitutional doctrine of unity of the «Turkish nation» is presented by analyzing the case-law of Turkish Constitutional Court related to the dissolutions of pro-Kurdish parties. The impediments for the conflict resolution are discussed in the last part and concluding remarks suggesting possible solutions to overcome the problem are provided.

Introduction

The Turkish-Kurdish cleavage and the resulting conflict («Kurdish question»¹) define the politics in Turkey today. The conflict captures not only dimensions of unity and territorial integrity of Republic of Turkey, but also dimensions of diversity in Turkey, multiculturalism, minority issues, identity politics (Kurdish nationalism), and the rights of the Kurds in a democratic country. The Kurdish people in Turkey repeatedly assert its right to self-determination with all its consequences, including the decision of the Kurds on their free will to establish a Kurdish state or decide to live within the framework of Turkish state. While secessionist aspirations by Kurds are disputed with regard to whether they are authorized by the scope of right to self-determination, the exercise of self-determination of peoples internally (e.g. federal arrangements, devolution of power, territorial autonomy, minority rights regime, etc.) within Turkey are seen as legitimate demands by Kurds. The «internal» self-determination options are seen as viable conflict resolution for the decades-long conflict.

However, the possible exercise of self-determination by Kurds sharpens the «unity vs. diversity» dilemma in Turkey. In particular, it appears that any form of self-determination by the Kurdish people is dialectical to the unity of «Turkish nation» as defined by the constitutional law of Turkish state. What are the main obstacles for the Kurdish right to self-determination and what measures needs to be taken to facilitate the exercise of this right?

The scope of this paper is limited to legal framework of conflict resolution and the paper does not delve into the social, economic or political aspects of the conflict resolution. Nonetheless, the ongoing debate about the necessity of new constitution in Turkey will obviously have to address the «Kurdish question» in such constitution. The paper proceeds by presenting the theoretical framework of right to self-determination of peoples and bringing the Kurdish issue into the context. Further, the constitutional doctrine of unity of «Turkish nation» is presented by analyzing the case-law of Turkish Constitutional Court related to dissolving pro-Kurdish parties. The impediments for the conflict resolution are discussed in the last part and concluding remarks suggesting possible solutions to overcome the problem are provided.

¹ Kurdish question in Turkey basically refers to the denial and repression of Kurdish ethnic identity by the Turkish state. See Saylan, Ibrahim (2012) «The Kurdish nationalist challenge to Democratic Consolidation of Turkey» footnote 1 in *Democratic Consolidation in Turkey*, edited by Muge Aknur (2012).

1. Right to self-determination of peoples and the Kurds

1.1. Right to self-determination

Right to self-determination is an essential norm of international law, which is reflected both in treaty law and international customary law. Right to self-determination is understood through its division into two aspects: internal and external. «The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state»². Such exercise of a right is compatible with the territorial integrity of that state.

External self-determination is people's decision to establish independent and sovereign state, to create free association with an independent state or to integrate with an existing independent state³. However, a right to so-called «external» self-determination arises only in exceptional situations. It is common agreement that «external» self-determination can be exercised by colonized or occupied peoples. However, there is no consensus whether there is a right to «external» self-determination outside situations of colonies and foreign occupation. If there would be a right to «external» self-determination by other peoples, this would potentially take the form of unilateral secession from an existing state and therefore dismember the territory of that state.

Internal self-determination

The internal aspect of the right concerns the right of peoples within a state to choose their political status⁴. Hannum claims that internal aspect of self-determination is democracy⁵, meaning that people have right to representative and democratic government. Simpson also considers that internal self-determination is alternatively called democratic self-determination⁶.

Internal self-determination may take various forms, including (but not limited to) autonomy within a state, federal arrangements or any other special constitutional arrangements for the people concerned. Various types of internal self-determination modes are mentioned in literature. For example, Simpson describes devolutionary self-determination that «refers to the various institutional arrangements and innovations used by states to advance reconciliation with national or indigenous

² *Reference re Secession of Quebec* S.C.R. 217, para. 126 (Supreme Court of Canada 1998). Kurdish question in Turkey basically refers to the denial and repression of Kurdish ethnic identity by the Turkish state.

³ 1960 December 15 UN General Assembly Resolution 1541 (XV) Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter.

⁴ McCorquodale, R. «Self-Determination: A Human Rights Approach», *International and Comparative Law Quarterly* 43 (1994), p. 864.

⁵ Hannum, Hurst. *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*. Revised Edition. University of Pennsylvania Press, (1996), p.30.

⁶ Simpson, Gerry J. «Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age», *Stanford Journal of International Law* 32 (1996), p.257.

groupings. These arrangements include the constitutional models attempted in Canada, the judicial forms the process has taken in Australia, the system of tribal self-government favored in the United States, and regionalism in Spain.»⁷ Tomuschat mentions federal right of self-determination⁸ which is similar to the devolutionary model Simpson describes. Tomuschat calls any form of self-determination within framework of a state as political self-determination⁹. Political self-determination may take all forms that are less intrusive than secession. Hannum claims that internal aspect of self-determination is democracy¹⁰, meaning that people have right to representative and democratic government. Similarly, Simpson considers that internal self-determination is alternatively called democratic self-determination¹¹.

1.2. Definition of a «people»

The notion that the subject of the right to self-determination is a «people» does not add any clarity. The very notion of «a people» is suffering from a high degree of ambiguousness – international law does not provide any clear criteria how to define a «people». Fitzmaurice has accurately noted «it is in fact ridiculous because the people cannot decide until somebody decides who are the people».¹²

Some authors have tried to introduce workable definitions of a people. For example, Murswiek in his definition links a people to a territory:

A people, as a group which can be holder of the right to self-determination exists only if it lives in a distinct territory, where it constitutes the majority and where it is able to speak its own language, develop its own culture, cultivate its traditions or practice its particular religion.¹³

Another workable doctrinal definition could be taken from 1989 UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples. In the «Final Report and Recommendations» international experts describes «people» as:

1. a group of individual human beings who enjoy some or all of the following common features:
 - a) common historical tradition;

⁷ Ibid., p. 258.

⁸ Tomuschat, Christian. «Self-determination in a post-colonial world», in *Modern Law of Self-Determination*, edited by Christian Tomuschat. 1st ed. Springer, (1993), p.13.

⁹ Ibid., p. 14.

¹⁰ Hannum, *Autonomy, Sovereignty, and Self-Determination*, p. 30.

¹¹ Simpson, «Diffusion of Sovereignty», p. 257.

¹² Fitzmaurice, as quoted in Crawford, James R. *The Creation of States in International Law*. 2nd ed. Oxford University Press, (2007).

¹³ Murswiek, Dietrich, «The Issue of a Right to Secession – Reconsidered», in *Modern Law of Self-Determination*, ed. Christian Tomuschat, 1st ed. (Springer, 1993), p. 27.

- b) racial or ethnic identity;
 - c) cultural homogeneity;
 - d) linguistic unity;
 - e) religious or ideological affinity;
 - f) territorial connection; and
 - g) common economic life.
2. the group must be of a certain number which need not to be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a state
 3. the group as a whole must have the will to be identified as a people or the consciousness of being a people <...>
 4. the group must have institutions or other means of expressing its characteristics and will for identity¹⁴

Analysis of this UNESCO definition suggests that the two-prong test is applied to determine whether a group qualifies as people:

1. Objective test – the group possesses external differences from other groups of individuals.
2. Subjective test:
 - a) Self-consciousness – individuals within the group perceive collectively themselves as distinct people.
 - b) Representation – individuals within the group have political/social structures through which they can be represented.

Relationship between a «people» and a minority

The issue of definition of a term «people» is important in order to define whether a minority can be regarded as a people. There is an existing position that a minority cannot be a people – these are two distinct categories and only a people enjoy right to self-determination¹⁵.

According to Ryngaert and Griffioen, «it must be noted that the term «minority» suffers from the same lack of clarity as the term «people». There is no generally accepted definition of what

¹⁴ 1990 February 22 Final report and recommendations, UNESCO International Meeting of Experts on further study of the concept of the rights of peoples, available at <http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

¹⁵ For example, Bing Bing Jia. «The independence of Kosovo: A unique case of secession?», *Chinese Journal of International Law* (2009), footnote 38.

constitutes a minority.»¹⁶ Murswiek stresses that the terms «minority» and «people» do not totally exclude one another but rather they partly overlap. It is possible that «one group that is minority in relation to the whole population of a State can, on the one hand, be a national minority in the meaning of the law relating to minorities. But on the other hand, it can be a people in the meaning of the right to self-determination at the same time».¹⁷ For example Basques constitute people but at the same time they are minority in Spain.

Thus it can be submitted that minorities and peoples are not mutually exclusive terms and there might be possible that a certain group of individuals may have characteristics of a people and of a minority at the same time.

1.3. The «Kurdish question» in Turkey

The Kurdish ethnic group lives in a territory currently divided by four countries: Turkey, Syria, Iraq and Iran. It is one of the oldest ethnic groups living in the Middle East region, having their distinct languages and distinct culture from Turkish one.

The state of Turkey does not provide an option to identify ethnicity in the national census, therefore there is disagreement over how much ethnic Kurds constitute the population of Turkey, estimates varying from 15 to 25 percent. The CIA fact book indicates that there are about 14 million Kurds living in Turkey, thus consisting of about 18% of the total population of nearly 80 million people¹⁸. Most of the Kurds in Turkey are concentrated in south-eastern part of the country.

The 1923 formation of the Turkish Republic marked the beginning of continuing period of reduced civic rights for Kurds. Kurdish regions were placed under martial law and the use of the Kurdish language, folklore, names was prohibited as well as villages renamed in Turkish language.¹⁹

The suppression of Kurds resulted into an armed conflict between Turkish government and military groups²⁰ of Kurds that claimed the right to self-determination and sought secession from Turkey and establishing independent state called Kurdistan. Nonetheless, moderate groups of Kurds opted for peaceful democratic process (political participation through forming political parties and elections) and envisioned Kurdish right to self-determination be exercised internally – though federal

¹⁶ Ryngaert, Cedric and Griffioen, Christine, «The relevance of the right to self-determination in the Kosovo matter: In partial response to Agora papers», *Chinese Journal of International Law* (2009), para. 12.

¹⁷ Murswiek, «The Issue of a Right to Secession – Reconsidered», p. 37.

¹⁸ <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html#People>.

¹⁹ See Bowring, Bill. «The Kurds of Turkey: Defending the Rights of a Minority» in *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East* edited by Kirsten E. Schulze, Martin Stokes and Colm Campbell, Tauris Academic Studies (1996); Hannum, Hurst. *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, p.186–190.

²⁰ The main military group is Kurdistan Workers' Party (PKK) that sought establishment of Kurdish state – Kurdistan. PKK is labeled as terrorist organization by Turkey and number of other countries.

arrangements, territorial autonomy, self-government or certain minority regime and guarantee of cultural rights.

It is little doubt that Kurds qualify as «people» for the purpose of self-determination²¹. They clearly meet the objective tests criteria by having common historical tradition, ethnic identity, cultural homogeneity, linguistic unity, territorial connection and common economic life. As for subjective test, individuals within the group perceive collectively themselves as distinct people and have self-consciousness of being Kurdish and they also meet criteria of representation, especially through numerous pro-Kurdish political parties in Turkey. In relation to population of Turkey, Kurds also qualify as minority group in Turkey in relation of majority of ethnic Turks.

Nonetheless, the democratic process is not smooth in Turkey at all. While any secessionism is generally met with opposition by governments of any state (and Turkish government stance against secession is understandable from statist perspective to retain its territorial integrity), there is no substantial push forward towards resolution of the «Kurdish question» within the legal framework of Turkey. While the ruling government led by AKP (Justice and Development Party, *Adalet ve Kalkinma Partisi*) has made some symbolic concessions (such as lifting the ban on Kurdish language or allowing national Kurdish TV channel) and in 2012 started negotiations with PKK militarized group to end armed conflict, the peace negotiations have stalled and the status of Kurdish identity and demands on internal self-determination hardly see any prospects to be solved in Turkey soon²². The major obstacle for solving is not only politics, but also the constitutional framework of Turkey that has a specific philosophy of «Turkish Nation» inherited from military regime and its drafters²³. The remainder of the paper will focus on the legal aspect of the «Kurdish question» through analysis of constitutional law of Turkey.

2. Unity of «Turkish nation»

2.1. Constitutional status of the «Turkish nation»

According to the 1982 Constitution, the first three articles of the Constitution are the «entrenched clauses» that cannot be amended. The Article 3 of the constitution of Turkish Republic²⁴ regulates integrity of the state and reads: «The State of Turkey shall constitute with its territory and nation an indivisible whole. The official language shall be Turkish». The notion of «Turkish nation» is derived from this article and the Constitutional Court of Turkey advanced the interpretation of «Turkish

²¹ Bowring, Bill. «The Kurds of Turkey: Defending the Rights of a Minority», p.30.

²² At the time of the writing, the newly established pro-Kurdish party HDP (Halkların Demokratik Partisi) has passed the highly unusual 10% election threshold in the general selections on 7 June 2015, and the truce between government and PKK fighters was terminated with start of new hostilities on both sides. Moreover, HDP party is facing possible closure and its co-chairman is under criminal investigation.

²³ The 1982 Constitution of the Turkish Republic was drafted by the outgoing military as an exit strategy in transition to civilian regime.

²⁴ 1982 Constitution of the Republic of Turkey.

nation». The Turkish state is single, the country is whole and the nation is one. The Turkish nation is indivisible and it is unifying and integrating element of the Turkish state. Any attempt to undermine the integrity of the state (that includes national unity) is contrary to the constitution. The Constitutional Court's interpretation is most consistently expressed in the jurisprudence regarding dissolution of pro-Kurdish parties that, in the Court's view, undermined the unity of the Turkish nation.

2.2. Dissolution of pro-Kurdish parties

The United Communist Party of Turkey (TBKP) was a political party formed in 1990 that was dissolved by the Turkish Constitutional Court in 1991. The party's constitution and programme stated that the Kurdish problem is a political one arising from the denial of the Kurdish people's existence, national identity and rights in Turkey. The programme referred to right of self-determination, which is a natural and inalienable right of all peoples; envisioned autonomy regime for Kurdish and mentioned Turkish and Kurdish nations. The Constitutional Court concluded that constitution and programme contained statements likely to undermine the territorial integrity of the State and the unity of the nation. The Constitutional Court noted, *inter alia*, that those documents referred to two nations: the Kurdish nation and the Turkish nation. But it could not be accepted that there were two nations within the Republic of Turkey, whose citizens, whatever their ethnic origin, had Turkish nationality. In Constitutional Court's opinion, the proposals in the party constitution covering support for non-Turkish languages and cultures were intended to create minorities, to the detriment of the unity of the Turkish nation. Reiterating that self-determination and regional autonomy were prohibited by the Constitution, the Constitutional Court said that the State was unitary, the country indivisible and that there was only one nation.²⁵

The Socialist Party (SP) was a political party founded in 1988 and dissolved by the Constitutional Court in 1992. In its programme SP stated that the Kurdish nation has a full and unconditional right to self-determination, including the right to secede if the Kurdish people decide so in referendum. Nonetheless, as the solution to the Kurdish problem, the SP proposed the creation of «democratic federal republic» among Turkish and Kurdish people and outlined the structure of the future «federated state». In reaching its decision to dissolve the party, the Constitutional Court noted, *inter alia*, that the SP referred in its political message to two nations: the Kurdish nation and the Turkish nation. But it could not be accepted that there were two nations within the Republic of Turkey, whose citizens, whatever their ethnic origin, had Turkish nationality. The Court considered that the statements made by the SP concerning Kurdish national and cultural rights were intended to create minorities and, ultimately, the establishment of a Kurdish-Turkish federation, to the detriment of the unity of the Turkish nation and the territorial integrity of the Turkish State.²⁶

People's Labour Party (HEP) was founded in 1990 and dissolved by the Constitutional Court in 1993 based on the oral and written statements of the party leaders. HEP was asserting through its

²⁵ *United Communist Party of Turkey and Others v. Turkey* ECtHR judgment (133/1996/752/951).

²⁶ *Socialist Party and Others v. Turkey* ECtHR judgment (20/1997/804/1007).

activities that there was a separate Kurdish people with its own culture and language, which the Kurds were not free to practice. The HEP demanded the right to self-determination for the Kurds, advocated the setting up of «Kurdish provinces» and supported the activities of Kurdish military groups by calling them freedom fighters. The Constitutional Court reiterated that all persons living within Turkish territory, whatever their ethnic origin, formed a whole united by their common culture. Accordingly, the sum of the persons who made up the Republic of Turkey was called the «Turkish nation». The different ethnic groups making up the «nation» were therefore not divided into a majority or minorities. The Constitutional Court pointed out that, under the Constitution, no political or legal distinction based on ethnic or racial origin could be made between citizens. The Constitutional Court concluded that HEP was «seeking to divide the Turkish nation in two, with Turks on one side and Kurds on the other, with the aim of establishing separate states» and was «seeking to destroy national and territorial integrity».²⁷

Founded in 1992, the Socialist Party of Turkey (STP) was dissolved by the Constitutional Court in 1993. In its programme, STP claimed that right to self-determination, including the right to secession, is guaranteed by the laws and social instruments and it called «the socialist and revolutionary forces to ensure the right to self-determination». It also demanded language and cultural rights for Kurdish people. Regarding the contents of the STP programme, the Constitutional Court observed that STP assumed the existence of a separate Turkish Kurdish people with culture and language that were its own. According to the Constitutional Court, the STP claimed a right to self-determination for the Kurds and supported the right to a «war of independence». It observed that the attitude of the STP was comparable to terrorist groups and was itself unlawful incitement to violence.²⁸

The Freedom and Democracy Party (ÖZDEP) was founded in 1992 and dissolved by Constitutional Court in 1993. As in HEP case, the Court repeated the concept of «Turkish nation» as all persons forming a whole with common culture. With regard to the content of ÖZDEP's programme, the Constitutional Court observed that it was based on the assumption that there was a separate Kurdish people in Turkey with its own culture and language. The Kurds were portrayed in the programme as an oppressed people whose democratic rights were being completely ignored. According to the Constitutional Court, ÖZDEP called for a right to self-determination for the Kurds and supported their right to wage a «war of independence». Its stance was similar to that of terrorist organizations and constituted in itself an incitement to insurrection.²⁹

Democracy Party (DEP) was founded in 1993. In 1994 the Constitutional Court ordered the dissolution of the DEP on the ground that its activities were liable to undermine the territorial integrity of the State and the unity of the nation. The Constitutional Court found that reference had been made in the declaration and speeches of party officials to the existence of a separate Kurdish people in Turkey fighting for their independence, and that the acceptance of a Kurdish identity with

²⁷ *Yazar, Karataş, Aksoy and The People's Labour Party (HEP) v. Turkey* ECtHR judgment (Applications nos. 22723/93, 22724/93 and 22725/93).

²⁸ *Socialist Party of Turkey (STP) and Others v. Turkey* ECtHR judgment (Application no. 26482/95).

²⁹ *Freedom And Democracy Party (ÖZDEP) v. Turkey* ECtHR judgment (Application no. 23885/94).

all the consequences that entailed, namely the creation of an independent state and the destruction of the existing state, had been advocated. It also considered that there had been references to equality between two nations and that the acts of a terrorist organization had been presented as a struggle for independence.³⁰

Founded in 1995, the Democracy and Change Party (DDP) was dissolved by the Constitutional Court in 1996 on the grounds that, among other things, its programme was likely to undermine the territorial integrity of the State and the unity of the nation. The Constitutional Court found that behind the stated intention of promoting the development of the Kurdish language, the real aim of the DDP's constitution was to create minorities to the detriment of territorial integrity and Turkish national unity, thereby encouraging separatism and the division of the Turkish nation.³¹

The Emek Partisi (EP) was founded in 1996. In 1997 the Constitutional Court ordered that the EP be dissolved, on the ground that its constitution and programme were likely to undermine the territorial integrity of the State and the unity of the nation. The Constitutional Court found that, on the pretext of promoting the development of the Kurdish language, the EP's constitution aimed to create minorities, to the detriment of the territorial integrity and national unity of the Turkish State, thus promoting separatism and the division of the Turkish nation.³²

The Democratic People's Party («Demokratik Kitle Partisi», DKP) was founded in 1997 and dissolved in 1999 by the Constitutional Court. The Constitutional Court noted, in particular, that the party's programme alleged the existence within Turkish territory of minorities founded on differences in national culture, membership of a race or language. The court considered that the DKP was seeking to destroy the integrity of the nation.³³

People's Democracy Party (HADEP) was founded in 1994. In 2003 the Constitutional Court had decided to dissolve HADEP because it had become «a centre of illegal activities against the indivisible unity of the State with its nation». The party advocated for right to self-determination of Kurds and demanded that citizens of Kurdish origin had the rights to be educated in their mother tongue, to listen to radio and watch television programmes in the Kurdish language, to sustain their culture and to exercise their democratic right to participate in the political arena.³⁴

The last pro-Kurdish party in Turkey to be dissolved by the Constitutional Court is Democratic Society Party (DTP). Founded in 2005, the party was dissolved in 2009. The Constitutional Court ruled that the DTP had become a «focal point of activities against the indivisible unity of the state, the country and the nation»³⁵.

³⁰ *Dicle for the Democratic Party (DEP) v. Turkey* ECtHR judgment (Application no. 25141/94).

³¹ *Democracy and Change Party and Others v. Turkey* ECtHR judgment (Application nos. 39210/98 and 39974/98).

³² *Emek Partisi and Şenol v. Turkey* ECtHR judgment (Application no. 39434/98).

³³ *Demokratik Kitle Partisi and Elçi v. Turkey* ECtHR judgment (Application no. 51290/99).

³⁴ *HADEP and Demir v. Turkey* ECtHR judgment (Application no. 28003/03).

³⁵ «Turkish top court bans pro-Kurdish party» <http://news.bbc.co.uk/2/hi/europe/8408903.stm>.

The disbanded DTP was succeeded by pro-Kurdish BDP (Peace and Democracy Party, Barış ve Demokrasi Partisi) in 2008 until it was succeeded by two fraternal parties in 2014, the DBP (Demokratik Bölgeleler Partisi, Democratic Regions Party) and HDP (Halkların Demokratik Partisi, Peoples' Democratic Party). The latter party has won surprising 13% of national vote in the 2015 general elections crossing the world's only and highest 10% electoral threshold; however soon after elections the HDP found itself subjected to investigation by the prosecutors and is facing possible closure by the Constitutional Court at the time of the writing of this paper³⁶.

2.3. National unity vs. self-determination

The jurisprudence regarding closure of pro-Kurdish parties demonstrates that Turkish Constitutional Court has developed the clear-cut constitutional doctrine of the «Turkish nation» and national unity – any attempt to create «Kurdish people», «Kurdish nation», «Kurdish minority» is deemed unconstitutional in the terms of Article 3 of the Turkish Constitution. As a result, any demands for federal arrangements, territorial autonomy, self-government or minority rights regime on behalf of Kurds are also considered as violating the constitution.

The interpretation of national unity in Turkey is very specific and strict that in fact denies any national aspirations of ethnically distinct people. While the unconstitutionality of secession could be understandable in light of state's territorial considerations, the other solutions to Kurdish problem in the scope of internal forms of self-determination are still deemed to be conflicting with the notion of national unity.

The author submits that the specific interpretation of «Turkish nation» and national unity in Turkish constitutional doctrine are violating the international legal norms that recognize the right to self-determination of peoples. Although there is no consensus whether contemporary law of self-determination authorizes external self-determination (in the form of secession), it is not questionable that peoples are entitled to self-determination within the framework of the state. It is obvious that Kurdish people are distinct from Turkish people and they do in fact constitute a notable minority within a population. The prohibition for Kurdish people (and in particularly, their representatives – political parties) to demand status negotiations or even minimal set of rights constitutes a serious violation of international law and human rights standards. The European Court of Human Rights (ECtHR) has found human rights violations in all the cases of pro-Kurdish party dissolutions mentioned above³⁷. According to the ECtHR, the banning of parties that offer solutions for Kurdish problem, demand self-determination, minority rights for Kurdish was not necessary in democratic society.

³⁶ «Turkey Investigates Kurdish Opposition Party for Links to Terrorism» <http://europe.newsweek.com/turkey-investigates-kurdish-opposition-party-links-terrorism-330893>.

³⁷ The ECtHR decision regarding DTP dissolution is still pending (Application no. 3840/10).

Turkey cannot use domestic law (constitutional law) in order to avoid its human rights obligations under international law. Serious constitutional reforms must be pursued to address the unitarian philosophy that is underlying the current Turkish constitution.

3. Impediments for conflict resolution

Currently Turkey is undergoing new constitution-making process in order to replace the 1982 constitution that was imposed by the military after the coup d'état. The process has stalled but is expected to resume after the coalition government will be established of snap elections will be held in 2015. The new constitution is supposed to address the «Kurdish question». This peace process between Turkish government and Kurdish militants is also preconditioned on including special Kurdish status in the new constitution and the conflict will depend on the success of providing such status. However with resumed hostilities with PKK fighters and possible closure of pro-Kurdish HDP party, the constitution-making process may be very challenging without meaningful representation of the Kurdish people.

It seems that there are many available options for Kurds to be given a special status in the new constitution. While federal arrangement is little plausible to be in the new constitution, devolution of power, regionalism or territorial autonomy could be possible solutions to address Kurdish demands to their right to self-determination. Other solutions, like non-territorial autonomy (e.g. cultural autonomy), multiculturalism or minority status may also be sufficient for Kurds in Turkey.

Nonetheless, the constitutional changes are not going to be smooth. As mentioned earlier, the current 1982 constitution defines the first three articles (including the Article 3 on national unity) as «entrenched clauses». This means that the mentioned articles cannot be amended nor proposals for amendments can be made. Is Turkey ready to rewrite entire constitution and rewrite the entrenched clauses that were deemed untouchable? And even though the very text of Article 3 is not impediment to the constitutional reform, it is the legacy of decades long jurisprudence of the Turkish Constitutional Court interpreting the Article 3 is what really matters. It is the Turkish Constitutional Court that has said that federalism and territorial autonomy violate the territorial integrity of Turkey and that Kurdish minority status and multiculturalism violate the national unity as guaranteed by the Article 3.

Unless these fundamental questions of constitutional framework are solved, the Turkish-Kurdish conflict cannot be resolved. The author submits that the problems of constitutional framework could be solved in two ways. As one option, the new Turkish constitution could be drafted by completely rewriting the «entrenched clauses». The democratic legitimacy for a new constitution by a popular referendum could overcome the restrictions of the 1982 constitutional framework. However the drafting of new consensus will require a broad social and political consensus which does not seem to be present in Turkey yet. As a second option, the Turkish Constitutional Court should reverse the previous interpretation of national unity and formulate the new constitutional doctrine consistent with right to self-determination of peoples, minority rights and diversity of cultures in Turkey. As such, the Turkish Constitutional Court could reinterpret Article 3 in the way that respects peoples

right to internal self-determination and provide guarantees for pro-Kurdish parties by ensuring Kurdish political participation in Turkish Republic through democratic means (political parties and elections).

Conclusion

Right to self-determination is an essential norm of international law recognized to all peoples. By virtue of the right, a people is entitled to pursue its political, economic, social and cultural development within the framework of an existing state. Although formal definition of what constitutes «a people» is lacking, a workable definition may be developed to determine whether a certain group of individuals are considered «people». Moreover, terms «people» and «minority» are not mutually exclusive and may be overlapping, where a group of people qualifies both as a people and as a minority.

The Kurds of Turkey obviously qualify as people for the purposes of self-determination and also qualifies as a minority group in Turkey. Nevertheless, Turkey does not recognize the right to self-determination for Kurds nor the Kurds are recognized as a minority. This happens because of a peculiar interpretation of «Turkish nation» in the constitutional doctrine. As the jurisprudence of the Turkish Constitutional Court demonstrates, there can be no ethnic Kurdish minority, Kurdish people or Kurdish nation existing in Turkey because it undermines the unity of «Turkish nation». The constitutional law of Turkey establishes contradiction with principle of self-determination of peoples enshrined in international law. As a result, any conflict resolution options for Kurdish problem, such as federalism, devolution of power, territorial autonomy, multiculturalism or minority rights regime are deemed unconstitutional.

The status of Article 3 of the Turkish constitution as entrenched clause prevents it to be amended and thus impedes the conflict resolution processes. However, in author's opinion, the very text of the Article 3 can be consistent with the possible reforms of Turkish Constitution. It is the interpretation of the national unity in the jurisprudence of the Constitutional Court that is detrimental for solutions to Kurdish problem.

The author submits that the problems of constitutional framework could be solved in two ways. As one option, the new Turkish constitution could be drafted by completely rewriting the «entrenched clauses». The democratic legitimacy for a new constitution by a popular referendum could overcome the restrictions of the 1982 constitution. As a second option, the Turkish Constitutional Court should reverse the previous interpretation of national unity and formulate the new constitutional doctrine consistent with right to self-determination of peoples, minority rights and diversity of cultures in Turkey.

References

Articles and books

- Bing Bing Jia. «The independence of Kosovo: A unique case of secession?» *Chinese Journal of International Law*, (2009)
- Bowring, Bill. «The Kurds of Turkey: Defending the Rights of a Minority» in *Nationalism, Minorities and Diasporas: Identities and Rights in the Middle East* edited by Kirsten E. Schulze, Martin Stokes and Colm Campbell, Tauris Academic Studies (1996)
- Crawford, James R. *The Creation of States in International Law*. 2nd ed. Oxford University Press, (2007)
- Hannum, Hurst. *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*. Revised Edition. University of Pennsylvania Press, (1996)
- McCorquodale, Robert. «Self-Determination: A Human Rights Approach», *International and Comparative Law Quarterly* 43 (1994)
- Murswiek, Dietrich. «The Issue of a Right to Secession - Reconsidered», In *Modern Law of Self-Determination*, edited by Christian Tomuschat. 1st ed. Springer, (1993)
- Ryngaert, Cedric and Griffioen, Christine, «The relevance of the right to self-determination in the Kosovo matter: In partial response to Agora papers», *Chinese Journal of International Law* 8(3) (2009)
- Simpson, Gerry J. «Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age», *Stanford Journal of International Law* 32 (1996)
- Saylan, Ibrahim. «The Kurdish nationalist challenge to Democratic Consolidation of Turkey», in *Democratic Consolidation in Turkey*, edited by Muge Aknur (2012)
- Tomuschat, Christian. «Self-determination in a post-colonial world», in *Modern Law of Self-Determination*, edited by Christian Tomuschat. 1st ed. Springer, (1993)

Jurisprudence of courts

- Democracy and Change Party and Others v. Turkey* ECtHR judgment (Application nos. 39210/98 and 39974/98)
- Demokratik Kitle Partisi and Elçi v. Turkey* ECtHR judgment (Application no. 51290/99)
- Dicle for the Democratic Party (DEP) v. Turkey* ECtHR judgment (Application no. 25141/94)
- Emek Partisi and Şenol v. Turkey* ECtHR judgment (Application no. 39434/98)
- Freedom And Democracy Party (ÖZDEP) v. Turkey* ECtHR judgment (Application no. 23885/94)
- HADEP and Demir v. Turkey* ECtHR judgment (Application no. 28003/03)
- Socialist Party and Others v. Turkey* ECtHR judgment (20/1997/804/1007)
- Socialist Party of Turkey (STP) and Others v. Turkey* ECtHR judgment (Application no. 26482/95)

United Communist Party of Turkey and Others v. Turkey ECtHR judgment (133/1996/752/951)

Yazar, Karataş, Aksoy and The People's Labour Party (HEP) v. Turkey ECtHR judgment (Applications nos. 22723/93, 22724/93 and 22725/93)

Reference re Secession of Quebec S.C.R. 217 (Supreme Court of Canada 1998).

Other materials

1982 Constitution of the Republic of Turkey

1960 December 15 UN General Assembly Resolution 1541 (XV)

1990 February 22 Final report and recommendations, UNESCO International Meeting of Experts on further study of the concept of the rights of peoples, available at

<http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf>

«Turkey Investigates Kurdish Opposition Party for Links to Terrorism», retrieved from <http://europe.newsweek.com/turkey-investigates-kurdish-opposition-party-links-terrorism-330893>

«Turkish top court bans pro-Kurdish party», retrieved from <http://news.bbc.co.uk/2/hi/europe/8408903.stm>

CIA world fact book, retrieved from <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html#People>