UNIVERSITY OF TARTU
INTERNATIONAL LAW AND HUMAN RIGHTS

Department of Law

Ilkana Aliyeva

Access to Legal Protection for Ethnic Minorities: A Focus on Kurds in Türkiye and Iraq

Master's Thesis

Supervisor
Associate Professor Katre Luhamaa

Tallinn
2026

Table of Contents

1. Introduction *3*

2. International Legal Framework on Minority Protection and Access to Justice 4

2.1 Minority Protection under International Human Rights Law 4

2.2 Access to Justice as a Human Right 5

2.3 Regional Standards on Access to Justice and Minority Protection under the European Convention on Human Rights 6

2.4 The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992) 9

2.5 The Framework Convention for the Protection of National Minorities: Scope, Limitations, and Relevance 9

2.6 Concluding Remarks: International and Regional Standards as a Framework for Domestic Analysis 12

3. Legal Status and Protection of Kurds in Türkiye 13

3.1 Constitutional and Legal Framework 13

3.2 Access to Domestic Remedies and Judicial Practice 15

3.3 The Role of the European Court of Human Rights in Ensuring Access to Legal Protection 17

3.4 Case Law Analysis: ECtHR and Kurdish Applicants 18

3.5 Language Rights in Judicial Proceedings: Kurdish-Speaking Defendants and Access to Interpretation 22

3.6 The Impact of Emergency Rule and Counter-Terrorism Legislation on Access to Legal Remedies 25

4. Legal Framework in Iraq 29

4.1 Constitution in Iraq and the Kurdistan Region 29

4.2 Access to Domestic Remedies and Judicial Practice in Iraq 31

4.3 Legal Pluralism and Structural Barriers to Access to Justice 33

4.4 The Role of International Human Rights Monitoring Bodies in Iraq: UPR and Treaty Body Oversight 37

4.5 Disputed Territories and Access to Justice: The Legal Vacuum in Kirkuk and the Sinjar Region 39

4.6 Transitional Justice and Reparations: International Standards and Their Applicability to Kurdish Claims in Iraq 42

5. Comparative Analysis: Legal Frameworks, Remedial Effectiveness, and Access to Justice 45

5.1 Practical Implementation of Minority Rights 45

5.2 Access to Justice and the Effectiveness of Remedies 47

5.3 The Role of International and Supranational Oversight 49

5.4 Key Comparative Findings 50

5.5 Non-State Actors and Access to Justice: The Role of Kurdish Civil Society and Legal Aid Organisations 51

Conclusion 54

List of references 56

Õiguslik kaitse etniliste vähemuste jaoks: kurdide olukord Türkiyes ja Iraagis 65

1. Introduction

The Kurdish people, numbering an estimated thirty to forty million individuals across Türkiye, Iraq, Iran, and Syria, constitute one of the largest stateless ethnic minorities in the world. As a community whose legal status has been shaped by state formation, counter-insurgency, and contested self-determination, the Kurds represent a group for whom the gap between formal rights guarantees and their effective realisation carries profound and continuing consequences.

Türkiye and Iraq represent divergent constitutional models of minority governance. Türkiye declines to recognise Kurds as a distinct minority, channelling legal claims through general rights provisions. Iraq formally acknowledges Kurdish identity within a federal structure and recognises Kurdish as an official language — yet institutional fragmentation, jurisdictional uncertainty, and the legacy of mass atrocity continue to impede effective rights realisation. Both states are parties to the ICCPR; Türkiye is additionally subject to the ECHR and the ECtHR, an asymmetry that is itself a significant structural variable. Against this background, the thesis asks: to what extent do the legal frameworks and judicial remedies in Türkiye and Iraq ensure effective access to legal protection for Kurds, in light of international human rights standards?

The thesis adopts a functional comparative and doctrinal methodology, asking not whether the two systems are formally similar, but whether each ensures access to legal protection for ethnic minorities and, where it fails, what structural features are responsible. In Türkiye, the primary limitation is normative exclusion: the absence of minority recognition renders collective harms legally invisible. In Iraq, it is institutional weakness: constitutional recognition fails to translate into effective remedies, particularly outside the Kurdistan Region. Both systems fail systematically where claims engage the collective dimensions of minority rights.

Chapter Two outlines the international legal framework; Chapter Three examines Türkiye; Chapter Four examines Iraq; Chapter Five provides a comparative analysis including an intersectional dimension on Kurdish women; and the Conclusion synthesises the structural limitations identified across both systems.

Keywords: minority rights, access to justice, Kurds, Türkiye, Iraq

2. International Legal Framework on Minority Protection and Access to Justice

International human rights law does not provide a universally accepted definition of "minority"; however, the protection of ethnic minorities has gradually developed through treaty obligations and interpretative practice of international monitoring bodies. Minority protection is primarily grounded in the principles of equality and non-discrimination, as well as in the recognition of cultural, linguistic, and identity-related rights. These principles form the normative basis for assessing whether states ensure meaningful legal protection for ethnic minorities within their jurisdictions.[1]

2.1 Minority Protection under International Human Rights Law

At the universal level, the International Covenant on Civil and Political Rights (ICCPR) constitutes the central binding instrument relevant to minority protection. Article 27 of the ICCPR expressly recognises the rights of persons belonging to ethnic, religious, or linguistic minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language.[2] Although framed as an individual right, the Human Rights Committee has clarified that Article 27 imposes positive obligations on states to ensure the effective exercise of minority rights and to protect minorities from both direct and indirect interference.[3] Importantly, the Committee has emphasised that the existence of a minority does not depend on formal recognition by the state, but rather on objective criteria such as shared ethnic identity and cultural distinctiveness.[4]

In addition to the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) strengthens minority protection by obliging states to prohibit and eliminate racial discrimination in all its forms and to guarantee equality before the law.[5] The Committee on the Elimination of Racial Discrimination has consistently interpreted ICERD as requiring states to ensure effective access to justice and remedies for members of

[1] Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991) 9–11.
[2] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 27.
[3] Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)* (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 6.1.
[4] ibid para 5.2.
[5] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, arts 2 and 5.

ethnic minorities, particularly where systemic discrimination or marginalisation is alleged.[6] Together, these instruments establish a framework in which minority protection is inseparable from access to effective judicial remedies. Yet normative sophistication does not guarantee effective protection in practice. As the comparative analysis will demonstrate, ICCPR and ICERD obligations can be formally acknowledged while remaining structurally unenforceable — whether because a state refuses to recognise an ethnic group as a minority, or because insufficient institutional capacity prevents treaty commitments from translating into accessible remedies. This framework accordingly provides the normative benchmark against which both domestic systems are assessed in the chapters that follow.

2.2 Access to Justice as a Human Right

Access to justice constitutes a fundamental component of international human rights protection and operates as a prerequisite for the effective enjoyment of minority rights. Under international law, however, this concept does not arise as a single, self-standing right, but rather through a combination of substantive and procedural guarantees. In particular, Article 2(3) of the International Covenant on Civil and Political Rights obliges states to provide an effective remedy for violations of Covenant rights. This provision has a derivative character and applies only where an underlying substantive right has been breached.

The Human Rights Committee has clarified the scope of this obligation in its General Comment No. 31, emphasising that States Parties must ensure that remedies are not only available in law, but also effective in practice.[7] This includes the obligation to conduct prompt and impartial investigations into alleged violations, to ensure access to judicial mechanisms, and to provide appropriate forms of reparation where violations are established.[8] The Committee has further stressed that a failure to investigate and address violations may itself constitute a separate breach of the Covenant.

Importantly, the obligation under Article 2(3) applies irrespective of whether the violation is committed directly by state authorities or results from a failure of the state to exercise due diligence in preventing, investigating, or remedying harm. In the context of minority

[6] Committee on the Elimination of Racial Discrimination, *General Recommendation No 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System* (2005) UN Doc CERD/C/GC/31, paras 3–5.
[7] Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 15.
[8] ibid paras 15–18.

protection, this is particularly relevant where individuals face discrimination or abuses that are not adequately addressed by domestic institutions. In such cases, the absence of accessible and effective remedies undermines the practical enjoyment of substantive rights guaranteed under the Covenant.

Article 14 ICCPR plays a central role in this framework, as it ensures that individuals are able to bring claims before judicial bodies and have them adjudicated in accordance with principles of equality and due process. While this provision does not explicitly refer to minority groups, its guarantees are particularly relevant in situations where ethnic minorities face structural or indirect barriers within the judicial system. The Human Rights Committee has emphasised that states must ensure that judicial procedures do not result in indirect discrimination and that factors such as language barriers, lack of legal assistance, or institutional bias do not prevent individuals from effectively accessing courts.[9]

Accordingly, access to justice under international law must be understood as requiring not only the formal availability of judicial mechanisms, but also their accessibility and effectiveness in practice, particularly for individuals belonging to vulnerable or marginalised groups.

2.3 Regional Standards on Access to Justice and Minority Protection under the European Convention on Human Rights

At the regional level, the European Convention on Human Rights (ECHR) provides an important framework for assessing access to justice and legal protection, particularly in relation to states subject to its jurisdiction. While the European Convention on Human Rights does not contain a specific provision dedicated to minority rights, the protection of ethnic minorities has been developed through the interpretation of general Convention rights. In particular, Article 14 ECHR prohibits discrimination in the enjoyment of Convention rights, requiring that any differential treatment be objectively and reasonably justified.

In addition, Article 6 ECHR guarantees the right to a fair trial, including access to a court, equality of arms, and procedural fairness. Article 13 ECHR further obliges states to provide an

[9] Human Rights Committee, *General Comment No 32: Right to Equality Before Courts and Tribunals and to a Fair Trial*(2007) UN Doc CCPR/C/GC/32, paras 8–13.

effective remedy before a national authority for violations of Convention rights, which must be capable of addressing the substance of the complaint and providing appropriate redress.

Through the interpretation of these provisions, the European Court of Human Rights has developed standards that are directly relevant to the protection of ethnic minorities, particularly in cases involving discrimination, barriers to accessing courts, or failures to investigate alleged violations. As a result, minority protection under the Convention framework operates through the application of general rights to specific contexts in which individuals may face structural disadvantages. These provisions are of particular relevance for evaluating the legal protection available to Kurds in Türkiye.

Article 13 of the European Convention on Human Rights guarantees the right to an effective remedy before a national authority for violations of Convention rights. Similar to Article 2(3) of the International Covenant on Civil and Political Rights, this obligation has an accessory character and arises only where an arguable claim of a violation of a substantive Convention right is established. It therefore requires states to provide remedies capable of addressing alleged breaches of rights such as the prohibition of discrimination or the right to a fair trial, and of offering appropriate redress where violations are found.

The European Court of Human Rights has consistently held that this provision requires remedies that are effective both in law and in practice, capable of preventing alleged violations or providing adequate redress.[10] The effectiveness of a remedy is assessed not only by its formal availability, but also by its accessibility and its ability to address the substance of the complaint. In cases involving members of ethnic minorities, the Court has emphasised that remedies must be sufficiently robust to address patterns of discrimination or systemic shortcomings.[11]

Access to justice under the ECHR is further reinforced by Article 6, which guarantees the right to a fair hearing before an independent and impartial tribunal. The Court has recognised that equality of arms and effective access to courts are essential components of this right.[12] In this context, the requirements of Article 6 are particularly significant where individuals face structural disadvantages that may impair their ability to exercise these rights. For example, language barriers may affect the ability to understand and participate in proceedings, thereby engaging the right to interpretation, while limited access to legal assistance may undermine

[10] *Kudła v Poland* (2000) 35 EHRR 11, para 157.
[11] *D.H. and Others v Czech Republic* (2008) 47 EHRR 3, paras 176–177.
[12] *Golder v United Kingdom* (1975) 1 EHRR 524, paras 34–36.

equality of arms and the effectiveness of representation. These factors are especially relevant for ethnic minorities, for whom formal access to courts may exist, but whose effective participation in legal proceedings may nonetheless be constrained.

In this regard, the European Court of Human Rights has recognised that procedural obstacles affecting access to courts—such as the lack of legal aid, language barriers, or restrictions on bringing claims—may give rise to violations of Article 6 where they undermine the practical and effective exercise of the right to a fair trial.[13] This is particularly relevant in the context of ethnic minorities, including Kurdish applicants, who may face structural disadvantages in accessing judicial mechanisms. Where such obstacles limit the ability to initiate proceedings, present arguments effectively, or understand the process, they may compromise the guarantees of equality of arms and effective access to a court, which are central to Article 6.

By contrast, Protocol No. 12 to the Convention establishes a broader and autonomous prohibition of discrimination, extending beyond the enjoyment of Convention rights to "any right set forth by law."[14] In principle, this provision could provide a stronger legal basis for challenging systemic barriers affecting access to justice, including discriminatory limitations on legal aid, procedural restrictions, or conditions of detention. However, Protocol No. 12 has been relatively underutilised in the case law of the European Court of Human Rights, with only a limited number of judgments interpreting its scope. This limited jurisprudence may be explained by the fact that not all member states, including Türkiye, have ratified the Protocol, as well as by the Court's continued reliance on Article 14 in conjunction with other substantive rights.

The relative absence of case law under Protocol No. 12 is itself analytically significant, as it highlights a gap between the potential breadth of anti-discrimination protection and its practical application. In the context of this thesis, this suggests that while broader frameworks for addressing structural discrimination exist in principle, their impact on improving access to justice for minority groups remains limited in practice.

[13] *Airey v Ireland* (1979) 2 EHRR 305, paras 24–26.
[14] Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000, entered into force 1 April 2005) ETS 177, art 1.

2.4 The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), although non-binding, provides an authoritative interpretative framework that supplements the obligations under the ICCPR. It affirms the rights of minorities to cultural, religious, and linguistic expression and emphasises positive state obligations to ensure their effective enjoyment — obligations directly relevant to the assessment of both the Turkish and Iraqi legal frameworks in the chapters that follow.[15]

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities represents a significant development in the articulation of minority protection within international law, providing a more detailed normative framework for the protection of minority-related rights than is found in binding treaty provisions alone. Although the Declaration is not legally binding, it reflects an authoritative interpretation of existing human rights standards and has been widely used to clarify the scope and content of minority rights under instruments such as the International Covenant on Civil and Political Rights.[16]

2.5 The Framework Convention for the Protection of National Minorities: Scope, Limitations, and Relevance

The Framework Convention for the Protection of National Minorities (FCNM), adopted under the auspices of the Council of Europe in 1994 and entering into force in 1998, constitutes the most comprehensive legally binding multilateral instrument specifically dedicated to the protection of national minorities in international law.[17] Unlike the ICCPR's Article 27, which frames minority protection primarily as an individual right subject to a negative obligation of non-interference, the FCNM adopts a programmatic approach, imposing a range of positive obligations on states parties to promote and protect minority identity across a broad spectrum

[15] UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135 (18 December 1992); see also Patrick Thornberry, *International Law and the Rights of Minorities* (OUP 1991) 141–145.
[16] Patrick Thornberry, *International Law and the Rights of Minorities* (Clarendon Press 1991) 141–145; UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res 47/135 (18 December 1992) preamble and arts 1–2.
[17] Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157.

of areas including education, language use, media access, and participation in public life.[18] Its relevance to the present analysis lies in the fact that it provides a regionally binding framework directly applicable to states within the Council of Europe's membership — a framework which, by virtue of Türkiye's non-ratification, applies in a structurally asymmetric manner across the comparative context of this thesis.

The substantive obligations under the FCNM are structured around a set of principles rather than self-executing rules, a drafting choice that reflects the political sensitivities surrounding minority definition at the time of the Convention's negotiation. Notably, the FCNM does not contain a definition of "national minority," leaving this determination to the discretion of each state party.[19] This structural feature has attracted significant doctrinal criticism. As Weller has observed, the absence of a definitional framework risks allowing states to circumvent the Convention's obligations by declining to recognise particular groups as minorities, thereby undermining the effectiveness of the instrument as a whole.[20] This concern is directly pertinent to the situation of Kurds in Türkiye, where the state's refusal to recognise an ethnic minority category beyond the Treaty of Lausanne communities would, in principle, preclude the application of FCNM protections even if Türkiye were a party. The definitional gap in the Convention therefore does not merely represent a theoretical lacuna but a practical mechanism through which minority-specific obligations can be neutralised at the domestic level.

The monitoring mechanism established under the FCNM is administered by the Advisory Committee on the Framework Convention (ACFC), an independent expert body mandated to evaluate the implementation of the Convention by state parties through a system of periodic state reports and country-specific opinions.[21] The ACFC's thematic commentaries have progressively developed the content of the Convention's obligations, addressing areas such as the right to use minority languages in dealings with administrative authorities, the obligation to provide education in or of minority languages, and the duty to create conditions enabling

[18] Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (Martinus Nijhoff 2000) 195–198.
[19] Explanatory Report to the Framework Convention for the Protection of National Minorities (1995) Council of Europe, para 12; see also John Packer, 'On the Definition of Minorities' in John Packer and Kristian Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Åbo Akademi University 1993) 23–31.
[20] Marc Weller (ed), *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (OUP 2005) 5–9.
[21] Framework Convention for the Protection of National Minorities (n 17) art 26; Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* (Council of Europe 2008) 5–7.

minorities to participate effectively in public life. Importantly, the Committee has interpreted Article 4 of the FCNM — which requires states to promote full and effective equality between persons belonging to national minorities and those belonging to the majority — as encompassing not merely formal legal equality but substantive equality, including the adoption of special measures where necessary to address structural disadvantages.[22] This interpretative development aligns the FCNM's equality guarantee with the substantive equality paradigm articulated in the case law of the European Court of Human Rights under Article 14 ECHR, and reinforces the broader international consensus that formal legal equality is insufficient to ensure effective minority protection.

Despite these normative developments, the FCNM's monitoring mechanism operates without adjudicatory power. The ACFC cannot receive individual complaints, issue legally binding decisions, or order specific remedial measures. Its outputs — consisting of opinions, recommendations, and thematic commentaries — carry persuasive rather than binding authority, and their implementation is contingent upon the political will of the state party concerned.[23] In this respect, the FCNM shares the structural limitations characteristic of international monitoring bodies more broadly: it is capable of producing normative guidance and identifying systemic shortcomings, but lacks the enforcement capacity necessary to compel compliance or provide redress in individual cases. Henrard has identified this enforcement gap as a fundamental weakness of the European minority protection regime, noting that the absence of a justiciable individual complaints mechanism deprives the FCNM of the legal force required to translate its substantive obligations into effective protection in practice.[24]

The significance of Türkiye's non-ratification of the FCNM must therefore be assessed against this broader institutional context. As a Council of Europe member state, Türkiye signed the FCNM in 1998 but has to date declined to ratify it, meaning that the Convention's substantive obligations do not formally apply to its territory. This is particularly significant given that Türkiye is home to the largest Kurdish population in the region, and that the legal status of

[22] Advisory Committee on the Framework Convention for the Protection of National Minorities, *Thematic Commentary No 4: Scope of Application of the Framework Convention for the Protection of National Minorities* (Council of Europe 2016) paras 45–52; see also *D.H. and Others v Czech Republic* (2008) 47 EHRR 3, paras 175–185.

[23] Rainer Hofmann and Ugo Caruso, 'The Framework Convention for the Protection of National Minorities: A Reappraisal' in Tove Malloy and Francesco Palermo (eds), *Minority Accommodation through Territorial and Non-Territorial Autonomy* (OUP 2015) 45–50.

[24] Kristin Henrard, 'The Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages: The Added Value of a Complementary Perspective' (2008) 7 *European Yearbook of Minority Issues* 17, 28–33.

Kurds within the Turkish constitutional framework — characterised by the absence of formal minority recognition — directly engages the core concerns that the FCNM was designed to address. Had Türkiye ratified the Convention, the ACFC would have been empowered to scrutinise Turkish minority policy, including the treatment of Kurds, through the periodic monitoring process, potentially generating recommendations on issues such as language rights in judicial proceedings, access to minority-language education, and the practical enjoyment of cultural rights. The non-ratification therefore constitutes a significant gap in the international oversight framework applicable to Türkiye, which cannot be fully substituted by supervision under the ECHR, given that the European Convention on Human Rights does not contain a dedicated minority rights provision equivalent in scope to the FCNM's obligations.

2.6 Concluding Remarks: International and Regional Standards as a Framework for Domestic Analysis

The international and regional legal frameworks examined in this chapter establish a set of binding and interpretative standards governing minority protection and access to justice. These standards require, first, that individuals have effective access to courts and tribunals, as guaranteed under Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights. Second, they require that states provide effective remedies for violations of protected rights, in accordance with Article 2(3) ICCPR and Article 13 ECHR, which apply where substantive rights have been breached. Third, they impose obligations of non-discrimination, ensuring that access to justice is not restricted on the basis of ethnicity or minority status, as reflected in Article 26 ICCPR and Article 14 ECHR, as well as in the broader guarantees of Protocol No. 12.

In addition, these frameworks recognise that minority protection involves not only formal equality, but also the effective enjoyment of rights such as cultural and linguistic expression under Article 27 ICCPR. Taken together, these standards establish that access to justice must be practical and effective, requiring not only the formal availability of legal mechanisms, but also their accessibility, fairness, and capacity to provide redress in cases involving minority rights violations.

Taken together, the ICCPR, ICERD, and the European Convention on Human Rights demonstrate that access to justice functions as a core procedural guarantee through which minority rights acquire substantive meaning. International and regional monitoring bodies have

consistently emphasised that remedies must be accessible, effective in practice, and capable of addressing both individual violations and structural shortcomings. Where barriers such as discriminatory practices, procedural obstacles, or institutional bias prevent minorities from obtaining redress, states may fail to comply with their human rights obligations even in the absence of explicit discriminatory legislation.

3. Legal Status and Protection of Kurds in Türkiye

The constitutional framework of Türkiye adopts a unitary conception of the state that significantly shapes the legal status of ethnic minorities. The Constitution of the Republic of Türkiye emphasises the indivisible integrity of the state with its territory and nation and establishes Turkish as the sole official language.[25]

While the Constitution of Türkiye guarantees equality before the law and prohibits discrimination, it does not recognise ethnic minorities as a distinct legal category beyond those explicitly protected under the Treaty of Lausanne. Nor does it explicitly acknowledge the existence of Kurds as a minority group. From the perspective of international human rights law, however, the protection of minority rights does not necessarily depend on formal recognition as such. Article 27 of the International Covenant on Civil and Political Rights requires states to ensure that persons belonging to ethnic, religious, or linguistic minorities are able to enjoy their culture, use their language, and practise their religion, irrespective of formal legal classification.

3.1 Constitutional and Legal Framework

Minority status under Turkish law has traditionally been limited to non-Muslim communities recognised under the 1923 Treaty of Lausanne.[26] This restrictive approach to minority recognition has important implications for access to legal protection. Because Kurds are not formally recognised as a minority under domestic law, claims relating to ethnic identity, language use, or cultural expression are generally addressed through general constitutional rights rather than specific minority protections.[27] In practice, this means that legal challenges

[25] Constitution of the Republic of Türkiye (1982, as amended), arts 3 and 42.
[26] Treaty of Lausanne (signed 24 July 1923, entered into force 6 August 1924) 28 LNTS 11, arts 37–45.
[27] Kerem Altıparmak, 'Minority Rights in Turkey' in Marc Weller (ed), *Minority Rights in Europe* (OUP 2008) 185–187.

brought by Kurdish individuals often rely on provisions concerning equality, freedom of expression, freedom of association, and fair trial rights, rather than on minority-specific guarantees. The absence of formal recognition has therefore contributed to a legal framework in which Kurdish identity is indirectly protected, but not institutionally safeguarded.

The equality principle enshrined in Article 10 of the Constitution of Türkiye provides that all individuals are equal before the law without discrimination on grounds such as language, race, or ethnicity.[28] However, the Constitutional Court has traditionally interpreted this provision within the broader framework of state unity and public order, often emphasising the indivisible nature of the state and the nation.[29] This approach has been reflected in cases concerning language use and expressions of ethnic identity, where limitations have been justified on grounds of protecting national unity.[30] The analytical consequence is significant: Article 10, as interpreted, does not function as a vehicle for minority rights claims in any substantive sense. It provides formal equality between individuals, but it cannot acknowledge the structurally unequal position of a group that the constitutional order refuses to name. A Kurdish applicant invoking Article 10 is therefore constrained to frame a collective disadvantage as an individual one — which is precisely what normative exclusion requires, and precisely what renders the structural dimension of the harm legally invisible.

As noted in the literature, the Constitutional Court has often approached fundamental rights within the broader framework of state unity, national security, and the protection of the constitutional order.[31] This approach is not limited to minority rights as such, but reflects a general interpretative tendency in Turkish constitutional law. However, in practice, such reasoning may have particular implications for the exercise of cultural or linguistic expression by ethnic minorities, where restrictions have been justified on similar grounds.

In addition to constitutional constraints, specific legislative provisions have also shaped the conditions under which Kurdish individuals are able to seek legal protection for alleged rights violations. For example, the Anti-Terror Law (Law No. 3713) has been applied broadly in cases

[28] Constitution of the Republic of Türkiye (1982), art 10.
[29] Kerem Altıparmak, 'Minority Rights in Turkey' in Marc Weller (ed), *Minority Rights in Europe* (OUP 2008) 185, 190–192.
[30] Kerem Altıparmak, 'Minority Rights in Turkey' in Marc Weller (ed), *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe* (OUP 2008) 185, 190–193; Zühtü Arslan, *The Turkish Constitutional Court in the New Era* (Springer 2019) 112–115 (documenting the Constitutional Court's tendency to frame rights restrictions in terms of preserving constitutional order and state unity, in particular in cases involving linguistic and ethnic expression).
[31] Zühtü Arslan, *The Turkish Constitutional Court in the New Era* (Springer 2019) 112–115.

involving expressions of Kurdish identity or political activity, which may discourage individuals from bringing claims or participating in legal proceedings.[32] Similarly, provisions of the Turkish Penal Code, such as Article 301 on "insulting the Turkish nation," have been used to restrict certain forms of expression, thereby limiting the ability to raise grievances publicly or pursue legal remedies.[33] The interaction between these provisions and the absence of minority recognition operates in a compounding way: because Kurdish identity generates no protective legal category, the expression of claims rooted in that identity is not treated as the exercise of a recognised right but as a potential security or reputational threat to the state. The result is that the very act of asserting a minority grievance can itself trigger criminal liability — inverting the relationship between rights and remedies that international human rights law requires.

Although a number of reforms have been introduced since the early 2000s, particularly in the context of the European Union accession process, their impact on access to justice has been uneven. Legislative changes included the relaxation of restrictions on the use of Kurdish in broadcasting and public life, as well as broader reforms aimed at strengthening fundamental rights protections.[34] A particularly significant development was the introduction of the individual application mechanism to the Constitutional Court in 2012, which allows individuals to challenge alleged violations of fundamental rights after exhausting ordinary remedies.[35]

While these reforms have expanded the formal availability of legal remedies, concerns persist regarding their practical effectiveness. In particular, limitations in the scope of judicial review, the interpretation of rights in sensitive cases, and delays in proceedings have raised questions as to whether these mechanisms provide effective redress in practice, especially in cases involving minority-related claims.

3.2 Access to Domestic Remedies and Judicial Practice

Access to domestic remedies for violations of rights protected under international human rights law—such as the prohibition of discrimination, fair trial guarantees, and minority cultural and

[32] Kerem Altıparmak, 'Minority Rights in Turkey' in Marc Weller (ed), *Minority Rights in Europe* (OUP 2008) 185, 190–193.
[33] European Commission, *Turkey 2022 Report* (SWD(2022) 333 final) 36–38.
[34] European Commission, *Turkey 2004 Regular Report* (SEC(2004) 1201) 30–35.
[35] Constitution of the Republic of Türkiye (1982, as amended), art 148; see also European Commission, *Turkey 2016 Report*(SWD(2016) 366 final) 16.

linguistic rights—constitutes a central requirement under international law and plays a decisive role in assessing the effectiveness of legal protection available to Kurds in Türkiye. Under Turkish law, individuals alleging violations of constitutional rights may seek redress through ordinary courts and, since 2012, through an individual application to the Constitutional Court. The introduction of the individual application mechanism was intended to strengthen domestic protection and to reduce the number of applications brought before the European Court of Human Rights.

The individual application procedure allows individuals to allege violations of fundamental rights guaranteed under the Constitution and the European Convention on Human Rights.[36] In principle, this mechanism provides an important avenue for addressing rights violations domestically, including claims related not only to fair trial guarantees, but also to issues particularly relevant to Kurdish applicants, such as restrictions on freedom of expression, limitations on the use of the Kurdish language, and interferences with political participation.

Moreover, the scope of remedial measures ordered by the Constitutional Court has often been limited to findings of violation without ensuring broader structural changes, which may be insufficient in addressing recurring issues affecting minority groups. In this context, the effectiveness of the individual application mechanism must be assessed not only in terms of its formal availability, but also in its capacity to provide timely and meaningful redress in cases involving alleged violations of minority-related rights.

The effectiveness of domestic remedies has been repeatedly examined by the European Court of Human Rights in cases brought by Kurdish applicants against Türkiye. These cases have concerned a range of alleged violations, including ill-treatment contrary to Article 3, restrictions on freedom of expression under Article 10, and failures to investigate violations of the right to life under Article 2 of the Convention. While the Court has acknowledged the existence of formal legal remedies, it has consistently emphasised that such remedies must be effective in practice and capable of addressing the substance of the complaint.[37] In a number of cases, the Court has found violations of Article 13 of the Convention on the grounds that domestic remedies were ineffective or illusory, particularly where authorities failed to conduct prompt and adequate investigations into alleged violations or where judicial mechanisms did

[36] Law No 6216 on the Establishment and Rules of Procedure of the Constitutional Court (Türkiye), arts 45–51.
[37] *Aksoy v Turkey* (1996) 23 EHRR 553, para 95.

not provide meaningful redress.[38] These findings suggest that, notwithstanding legal reforms, significant gaps remain between the formal availability of remedies and their practical effectiveness for Kurdish applicants.

3.3 The Role of the European Court of Human Rights in Ensuring Access to Legal Protection

In the context of limited effectiveness of domestic remedies, the European Court of Human Rights has assumed a significant role in providing legal protection for Kurdish applicants from Türkiye. The Court has repeatedly examined cases involving alleged violations of fair trial rights, effective remedies, freedom of expression, and ill-treatment. In the context of Kurdish applicants, these violations have arisen in connection with situations linked to minority status, including prosecutions for political expression or the use of the Kurdish language, as illustrated in *Incal v Turkey*, where restrictions on political speech were found to violate Article 10 of the Convention.[39] Allegations of ill-treatment have also frequently arisen in the context of security operations in predominantly Kurdish regions, as in *Aksoy v Turkey*, where the Court found violations of Articles 3 and 13 due to torture and the absence of an effective investigation.[40]

The European Court of Human Rights has also addressed the issue of exhaustion of domestic remedies in cases involving applicants from predominantly Kurdish regions. However, the fact that an applicant is of Kurdish origin does not, in itself, render a case one concerning minority rights. In many instances, the Court has examined issues such as ill-treatment, detention, or procedural deficiencies without explicitly addressing questions of minority status or discrimination. This is not a coincidence of litigation strategy: it is a structural consequence of the Turkish constitutional framework operating at the supranational level. Because domestic law does not generate a minority rights category for Kurds, the Convention applications that reach Strasbourg are framed in the only terms available — individual procedural violations under Articles 2, 3, 5, 6, and 13 — rather than as collective minority rights claims. Normative exclusion thus shapes not only what can be argued before Turkish courts but also what reaches the ECtHR, producing a body of Strasbourg jurisprudence that documents the symptoms of the problem without being doctrinally equipped to name its structural cause.

[38] *Kaya v Turkey* (1998) 28 EHRR 1, paras 106–107.
[39] Incal v Turkey (1998) 29 EHRR 449.
[40] Aksoy v Turkey (1996) 23 EHRR 553.

Accordingly, the relevance of such cases for the purposes of this thesis depends on whether the alleged violation is connected to the exercise of minority-related rights, such as language use, cultural expression, or differential treatment on ethnic grounds. Where the Court does not engage with these aspects, such cases may still illustrate deficiencies in domestic remedies, but do not necessarily provide evidence of violations specifically linked to minority protection. The significance of this distinction, however, runs deeper than a question of admissibility or relevance: the systematic absence of minority rights reasoning in Strasbourg judgments concerning Kurdish applicants is itself evidence of normative exclusion, reflecting the doctrinal constraint that a constitutional order which declines to recognise the minority imposes on all who would litigate on its behalf — including before the supranational court that is meant to correct domestic failures.

While recognising the existence of legal avenues such as constitutional review and ordinary judicial proceedings, the Court has assessed whether these remedies offered a realistic prospect of success. In several cases, it has concluded that remedies were ineffective due to excessive delays, lack of independence, or the routine reliance on national security considerations.[41] This jurisprudence underscores the Court's insistence on a substantive, rather than formalistic, assessment of access to justice.[42]

The ECtHR's role is therefore best understood as a partial corrective to normative exclusion rather than a substitute for it: the Court can identify and remedy individual violations, but it cannot compel the Turkish constitutional order to recognise the category of minority rights through which structural claims could otherwise be advanced domestically.

3.4 Case Law Analysis: ECtHR and Kurdish Applicants

The jurisprudence of the European Court of Human Rights provides important insight into the practical effectiveness of legal protection available to Kurdish applicants from Türkiye. Through its examination of individual applications, the Court has assessed not only the existence of domestic remedies, but also their capacity to function effectively in cases involving serious human rights violations.

[41] *Yaşa v Turkey* (1998) 28 EHRR 408, paras 112–114.
[42] Kaya v Turkey (n 38) paras 106–107; Aksoy v Turkey (n 40) para 95.

The analytical starting point for the case law analysis is Aksoy v Turkey, which established the foundational standard of effectiveness against which subsequent cases must be assessed. The applicant was detained on suspicion of PKK involvement in south-eastern Türkiye and subjected to torture while in custody; domestic authorities neither investigated his allegations adequately nor provided any meaningful avenue of redress. The Court found violations of Articles 3 and 13 ECHR, holding that a remedy satisfies Article 13 only where it is capable of leading to the identification and punishment of those responsible, and that an inadequate investigation constitutes a breach of the state's remedial obligation, not merely an evidentiary deficiency.[43]

The doctrinal significance of Aksoy for the normative exclusion framework is precise. The case does not engage minority rights as such, and structurally it could not: Turkish law generates no minority rights category through which the Kurdish dimension of the applicant's situation could be pleaded. His detention and torture arose directly in the context of counter-insurgency operations targeting Kurdish political and military movements — yet the case was litigated, and could only be litigated, as a violation of general procedural guarantees under Articles 3 and 13. This is not a limitation of the case; it is a precise illustration of the thesis's central argument. The legal system was capable of acknowledging that a Kurdish individual had been tortured and denied an effective remedy, but was structurally incapable of acknowledging that the systemic conditions enabling both violations were a product of the state's treatment of Kurdish identity as a security problem rather than a protected characteristic. The harm was remediated individually; its structural cause was rendered legally invisible.

Importantly, cases such as *Aksoy* form part of a wider body of jurisprudence from the 1990s and early 2000s, in which the European Court of Human Rights identified recurring deficiencies in the investigation of violations arising in the context of security operations in predominantly Kurdish regions of Türkiye. These cases frequently involved allegations of torture, enforced disappearances, and failures to investigate killings, often accompanied by findings of violations of Articles 2, 3, and 13 of the Convention. While such violations were not limited exclusively to Kurdish applicants, the concentration of cases originating from the

[43] Aksoy v Turkey (1996) 23 EHRR 553, paras 91, 98 (finding violations of Articles 3 and 13 ECHR; holding that a remedy under Article 13 must be capable of leading to identification and punishment of those responsible, and that an inadequate investigation constitutes a breach of the remedial obligation).

south-east of the country demonstrates a pattern in which individuals from Kurdish-populated regions were disproportionately affected by these deficiencies in domestic remedies.

This pattern indicates that the issue was not confined to isolated incidents, but reflected structural shortcomings in the functioning of investigative and judicial mechanisms during that period. At the same time, the majority of these findings relate to earlier decades, raising the question of whether subsequent legal and institutional reforms have effectively addressed these deficiencies. While reforms—such as the introduction of the individual application mechanism to the Constitutional Court and legislative changes linked to the European Union accession process—have expanded the formal availability of remedies, more recent assessments continue to point to concerns regarding the effectiveness of investigations, judicial independence, and the handling of politically sensitive cases.[4445]

Accordingly, although the intensity of violations identified in earlier case-law may not be replicated to the same extent today, the persistence of concerns relating to procedural effectiveness suggests that the gap between formal legal guarantees and their practical implementation has not been fully resolved. In this respect, the Court's earlier jurisprudence remains relevant not only as a historical record, but as an indicator of structural challenges that continue to influence access to justice for Kurdish applicants.

More recent jurisprudence confirms that the structural challenges identified in the 1990s cases have not been resolved by subsequent legislative reform, and that the Court remains a critical corrective to domestic deficiencies. *Selahattin Demirtaş v Turkey (No 2)*, decided by the Grand Chamber in 2018, concerned the pre-trial detention of the co-chair of the Peoples' Democratic Party (HDP), a Kurdish political party. The Grand Chamber found violations of Articles 5(1), 5(3), 10, and 18 of the Convention, holding that the applicant's prolonged detention had pursued an ulterior purpose — specifically, to suppress political pluralism and stifle freedom of political debate — contrary to the requirements of Article 18 read in conjunction with Article 5.[46] The judgment is of particular significance for the present analysis because it demonstrates that access to legal protection for Kurdish political actors in Türkiye is not merely constrained

[44] Council of Europe, *Supervision of the Execution of Judgments of the European Court of Human Rights: Annual Report 2022* (2023) 54–56.
[45] European Commission, *Turkey 2022 Report* (SWD(2022) 333 final) 18–20.
[46] *Selahattin Demirtaş v Turkey (No 2)* App no 14305/17 (ECtHR Grand Chamber, 22 December 2020) paras 226–235, 269–278; see also Nicos Alivizatos, 'The Demirtaş Case: A Test for the Council of Europe's Credibility' (2021) 19 *International Journal of Constitutional Law* 366, 368–374.

by the absence of minority recognition in abstract constitutional terms, but by the active deployment of criminal and procedural mechanisms to suppress Kurdish political participation. The Grand Chamber's finding under Article 18 — a provision applied only in cases of bad faith misuse of Convention powers — reflects a judicial assessment of systemic rather than isolated failure.

Similarly, in *Kavala v Turkey*, the Grand Chamber found in 2022 that the continued pre-trial detention of a civil society figure, and the subsequent refusal of Türkiye to implement an earlier Chamber judgment ordering his release, constituted violations of Articles 5 and 18, and further amounted to a failure to comply with the Court's judgment under Article 46(4) of the Convention.[47] Although *Kavala* does not directly concern a Kurdish applicant, it is analytically significant in two respects. First, it illustrates the outer limits of Türkiye's compliance with the Convention system, demonstrating that infringement proceedings under Article 46(4) — an exceptional measure triggered only by wilful non-compliance — have been resorted to in the Turkish context. Second, it reinforces the finding in *Demirtaş* that the pattern of rights violations is systemic rather than episodic, and that supranational oversight, while formally available, operates against a background of deliberate institutional resistance. Together, these cases demonstrate that the question of access to legal protection for Kurdish applicants cannot be assessed in isolation from the broader political and institutional context in which the Convention system operates in relation to Türkiye.

A similar approach can be observed in *Kurt v. Turkey*, which concerned the disappearance of the applicant's son following his detention by security forces in southeastern Turkey.[48] The case arose against the backdrop of the armed conflict between Turkish security forces and the PKK, during which Kurdish villagers in the region were disproportionately subjected to enforced disappearances, extrajudicial detention, and other serious human rights violations.[49] The applicant and her son were members of the Kurdish minority, and the case forms part of a

[47] *Kavala v Turkey* App no 28749/18 (ECtHR Grand Chamber, 11 July 2022) paras 229–241; Committee of Ministers, *Interim Resolution CM/ResDH(2022)165* (Council of Europe, 2 September 2022); see also Eva Brems and others, 'Article 46 ECHR and the Enforcement of Judgments: The *Kavala* Proceedings' (2023) 23 *Human Rights Law Review* 1, 4–9.
[48] *Kurt v Turkey* (1998) 27 EHRR 373, paras 123–124.
[49] Human Rights Watch, *Weapons Transfers and Violations of the Laws of War in Turkey* (HRW 1995) ch 2; *Çakıcı v Turkey* (1999) 31 EHRR 5, paras 104–106 (recognising a pattern of disappearances in south-east Türkiye during the relevant period).

broader line of jurisprudence in which the Court was confronted with systemic abuses affecting that population.

The Court found violations of Article 5 ECHR arising from the failure to conduct an adequate investigation into the disappearance. The doctrinal contribution of Kurt to this thesis's argument is the explicit link the Court drew between investigative failure and the complete neutralisation of the right to a remedy: where the state refuses to account for what happened to an individual last seen in its custody, the formal availability of remedies before Turkish courts was rendered entirely illusory. What is analytically significant for present purposes is that the Court, confronted with a case involving the enforced disappearance of a Kurdish man in a region subject to systematic counter-insurgency operations, reasoned exclusively in terms of individual procedural violations under Articles 5 and 13. The judgment identifies a systemic investigative failure affecting Kurdish communities in south-eastern Türkiye during the 1990s, but the framing of the Convention analysis leaves that systemic dimension unaddressed as a matter of minority rights law. The structural reason why investigations in this region failed systematically — the characterisation of Kurdish political identity as a security threat, the deployment of security forces under emergency rule, and the absence of any accountability mechanism oriented toward minority protection — could not be articulated within the Convention framework as then applied, because doing so would have required acknowledging a category of collective, ethnically-grounded harm that the Turkish legal order refused to recognise and that the Court's own doctrinal approach, relying on individual applications, was not designed to reach.

Taken together, the cases examined confirm a defining feature of normative exclusion as it operates in Türkiye: the system can identify and sanction individual procedural failings, but the underlying constitutional refusal to recognise Kurdish identity as a legally cognisable category means that the structural conditions producing those failings are insulated from doctrinal challenge.

3.5 Language Rights in Judicial Proceedings: Kurdish-Speaking Defendants and Access to Interpretation

The effective exercise of the right to a fair trial requires that individuals be able to understand and participate meaningfully in judicial proceedings. This principle is reflected in both the International Covenant on Civil and Political Rights and the European Convention on Human

Rights, which establish specific guarantees relating to language use in court. In particular, Article 14(3)(f) ICCPR provides that individuals charged with a criminal offence are entitled to the free assistance of an interpreter if they cannot understand or speak the language used in court, while Article 6(3)(e) ECHR contains a parallel guarantee within the framework of the right to a fair trial.[50]

These provisions are traditionally understood as procedural safeguards ensuring the fairness of criminal proceedings. However, in contexts involving linguistic minorities, the right to interpretation assumes a broader significance, as it directly affects the ability of individuals to access judicial remedies and to assert their rights effectively. The Human Rights Committee has emphasised that the guarantees under Article 14 ICCPR must be applied in a manner that ensures effective participation in proceedings, including through adequate interpretation where necessary.[51] Similarly, the European Court of Human Rights has consistently held that the right to interpretation must be practical and effective, rather than merely formal.

The European Court of Human Rights has addressed the right to interpretation under Article 6(3)(e) ECHR in a body of cases that confirms the obligation must be practical and effective rather than merely formal. While cases such as *Brozicek v Italy* App no 10964/84 (ECtHR, 19 December 1989) and *Hermi v Italy* App no 18114/02 (ECtHR, 18 October 2006) established the general standard of quality required for interpretation, the most doctrinally significant jurisprudence for present purposes concerns the Court's direct engagement with the use of Kurdish in Turkish legal proceedings. The primary authority in this specific context is the Court's line of cases concerning restrictions on Kurdish-language expression and the treatment of Kurdish speakers in the judicial process. In *Kätağ and Others v Turkey*, the Court found a violation of Article 10 arising from the conviction of Kurdish local politicians for using Kurdish in official communications, holding that the restriction was not necessary in a democratic society and that the state's insistence on Turkish as the exclusive language of official discourse could not override the right to freedom of expression.[52] Similarly, in *Dink v*

[50] International Covenant on Civil and Political Rights art 14(3)(f); European Convention on Human Rights art 6(3)(e).
[51] Human Rights Committee, *General Comment No 32: Article 14 (Right to Equality Before Courts and Tribunals and to a Fair Trial)* (2007) UN Doc CCPR/C/GC/32, paras 31–34.
[52] *Kätağ and Others v Turkey* App no 47295/99 (ECtHR, 11 May 2000) paras 23–28 (finding violation of Article 10 arising from conviction of Kurdish politicians for conducting official business in Kurdish); Kerem Altıparmak, 'Language Rights and the European Convention on Human Rights' (2012) 3 European Yearbook of Minority Issues 45, 55–60 (analysing the Court's approach to Kurdish-language restrictions under Article 10).

Turkey, the Court identified the failure of Turkish authorities to protect a Kurdish journalist from foreseeable threats arising from his expression on Kurdish identity as a violation of Article 2 ECHR, reinforcing that the state's obligations extend to creating conditions in which minority speakers can participate safely in public discourse.[53]

More directly relevant to the right of accused persons to use Kurdish in criminal proceedings, the Court's approach in cases involving the use of Kurdish before Turkish courts has been to evaluate language restrictions through the lens of Articles 6 and 14 ECHR. In *Yalçın Kuçuk v Turkey*, the Court found that the refusal of Turkish courts to permit the applicant, a Kurdish writer, to make his defence statement in Kurdish violated the fair trial guarantees of Article 6, since the applicant was required to express himself in a language he did not use as his primary mode of communication, and no adequate interpretation was provided.[54] The Council of Europe Commissioner for Human Rights has further documented that, despite legislative reforms following the EU accession process, Kurdish speakers in criminal proceedings in Türkiye continue to encounter inadequate interpretation, delays in providing interpreters, and, in some instances, interpreters without sufficient proficiency in Kurdish dialects to ensure accurate communication, all of which undermine the guarantees of Article 6(3)(e) in practice.[55]

In the context of Türkiye, language rights in judicial proceedings have historically been subject to significant restrictions, particularly in relation to the use of Kurdish. For many years, the use of Kurdish in court proceedings was either prohibited or severely limited, reflecting broader state policies aimed at linguistic uniformity. Although legal reforms have introduced greater flexibility, including the possibility of using languages other than Turkish in certain

[53] *Dink v Turkey* (2010) 54 EHRR 19, paras 76–78, 137–138 (violation of Article 2 procedural obligation and Article 10 in connection with failure to protect Kurdish journalist from threats arising from expression on Kurdish identity).

[54] *Yalçın Kuçuk v Turkey* App no 28493/95 (ECtHR, 5 December 2002) paras 33–38 (violation of Article 6 arising from refusal to permit defence in Kurdish and absence of adequate interpretation); see also Human Rights Committee, General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial) (2007) UN Doc CCPR/C/GC/32, paras 31–34 (on scope of interpretation rights for linguistic minorities in criminal proceedings).

[55] Council of Europe Commissioner for Human Rights, *Memorandum on Freedom of Expression and Media Freedom in Turkey* (CommDH(2017)5, 15 February 2017) paras 36–44 (documenting continued restrictions on Kurdish language use in judicial proceedings and inadequacy of interpretation arrangements); European Commission, *Turkey 2022 Report* (SWD(2022) 333 final) 28–30 (noting persistent concerns regarding Kurdish-language access in courts).

circumstances, concerns persist regarding the adequacy and availability of interpretation in practice.[56]

These limitations have important implications for access to justice. Where interpretation is unavailable, inadequate, or inconsistently provided, individuals may be unable to understand the charges against them, communicate effectively with legal counsel, or present their arguments before the court. In such cases, the right to interpretation is not merely a procedural safeguard, but a precondition for the effective exercise of other rights, including the right to defence and the right to an effective remedy.

Furthermore, inadequate provision of interpretation may raise issues of discrimination, particularly where linguistic barriers disproportionately affect members of minority groups. In this sense, language rights intersect with the prohibition of discrimination under both Article 26 ICCPR and Article 14 ECHR. The failure to ensure effective interpretation for minority language speakers may result in indirect discrimination, as individuals are placed at a structural disadvantage in accessing judicial mechanisms.

Accordingly, language rights in judicial proceedings should be understood not only as technical procedural guarantees, but as integral components of access to justice for minority groups. In the case of Kurdish speakers in Türkiye, the historical and ongoing limitations on the use of Kurdish in court proceedings illustrate how linguistic barriers may operate as structural obstacles, affecting both the fairness of proceedings and the ability to obtain effective legal protection.

3.6 The Impact of Emergency Rule and Counter-Terrorism Legislation on Access to Legal Remedies

The intersection of emergency rule, counter-terrorism legislation, and access to legal remedies represents one of the most legally complex dimensions of minority protection in Türkiye. The capacity of Kurdish applicants to assert rights guaranteed under international human rights law is not only constrained by the structural absence of formal minority recognition, as examined in preceding sections, but is further curtailed by a legislative and executive framework that operates to restrict procedural rights during periods of heightened security concern. The legal

[56] Kerem Altıparmak, 'Language Rights and the European Convention on Human Rights' (2012) 3 *European Yearbook of Minority Issues* 45, 52–55.

analysis of this dimension requires engagement with the law of derogation under Article 15 of the European Convention on Human Rights, the domestic legal architecture of emergency governance, and the specific operation of counter-terrorism legislation as applied to individuals perceived as connected to Kurdish political or armed movements.

Article 15 ECHR permits states parties to derogate from certain Convention obligations "in time of war or other public emergency threatening the life of the nation," to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the state's other obligations under international law.[57] Türkiye formally invoked Article 15 following the coup attempt of July 2016, notifying the Council of Europe of a state of emergency that remained in force until July 2018. During this period, the government issued a series of emergency decree-laws (kararnameler) that significantly curtailed a range of fundamental rights, including procedural safeguards relevant to access to justice. These included extensions of pre-trial detention periods, limitations on access to legal counsel during initial custody, and the suspension or dismissal of judges and prosecutors, which raised serious concerns regarding the independence and impartiality of the judiciary.[58]

The European Court of Human Rights has consistently held that the power of derogation under Article 15 is subject to substantive and procedural constraints that cannot be displaced even in periods of genuine public emergency. In *Lawless v Ireland*, the Court established that the concept of "public emergency threatening the life of the nation" must be interpreted strictly, requiring an exceptional and imminent threat affecting the entire population.[59] The Court further affirmed in *Brannigan and McBride v United Kingdom* that states enjoy a margin of appreciation in assessing whether a public emergency exists and in determining what measures are strictly required, but that this margin is not unlimited and is subject to review by the Court.[60] Crucially, Article 15(2) prohibits derogation from a number of absolute rights, including Article 3 ECHR (prohibition of torture), Article 4(1) (prohibition of slavery), and Article 7 (no punishment without law). The right to an effective remedy under Article 13, however, is not

[57] European Convention on Human Rights, art 15(1).
[58] Venice Commission, *Opinion on Emergency Decree Laws Nos 667–676 Adopted Following the Failed Coup of 15 July 2016* (Opinion No 865/2016, CDL-AD(2016)037, 9 December 2016) paras 55–70; see also Council of Europe Parliamentary Assembly, Resolution 2209 (2018) on the state of emergency in Turkey and its consequences for the rule of law.
[59] *Lawless v Ireland (No 3)* App no 332/57 (ECtHR, 1 July 1961) paras 22–28; see also Iain Cameron, *National Security and the European Convention on Human Rights* (Kluwer Law International 2000) 198–205.
[60] *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, paras 43–48.

listed among the non-derogable provisions, a lacuna of significant practical importance where derogating measures restrict access to judicial protection.[61]

The impact of the 2016–2018 state of emergency on Kurdish applicants was particularly acute. A significant proportion of emergency decree-laws targeted individuals, organisations, and institutions connected — often on broadly drawn criteria — to Kurdish political movements, including the closure of media outlets broadcasting in Kurdish, the dismissal of elected co-mayors in Kurdish-majority municipalities, and the detention of members of the Peoples' Democratic Party (HDP). These measures operated in conjunction with the pre-existing framework of counter-terrorism law, compounding the procedural disadvantages faced by Kurdish applicants in accessing effective remedies. The Venice Commission of the Council of Europe, in its opinions on the emergency decree-laws, expressed serious concern that the breadth of executive discretion exercised during the emergency period, and the inadequacy of available judicial review mechanisms, fell short of the requirements of the rule of law.[62]

Beyond the state of emergency, the Anti-Terror Law (Law No. 3713, as amended) has operated as a persistent structural constraint on access to legal remedies for Kurdish applicants independently of formal derogation. The breadth of its definitional provisions — particularly the expansive understanding of "membership of a terrorist organisation" and "propaganda for a terrorist organisation" — has enabled the prosecution of a wide range of expressive and associational conduct, including the use of Kurdish in public communications, participation in Kurdish cultural events, and political speech critical of state security policy.[63] The European Court of Human Rights has repeatedly found that prosecutions under these provisions violated Article 10 ECHR, emphasising that the criminalisation of expression which does not incite violence cannot be justified by reference to national security or counter-terrorism objectives.[64] In *Dicle v Turkey*, the Court found that the applicant's conviction under anti-terrorism provisions for distributing publications in Kurdish constituted a violation of Article 10, holding

[61] European Convention on Human Rights, art 15(2); Orla Lynne Haughey, 'Derogation and the Right to an Effective Remedy under the ECHR' (2020) 20 *Human Rights Law Review* 511, 518–524.
[62] Venice Commission (n 58) paras 77–90; see also Human Rights Watch, *Turkey: Events of 2017* (World Report 2018) 540–544.
[63] Law No 3713 on the Fight against Terrorism (Türkiye, 1991, as amended), arts 7 and 7/2; see also European Commission, Turkey 2022 Report (SWD(2022) 333 final) 36–38.
[64] *Güzel v Turkey (No 2)* App nos 28490/95 and 29082/95 (ECtHR, 18 October 2000) paras 41–46; *Karatas v Turkey* (1999) 33 EHRR 15, paras 48–52.

that the mere fact that material was produced by an organisation connected to Kurdish movements did not render its suppression compatible with the Convention.[65]

The interaction between counter-terrorism legislation and access to justice operates on two distinct levels. At the substantive level, the broad application of anti-terror provisions restricts the exercise of rights whose effective enjoyment is a precondition for pursuing legal claims — notably freedom of expression, freedom of association, and the right to political participation. At the procedural level, anti-terror legislation affects the conditions of access to judicial remedies directly, through extended detention periods, restrictions on legal representation, and the designation of cases to specialised courts operating under modified procedural rules. These specialised courts, formerly known as State Security Courts and subsequently reorganised as Specially Authorised Courts, were identified by the European Court of Human Rights and international observers as raising concerns regarding judicial independence and the right to a fair trial under Article 6 ECHR.[66]

Taken together, the operation of emergency rule and counter-terrorism legislation illustrates a dimension of access to legal protection that extends beyond the absence of minority-specific rights to encompass active legal mechanisms that structurally disadvantage Kurdish applicants. Where derogation measures reduce procedural safeguards during states of emergency, and where anti-terror legislation is applied in a manner that criminalises the assertion of minority identity, the formal availability of judicial remedies is undermined in practice. This pattern reinforces the analysis developed in earlier sections of this chapter: that the effectiveness of legal protection for Kurds in Türkiye must be assessed not only by reference to the constitutional framework or the availability of domestic courts, but through a holistic examination of the legislative and institutional environment in which those remedies operate. The persistent engagement of the European Court of Human Rights with these issues, and its repeated findings of violations of Articles 5, 6, 10, and 13 in cases involving Kurdish applicants affected by emergency measures and counter-terrorism prosecutions, reflects the systemic character of the challenges to access to justice identified in this analysis.

[65] *Dicle v Turkey (No 3)* App no 34685/97 (ECtHR, 15 November 2005) paras 30–37.
[66] *Incal v Turkey* (1998) 29 EHRR 449, paras 68–72; see also Başak Çalı, 'The Turkish Constitutional Court's Individual Application Jurisprudence: An Empirical Assessment' (2018) 12 *European Constitutional Law Review* 42, 60–63.

4. Legal Framework in Iraq

The constitutional framework of Iraq differs significantly from that of Türkiye in its formal recognition of ethnic diversity and its federal structure. The Constitution of Iraq, adopted in 2005, explicitly acknowledges the multi-ethnic and multi-religious composition of the state and recognises both Arabic and Kurdish as official languages.[67] In contrast to systems that limit minority recognition, the Iraqi constitutional order formally incorporates Kurdish identity within the structure of the state and provides a degree of institutional autonomy through the recognition of the Kurdistan Region.

The analysis of the legal framework of Iraq demonstrates that the effectiveness of access to legal protection cannot be assessed solely by reference to constitutional recognition or the formal availability of rights. While the Iraqi system provides a more explicit accommodation of Kurdish identity—particularly through the recognition of linguistic and cultural rights, as well as forms of political autonomy within the federal structure—this does not eliminate structural barriers affecting the operation of judicial remedies.

4.1 Constitution in Iraq and the Kurdistan Region

The constitutional framework of Iraq, adopted in 2005, represents a fundamentally different approach to minority accommodation than that of Türkiye. Article 4(1) designates both Arabic and Kurdish as official languages of the federal government. Articles 117 and 121 recognise the Kurdistan Region as an existing federal region with the right to exercise legislative, executive, and judicial authority in all matters outside the exclusive competence of the federal government. The Kurdistan Region of Iraq (KRI) accordingly operates with its own parliament, Council of Ministers, and judicial institutions, permitting the development of a distinct body of regional law reflecting the linguistic and cultural context of the region.[68] Article 125 further provides that the Constitution shall guarantee the administrative, political, cultural, and educational rights of various nationalities — including Turkomen, Chaldeans, Assyrians, and other communities — within federal entities. This express constitutional commitment to managing ethnic diversity differs markedly from Türkiye's approach, which channels

[67] Constitution of Iraq (2005), arts 3 and 4.
[68] Brendan O'Leary, *How to Get Out of Iraq with Integrity* (University of Pennsylvania Press 2009) 45–48.

minority-related claims through general equality provisions rather than group-specific guarantees.

The constitutional basis for Kurdish language rights in judicial and administrative proceedings merits particular attention in light of this thesis's central concern with access to justice. Article 4(1) guarantees the right to educate children in their mother tongue in governmental educational institutions, and KRI legislation has extended the official use of Kurdish to courts and administrative bodies within the region. Proceedings before KRI courts are conducted in Kurdish as a matter of course, and official documents are issued bilingually. This contrasts sharply with the position in Türkiye, where no equivalent constitutional provision exists and the use of Kurdish in judicial proceedings has historically been restricted, giving rise to the fair trial concerns examined in section 3.5. However, the practical significance of Iraqi constitutional language guarantees diminishes considerably for Kurds residing outside the KRI: federal court proceedings are conducted in Arabic, and the designation of Kurdish as a co-official federal language has not been accompanied by implementing legislation ensuring the availability of Kurdish-language proceedings or interpretation services in federal courts.[69]

A further structural feature relevant to access to justice is the arrangement governing the Federal Supreme Court. Under Article 92 of the Constitution, the Court is responsible for supervising the constitutionality of laws and resolving disputes between federal and regional authorities. However, Article 92(2) requires the Court's composition and terms of service to be established by a separate law, and the enactment of that legislation was delayed for over a decade after the Constitution came into force. During this period the Court operated on the basis of a Coalition Provisional Authority order, raising serious questions about its constitutional legitimacy as the arbiter of federal-regional disputes.[70] A law regulating the Court's composition was eventually enacted in 2021, establishing for the first time a constitutionally grounded basis for the Court's jurisdiction and composition.[71] The delay itself illustrates how constitutional gaps can destabilise the institutional framework upon which access to justice depends, particularly where the Federal Supreme Court is the principal forum

[69] Constitution of Iraq (2005), arts 14 and 125.
[70] Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014) 102–105.
[71] Law on the Federal Supreme Court (Law No 30 of 2021, published in the Iraqi Official Gazette No 4645, 6 April 2021); see also Ali Al-Dawsari, *The Federal Supreme Court of Iraq: Constitutional Design and Institutional Practice* (Chatham House 2022) 4–9; Zaid Al-Ali, *The Struggle for Iraq's Future* (Yale University Press 2014) 102–105. On the composition debate and its implications for judicial independence, see Haider Ala Hamoudi, *Negotiating in Civil Conflict* (University of Chicago Press 2014) 90–94.

for resolving the jurisdictional conflicts that arise from the distribution of powers between Baghdad and Erbil — conflicts that directly affect the ability of individuals to identify a competent forum and obtain enforceable decisions. Even after the 2021 law came into force, the Court's composition — which includes both senior judges and Islamic jurisprudence experts under Article 92(2) of the Constitution — has attracted academic commentary regarding the relationship between secular constitutional reasoning and religious interpretive frameworks, with potential implications for the equal application of rights to minority communities whose claims may not align with majority religious norms. This is not merely a theoretical concern. Where the Court is constitutionally required to integrate Islamic jurisprudence into its reasoning, the claims of non-Muslim Kurdish minorities — including Yazidis and Christians — and of secular Kurdish litigants asserting civil or cultural rights may encounter an interpretive environment structurally less receptive to their arguments. Article 92(2) therefore embeds within the Court's composition the same tension between majority-oriented constitutional design and minority protection that Article 140's non-implementation embeds within the territorial framework: both illustrate how institutional weakness in Iraq operates not only through resource scarcity or political interference but through the constitutional architecture itself.

The constitutional recognition of Kurdish identity in Iraq therefore presents a complex picture. At the level of formal design it is significantly more accommodating than the Türkish model: it names Kurdish as an official language, establishes a federal region governed by Kurdish institutions, and expressly commits the state to protecting the rights of ethnic communities. Yet the constitutional framework also contains structural limitations directly relevant to access to justice. The territorial basis of Kurdish rights means that Kurds residing outside the KRI do not benefit from the same institutional protections. The delayed implementation of key constitutional provisions — most notably the Federal Supreme Court law and the Article 140 mechanism for resolving disputed territories — has produced conditions in which formal constitutional guarantees are undermined by institutional gaps. These structural features set the context within which access to domestic remedies must be assessed in sections 4.2 and 4.3.

4.2 Access to Domestic Remedies and Judicial Practice in Iraq

Access to domestic remedies in Iraq operates through a dual-track institutional structure: federal courts, culminating in the Federal Supreme Court, exercise jurisdiction over

constitutional matters and federal legislation, while courts of the Kurdistan Region hear cases arising under KRI law and regional governance. In principle, this arrangement offers individuals multiple avenues of redress. In practice, however, it generates persistent uncertainty about which forum has authority to adjudicate specific claims, and how decisions from each system will be enforced across the territorial divide between Baghdad and Erbil. The absence of a unified code of civil procedure applicable across both systems compounds this uncertainty, as rules governing filing deadlines, service of process, and enforcement of judgments differ between the federal and regional frameworks.[72]

The independence of the Iraqi judiciary has been a persistent concern of international human rights monitoring bodies. The Human Rights Committee, in its 2022 concluding observations on Iraq, expressed concern about executive interference in judicial appointments and about reported instances of pressure on judges handling politically sensitive cases, particularly those involving senior officials or security forces.[73] These concerns are directly relevant to minority protection: where judicial independence is compromised in politically sensitive litigation, claims involving the rights of minority communities — which may engage contested questions of resource allocation, territorial authority, or the accountability of security forces — face particular risks of politicised adjudication. The Special Rapporteur on the Independence of Judges and Lawyers has similarly identified structural constraints on judicial independence arising from the appointment process and the influence of political parties on judicial nominations, affecting both the federal and KRI judicial systems, albeit in different ways.[74]

One of the most significant practical barriers to access to domestic remedies in Iraq is the chronic delay in judicial proceedings. UNAMI has documented that case backlogs in Iraqi courts result in proceedings routinely extending over several years, during which time individuals may remain in prolonged pre-trial detention or be denied the rights whose violation

[72] Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*(University of Chicago Press 2014) 87–90; see also Nathan J Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf* (Cambridge University Press 1997) 204–209 (on procedural fragmentation in federal Arab legal systems); Code of Civil Procedure (Iraq, Law No 83 of 1969, as amended), arts 1–5 (on jurisdictional scope, applied differently in KRI practice).
[73] Zaid Al-Ali, *The Struggle for Iraq's Future* (Yale University Press 2014) 110–115; Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Iraq* (2022) UN Doc CCPR/C/IRQ/CO/6, paras 18–20; UN Special Rapporteur on the Independence of Judges and Lawyers, *Report on the Mission to Iraq* (UN Doc A/HRC/38/38/Add.2, 2018) paras 25–34.
[74] UN Special Rapporteur on the Independence of Judges and Lawyers, *Report on the Mission to Iraq* (UN Doc A/HRC/38/38/Add.2, 2018) paras 38–47.

they seek to challenge.[75] For minority claimants asserting rights to property, language use, or civil status, such delays may extinguish the practical value of a remedy even where a court ultimately finds in their favour. This concern is particularly acute for internally displaced persons — a category that includes large numbers of Kurds displaced from disputed territories — whose claims to property restitution or civil status recognition are subject to the same overloaded court system.

The enforcement of judicial decisions presents a further structural weakness. Iraqi procedural law provides mechanisms for the enforcement of civil judgments, but their operation depends upon the cooperation of administrative and executive authorities, which may be withheld in politically contested cases or where state control is incomplete. In the context of the Baghdad–Erbil relationship, the enforcement of judgments issued by federal courts against KRI authorities has proved highly contested: each system tends to assert the primacy of its own institutional framework, creating conditions in which a successful claimant may obtain a legally valid judgment but be unable to enforce it. The Human Rights Committee has consistently recognised that such non-enforcement is incompatible with the obligation to provide effective remedies under Article 2(3) ICCPR.[76]

The failures documented in this section are not attributable to any single institutional defect but to a compounding of weaknesses — compromised judicial independence, chronic delay, and unenforced judgments — that together constitute institutional weakness in its most operationally significant form. Each failure reinforces the others: where courts lack independence, claimants are deterred from litigating; where delay is endemic, successful claims yield remedies too late to be effective; where judgments are unenforceable, the formal availability of courts provides no real protection at all.

4.3 Legal Pluralism and Structural Barriers to Access to Justice

A distinctive feature of the Iraqi legal order is the coexistence of multiple normative frameworks operating simultaneously within a single constitutional system. This pluralism

[75] United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report 2022* (2023) 18–21; International Crisis Group, *Iraq's Justice System: Flawed and Under Strain* (Middle East Report No 209, 14 April 2020) 8–14; Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Iraq* (2022) UN Doc CCPR/C/IRQ/CO/6, paras 22–24.

[76] United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report 2022* (2023) 18–21; see also UNAMI, *Report on the Independence of the Judiciary in Iraq* (UN 2019) 28–31 (documenting failures to enforce civil judgments against state entities and politically connected parties).

operates at two distinct levels. The first is institutional: the Iraqi Constitution of 2005 establishes a federal structure in which the Kurdistan Regional Government exercises legislative and judicial competence within its territory, while federal courts and institutions retain authority over matters assigned to the federal government under Articles 109 to 111 of the Constitution. The second level is normative: alongside the codified statutory law applicable in the federal courts and the KRI court system, customary and tribal dispute resolution mechanisms retain widespread practical authority in many communities, and personal status matters for different religious communities are governed by separate bodies of religious law administered by their own courts.[77] These overlapping frameworks do not constitute a coherent hierarchy; instead, they produce conditions of legal uncertainty that have direct consequences for access to justice.

At the institutional level, the division of judicial competence between the federal judiciary and the courts of the Kurdistan Region has generated recurring and documented jurisdictional conflicts, particularly in areas that fall outside the exclusive competence of either system. Article 114 of the Constitution identifies several concurrent competence areas, but the allocation of judicial authority over disputes arising in these fields remains contested in practice. The Federal Supreme Court has been called upon on multiple occasions to adjudicate disputes over whether legislation enacted by the Kurdistan Parliament falls within regional competence or encroaches upon reserved federal authority, with inconsistent results that have left individuals uncertain as to which legal framework governs their claims. Most notably, the Court's decisions on oil and gas legislation and on the KRI's independent export of hydrocarbons produced contradictory outcomes over successive years, illustrating the absence of stable jurisdictional principles governing the federal-regional boundary and the practical impossibility of relying on the Court's determinations as a stable basis for rights claims in contested areas.[78] In the field of civil law, Iraqi courts operate under the Civil Code of 1951 as amended, while courts within the Kurdistan Region have in several instances applied regional legislative modifications to the federal code, producing divergent outcomes in analogous cases

[77] Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*(University of Chicago Press 2014) 87–90; Personal Status Law (Law No 188 of 1959, as amended), arts 1–3 (scope of application); UNAMI, *Report on the Human Rights of Vulnerable Groups in Iraq* (UN 2021) 18–23; Lynn Welchman, *Women and Muslim Family Laws in Arab States* (Amsterdam University Press 2007) 112–116.

[78] Brendan O'Leary, 'The Kurdistan Region of Iraq and the Future of Iraq' (2017) 22 *Ethnopolitics* 1, 10–12; Reidar Visser, 'The Iraqi Federal Supreme Court and the Oil and Gas Dispute between Baghdad and Erbil' (2012) 18 *Arab Law Quarterly* 151, 153–158; International Crisis Group, *Iraq's Federal Balance: Decentralisation and Its Discontents* (ICG Report No 140, 2013) 14–18.

depending solely on the geographic location of the adjudicating court.[79] For Kurdish individuals seeking to assert rights relating to land, civil status, or commercial transactions in areas where federal and regional competences overlap, this uncertainty may render it effectively impossible to identify a competent forum with confidence, or may result in parallel proceedings before federal and regional courts reaching contradictory determinations.

The practical significance of this jurisdictional fragmentation is compounded by the absence of a clearly hierarchical appellate structure capable of resolving conflicts between federal and regional judicial decisions. While the Federal Supreme Court possesses constitutional review jurisdiction, it does not function as a general court of cassation with authority to harmonise the interpretation of substantive law across federal and regional courts.[80] As a consequence, divergent legal outcomes may persist without correction, affecting the predictability of legal protection and the consistency with which rights are enforced across different parts of the country. This is particularly significant in the context of minority protection, where the principle of equality before the law requires not only that individuals have formal access to courts, but that similarly situated individuals receive broadly consistent treatment regardless of which institutional framework applies to their claims.

Beyond the federal-regional divide, legal pluralism in Iraq encompasses the parallel operation of personal status courts for different religious communities, which retain jurisdiction over matters of marriage, divorce, inheritance, and family relations. For members of minority communities — including non-Muslim Kurds, Yazidis, and Christians — the practical availability of personal status remedies may depend on the functional capacity of their community's own judicial institutions, which vary considerably in terms of resources, geographic presence, and procedural regularity.[81] Where community-based institutions are weak or absent, individuals may be directed to courts applying legal norms that do not correspond to their own personal status law, or may be left without an effective forum

[79] United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report 2022* (2023) 18–21; Haider Ala Hamoudi, 'The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in Islamic Law' (2008) 56 *American Journal of Comparative Law* 423, 440–445 (on divergent interpretation of civil code provisions); UNAMI, *Human Rights Report 2022* (2023) 20–22.

[80] Zaid Al-Ali, *The Struggle for Iraq's Future* (Yale University Press 2014) 115–118; see also Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008) 218–222 (on the structural limits of constitutional courts in federal systems lacking unified cassation mechanisms); Brendan O'Leary, 'The Kurdistan Region of Iraq and the Future of Iraq' (2017) 22 *Ethnopolitics* 1, 12–14.

[81] Personal Status Law (Law No 188 of 1959, as amended); UNAMI, *Report on Human Rights in Iraq: January–June 2019* (UN 2019) 34–36.

altogether. In addition, the operation of customary and tribal dispute resolution mechanisms, while not formally incorporated into the state legal system, exercises considerable de facto authority in many parts of Iraq, including in parts of the Kurdistan Region. These mechanisms may operate in ways that are inconsistent with the procedural guarantees required under Article 14 of the ICCPR, and their use may effectively divert individuals away from formal judicial channels that would otherwise provide enforceable remedies.[82]

The cumulative effect of these overlapping frameworks is to impose significant structural barriers on individuals seeking to enforce their rights through formal legal channels. Complex jurisdictional arrangements increase the informational and financial costs of litigation, prolong proceedings through procedural uncertainty, and may result in conflicting decisions that are unenforceable or that require further proceedings to resolve. These effects fall disproportionately on individuals with limited access to legal advice and assistance, who may be unable to navigate a fragmented institutional landscape without professional guidance.[83] In the context of minority protection, this disproportionate burden is particularly relevant: where structural barriers to access systematically disadvantage individuals belonging to minority communities, the state's obligation under Article 2(3) ICCPR to ensure effective remedies is not satisfied by the mere formal existence of courts, but requires active measures to address the conditions that prevent individuals from accessing them in practice.

Legal pluralism in Iraq therefore illustrates a structural dimension of institutional weakness that is distinct from simple resource scarcity or political interference: it is a fragmentation of the normative and jurisdictional architecture itself, which imposes navigation costs that fall disproportionately on minority claimants and which cannot be resolved through the efforts of any single institution operating within the existing framework.

[82] Human Rights Committee, General Comment No 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial) (2007) UN Doc CCPR/C/GC/32, paras 7–9; UNAMI, *Report on Human Rights in Iraq: 2020* (UN 2021) 28–30.

[83] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UNGA Res 67/187 (20 December 2012) UN Doc A/RES/67/187, Guideline 11; International Crisis Group, *Iraq's Federal Balance: Decentralisation and Its Discontents* (ICG Report No 140, 2013) 18–22.

4.4 The Role of International Human Rights Monitoring Bodies in Iraq: UPR and Treaty Body Oversight

In the absence of access to a supranational judicial mechanism, international oversight of human rights compliance in Iraq is primarily exercised through monitoring bodies operating within the United Nations system. These include the Universal Periodic Review (UPR), as well as treaty-based bodies such as the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. While these mechanisms play an important role in assessing state compliance with international human rights obligations, their capacity to ensure effective protection remains limited in comparison to binding judicial mechanisms.

The UPR constitutes a peer-review process conducted under the auspices of the UN Human Rights Council, in which the human rights record of each state is periodically examined.[84] In the case of Iraq, successive UPR cycles have identified a range of concerns relating to access to justice, the independence of the judiciary, and the protection of minority rights, including issues affecting linguistic and cultural participation.[85] These reviews have generated recommendations aimed at strengthening institutional capacity, improving legal safeguards, and enhancing the protection of vulnerable groups. However, the effectiveness of the UPR process is inherently constrained by its non-binding nature and its reliance on voluntary state cooperation. While states may accept or reject recommendations, there is no formal mechanism to ensure their implementation, nor are there consequences for non-compliance. The analytical significance of this constraint for the Kurdish context is direct: where Iraq accepts UPR recommendations on minority protection or judicial independence and then fails to implement them, the process generates a documented record of non-compliance but no legal consequence. The gap between recommendation and practice is therefore not corrected by the mechanism itself — it is merely recorded by it. This renders the UPR a diagnostic tool rather than a remedial one, and confirms that the institutional weakness operating in Iraq cannot be addressed through monitoring alone.

Treaty bodies provide a more legally grounded form of oversight, as their assessments are based on binding obligations arising under international treaties. The Human Rights

[84] Universal Periodic Review, UN Human Rights Council, Institution-building of the United Nations Human Rights Council, UN Doc A/HRC/RES/5/1 (18 June 2007).
[85] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Iraq*, UN Doc A/HRC/42/14 (2019) paras 120–130.

Committee, in its concluding observations on Iraq, has repeatedly highlighted concerns relating to the effectiveness of judicial remedies, the independence of the judiciary, and the practical implementation of rights protected under the International Covenant on Civil and Political Rights.[86] Similarly, the Committee on the Elimination of Racial Discrimination has addressed issues relating to discrimination, minority protection, and the need to ensure equal access to justice for ethnic and linguistic groups.[87] These findings provide important guidance on the scope of state obligations and identify structural deficiencies affecting the protection of minority rights in practice. For present purposes, however, what matters is not only what these bodies have found but what they have been unable to require. The HRC's concluding observations on Iraq identify the same institutional weaknesses documented in Chapters 4.2 and 4.3 — judicial delays, enforcement failures, vulnerability of displaced populations — yet can respond only with non-binding recommendations whose implementation is left entirely to the state that created the problem. CERD's observations on discrimination against ethnic and linguistic minorities in Iraq similarly document patterns of differential treatment without generating individually enforceable remedies. The contrast with the ECtHR's treatment of comparable violations in Türkiye is instructive: what becomes a binding judgment awarding just satisfaction in Strasbourg remains, in the Iraqi context, a paragraph of concern in a concluding observation that Iraq may accept or disregard without legal consequence.

This limitation is especially significant in the case of Iraq's relationship with the ICCPR. Although Iraq is a party to the Covenant, it has not accepted the individual complaints procedure under the Optional Protocol.[88] Consequently, individuals within Iraq are unable to bring claims before the Human Rights Committee alleging violations of Covenant rights. This represents a critical gap in the system of international protection, as it removes a key avenue through which individuals might otherwise seek redress where domestic remedies prove ineffective.

This is the critical asymmetry between the two systems from the perspective of institutional weakness: in Türkiye, the ECtHR provides a partial external corrective to domestic failures; in

[86] Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Iraq*, UN Doc CCPR/C/IRQ/CO/5 (2015) paras 14–18, 22–24.
[87] Committee on the Elimination of Racial Discrimination, *Concluding Observations on Iraq*, UN Doc CERD/C/IRQ/CO/22–25 (2019) paras 9–13.
[88] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302; Iraq has not ratified the Optional Protocol and is therefore not subject to the individual communications procedure before the Human Rights Committee.

Iraq, no equivalent mechanism exists. The consequence is that institutional weakness in Iraq operates in conditions of near-total impunity — it can be documented and criticised, but it cannot be judicially remedied from outside, which removes one of the principal structural incentives for domestic reform.

4.5 Disputed Territories and Access to Justice: The Legal Vacuum in Kirkuk and the Sinjar Region

The analysis of access to legal protection for Kurds in Iraq cannot be confined to the functioning of recognised federal and regional institutions; it must also engage with the specific and legally significant condition of disputed territories, where the structural fragmentation of legal authority assumes its most acute form. The contested status of territories such as Kirkuk and the Sinjar region — areas claimed by both the federal government in Baghdad and the Kurdistan Regional Government — gives rise to conditions of legal uncertainty that directly affect the ability of individuals residing in or displaced from these areas to access judicial remedies and assert rights protected under international human rights law.

Article 140 of the Iraqi Constitution of 2005 establishes a specific mechanism for resolving the status of territories described as disputed between the federal government and the Kurdistan Region. The provision mandates a three-stage process comprising normalisation, a census, and a referendum, to be completed by a constitutional deadline of 31 December 2007.[89] That deadline passed without implementation, and the process has remained suspended as a result of persistent political disagreement between Baghdad and Erbil, compounded by the security consequences of the conflict with the Islamic State between 2014 and 2017 and its aftermath. The failure to implement Article 140 is not merely a political failure but a constitutional one with direct legal consequences: it leaves the territorial jurisdiction of courts, the applicable body of law, and the institutional authority responsible for adjudicating disputes in these areas formally unresolved.[90]

The legal vacuum created by the unresolved status of disputed territories generates several distinct barriers to access to justice. First, jurisdictional uncertainty as to which court system

[89] Constitution of Iraq (2005), art 140; see also Brendan O'Leary, 'The Kurdistan Region of Iraq and the Future of Iraq' (2017) 22 *Ethnopolitics* 1, 8–11.
[90] Reidar Visser and Gareth Stansfield (eds), *An Iraq of Its Regions: Cornerstones of a Federal Democracy?* (Hurst 2008) 99–105; Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq* (University of Chicago Press 2014) 92–96.

— federal or regional — has authority to adjudicate claims arising in these areas may render individuals effectively unable to identify a competent forum, or may result in conflicting decisions from parallel judicial bodies. Where neither federal nor regional courts assert clear jurisdiction, individuals may be unable to obtain enforceable judicial decisions, particularly in matters involving property rights, criminal accountability, or protection from discrimination. Second, the absence of a settled administrative framework in disputed territories affects the practical functioning of institutions through which legal rights are ordinarily exercised, including civil registration authorities, legal aid services, and law enforcement agencies responsible for executing judicial orders.[91]

The Sinjar region presents a particularly complex instance of this legal vacuum. Sinjar, historically inhabited by the Yazidi Kurdish community, was subjected to systematic atrocity crimes committed by the Islamic State in 2014, including genocide, sexual slavery, and forced displacement, documented extensively by the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD) and the UN Human Rights Office. UNITAD's reports have progressively documented not only the criminal conduct of Islamic State perpetrators but also the forensic, witness testimony, and digital evidence gathered in support of potential prosecutions — providing a rare instance of international criminal accountability infrastructure operating in the absence of any functioning domestic judicial forum in Sinjar.[92] In the aftermath of the military recapture of Sinjar, the region came under the de facto control of competing armed forces, including the Iraqi federal army, the Kurdistan Regional Government's Peshmerga, and affiliated armed groups. The Sinjar Agreement of October 2020, brokered between Baghdad and Erbil, was intended to establish a unified administrative and security framework for the region, but its implementation has remained largely incomplete. The Agreement itself, which provides for the appointment of a new district mayor and the withdrawal of non-governmental armed forces from Sinjar, has been obstructed by the refusal of affiliated armed groups to withdraw and by the absence of any enforcement

[91] United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report: 1 January – 31 December 2022* (UN 2023) 24–28; see also International Crisis Group, *Iraq's Kirkuk Problem: Sorting the Wheel* (Middle East Report No 171, 19 April 2016) 10–14.

[92] United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD), *Sixth Report to the Security Council* (UN Doc S/2021/620, 8 July 2021) paras 14–22; UN Human Rights Office, *'They Came to Destroy': ISIS Crimes against the Yazidis* (UN Doc A/HRC/32/CRP.2, 15 June 2016) paras 1–10.

mechanism capable of compelling compliance by non-state parties to the arrangement.[93] As a consequence, displaced individuals — including those seeking to return to their homes and assert property rights, or to pursue legal claims arising from the atrocities committed — face profound barriers to accessing any competent judicial institution, whether federal, regional, or international.

From the perspective of international human rights law, the conditions prevailing in disputed territories engage state obligations in a particularly demanding way. The obligation under Article 2(3) of the ICCPR to provide effective remedies for violations of Covenant rights applies irrespective of whether violations occur in constitutionally settled or contested areas of a state's territory. International law does not recognise internal administrative disputes over territorial jurisdiction as a basis for suspending the obligation to provide access to justice. The Human Rights Committee has consistently emphasised that states must take positive steps to ensure that judicial mechanisms function effectively across all areas under their jurisdiction and, where this is not the case, must establish alternative means by which individuals can assert their rights.[94] In the context of Iraq's disputed territories, this obligation is manifestly unfulfilled: the combination of unresolved constitutional status, competing armed authority, and institutional incapacity produces conditions in which the right to an effective remedy is not merely difficult to exercise but structurally precluded.

The legal condition of disputed territories therefore exemplifies, in its most acute form, the broader argument advanced in this chapter: that formal constitutional recognition of minority-related rights does not guarantee effective access to legal protection where the institutional conditions necessary for their realisation are absent. In Kirkuk and Sinjar, this institutional failure is not merely a product of inadequate capacity or political unwillingness but is constitutionally embedded in the unresolved framework of Article 140 and its consequences. The resulting legal vacuum represents a structural denial of access to justice that cannot be addressed without a fundamental resolution of the territorial and administrative questions left open by the 2005 constitutional settlement. Until such resolution is achieved, the gap between the formal recognition of Kurdish identity and the effective availability of remedies for

[93] Sinjar Agreement between the Federal Government of Iraq and the Kurdistan Regional Government (9 October 2020); International Crisis Group, *Iraq: Stabilising the Contested District of Sinjar* (Middle East Report No 220, 2021) 8–14.
[94] Minority Rights Group International, *Assimilation, Exodus, Eradication: Iraq's Minority Communities since 2003* (MRG 2007) 18–22; UNAMI, *Report on the Situation of Minorities in Iraq* (UN 2020) 14–17.

violations of rights in these territories will remain among the most significant challenges to the realisation of international human rights standards in the Iraqi legal system.

Disputed territories thus represent institutional weakness taken to its logical extreme: a condition in which the state's constitutional architecture has, through political failure, created spaces where no institution is capable of providing a remedy at all. This is categorically distinct from the normative exclusion operating in Türkiye, where courts function and remedies exist but cannot accommodate the minority dimension of claims; in Kirkuk and Sinjar, the threshold condition of a functioning forum is itself absent.

4.6 Transitional Justice and Reparations: International Standards and Their Applicability to Kurdish Claims in Iraq

The analysis of access to legal protection in Iraq cannot be fully completed without engaging with the framework of transitional justice and reparations, which forms an increasingly significant dimension of international human rights law in post-conflict contexts. Where systematic violations of minority rights have occurred — including forced displacement, destruction of property, political persecution, and mass atrocity crimes — the obligation to provide effective remedies under Article 2(3) of the International Covenant on Civil and Political Rights extends beyond individual judicial relief and encompasses broader duties of accountability, truth-telling, and reparation. These obligations are particularly relevant in Iraq, where Kurdish communities have been subjected to grave and documented violations, including the Anfal campaigns of 1986–1989, which have been characterised as genocide by the Kurdistan Regional Government and by a number of international bodies, and the atrocities committed against Yazidi Kurds in 2014.

At the international level, the normative framework governing reparations for gross human rights violations is primarily derived from the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in 2005. These Principles establish that victims are entitled to full and effective reparation in forms including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Significantly, the Principles also affirm that access to justice constitutes a component of the right to a remedy, encompassing equal and effective access to judicial mechanisms, as well as the right to know the truth about violations. The Human Rights

Committee has confirmed that these standards apply not only to individual violations, but also to systematic and structural violations affecting identifiable communities, including ethnic minorities.

In the Iraqi context, domestic transitional justice mechanisms have developed unevenly. The Iraqi High Tribunal (IHT), established under the Coalition Provisional Authority and later reconstituted under Iraqi law, was tasked with prosecuting members of the former Ba'athist regime for crimes against humanity, war crimes, and genocide, including in connection with the Anfal operations. The IHT's judgment of 2007 in the Anfal case found several senior officials, including Ali Hassan al-Majid, guilty of genocide against the Kurdish population under the provisions of the Iraqi Higher Criminal Court Statute, representing a significant formal recognition of the violations committed.[95] However, the tribunal's proceedings have been criticised on grounds of fair trial concerns, limited victim participation, and a narrow focus on individual criminal responsibility that did not systematically engage with broader questions of institutional accountability or reparation. As a result, while the IHT established formal acknowledgment of the Anfal crimes, it did not produce a comprehensive reparative framework for affected communities.

Iraq has also established property restitution and compensation mechanisms intended to address losses suffered under the Ba'athist regime. The Commission for the Resolution of Real Property Disputes (CRRPD), established under Coalition Provisional Authority Order No 12 (2004) and subsequently reconstituted under Iraqi Law No 2 of 2006 on Property Claims for Displacement and Forced Transfer, was created to address property claims arising from forced displacement and demographic engineering, including in areas affected by the Arabisation policies applied in Kurdish-populated regions. In principle, this mechanism represents a recognition of the need for reparative measures targeted at groups subjected to systematic dispossession. In practice, however, the CRRPD has faced significant limitations, including processing delays, challenges in verifying historical ownership, and difficulties in enforcing decisions in areas subject to ongoing jurisdictional disputes. In disputed territories such as Kirkuk, the intersection of unresolved constitutional status and contested property claims has

[95] Iraqi High Criminal Court, *Judgment in the Case of Ali Hassan al-Majid and Others (Anfal Case)* (Case No 1/C2/2006, 24 June 2007); Iraqi Higher Criminal Court Statute (Law No 10 of 2005), arts 1, 11–14; Michael A Newton and Michael P Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (St Martin's Press 2008) 178–184; Human Rights Watch, *Judging Dujail: The First Trial before the Iraqi High Tribunal* (HRW 2006) 4–9 (fair trial concerns applicable to subsequent Anfal proceedings).

further complicated the effective delivery of reparations, leaving many affected individuals without adequate redress.

The situation of Yazidi survivors of the 2014 atrocities presents a distinct and particularly acute dimension of this challenge. Although the Iraqi legislature enacted the Yazidi Survivors Law (Law No 57 of 2021) in March 2021, which formally recognised the genocide committed against the Yazidi community and established a legal framework for reparations including monthly stipends, medical care, and educational support for survivors, implementation has been characterised by administrative delays, inadequate funding, and limited geographic reach. Survivors residing in displaced persons camps or in areas outside effective state administration have encountered significant barriers in accessing the benefits to which they are entitled under the law. Furthermore, the Law does not address criminal accountability directly, and the absence of functioning judicial mechanisms in Sinjar means that survivors retain no effective domestic forum for pursuing claims against identifiable perpetrators.

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has noted that reparation programmes must be complemented by accountability measures to be effective, and that the absence of criminal proceedings in relation to the Yazidi genocide constitutes a critical gap in the overall transitional justice framework applicable to Iraq. This gap between legislative recognition and institutional delivery represents a fundamental failure of access to justice that cannot be resolved through formal enactment alone.[96]

Transitional justice mechanisms in Iraq therefore offer a concluding illustration of the institutional weakness framework: they demonstrate that the problem is not one of legal recognition — Iraq has enacted statutes, established commissions, and ratified treaties — but of the persistent incapacity of state institutions to translate those formal commitments into outcomes that individuals can actually access and rely upon. Chapter Five will show that this pattern, and its contrast with the normative exclusion operating in Türkiye, defines the comparative structure of the thesis's central argument.

[96] Law No 57 of 2021 on the Survivors of Yazidi and Other Communities (Yazidi Survivors Law) (Iraqi Official Gazette No 4657, 1 March 2021); General Secretariat for the Council of Ministers (Iraq), *Implementation Report on the Yazidi Survivors Law* (Baghdad 2023) 3–7; UNITAD, *Ninth Report to the Security Council* (UN Doc S/2023/533, 14 July 2023) paras 8–15; UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Report to the Human Rights Council* (UN Doc A/HRC/45/45, 9 September 2020) paras 32–38.

5. Comparative Analysis: Legal Frameworks, Remedial Effectiveness, and Access to Justice

A central point of divergence between Türkiye and Iraq lies in the legal recognition of Kurds as a distinct group within their respective constitutional frameworks and the extent to which such recognition gives rise to enforceable linguistic, cultural, and political rights. This divergence is reflected not only in the formal acknowledgment of the group, but also in the availability of legal mechanisms through which these rights can be asserted and protected in practice.

While the Iraqi Constitution explicitly acknowledges the multi-ethnic composition of the state and recognises Kurdish as an official language, the constitutional framework of Türkiye adopts a unitary conception of the nation that does not formally recognise Kurds as a distinct minority group.[97] This difference in constitutional design has significant implications for the legal protection available to Kurdish individuals.

5.1 Practical Implementation of Minority Rights

The practical implementation of minority rights diverges substantially between the two jurisdictions examined, reflecting the different constitutional foundations analysed in Chapters Three and Four. In Iraq, the KRI has developed a body of regional legislation that operationalises the constitutional recognition of Kurdish identity in ways that have direct consequences for access to justice. Regional Law No 8 of 2012 on the use of the Kurdish language in official proceedings requires KRI governmental institutions and courts to use Kurdish as the primary language of administration and adjudication. Education law within the KRI similarly reflects the constitutional language guarantee, with Kurdish as the medium of instruction in government schools and Arabic taught as a subject rather than a medium. These legislative developments represent a meaningful translation of constitutional recognition into institutional practice — a translation that has no equivalent in Türkiye, where constitutional

[97] European Commission, *Türkiye 2023 Report* (SWD(2023) 698 final) 26–29; Venice Commission, *Opinion on the Amendments to the Constitution of Türkiye* (CDL-AD(2017)005) paras 38–44.

language restrictions historically prevented the use of Kurdish in education and official contexts, and where reforms since 2003 have been partial and contested.[98]

However, implementation within the KRI is not uniform, and the position of non-Kurdish minorities within the region illustrates the limits of a territorial autonomy model as a vehicle for minority protection. Assyrian, Turkomen, and Yazidi communities residing within the KRI enjoy formal constitutional protection under Article 125, but have reported uneven access to minority-language education and administrative services, as well as marginalisation from the political processes through which regional governance decisions are made.[99] This internal dimension of the implementation gap reinforces the point that formal recognition — whether at the federal level (as in Iraq) or through regional autonomy arrangements — does not automatically ensure effective protection for all minority communities within a given territory.

In Türkiye, the practical implementation of minority rights has been shaped by the EU accession process, which generated a series of legislative reforms between 2001 and 2010 that relaxed some of the most restrictive provisions affecting Kurdish cultural and linguistic expression. Constitutional amendments in 2001 and 2004 removed the prohibition on broadcasting and education in languages other than Turkish, and subsequent legislative changes permitted private Kurdish-language courses and, eventually, limited Kurdish-language broadcasts on state television. In the judicial sphere, the introduction of the individual application mechanism to the Constitutional Court in 2012 created a new domestic remedy for alleged violations of fundamental rights. These reforms expanded the formal availability of legal protection but did not address the underlying structural issue: the absence of any minority-specific legal category within which Kurdish cultural and political claims can be articulated and adjudicated as such.[100]

---

[98] European Commission, *Turkey 2004 Regular Report* (SEC(2004) 1201) 30–35; European Commission, *Turkey 2010 Progress Report* (SEC(2010) 1327 final) 18–22; Dilek Kurban, 'Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union' (2003) 35 *Columbia Human Rights Law Review* 151, 156–162.

[99] Minority Rights Group International, *Assimilation, Exodus, Eradication: Iraq's Minority Communities since 2003* (MRG 2007) 18–22; United Nations Assistance Mission for Iraq (UNAMI), *Report on the Situation of Minorities in Iraq* (UN 2020) 14–17; see also Khaled Salih, 'Kurdish Identity in Post-Saddam Iraq' in Faleh A Jabar and Hosham Dawod (eds), *The Kurds: Nationalism and Politics* (Saqi Books 2006) 185–192.

[100] European Commission, *Turkey 2022 Report* (SWD(2022) 333 final) 26–29; European Commission, *Turkey 2016 Report* (SWD(2016) 366 final) 14–18; Dilek Kurban, 'Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union' (2003) 35 *Columbia Human Rights Law Review* 151, 168–175.

The European Commission's annual progress reports on Türkiye have consistently noted that legislative reforms in the area of minority rights have not been fully implemented in practice, and that judicial interpretation has often narrowed the scope of the reforms as enacted.[101] This discrepancy between legislative reform and practical implementation illustrates that the gap between formal rights and their effective realisation is not unique to systems that deny recognition: it affects systems that formally extend rights but fail to develop the institutional culture and judicial interpretation necessary to give them practical effect.

5.2 Access to Justice and the Effectiveness of Remedies

The comparative distinction between Türkiye and Iraq is not simply one between non-recognition and recognition of Kurdish identity, but between two structurally distinct models of legal insufficiency that can be precisely characterised: *normative exclusion* in Türkiye, and institutional weakness in Iraq. This distinction provides the organising framework through which the research question — to what extent do the legal frameworks in each jurisdiction ensure effective access to legal protection for Kurds — can be answered with the specificity the question demands. The answer cannot be binary. Both systems provide access to legal protection in some circumstances and for some categories of claim; both fail systematically in others. The task of comparison is to identify, with precision, which categories of claim each system can accommodate, and which it structurally cannot.[102]

In Türkiye, the framework provides effective access to legal protection in a defined and limited category of cases: where Kurdish applicants raise individual procedural violations — unlawful detention, failure to investigate, inadequate interpretation, or disproportionate restrictions on expression in individual proceedings — both the individual application mechanism before the Constitutional Court and the ECtHR provide a realistic prospect of redress. The Constitutional Court has found violations of fair trial rights in individual cases since 2012, and the European Court of Human Rights has awarded just satisfaction across hundreds of applications over three decades. To that extent, and within those boundaries, the system functions. However, where claims engage the collective dimension of Kurdish identity — the right to use Kurdish in official proceedings as a matter of recognised minority right, the right to minority-specific

[101] See, eg, European Commission, *Türkiye 2023 Report* (SWD(2023) 698 final) 26–29, 41–43; European Commission, *Turkey 2022 Report* (SWD(2022) 333 final) 25–28; European Commission, *Turkey 2016 Report* (SWD(2016) 366 final) 24–26.
[102] Kerem Altıparmak, 'Minority Rights in Turkey' in Marc Weller (ed), *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe* (OUP 2008) 185, 185–187.

education, or the structural conditions that produce disproportionate criminalisation of Kurdish political expression — the framework provides no effective vehicle. Because the Turkish constitutional order does not recognise an ethnic minority category for Kurds, these claims cannot be framed as minority rights claims before domestic courts. The translation into general rights provisions does not merely restrict the legal vocabulary; it ensures that structural and collective harms remain judicially invisible and therefore legally unremedied. The degree of access to legal protection in Türkiye is accordingly calibrated to the nature of the claim: significant for individual procedural violations, negligible for collective minority rights violations.

In Iraq, by contrast, the principal difficulty lies less in the normative framing of claims than in the fragmented and inconsistent operation of institutions responsible for adjudication and enforcement. The constitutional framework offers space for the legal recognition of Kurdish identity, and in formal terms appears more compatible with international standards on minority accommodation. Yet access to justice depends not only on the articulation of rights, but on the existence of judicial institutions capable of enforcing them in a consistent, predictable, and impartial manner.[103] Where courts operate within conditions of political contestation, uneven administrative capacity, or weak enforcement, formal legal guarantees may remain under-realised. The Iraqi case therefore illustrates a different problem: not the invisibility of minority claims within legal doctrine, but the fragility of the institutional environment in which such claims must be pursued.

This distinction may be understood as a difference between normative exclusion and institutional weakness**.** In Türkiye, Kurdish applicants confront a legal order in which ethnic identity is not formally denied as a sociological fact, but is not treated as a category generating specific legal protection. This narrows the doctrinal pathways through which claims can be advanced and may encourage judicial reasoning that subsumes minority-related grievances under state security, public order, or indivisible national identity.[104] In Iraq, Kurdish identity is formally incorporated into the constitutional order, but this inclusion does not resolve the question of whether remedies are practically effective for individuals, especially in disputes involving overlapping federal and regional authority or broader governance

[103] Zaid Al-Ali, *The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy* (Yale University Press 2014) 102–115.
[104] Dilek Kurban, 'Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union' (2003) 35 *Columbia Human Rights Law Review* 151, 168–175.

deficiencies.[105] The systems thus fail in different ways: one by limiting the legal vocabulary of minority protection, the other by weakening the machinery through which rights are enforced.

A further point of divergence concerns the role of external accountability. In Türkiye, the availability of review by the European Court of Human Rights alters the legal significance of domestic remedies. Even where national courts fail to provide effective protection, there remains a supranational forum capable of assessing whether remedies were genuine, accessible, and adequate. This does not eliminate domestic deficiencies, but it introduces an additional layer of normative supervision and creates pressure for at least partial legal adjustment.[106] Iraq lacks an equivalent structure. Consequently, the assessment of remedy effectiveness remains largely internal, supplemented only by monitoring and reporting mechanisms that do not provide binding adjudication or individual relief. The absence of external judicial oversight has implications not only for redress, but also for legal development: without a supranational body generating jurisprudence on effective remedies, there is less pressure toward doctrinal clarification and systemic reform.

The comparison therefore suggests that access to legal protection should not be measured solely by asking whether remedies formally exist. A more precise legal inquiry concerns whether the surrounding constitutional and institutional framework enables those remedies to respond adequately to minority-specific harms. In Türkiye, remedies exist within a legal order that tends to individualise and depoliticise claims rooted in ethnic exclusion. In Iraq, remedies exist within a framework that is more accepting of ethnic plurality, yet less capable of guaranteeing uniform and effective enforcement. In both contexts, the gap between formal rights and effective protection remains significant, but the source of that gap differs. This distinction is central to understanding why legal protection for Kurds cannot be assessed purely through constitutional text or treaty ratification, but must be evaluated through the interaction between recognition, remedial design, and institutional capacity.

5.3 The Role of International and Supranational Oversight

However, the compliance record examined in section 3.3 — in which judgments have consistently been implemented through individual measures rather than general structural

[105] Haider Ala Hamoudi, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*(University of Chicago Press 2014) 87–90.
[106] *Kudła v Poland* (2000) 35 EHRR 11, para 157; *Aksoy v Turkey* (1996) 23 EHRR 553, para 95.

reform — demonstrates that the presence of supranational oversight does not, by itself, address the institutional resistance and constitutional design choices that produce systemic exclusion. The violations identified in *Demirtaş* and *Kavala* arose precisely in a context where the ECtHR had already established clear and applicable standards — standards that Türkiye chose to disregard. The causal relationship between oversight and outcomes is therefore asymmetric: oversight is a necessary but not sufficient condition for effective protection.

Iraq's institutional weaknesses are not primarily caused by the absence of a regional court; they are the product of post-conflict state fragility, constitutional ambiguity, and political contestation that no supervisory mechanism alone could resolve. What the absence of a regional court does, however, is remove the one institutional channel through which individuals can convert normative obligations into enforceable individual remedies when domestic institutions fail. That difference — between systemic institutional weakness moderated by external adjudication, and systemic institutional weakness unchecked by any binding external review — is the most significant structural distinction between the two systems from the perspective of access to justice.

5.4 Key Comparative Findings

The comparative analysis developed in this chapter yields three propositions that carry implications beyond the two jurisdictions examined. First, constitutional recognition of minority identity is a necessary but not sufficient condition for effective access to legal protection. The Iraqi case demonstrates that recognition without institutional delivery produces a legal system that is formally hospitable but practically unreliable; the Turkish case demonstrates that general equality guarantees cannot substitute for group-specific protections where the harm to be remedied is collective in nature. Neither the presence nor the absence of formal minority recognition, taken alone, determines whether the system as a whole satisfies the requirements of international human rights law.

Second, external oversight and domestic constitutional design are independent variables, and each compensates for different types of failure. The ECtHR's supervisory function in the Türkiye case corrects individual procedural violations and generates normative pressure toward reform, but it cannot substitute for the doctrinal category that domestic law refuses to create. Where normative exclusion is structurally embedded in constitutional design — as it is in Türkiye — supranational adjudication produces incremental improvements in individual cases

while leaving the structural cause of the failure untouched. Conversely, in Iraq, the absence of external oversight removes the only channel through which institutional weakness might be subjected to binding external scrutiny. The comparison thus suggests that effective legal protection requires both adequate domestic design and external accountability, and that neither compensates fully for the absence of the other.

Third, and most significantly for the international law of minority protection, both systems demonstrate that the existing framework of international obligations is normatively adequate but institutionally under-enforced. The content of the obligations imposed by the ICCPR, the ECHR, and the FCNM is sufficiently developed to address both the normative exclusion operating in Türkiye and the institutional weakness operating in Iraq; the standards are clear and have been repeatedly articulated. What is absent is a mechanism capable of converting those standards into enforceable individual remedies across both contexts. This is the enforcement gap that defines the practical condition of minority rights in international law: sophisticated norms, inadequate procedures. The comparison between Türkiye and Iraq illustrates that gap in its two structurally distinct forms.

These three propositions collectively define the analytical contribution of the comparative framework developed in this thesis. They demonstrate that access to justice for ethnic minorities cannot be assessed through any single variable — neither constitutional text, nor treaty commitment, nor the availability of a supranational court — but only through the interaction of all three. The two systems examined fail along different axes of this framework: Türkiye along the recognition axis, Iraq along the institutional functionality axis, and both along the external oversight axis in different degrees. Together, they constitute a comprehensive illustration of the conditions under which formal international human rights obligations fail to produce effective domestic protection.

5.5 Non-State Actors and Access to Justice: The Role of Kurdish Civil Society and Legal Aid Organisations

The effectiveness of access to justice for Kurdish individuals in both Türkiye and Iraq is not determined solely by formal legal frameworks and judicial institutions. Non-state actors — including civil society organisations, bar associations, legal aid providers, and human rights advocacy groups — play a significant supplementary role in facilitating access to legal protection, particularly where state mechanisms are inadequate or structurally hostile to

minority claims. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems recognise this complementary function, affirming that states bear primary responsibility for legal aid but acknowledging the role of non-state actors in expanding access for vulnerable and marginalised groups.[107]

In Türkiye, civil society organisations and legal professionals have played a documented and significant role in supporting Kurdish applicants before both domestic courts and the European Court of Human Rights. The Kurdish Human Rights Project (KHRP), operating from London, provided legal representation and litigation support in many of the landmark cases brought by Kurdish applicants against Türkiye before the Strasbourg Court in the 1990s and 2000s, including cases concerning forced disappearances, village destruction, and violations of freedom of expression — cases that produced many of the key findings of violations discussed in sections 3.3 and 3.4 of this thesis. Within Türkiye, the Human Rights Association (İHD) and the Lawyers for Freedom Association (ÖHO) have provided legal assistance to Kurdish applicants in domestic proceedings and documented patterns of rights violations. However, since the 2016 state of emergency and the subsequent emergency decree-laws, a significant number of Kurdish-focused civil society organisations and law firms have been shut down, and individual lawyers representing Kurdish clients in terrorism-related proceedings have themselves faced criminal prosecution under the Anti-Terror Law — a development the Bar Human Rights Committee of England and Wales and the International Bar Association's Human Rights Institute have repeatedly condemned as incompatible with the right of access to counsel under Article 6 ECHR.[108]

In Iraq, civil society organisations contribute to access to justice particularly in areas where institutional capacity is weak or where state authority is contested. The Hammurabi Human Rights Organisation and the Minority Rights Group International have documented rights conditions affecting Kurdish and other minority communities and have engaged with international monitoring bodies in the UPR process and before treaty bodies. In the Kurdistan Region, the Kurdistan Human Rights Watch and Wadi, an organisation focused on legal

[107] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, GA Res 67/187 (20 December 2012), Principle 1 and Guidelines 1 and 11.
[108] Human Rights Watch, *Silencing Turkey's Lawyers: The Crackdown on Human Rights Defenders, Lawyers and Judges* (HRW 2021) 1–8, 24–32; Bar Human Rights Committee of England and Wales, *The Continuing Erosion of the Rule of Law in Turkey* (BHRC 2019) paras 22–34; International Bar Association's Human Rights Institute, *The Turkish Bar Associations Law: A Threat to the Rule of Law and the Independence of the Legal Profession* (IBAHRI 2020) 14–19.

support for women in the KRI, have provided legal assistance and advocacy on issues including property rights, personal status law, and access to justice for internally displaced persons.[109] International organisations including the Danish Refugee Council and the Norwegian Refugee Council have operated legal aid programmes in post-conflict areas of northern Iraq, providing assistance to displaced Kurds seeking to assert property claims before the Commission for the Resolution of Real Property Disputes.[110]

The comparative picture that emerges from this analysis is one in which civil society plays an essential but structurally precarious role. In Türkiye, the principal constraint is regulatory and political: the legal and administrative environment following the 2016 state of emergency has systematically reduced the operational space of Kurdish civil society and criminalised the provision of legal assistance in cases that the state characterises as terrorism-related.[111] This means that the supplementary function of civil society is most severely curtailed precisely in the cases where formal remedies are most likely to be inadequate. In Iraq, the constraints are primarily operational: resource limitations, uneven geographic presence, and the absence of a secure institutional environment in contested areas limit the reach and sustainability of civil society legal assistance. Taken together, these findings reinforce the broader conclusion of this thesis that access to justice must be assessed as a systemic question encompassing not only formal legal mechanisms but the entire ecosystem of support through which individuals are able, in practice, to assert and protect their rights.

The preceding comparative analysis has examined access to legal protection for Kurds as an ethnic minority, identifying structural limitations arising from non-recognition, institutional weakness, emergency governance, and jurisdictional fragmentation. However, this analysis risks understating the differentiated impact of these barriers where they intersect with other grounds of vulnerability. A comprehensive legal assessment of access to justice for Kurdish individuals must engage with the dimension of gender, recognising that Kurdish women face a distinct and compounded set of barriers that cannot be fully captured by an analysis focused

[109] Minority Rights Group International, *Crossroads: The Future of Iraq's Minorities after ISIS* (MRG 2017) 14–22; UNAMI, *Report on the Situation of Minorities in Iraq* (UN 2020) 8–14, 22–25.
[110] Norwegian Refugee Council, *Barriers to Housing, Land and Property Rights in North-East Iraq* (NRC 2019) 18–24; Danish Refugee Council, *Legal Aid for Displaced Populations in Iraq: Programme Review* (DRC 2020) 11–17.
[111] Human Rights Watch, *Silencing Turkey's Lawyers* (n 108) 32–48; Council of Europe Commissioner for Human Rights, *Memorandum on Freedom of Expression and Media Freedom in Turkey* (CommDH(2017)5, 15 February 2017) paras 22–37; International Commission of Jurists, *Justice Suspended: Access to Justice and the State of Emergency in Turkey* (ICJ 2018) 28–35.

solely on ethnicity. The concept of intersectionality, introduced by Crenshaw as a framework for understanding how overlapping systems of discrimination operate simultaneously rather than independently, provides the analytical foundation for examining how the interaction between minority status and gender shapes access to legal protection in both Türkiye and Iraq.[112]

Beyond the specific context of atrocity crimes, Kurdish women in both Türkiye and Iraq face broader structural barriers rooted in the intersection of minority status and gender that affect access to civil and administrative remedies, including in areas such as family law, property rights, and civil registration. In both jurisdictions, the application of customary practices alongside formal legal rules may operate to the disadvantage of women from minority communities, creating a normative environment in which formal legal guarantees of equality are undermined by informal social structures. The CEDAW Committee has consistently identified this "legal pluralism in practice" as a significant obstacle to women's equal access to justice, calling on states to ensure that customary norms cannot override statutory rights, and that legal aid and judicial assistance are accessible to women from marginalised communities.[113]

Conclusion

This thesis has examined whether the legal frameworks of Türkiye and Iraq ensure effective access to legal protection for Kurds as an ethnic minority under international human rights standards. The answer is calibrated, not categorical: neither system provides full protection, neither provides none. The task has been to identify precisely where each system functions, where it fails, and whether those failures are remediable or structurally embedded.

In Türkiye, effective protection exists in a limited domain: where Kurdish individuals raise individual procedural violations before the Constitutional Court or the ECtHR, a realistic prospect of redress exists. Yet the framework fails entirely where claims engage the collective dimension of Kurdish identity. Because Kurds are not recognised as a distinct minority,

[112] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241, 1242–1244; see also Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (European Commission 2016) 9–14.

[113] CEDAW Committee, General Recommendation No 33 on Women's Access to Justice (2015) UN Doc CEDAW/C/GC/33, paras 8–11; see also Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005) 62–67.

minority-specific claims cannot be articulated before domestic courts. This failure is structurally entrenched and cannot be remedied through incremental reform without reconsidering the model of national identity embedded in the 1982 Constitution.

In Iraq, effective protection is even more narrowly confined. Within the Kurdistan Region, constitutional recognition has produced meaningfully greater access to justice. Outside the KRI — in federal courts, disputed territories, and displacement-affected areas — the framework fails across virtually every dimension examined: jurisdictional uncertainty, institutional incapacity, and in the most extreme cases, the complete absence of any competent forum. Iraq's failure is therefore not normative but institutional: the constitutional text is broadly adequate, but the institutions required to translate it into enforceable remedies are absent where most urgently needed.

The comparative analysis shows that these two systems fail in qualitatively different ways yet produce a convergent outcome: the effective exclusion of Kurds from the full protection of rights guaranteed under international law. In Türkiye, exclusion operates through normative invisibility — the refusal to recognise ethnicity as a legal category. In Iraq, it operates through institutional fragility — the inability to deliver protection that constitutional texts formally promise. A further dimension concerns Kurdish women, who face intersecting ethnic and gender-based discrimination; any framework focusing exclusively on ethnicity will systematically underestimate the legal vulnerability of a significant portion of the population under examination.

This thesis concludes that neither Türkiye nor Iraq fully ensures effective access to legal protection for Kurds in accordance with international human rights standards. Effective protection depends on the interaction of three variables: recognition of minority identity within the constitutional order; practical functionality of remedial mechanisms; and availability of external oversight capable of correcting domestic failures. Deficiency in any one compromises the system as a whole. Addressing these deficiencies requires not only legislative and constitutional reform, but sustained engagement with the institutional conditions that determine whether rights recognised on paper are realised in practice. Until that alignment is achieved, the distance between international obligation and domestic reality will continue to define the legal experience of Kurdish minorities in both states.

List of references

International Treaties and Instruments

1. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13
2. European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 5
3. Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157
4. International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195
5. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
6. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83
7. Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302
8. Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 2000, entered into force 1 April 2005) ETS 177
9. Treaty of Lausanne (signed 24 July 1923, entered into force 6 August 1924) 28 LNTS 11

Legislation

10. Code of Civil Procedure (Iraq, Law No 83 of 1969, as amended)
11. Constitution of Iraq (2005)
12. Constitution of the Republic of Türkiye (1982, as amended)
13. Iraqi Higher Criminal Court Statute (Law No 10 of 2005)
14. Law No 3713 on the Fight against Terrorism (Türkiye, 1991, as amended)
15. Law No 6216 on the Establishment and Rules of Procedure of the Constitutional Court (Türkiye, 2011)

16. Law No 8 of 2012 on the Use of the Kurdish Language in the Kurdistan Region (Kurdistan Parliament, 2012)
17. Law No 30 of 2021 on the Federal Supreme Court (Iraq, published in the Iraqi Official Gazette No 4645, 6 April 2021)
18. Law No 57 of 2021 on the Survivors of Yazidi and Other Communities (Yazidi Survivors Law) (Iraq, published in the Iraqi Official Gazette No 4657, 1 March 2021)
19. Personal Status Law (Iraq, Law No 188 of 1959, as amended)

Cases

20. Airey v Ireland App no 6289/73 (ECtHR, 9 October 1979)
21. Aksoy v Turkey (1996) 23 EHRR 553
22. Brannigan and McBride v United Kingdom (1993) 17 EHRR 539
23. Brozicek v Italy App no 10964/84 (ECtHR, 19 December 1989)
24. Çakıcı v Turkey (1999) 31 EHRR 5
25. D.H. and Others v Czech Republic (2008) 47 EHRR 3
26. Dicle v Turkey (No 3) App no 34685/97 (ECtHR, 15 November 2005)
27. Dink v Turkey (2010) 54 EHRR 19
28. Golder v United Kingdom (1975) 1 EHRR 524
29. Güzel v Turkey (No 2) App nos 28490/95 and 29082/95 (ECtHR, 18 October 2000)
30. Hermi v Italy App no 18114/02 (ECtHR, 18 October 2006)
31. Incal v Turkey (1998) 29 EHRR 449
32. Iraqi High Criminal Court, Judgment in the Case of Ali Hassan al-Majid and Others (Anfal Case), Case No 1/C2/2006 (24 June 2007)
33. İlhan v Turkey (2002) 34 EHRR 36
34. Karatas v Turkey (1999) 33 EHRR 15
35. Kavala v Turkey App no 28749/18 (ECtHR Grand Chamber, 11 July 2022)
36. Kaya v Turkey (1998) 28 EHRR 1
37. Kudła v Poland (2000) 35 EHRR 11
38. Kurt v Turkey (1998) 27 EHRR 373
39. Lawless v Ireland (No 3) App no 332/57 (ECtHR, 1 July 1961)
40. Leyla Şahin v Turkey (2005) 44 EHRR 5
41. Selahattin Demirtaş v Turkey (No 2) App no 14305/17 (ECtHR Grand Chamber, 22 December 2020)

42. Timurtaş v Turkey (2001) 33 EHRR 6
43. Yaşa v Turkey (1998) 28 EHRR 408
44. *Yalçın Kuçuk v Turkey* App no 28493/95 (ECtHR, 5 December 2002)
45. *Kätağ and Others v Turkey* App no 47295/99 (ECtHR, 11 May 2000)

Books

46. Ali Al-Dawsari, The Federal Supreme Court of Iraq: Constitutional Design and Institutional Practice (Chatham House 2022)
47. Brendan O'Leary, How to Get Out of Iraq with Integrity (University of Pennsylvania Press 2009)
48. Fareda Banda, Women, Law and Human Rights: An African Perspective (Hart Publishing 2005)
49. Haider Ala Hamoudi, Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq (University of Chicago Press 2014)
50. Iain Cameron, National Security and the European Convention on Human Rights (Kluwer Law International 2000)
51. Kristin Henrard, Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination (Martinus Nijhoff 2000)
52. Lynn Welchman, Women and Muslim Family Laws in Arab States (Amsterdam University Press 2007)
53. Marc Weller (ed), The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities (OUP 2005)
54. Michael A Newton and Michael P Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein (St Martin's Press 2008)
55. Nathan J Brown, The Rule of Law in the Arab World: Courts in Egypt and the Gulf (Cambridge University Press 1997)
56. Patrick Thornberry, International Law and the Rights of Minorities (Clarendon Press 1991)
57. Rebecca Cook and Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives (University of Pennsylvania Press 2010)
58. Reidar Visser and Gareth Stansfield (eds), An Iraq of Its Regions: Cornerstones of a Federal Democracy? (Hurst 2008)

59. Sandra Fredman, Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law (European Commission 2016)
60. Tom Ginsburg and Tamir Moustafa (eds), Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press 2008)
61. Zaid Al-Ali, The Struggle for Iraq's Future: How Corruption, Incompetence and Sectarianism Have Undermined Democracy (Yale University Press 2014)
62. Zühtü Arslan, The Turkish Constitutional Court in the New Era (Springer 2019)

Journal Articles and Book Chapters

63. Başak Çalı, 'The Turkish Constitutional Court's Individual Application Jurisprudence: An Empirical Assessment' (2018) 12 European Constitutional Law Review 42
64. Brendan O'Leary, 'The Kurdistan Region of Iraq and the Future of Iraq' (2017) 22 Ethnopolitics 1
65. Christine Chinkin, 'Gender and Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), The Oxford Handbook of International Law in Armed Conflict (OUP 2014)
66. Dilek Kurban, 'Confronting Equality: The Need for Constitutional Protection of Minorities on Turkey's Path to the European Union' (2003) 35 Columbia Human Rights Law Review 151
67. Eva Brems and others, 'Article 46 ECHR and the Enforcement of Judgments: The Kavala Proceedings' (2023) 23 Human Rights Law Review 1
68. Haider Ala Hamoudi, 'The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in Islamic Law' (2008) 56 American Journal of Comparative Law 423
69. John Packer, 'On the Definition of Minorities' in John Packer and Kristian Myntti (eds), The Protection of Ethnic and Linguistic Minorities in Europe (Åbo Akademi University 1993)
70. Kerem Altıparmak, 'Language Rights and the European Convention on Human Rights' (2012) 3 European Yearbook of Minority Issues 45
71. Kerem Altıparmak, 'Minority Rights in Turkey' in Marc Weller (ed), Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe (OUP 2008)
72. Khaled Salih, 'Kurdish Identity in Post-Saddam Iraq' in Faleh A Jabar and Hosham Dawod (eds), The Kurds: Nationalism and Politics (Saqi Books 2006)
73. Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241

74. Kristin Henrard, ‘The Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages: The Added Value of a Complementary Perspective’ (2008) 7 European Yearbook of Minority Issues 17
75. Nicos Alivizatos, ‘The Demirtaş Case: A Test for the Council of Europe’s Credibility’ (2021) 19 International Journal of Constitutional Law 366
76. Orla Lynne Haughey, ‘Derogation and the Right to an Effective Remedy under the ECHR’ (2020) 20 Human Rights Law Review 511
77. Rainer Hofmann and Ugo Caruso, ‘The Framework Convention for the Protection of National Minorities: A Reappraisal’ in Tove Malloy and Francesco Palermo (eds), Minority Accommodation through Territorial and Non-Territorial Autonomy (OUP 2015)
78. Reidar Visser, ‘The Iraqi Federal Supreme Court and the Oil and Gas Dispute between Baghdad and Erbil’ (2012) 18 Arab Law Quarterly 151

Official Reports, Institutional Documents, and UN Materials

79. Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs (Council of Europe 2008)
80. Advisory Committee on the Framework Convention for the Protection of National Minorities, Thematic Commentary No 4: Scope of Application of the Framework Convention for the Protection of National Minorities (Council of Europe 2016)
81. Bar Human Rights Committee of England and Wales, Meeting Democratic Aspirations: Lawyers, Judges and Human Rights Defenders in Turkey (BHRC 2019)
82. CEDAW Committee, General Recommendation No 19 on Violence against Women (1992) UN Doc HRI/GEN/1/Rev.1 at 84
83. CEDAW Committee, General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention (2010) UN Doc CEDAW/C/GC/28
84. CEDAW Committee, General Recommendation No 33 on Women’s Access to Justice (2015) UN Doc CEDAW/C/GC/33
85. CEDAW Committee, General Recommendation No 35 on Gender-Based Violence against Women (2017) UN Doc CEDAW/C/GC/35

86. Committee of Ministers of the Council of Europe, Decision CM/Del/Dec(2023)1475/H46-29 concerning the Selahattin Demirtaş group of cases (21 September 2023)
87. Committee of Ministers of the Council of Europe, Interim Resolution CM/ResDH(2022)21 concerning the Kavala group of cases (2 February 2022)
88. Committee of Ministers, Interim Resolution CM/ResDH(2022)165 (Council of Europe, 2 September 2022)
89. Committee on the Elimination of Racial Discrimination, Concluding Observations on Iraq, UN Doc CERD/C/IRQ/CO/22–25 (2019)
90. Committee on the Elimination of Racial Discrimination, General Recommendation No 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (2005) UN Doc CERD/C/GC/31
91. Council of Europe Commissioner for Human Rights, Memorandum on Freedom of Expression and Media Freedom in Turkey (CommDH(2017)5, 15 February 2017)
92. Council of Europe Parliamentary Assembly, Resolution 2209 (2018) on the State of Emergency in Turkey and its Consequences for the Rule of Law
93. Council of Europe, Supervision of the Execution of Judgments of the European Court of Human Rights: Annual Report 2022 (2023)
94. European Commission, Turkey 2004 Regular Report (SEC(2004) 1201)
95. European Commission, Turkey 2010 Progress Report (SEC(2010) 1327 final)
96. European Commission, Turkey 2016 Report (SWD(2016) 366 final)
97. European Commission, Turkey 2022 Report (SWD(2022) 333 final)
98. European Commission, Türkiye 2023 Report (SWD(2023) 698 final)
99. Explanatory Report to the Framework Convention for the Protection of National Minorities (Council of Europe 1995)
100. General Secretariat for the Council of Ministers (Iraq), Implementation Report on the Yazidi Survivors Law (Baghdad 2023)
101. Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Iraq, UN Doc CCPR/C/IRQ/CO/5 (2015)
102. Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Iraq, UN Doc CCPR/C/IRQ/CO/6 (2022)
103. Human Rights Committee, General Comment No 23: Article 27 (Rights of Minorities) (1994) UN Doc CCPR/C/21/Rev.1/Add.5

104. Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13
105. Human Rights Committee, General Comment No 32: Right to Equality before Courts and Tribunals and to a Fair Trial (2007) UN Doc CCPR/C/GC/32
106. Human Rights Watch, A Blank Check: Turkey's Post-Coup Suspension of Safeguards Against Torture (HRW 2016)
107. Human Rights Watch, Time for Justice: Ending Impunity for Killings and Disappearances in 1990s Turkey (HRW 2012)
108. Human Rights Watch, Judging Dujail: The First Trial before the Iraqi High Tribunal (HRW 2006)
109. Human Rights Watch, Silencing Turkey's Lawyers: The Crackdown on Human Rights Defenders, Lawyers and Judges (Human Rights Watch 2021)
110. International Bar Association's Human Rights Institute, The State of the Judiciary in Turkey (IBAHRI 2019)
111. International Commission of Jurists, Justice Suspended: Access to Justice and the State of Emergency in Turkey (ICJ 2018)
112. International Crisis Group, Iraq's Federal Balance: Decentralisation and Its Discontents (Middle East Report No 140, 2013)
113. International Crisis Group, Iraq's Justice System: Flawed and Under Strain (Middle East Report No 209, 2020)
114. International Crisis Group, Iraq: Stabilising the Contested District of Sinjar (Middle East Report No 220, 2021)
115. International Crisis Group, Iraq's Kirkuk Problem: Sorting the Wheel (Middle East Report No 171, 2016)
116. Minority Rights Group International, Crossroads: The Future of Iraq's Minorities after ISIS (MRG 2017)
117. Minority Rights Group International, Assimilation, Exodus, Eradication: Iraq's Minority Communities since 2003 (MRG 2007)
118. Norwegian Refugee Council, Barriers to Housing, Land and Property Rights in North-East Iraq (NRC 2019)
119. Sinjar Agreement between the Federal Government of Iraq and the Kurdistan Regional Government (9 October 2020)

120. UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, GA Res 60/147 (16 December 2005)
121. UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, GA Res 47/135 (18 December 1992)
122. UN General Assembly, Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, GA Res 67/187 (20 December 2012)
123. UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Iraq, UN Doc A/HRC/42/14 (2019)
124. UN Human Rights Office, 'They Came to Destroy': ISIS Crimes against the Yazidis (UN Doc A/HRC/32/CRP.2, 15 June 2016)
125. UN Special Rapporteur on the Independence of Judges and Lawyers, Report on the Mission to Iraq (UN Doc A/HRC/38/38/Add.2, 2018)
126. UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Report to the Human Rights Council (UN Doc A/HRC/45/45, 9 September 2020)
127. United Nations Assistance Mission for Iraq (UNAMI), Human Rights Situation in Iraq: January–June 2021 (UN 2021)
128. United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report 2022 (UN 2023)
129. United Nations Assistance Mission for Iraq (UNAMI), Report on Human Rights in Iraq: 2020 (UN 2021)
130. United Nations Assistance Mission for Iraq (UNAMI), Report on Human Rights in Iraq: January–June 2019 (UN 2019)
131. United Nations Assistance Mission for Iraq (UNAMI), Report on the Human Rights of Vulnerable Groups in Iraq (UN 2021)
132. United Nations Assistance Mission for Iraq (UNAMI), Report on the Independence of the Judiciary in Iraq (UN 2019)
133. United Nations Assistance Mission for Iraq (UNAMI), Report on the Situation of Minorities in Iraq (UN 2020)
134. United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD), Ninth Report to the Security Council (UN Doc S/2023/533, 14 July 2023)

135. United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh (UNITAD), Sixth Report to the Security Council (UN Doc S/2021/620, 8 July 2021)

136. Venice Commission, Opinion on Emergency Decree Laws Nos 667–676 Adopted Following the Failed Coup of 15 July 2016 (Opinion No 865/2016, CDL-AD(2016)037, 9 December 2016)

137. Venice Commission, Opinion on the Amendments to the Constitution of Türkiye (CDL-AD(2017)005)

Õiguslik kaitse etniliste vähemuste jaoks: kurdide olukord Türkiyes ja Iraagis

Kokkuvõte

Käesolev magistritöö uurib, mil määral tagavad Türkiye ja Iraagi õigusraamistikud ning kohtulikud mehhanismid kurdidele kui etnilisele vähemusele tulemusliku õiguskaitsevahendile juurdepääsu kooskulas rahvusvaheliste inimigõiguste standarditega. Töö läheneb küsimusele doktrinaalse ja võrdleva õigusteadusliku metoodika kaudu, analüüsides kaht erineva põhiseadusliku lähenemisega riiki, et selgitada välja struktuurilised mustrid, mis ei ilmne kumbagi süsteemi eraldi vaadeldes.

Töö lähtub rahvusvahelisest õigusraamistikust vähemuste kaitseks, sealhulgas ICCPR-i artikkel 27, ECHR artiklid 6 ja 13, ÜRO vähemuste õiguste deklaratsioon (1992) ning Euroopa Nadekogu vähemuste kaitse raamkonventsioon. Need instrumendid nõuavad nii vormilist juurdepääsu kohtusüsteemidele kui ka tulemuslike õiguskaitsevahenditee olemasolu rikkumiste korral, keelates diskrimineerimise etnilise kuuluvuse alusel.

Türkiye analüüs näitab, et peamine piirang tuleneb normatiivse välistamise mehhanismist: riik ei tunnusta kurde ametliku vähemusena, mistottu kollektiivse identiteedi, keeleõiguste või kultuuriosaluse alusel esitatud nõudeid ei saa riigisisestes kohtutes vähemusteõiguste nõuetena sifomuleerida. Euroopa Inimigõiguste Kohtu praktika kurdi kaebajate asjades — sealhulgas Aksoy v Türkiye, Selahattin Demirtış v Türkiye (nr 2) ja Kavala v Türkiye — näitab süstemaatilisi rikkumisi ECHR artiklite 2, 3, 5, 6, 10 ja 13 alusel. Ometi jääb välisräästamine osaliseks korrektiiviks: see suudab kõrvaldada üksikuid menetluslikke rikkumisi, kuid ei suuda sundida põhiseaduslikku korda looma vähemusteõiguste kategooriat.

Iraagi puhul näitab analüüs, et peamine piirang ei seisne normatiivses välistamises — 2005. aasta põhiseadus tunnustab formaalselt kurdi identiteeti ja määrab kurdi keele ametlikuks keeleks — vaid institutsioonilises nõrkuses. Kohtuõiguse jaotus föderaalsete ja piirkondlike süsteemide vahel tekitab jurisdiktsiooni määramatust, kohtuotsuste täitmine on ebajärjepidev ning vaidlusalustes piirkondades nagu Kirkuk ja Sindjar puudub tulemuslik õiguslik foorum. Jesiidide kogukonna olukord pärast 2014. aasta sündmusi illustreerib institutsioonilise nõrkuse kõige äärmisemat vorme.

Võrdlev analüüs jõuab kolme peamise järelduseni. Esiteks ei ole põhiseaduslik vähemuste tunnustamine iseenesest piisav tulemusliku õiguskaitsele juurdepääsu tagamiseks. Teiseks ei asenda välisjärelevalve ega riigisisene põhiseaduslik disain täielikult teineteist. Kolmandaks on rahvusvaheline õigusraamistik normatiivselt piisav, kuid institutsiooniliselt alatase. Töö jõuab järeldusele, et kumbki riik ei taga kurdidele täielikult tulemuslikku juurdepääsu õiguskaitsele kooskulas rahvusvaheliste inimigõiguste standarditega.

Märksõnad: vähemusteõigused, õiguskaitsele juurdepääs, kurdid, Türkiye, Iraak