Norman Paech und Sebahattin Topçuoğlu

Protection of minorities, right to self-determination and autonomy

On the legal basis of a solution to the Kurdish problem in Turkey

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by
Prof. Dr Norman Paech and Dr Sebahattin Topçuoğlu

Content

INTRODUCTION BY MAF-DAD AND AZADÎ

This pamphlet is being published at a time when the grassroots democratic structures of self-government, which have until now been successfully implemented, are under threat not only in the Kurdish areas of Turkey but, dramatically, in the cantons of Northern Syria, in Rojava, from the 'Islamic State' (IS) terrorist militia. We therefore thought it important to take a brief look at the past, in order to illustrate how important it is to hold on to the ideas of autonomy and self-determination.

The disintegration of the existing state structures in the Middle East, which began with the US invasion of Iraq in 2003, has gathered pace in the last three years. Both internal opposition and focussed conflicts by the superpowers and regional powers have led, especially in Syria and Iraq, to a split into various ethnically and religiously dominated war zones, which are largely beyond the control of the respective central governments with the frontlines constantly shifting. The enormous rise of 'Islamic State (IS)"in Iraq and the capture of Mosul in the spring of this year have once again dramatically exacerbated the situation.

In connection with these radical changes, the Kurdish areas and their political groupings have been brought to international attention, as until now they have been more or less successfully able to limit the rise of IS on their own. There is consensus among the Kurds, and now also internationally, to achieve greater independence in the countries concerned once the current state of war has been stabilised and overcome. However, the two relevant political movements in Kurdistan have very different ideas about the nature of this planned independence. Whilst the northern Iraqi part of Kurdistan, under the influence of Mesud Barzani, plans a traditional independent nation state, the Kurds in Syria and Turkey embrace the concept of 'Democratic Confederalism' developed by the PKK leader, Abdullah Öcalan, which envisages autonomy for the Kurdish regions within the respective democratically converted nation states.

Developments are taking place in the various parts of Kurdistan under very different circumstances. Following occupation of the Kirkuk region in the spring by Kurdish Peshmerga in the shadow of central-Iraqi troops who had fled from the IS militias, Northern Iraq had already announced the declaration of an independent state but then itself became the victim of large-scale attacks by IS. Occupation of Kurdistan by the jihadists could only be prevented by a military cooperation between the Peshmerga in Northern Iraq and guerilla forces of the PKK with the

support of American airstrikes. In Syria the Kurds managed to fill the power vacuum caused by the Syrian civil war and in 'Rojava', three cantons along the Turkish-Syrian border which are not geographically linked, to build on their idea of grassroots democratic self-government under warlike conditions. Yet, this project is also threatened by attacks from IS, strongly supported by Turkey - currently principally in the middle canton of Kobanê.
In Turkey itself, the peace process which began in 2013 between the Turkish government and the PKK has now come to a halt. Further development depends directly on the situation in Syria and particularly on the line taken there by the Turkish government with regard to the Kurdish autonomous territories.
The outcome of this bloody conflict in Syria and in Iraq for the moment remains speculative, but there will be an 'end' to it.
And that is precisely why this study relating to future socio political concepts can form a basis for discussion. Norman Paech, founding member and board member of MAF DAD, and Sebahattin Topçuoğlu outline the legal framework for the Kurdish people under universal international law, from the concept of the protection of minorities through to the right of the peoples to self-determination right up to the various options for political self-determination.
In addition to much that is theoretical, in the annex the authors present practical examples of autonomy and federalism. These are historical and current experiences in Spain, with the Basque Country and Catalonia, Italy (South Tyrol), Belgium (Flemish, Walloons, Germans) and Great Britain (Scotland, Northern Ireland, Wales).
This is supported by an extensive bibliography.

We wish our readers an informative read.

Heike Geisweid
Chairman of MAF-DAD,
registered association

Dr. Elmar Millich
Chairman of AZADÎ,
registered association

Cologne, 20 October 2014

INTRODUCTION BY BILL BOWRING

This contribution to the resolution of the Kurdish question in Turkey is well-researched and very timely.

The distinguished authors conclude that without a political concept which enables the various peoples of Turkey to live together, their future will remain uncertain. Without a form of decentralisation, of autonomy, of renewal of the provinces of Turkey and federalism, the democratisation of state and society in Turkey will be impossible. It is impossible to argue with that conclusion. The burning question for the authors, and for the European Lawyers for Democracy and Human Rights, of which I am President, and whose member associations include the German Democratic Lawyers and Turkish Progressive Lawyers of which the authors are respectively activists, is what role if any international law can play. ELDH has proudly supported the struggle of the Turkish Kurds for the whole of its more than 20 years existence.

This is not a question for Turkey alone. The Kurds are most certainly a 'people' for the purpose of the right of peoples to self-determination in international law. Their continuing tragedy is that following World War I and the infamous Sykes-Picot agreement which carved up the middle east between Britain and France, the Kurds find themselves living geographically in their historical homeland, but politically in five different states: Turkey, Iraq, Iran, Syria and the Former Soviet Union. In each of them, Kurds are a minority, save in Kurdistan in northern Iraq in which they are autonomous and de facto independent.

Indeed, since the authors completed their text in April 2014, events have moved with extraordinary speed. At the time of writing this introduction the USA and UK are arming the Kurdish autonomy in northern Iraq, and the Christian Yezidi minority of Iraq, threatened with genocide by the forces of the Islamic State, are seeking asylum in Kurdistan. The Kurds of northern Syria face a very similar threat. Only the Kurds and their Peshmerga forces are seen by the West as capable of fighting the Sunni Islamic threat. Even Iran has become a potential ally in this bloody struggle. One thing is clear: the aftermath of the illegal invasion and occupation of Iraq by the USA and UK, and the continuing armed conflict in Iraq and Syria have proved to be lethal for all minorities.

At the same time, Recep Tayyip Erdogan has achieved an overwhelming victory in the recent presidential elections in Turkey. Having concentrated power in his hands as Prime Minister, he intends to turn Turkey into a presidential republic

along the lines of France or Russia. The position of the Kurds has certainly improved in recent years, in particular as concerns recognition of the Kurdish language. But the Constitution of Turkey expressly forbids any form of territorial autonomy or recognition of the group rights of a minority. The future of the Kurds of Turkey is very uncertain.

The authors give a brief overview of the current state of international law as concerns the protection of minority rights and the right of peoples to self-determination. There are two omissions, I think. First, the Council of Europe's 1992 European Charter for Regional or Minority Languages, which came into force in 1998, has not been signed or ratified by Turkey. The Charter does not protect minorities or their members, but is designed to protect languages as such. France, which like Turkey refuses to recognise the existence of minorities, will soon ratify the Charter. Ratification by Turkey would probably require an amendment to the Constitution, but would be an enormous step forward.

econd, the European Court of Human Rights has played a very important role in vindicating the rights of Kurds against Turkey. With my colleagues in the Kurdish Human Rights project I worked throughout the 1990s and into the new millennium, with human rights lawyers in Turkey to take several hundred cases to the Strasbourg Court. These concerned unlawful killing, torture, disappearance, and most important for the Kurds, confirmation of the massive programme of village destruction carried out in South East Turkey in the 1990s, leading to the internal displacement of some 3.5 million Kurds. And Turkey was forced to abandon the death penalty, saving the life of Abdullah Ocalan.

As noted above, the Kurds are most certainly a people, and most certainly have the right to self-determination in international law. As the authors point out, this right is rarely secured by way of secession from an existing state. International law balances the right to self-determination with the principle of uti possidetis juris which favours the preservation of existing boundaries. So in most cases some form of autonomy or even a federal arrangement will be the only solution.

The authors provide a useful focus on my own state, the United Kingdom, where, within a few weeks of writing this Introduction, there will be a referendum in Scotland as to whether it should become an independent state. But Scotland is a historical nation, which voluntarily united with England, and has every right to leave if and when it so desires. A bloody internal armed conflict in the whole of the UK over the question of Northern Ireland, which started in 1969 and caused some 40,000 deaths, was only brought to an end in 1997 when the Westminster government recognised the right of the people of the Island of Ireland to self-de-

termination. This was throughout the conflict a key demand of the Irish nationalist party, Sinn Fein.

Indeed, the right of peoples to self-determination is an eruption of revolutionary politics into international law, and is in no way the result of the liberal impulses of Woodrow Wilson in 1918, as the standard textbooks pretend. In the second half of the 19th century Karl Marx and Friedrich Engels fought for the right to self-determination of the Irish nation from England, and the Polish nation from Russia – and indeed for the Algerians and Indians bloodily oppressed by the French and British Empires. Before World War I, in an intense debate with Austro-Marxists who proposed non-territorial autonomy, Vladimir Lenin formulated in several texts a right of nations to self-determination, which he put into practice in the dissolution of the Russian Empire after 1918. The USSR fought tenaciously (if often hypocritically) for the right of colonial peoples to self-determination in the context of the UN Charter, the Universal Declaration of Human Rights, the 1960 Anti-Colonial Declaration, and with final success in Common Article I to two key legally binding treaties, the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights, of 1966.

This is why I have described the right of peoples to self-determination as 'the revolutionary kernel of international law'. The right of peoples to self-determination is now enshrined in international law, and has been recognised by the International Court of Justice as binding on all states erga omnes, as customary international law. But this right remains scandalous and an abomination to imperialism. In and near Europe alone, not only the Kurds but also the Basques, the Palestinians, the Irish and many other peoples are struggling for self-determination. The role of democratic and socialist lawyers is to assist them in every way possible. The two authors of this essay have performed a great service to the Kurds and to the development of international law.

Prof. Bill Bowring
President of the European Association of Lawyers for Democracy and World Human Rights, registered association, ELDH, London
17 August 2014

1. SCOPE OF THE STUDY

1.1 Political and legal context of the Kurdish question

The historic declaration by Abdullah Öcalan at Newroz in 2013[1] has opened a new chapter in the decades-long conflict between Turks and Kurds over peace, self-determination and recognition. It is not the first peace initiative to have come from him. However, to date they have all been stifled with blood and destruction in military conflict. One should recall in particular the ceasefire decision of 1998, which the PKK had extended to a definitive halt to all armed attacks on the Turkish military and to a withdrawal of their guerilla fighters from the disputed Kurdish territories. The sole objective of this ambitious offer was to put pressure on the Turkish government to find a political solution to enable the Turkish and Kurdish peoples to live peacefully together. For cessation of the armed struggle by the PKK did not mean at that time, any more than it does today, that the Kurdish people had given up their claim to recognition of their identity as a people and a minority and the rights arising therefrom. The move was at the same time coupled with the hope that pressure on the Turkish government would also be increased by the states of the European Union. For they also see a solution to the Kurdish question as being closely linked with their demand for the democratisation of Turkish society, in order to fulfil the EU admission criteria.

However, 1999 saw a series of events which clearly changed the parameters for a political solution to the Kurdish question. The decision by the PKK leader, Abdullah Öcalan, to leave his place of residence in Syria and travel to Europe ended in his unlawful abduction in Turkey and conviction on Imralı. Although the death sentence has since been lifted, and also his total isolation in prison on the island of Imralı has been temporarily relaxed, he continues to be denied the right to make the contribution which he could offer, given his importance to the Kurdish movement, in the search for a solution to the conflict.

Repeated assurances by the Turkish President, Turgut Özal, via Prime Ministers Bülent Ecevit and Necmettin Erbakan and now Recep Tayyip Erdoğan of their desire to resolve the Kurdish question do indeed show that discussions are going on in Turkey about key elements of Turkish policy and constitution, which also include the Kurdish question. However, apart from marginal cultural changes, Turkish politics has not moved away from its repressive and still essentially anti Kurdish approach.

1 Cf. Kurdistan Report 167, May/June 2013, p. 7 et seq.

As is demonstrated by the conflicts in the Balkans, Spain, the Caucasus, Africa, Indonesia and the Philippines, resolution of the Kurdish question is only one specific problem of the question reasserting itself all over the world, as to what rights peoples and minorities can claim within a sovereign federal state. The demand for secession and formation of a separate independent state, as is currently being made for example by the Basques and Catalans in Spain, is often the expression of a political impasse and lack of alternatives. However, a people which is persistently refused recognition and representation of its political, cultural and economic interests as well as its basic and human rights ultimately has no alternative but to demand its own state organisation.

The age of decolonisation has taught us that the demand for an independent state in many cases can only be achieved through the use of force. However, the two NATO states of Turkey and Spain bear testament to how slim the chances are of forcibly breaking up the borders of modern, well-armed states integrated in a military alliance in favour of a new state structure. It also took a bloody thirty-year struggle for liberation to release a separate Eritrean state from Ethiopia, but this example is not an appropriate model for liberation struggles in a European context. The political and socio-economic conditions are too different. Nor does the dissolution of Yugoslavia into a number of individual sovereign states since 1991 provide a reproducible model. The secession of different constituent republics, a process which evidently has not yet concluded, was and is only possible because it has been actively supported by the NATO states of Western Europe and the USA.

However, the case of Kurdistan is quite different. Here, there is not only a lack of support by the NATO states but the secession of Turkey is diametrically opposed to their own interests. Division of the Kurdish people across four sovereign states, Turkey, Iran, Iraq and Syria, and the sociological constitution of Kurdish society currently still present insuperable internal problems for the formation of an independent state. This adverse internal and external situation has contributed to the PKK waiving the creation of a separate independent Kurdish state since as recently as 1995. Whilst there may also be groups within the Kurdish population which continue to strive for the creation of an independent state, and whilst the effective autonomy of the Kurds in Northern Iraq offers a seductive example, the advocates of this idea are not as representative of the Kurdish people as the PKK.

It has been a feature of Turkish politics to ignore all these political advances by the Kurds, whether it be a ceasefire or waiver of an independent state, and to rely solely on the subjugation and destruction policies of its military. However, the cessation of hostilities by the Kurds should not lull the Turkish government into

the false belief that it has now resolved the Kurdish question. Rather, this question combines challenges such as economic development, political participation and cultural identity which relate to one mission, that of remodelling Turkish society into a democratic, multi-cultural society. In this respect also, ideas have time and time again been developed by the Kurds, particularly by the PKK leader, Abdullah Öcalan, since his defence plea, and also by the executive committee of the PKK, but have to date been rejected by the Turks without closer examination.

The primary objective of the most recent proposal by Abdullah Öcalan in March 2013, which has been adopted by the 'Community of the Societies of Kurdistan' (KCK), the 'Kurdistan Workers' Party' (PKK) and the 'People's Defence Force' (HPG), is the restoration of peace. In a three-stage process, following a ceasefire by both sides, there should initially be a withdrawal of the guerilla forces from Turkish national territory and a 'Committee of Wise Men' should be set up for public and parliamentary discussion of the resolution process.[2] In the second phase, in parallel with the withdrawal of the guerrilla forces, political prisoners should be released from custody and the solitary confinement conditions imposed on Abdullah Öcalan lifted. Then, the building of new military bases, dams and hydroelectric power plants should be stopped, the village guard system and the anti-terror laws (TMK) scrapped, teaching in the Kurdish language reintroduced into schools and conditions created which would enable millions of internally displaced Kurds to return to the homeland.

The scope of the demands shows the considerable extent to which changes in Turkish politics are necessary in order to democratise the society. On top of these are other demands such as the demand for a guarantee of freedom of the press and the release of all detained journalists, as well as a reduction of the 10 % hurdle for elections. The demand for a move away from the central state with subdivision into 20 – 25 regions [3] according to cultural, social and economic criteria must seem truly revolutionary to the Turkish government. Furthermore, these regions should maintain a communal self-government in order to strengthen representation of the people and democratisation.

This second stage requires an in-depth restructuring of the Turkish state structure, in which all antidemocratic laws and regulations should be removed and the way paved for a new constitution. The second phase should be concluded with a

2 Cf. Civaka Azad, The Kurds demand a fair peace process, in: Kurdistan Report 169, September/October 2013, p. 7 et seq.

3 Cf. Topçuoğlu, Dezentralisierung und Selbstverwaltung. Eine Herausforderung an den Nationalstaat als Antwort auf die Kurdenfrage in der Türkei (Decentralisation and self-government. A challenge to the nation state in response to the Kurdish question in Turkey), Baden-Baden 2012, p. 303; 362.

new constitution. Progress will no doubt take some time, if it is actually to be accepted by the Turkish government. Not until the second phase has been completed should the third phase of standardisation begin, in which the guerrillas are returned to Northern Kurdistan (South-East Anatolia), the PKK is legalised and Abdullah Öcalan and all other political prisoners are released.

This study is limited in scope to the legal basis of the coexistence of two peoples in Turkey and its neighbouring states. It starts with the political demands of the Kurdish people for recognition of their Kurdish identity, for equality in the democratic society and participation in the political, economic and cultural organisation of the Turkish state, as they are made clear in the specific demands outlined.

The study will not discuss the political alternatives of theoretical models of the state, which must be reserved for political negotiations. It seeks only to clarify which legal framework is available to the Kurds, within which they can develop their claims and proposals and present them to the Turks. It is therefore to be determined in the necessary negotiations whether the Kurds exhaust the scope of the rights available to them or claim these only in part.

1.2 The Kurds as a people and a minority

The starting point of the legal assessment is the fact, gradually ceasing to be denied by the Turkish government, that the Kurdish people are a separate entity from the Turkish people as to their history, language, culture and traditions, i.e. are an independent people. The criteria according to which this distinction is made are difficult to determine in the absence of a clear definition of 'peoples' under international law. The definition is made all the more difficult by the fact that conventional international law is a law of states rather than a law of peoples, i.e. it is associated with the existence and organisation of states, not of peoples. Only states were bearers of the rights and subjects of international law until enforcement of the right to self-determination as a law of peoples. Different peoples could only exercise certain limited rights within their borders as minorities. Only with the enshrining of the right to self-determination in the Charter of the United Nations and recognition of its legal character in the mid 70s did it become necessary to extend an ethic, religious or linguistic concept of community with legal definition to a legally binding concept of people,

as it is initially the national population which forms the human basis of each state. The national population includes the entire population of the state and is

generally made up of a plurality of different ethnic peoples and minorities. If the national population is considered by numerous authors to be the bearer of the right to self-determination[4], then this is broadly identical to the right of the state, resulting from its sovereignty, to defend itself against incursions. Therefore, it is essentially a defensive right to self-determination directed against external influences,[5] which tells us little about the internal status of the national population.

However, in states which are not ethnically homogenous, which is more the reality in the world of modern states, the assignment of rights is more complicated. Here, there may be ethnic groups none of which dominates in a state, so they live together equal in strength and on equal terms. This was the case in Yugoslavia under Tito, for example, and the same can also be said today of Belgium and Spain. However, there are also states in which one ethnic group is dominant and others live as minorities. In this case, a crucial factor is whether the ethnic minorities accept their status or wish to break away from the dominant ethnic group and establish their own independent state organisation. Canada (Quebec) and Spain (Basques and Catalans) may serve as examples of the latter case. In order to determine the rights of these groups as a people and/or minority, the question arises of how to define the concept of an ethnic people. For only a people is the bearer and subject of the right to self-determination.

Two definitions have emerged, which relate on the one hand to subjective and on the other to objective elements. The subjective approach takes into account only whether a group of people see themselves as a people. As special reporter to the United Nations on the right of peoples to self-determination, Aureliu Cristescu, says:

> 'The fact is that, whenever in the course of history a people has become aware of being a people, all definitions have proved superfluous.'[6]

The arbitrariness of this approach is avoided if objective criteria are included, which are crucial in ethnology: language, territory, culture, religion, tradition and historical roots. A group of people who identifiably settle in a particular territory and have common linguistic, cultural and historical characteristics, should beyond

4 Cf. for example Daniel Thürer, Das Selbstbestimmungsrecht der Völker (mit einem Exkurs zur Jurafrage) (The right of peoples to self-determination (with an excursion on the Jura question)), Berne 1976, p. 197.

5 Cf. Dietrich Murswieck, Offensives und defensives Selbstbestimmungsrecht (Offensive and defensive right to self determination), in: Der Staat (The state), 1984, p. 532.

6 Aureliu Cristescu, The Right to Self-Determination, the Historical and Current Development on the Basis of United Nations Instruments, in: UN-Doc. E/CN. 4/Sub.2/404/Rev.1, p. 17.

doubt be recognised as an independent people, if they see themselves as a people as well. So, for example, on the basis of these subjective and objective criteria, the Tibetans have been described and recognised indisputably as a people.[7]

It may be difficult to still refer to a people, if that group of people is no longer assigned to a delimited territory because the people have settled elsewhere or been driven out. The absence of territorial identifiability can be taken as evidence that the people have become assimilated and can no longer be considered to be an independent people. On the other hand, however, the fact that a people has never in the course of its history attempted an independent state organisation, cannot be turned against its characterisation and definition as a people. Even if building a state forms part of the political objective of most peoples, it is not however a necessary element of the concept of a nation.

Based on all these criteria, there is no doubt that the Kurds possess all the characteristics of an independent people: These include, firstly, the ancestral settlement area, which in spite of the creation of arbitrary boundaries and subdivision into multiple states at the beginning of the last century is still identifiable as Kurdistan. Nor have the massive displacements and movements of refugees from Northern Kurdistan (Turkey) and Southern Kurdistan (Iraq) taken away the territorial cohesion of the Kurdish people. The Kurdish language, which has as little commonality with Turkish as it does with Arabic, is the most persuasive element of an independent Kurdish national character. Added to this are cultural characteristics of the literature and music which, despite extensive suppression by the states, have not however been destroyed or lost their independence. In this respect, the fact that the Kurds are an independent people is no longer seriously disputed even in Turkey.[8]

Yet, peoples such as the Kurds are at the same time minorities in their country. Minorities also have particular protective rights which, whilst they are not identical with the right of peoples to self-determination, do overlap with it.[9] The difference is already highlighted by the fact that people do not generally speak of a right to self-determination for minorities, and the development of protective

7 Cf. Felix Ermacora, Wolfgang Benedek, Bericht der österreichischen Rechtsexpertendelegation über ihren Besuch in China/Tibet im Juli 1992 (Report by the Austrian delegation of legal experts on their visit to China/Tibet in July 1992), in: Verfassung und Recht in Übersee (Overseas constitution and law) 1993, p. 31 et seq.

8 Cf. Philip G. Kreyenbroek, Stefan Sperl (eds.), The Kurds. A contemporary overview, London New York 1992; Henri J. Barkey, Graham E. Fuller, Turkey's Kurdish Question, New York 1998; Ove Bring, Kurdistan and the Principle of Selfdetermination, in: German Yearbook of International Law 35, p. 157 et seq.

9 Cf. Antonio Cassese, Self-Determination of Peoples. A Legal Appraisal, Cambridge 1995, p. 348 et seq.

rights for minorities has evolved independently.[10] However, the substantive differences which arise in the scope and form of the rights for peoples and minorities cannot be determined from the fact alone that one is a collective right and the other an individual right, or that the option of forming an independent state is strictly withheld from minority rights.[11]

Nor does international law offer any definition of minorities which is not equally problematic in view of the weaker rights of a people vis-à-vis the right to self-determination. Nevertheless, the term 'minority' is also ethnically and not politically (e.g. communists) or culturally (e.g. homosexuals) defined. Thus, F. Capotorti combines the subjective and objective elements mentioned above in a definition which includes inferiority in terms of numbers and non-dominant position as well as distinctiveness on the basis of ethnic, religious or linguistic characteristics and the will for solidarity.[12] However, it does emerge from this that minorities are not always peoples, but may also be religious or cultural groups.[13] Often they are merely ethnic groups which are part of another national population (e.g. the Danish minority in Schleswig Holstein).

However, since most populations are at the same time minorities which have to assert themselves within a country against the majority population or populations, or even wish to break away from them into their own state, competition between them and/or limitation of the right to self-determination and the protection of minorities is critical for the content and scope of laws. This is especially true of the Kurds, who cannot simply be reduced to the status of a minority given that, after the Turks, they are the second largest population in the country, with their own minorities (e.g. Aramaeans/Assyrians). Moreover, the desire for separation from Turkey and sovereignty will surface again and again, if the dominant Turkish pop-

10 Cf. Hans-Joachim Heintze (ed.) Moderner Minderheitenschutz. Rechtliche oder politische Absicherung? (Modern protection of minorities. Legal or political protection?) Bonn 1998.

11 Cf. Hans-Joachim Heintze, Selbstbestimmungsrecht und Minderheiten (Right to self-determination and minorities), in: Erich Reiter (ed.), Grenzen des Selbstbestimmungsrecht. Die Neuordnung Europas und das Selbstbestimmungsrecht der Völker (Limits on the right to self-determination. The restructuring of Europe and the right of its peoples to self determination), Vienna inter alia, 1996, p. 61 et seq.

12 Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and LinguisticMinorities, United Nations, New York 1991, para. 95 et seq.

13 Manfred Mohr, Die Vereinten Nationen und der Minderheitenschutz. Versuch einer Bestandsaufnahme (The United Nations and the protection of minorities. Attempt at an evaluation), in: M. Mohr (ed.) Friedenssichernde Aspekte des Minderheitenschutzes in der Ära des Völkerbundes und der Vereinten Nationen in Europa (Peacekeeping aspects of the protection of minorities in the age of the League of Nations and the United Nations in Europe), Berlin inter alia 1996, p. 85 et seq., 89 et seq.

ulation is not prepared to continue to recognise the rights of the Kurds.

The competition between the right to self-determination and the protection of minorities in relation to the Kurdish question makes it necessary first to present both legal concepts in substance and in terms of their historical development. After that, we will look at which legal framework emerges for the Kurds in a political solution to their coexistence with the other peoples in the countries in which they form a minority, but particularly in Turkey.

2. THE CONCEPT OF THE PROTECTION OF MINORITIES

2.1 Historical protection of minorities

Minorities have always found it difficult to maintain their identity, traditions, culture and language vis-à-vis dominant peoples and to resist the pressure exerted on them by the respective ruling civilisation to assimilate. Many ethnic groups have disappeared, whilst others have been able to survive as a result of state protection agreements. Efforts to provide such protection to religious, linguistic and ethnic minorities have been made since the end of the 15th century, when European civilisation effectively spread across the entire globe.[14]

Initially, in Europe itself, it was a question of the protection of religious minorities, as was sought, for example, in the religious Peace of Augsburg. At the same time, in agreements with the countries of the Middle East and Far East, which were outside European international law and Christendom, the European powers secured for themselves the privilege of jurisdiction over their own nationals, which they often associated with a right to intervene. Such agreements between the Turkish sultan and the Christian countries were customary from 1535. The 1878 Act of the Congress of Berlin secured the principle of religious freedom and equal rights for all subjects of the sultan and, by the same token, for the non-Christian minorities in the newly formed countries of Bulgaria, Montenegro, Serbia and Romania. In the 17th and 18th centuries, rules were adopted in favour of religious minorities under the terms of the Peace of Westphalia. With the Congress of Vienna in 1815, protective provisions then became widespread for the first time for national minorities. Thus, the final act of the Congress of Vienna attempted to give the Poles protection of their nationality as did the Treaty of Berlin of 1878 to the Armenians in Turkey and the Turks, Romanians and Greeks in Bulgaria.

International recognition and regulation of the rights of minorities became urgent after the First World War, which reshaped the nations of the world, particularly in Eastern and South-Eastern Europe.[15] However, the percentage of the popu-

14 Cf. Felix Ermacora, Menschenrechte in der sich wandelnden Welt (Human rights in the changing world), Vol. 1, Vienna 1974, p. 81 et seq.; Patrick Thornberry, International Law and the Rights of Minorities, Oxford 1991, p. 25 et seq.

15 Cf. Francesco Capotorti, Minderheiten (Minorities), in: Rüdiger Wolfrum (ed.), Handbuch der Vereinten Nationen (Handbook of the United Nations), Munich 1991, p. 598 et seq.; Rainer Hofmann, Minorities, European Protection, in: Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (MPEPIL),

lation which could be counted as minorities in the European countries had greatly reduced. If in 1914 approximately sixty million people, or fifty per cent of the population, in Eastern Europe still belonged to minorities, by 1920 the number had dropped to approximately thirty million, which made up twenty-five per cent of the total population. On the other hand, the number of minorities increased, as the number of countries had increased overall.[16] Under the peace treaties, the occupied countries of Austria, Hungary and Turkey had to commit to a minimum protection plan in respect of minority rights. Yet it failed to enshrine a legal principle for the protection of minorities either for religious or ethnic groups in the constitution of the League of Nations. However, in 1922/23, the Baltic countries had to make corresponding declarations, in order to be accepted into the League of Nations.

The German Reich, which had lost almost all its ethnic minorities as a result of the cession of territories, was obliged in 1921 in Upper Silesia to apply the same rules to the population of Polish origin. Protective provisions for minorities appeared in numerous bilateral agreements of the post-war period. Some agreements even provided for a compulsory exchange of minorities, as in the Convention Concerning the Exchange of Greek and Turkish Populations in 1923.

The protective provisions of these agreements not only prohibited discrimination in relation to general civil liberties and assimilation, but to some extent granted significant special rights for educational, cultural, social and religious institutions. At the same time, these agreements were concluded under the 'guarantee' of the League of Nations and the Permanent Court of International Justice (PCIJ). The duty of the state to provide protection was specifically set out as follows, 'that each member of the Council is authorised to draw the attention of the Council to any breach or any risk of a breach of any of these obligations, and that the Council is authorised to take any steps and to issue any instructions which appear appropriate and effective in the particular circumstances of the case'. Each member of the Council was actively authorised, 'in the event of a difference of opinion with the country obliged to protect minorities' to present this dispute to the PCIJ. In practice, however, this protection failed, as the members of the Council failed to exercise their guarantee rights.[17]

Heidelberg 2007, para. 10 et seq.; Kristin Henrad, Minorities, International Protection, in: MPEPIL, 2008, para. 32 et seq.; Anna Meijknecht, Minority Protection System between World War I and World War II, in: MPEPIL, 2010, para. 1 et seq.

16 Cf. Jörg Fisch, Das Selbstbestimmungsrecht der Völker (The right of peoples to self-determination), Munich 2010, p. 183.

17 Cf. Norman Paech, Gerhard Stuby, Machtpolitik und Völkerrecht in den internationalen Beziehungen

2.2 Definition of minority and protection of minorities

In the absence of a definition of the concept of a minority under international law treaties, there have been repeated attempts to define it in the literature and the Commission works of the United Nations. Ultimately, a number of features have emerged which are generally accepted and deliver the framework for a definition of 'minorities'.[18] Minorities are groups of persons having a strong sense of solidarity, who are smaller in number than the majority and are identified by ethnic, religious or linguistic characteristics, which they wish to preserve, and who have the nationality of the majority.

However, the characteristic of nationality was a contentious issue for a long time. In fact, there are substantively good reasons to also include the 'new minorities' of migrant and foreign workers, refugees and asylum seekers in the protection of minorities. Nor does Art. 27 of the International Covenant on Civil and Political rights rule out such an interpretation. And yet all attempts in the UN Human Rights Committee to push through such an extension of the concept of minorities have so far failed.[19]

In addition, there were always those demanding an assurance of national loyalty from the minority. On the other hand, however, it might be argued that even an oppositionalist and disloyal grouping, which may have separatist tendencies (for example, the Basques in Spain today), constitutes a minority. Nonetheless, minorities do not include discriminated groups such as homosexuals, since they are not identified by ethnic, linguistic or religious characteristics. Protection of these groups must be guaranteed by way of the prohibitions on discrimination and equal rights postulates which are codified in almost all constitutions. There is no doubt then that the Kurds have minority status in Turkey, Iran, Iraq and Syria.

2.2.1 Protection of minorities within the scope of the UN

The protection of minorities does not feature in the Charter of the United Nations either. It was considered that the problems arising with the ban on discrimination under Art. 1 paragraph 3 can be resolved, in that:

(Power politics and international law in international relations), Hamburg 2013, p. 190 et seq., para. 138 et seq.

18 This definition was greatly influenced by a study by Francesco Capotorti, Study on the Ethnic, Religious and Linguistic Minorities, in: UN-Doc. E/CN.4/Sub.2/384/Rev.1.

19 Cf. Hans-Joachim Heintze, Selbstbestimmungsrecht und Minderheitenrechte im Völkerrecht (Right to self-determination and minority rights in international law), Baden-Baden 1994, p. 126.

> 'The United Nations set themselves the following objectives: …3. to bring about international cooperation, in order to resolve international problems of an economic, social, cultural and humanitarian nature and to promote and secure respect for human rights and basic freedoms for all, irrespective of race, sex, language or religion.'

In 1946, the UN Economic and Social Council transferred protection of minorities to the Commission on Human Rights established by it, which was authorised to establish two subcommittees to confront discrimination and for the protection of minorities. The Commission on Human Rights was content with the formation of a 'Sub-Commission on Prevention of Discrimination and Protection of Minorities'. The wording of Art. 27 of the International Covenant on Civil and Political Rights of 1966, which until now has remained the only universal regulation for the protection of minorities, is based on the preliminary work of this sub-commission:

> 'In countries with ethnic, religious or linguistic minorities, members of such minorities may not be denied the right to lead their own cultural life, to profess and practise their own religion or to use their own language together with other members of their group.'

Paramount is the fight against discrimination without granting special rights.

Also the Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 only permits special rights for the promotion of specific groups which are of limited duration, and so essentially adopts the approach of equal integration of all individuals in one society. Art. 27 defines the individual within the minority as the bearer of the human rights. However, it is generally accepted that these rights must necessarily be exercised collectively, but without giving the rights themselves a collective character, as is the case with the right to self-determination. First and foremost, the contracting states are obliged to refrain from taking any measures which would exert pressure to integrate or assimilate. Obligations to exercise positive discrimination (affirmative action) are generally rejected.

Since 1979 the United Nations Sub-Commission had been working on drawing up a declaration of minority rights, based on a Yugoslav draft, which was concluded at the beginning of the 1990s and successfully adopted in 1992 with UN resolution 47/135.[20] In it, the individual rights of members of minorities are more

20 Cf. wording in: German Federal Agency for Political Education (ed.), Menschenrechte. Dokumente und

specifically designated as individual rights, from the nurture of their culture, practising their religion and public use of their own language, through participation in public life, to freedom of association and contacts with other minorities related to them even across borders (Art. 2). The resolution includes a request to countries to take positive steps to realising minority rights. This is what is stated in Art. 4:

> '1. States should take the necessary measures to guarantee that members of minorities are able to exercise fully and effectively all their human rights and basic freedoms without any discrimination and in full equality before the law… 5. States should consider appropriate measures to ensure that members of minorities can fully participate in the economic progress and economic development in their country.'

However, the resolution is merely a recommendation and does not create any rights and obligations. The same is true of the resolutions of the UN General Assembly at the 49th Session, by which the discriminations and human rights breaches against 'ethnic Albanians' in Kosovo, discrimination against religious minorities in Iran, such as the Baha'is, whose existence as a religious community is under threat, and the situation in Afghanistan which threatens the safety of members 'of all ethnic and religious groups including minorities' are condemned.[21] There has to date been no corresponding resolution on the situation in Kurdistan.

The famous resolution of the UN Security Council 688 (1991), which denounces the 'suppression of the Iraqi civilian population in the Kurdish settlements' and refers to the human rights and political rights of 'all Iraqi citizens' (paragraphs 1 and 2), is not strictly speaking a minority protection measure. The creation of safe zones is a humanitarian measure for the general protection of human rights, as such measures have also been undertaken in other regions which are under threat.[22] By resolution 925 (1994) on Rwanda, for example, the UN Security Council declared a humanitarian crisis, just as it did in the case of Somalia by resolution 794 (1992), which already in itself - and not only as a result of the ensuing flood of refugees, as in resolution 688 – constituted a threat to international peace. Resolution 925, for example, condemns incitement to racial hatred, the exploita-

Deklarationen (Human rights. Documents and declarations), Bonn 1999, p. 131 et seq.; Cf. Manfred Mohr, The United Nations and the protection of minorities. Survey, (Note 13) p. 85 et seq.

21 UNGA resolutions 49/204, 49/202, 49/207.

22 Cf. Manfred Mohr, The United Nations and the protection of minorities (Note 12), p. 105; Schulte-Tenckhoff, Tatjana Ansbach, Les minorités en droit international (Minorities in international law), in: A. Fenet (ed.), Le Droit et les Minorités (Minorities and the Law), Brussels, 1995, p. 79 et seq.

tion of ethnic tensions for political ends, which has led to war and human rights breaches.

As is so often the case, minorities are instrumentalised in political disputes and used to exacerbate conflicts, yet these conflicts are not in themselves originally minority problems. They exacerbate the conflict but do not cause it.

2.2.2 Protection of minorities at European level: OSCE and the Council of Europe

It is also necessary to take a look at the European regulations. Art. 14 of the European Convention on Human Rights (ECHR) of 1950 guarantees a right to equality in the case of 'membership of a national minority' only in the context of a prohibition on discrimination:

> 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

For a long time, efforts to supplement this purely negative protection by means of an additional protocol with unambiguous standards were fruitless, and adoption of a European Charter of Regional and Minority languages only succeeded on 5 November 1992[23]. In its document of the Copenhagen conference on the human dimension of 29 June 1990, the CSCE dedicated Articles 30–39 to the principles of the protection of minorities. An important aspect of this non-binding recommendation is that association with a national minority should be a matter for the personal and subjective decision of the individual, which should not bring with it any disadvantage. Furthermore, in 1992 it was resolved to appoint a High Commissioner for Minorities as a quasi early warning system for impending minority problems.

Finally, following lengthy preliminary work,[24] in February 1995 a framework agreement of the Council of Europe was set up for the protection of national

23 Wording in: German Federal Agency for Political Education (ed.), Menschenrechte (Human rights) (Note 20), p. 540 et seq.

24 Cf. on the previous history, Federal Ministry of Justice, Schutz nationaler Minderheiten in Europa. Texte, Materialien, Erläuterungen zum Rahmenübereinkommen (Protection of national minorities in Europe. Texts, materials and explanations to the framework agreement), Bonn o.J., p. 26 et seq.

minorities.[25] It came into force with the 15th ratification by Finland on 1 February 1997.[26] It contains for the first time detailed and specific regulations on the standards of a modern democratic minority policy, which are mandatory for the signatory states: protection from assimilation, prohibition on discrimination, principle of equality, protection of the civil liberties of minorities, request for assistance. However, these provisions will not be directly applicable, but merely provide the orientation and the framework, albeit binding, within which they must make their laws for the protection of minorities. Art. 3(2) specifies that the rights and freedoms which arise under the framework agreement can be practised both individually and jointly with others. The difference between this and the granting of collective rights is therefore obvious. However, a clear boundary is also drawn with the right to self determination, in order to prevent any attempts at separation. For example, the Federal Government has agreed to apply German nationality to the Danish minority and to the Sorbs, Frisians, Sinti and Roma. However, there is no definition of 'national minority' in the agreement, as the states were unable to agree on one.

The following elements are now generally accepted as part of the protection of minorities: protection from assimilation, prohibition on discrimination, guarantee of equality and participation in public life, promotion of participation. Rights to political participation are understood to mean not only participation in decision-making processes and the founding of independent political associations and parties but potentially also the establishment of an autonomous state, which may lead to 'territorial decentralisation'.[27]

It is also generally agreed that minorities have no right of secession for the purpose of forming an independent state.[28] The former Secretary General of the UN,

25 Wording in: German Federal Agency for Political Education (ed.), Human rights (Note 20), p. 530 et seq.

26 The 15 necessary ratifications originate from Denmark, Germany, Estonia, Finland, Italy, Liechtenstein, Croatia, Macedonia, Moldavia, Romania, San Marino, Slovakia, Spain, Hungary and Cyprus. France has expressed a reservation, as it denies the existence of any minorities on its territory. Rainer Hofmann, Minorities, European Protection, in: Rüdiger Wolfrum (ed.), MPEPIL, Heidelberg 2007.

27 Cf. Asbjörn Eide, Protection of Minorities, Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities, Report to the Subcommission of the Human Rights Commission E/CN.4/Sub.2/1993/34, Add. 4, para. 17; Hans-Joachim Heintze, Völkerrechtliche Konsequenzen der Schaffung von Schutzzonen für die Kurden im Nordirak (Implications for international law of the creation of safe areas for the Kurds in Northern Iraq), in: Humanitäres Völkerrecht (International humanitarian law) 8 (1995) 1, p. 16 et seq.

28 Cf. Hans-Joachim Heintze, Right to self-determination and minority rights in international law, (Note 16) p. 140 et seq.; Manfred Mohr, Abgrenzung von Selbstbestimmungsrecht und Minderheitenschutz (Delimitation of the right to self determination and protection of minorities), in: Hans-Joachim Heintze (ed.), Selbstbestim-

Boutros Boutros-Ghali, in his Agenda for Peace, pointed to the destabilisation of states as a result of secession claims:

> '… if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.'[29]

One of the significant differences between the protection of minorities and the right to self-determination lies in this limitation of the former. The concept of the protection of minorities is aimed at awareness of the rights of minorities and human rights within an existing state structure which is, in principle, worth preserving. To some extent, this is a consequence of attempts to express the fact that minorities are referred to as bearers of an 'internal right to self determination'.[30] However, the prevailing opinion starts from the premise that minorities in principle have no right to self-determination.[31]

mungsrecht der Völker – Herausforderung der Staatenwelt (Right of peoples to self determination, challenge to the nations of the world), Bonn 1997, p. 122 et seq., p. 133 et seq.

29 Agenda for Peace A/47/277. para. 17.

30 Thus, for example, Felix Ermacora, Der Minderheitenschutz im Rahmen der Vereinten Nationen (The protection of minorities under the aegis of the United Nations), Vienna 1988, p. 18 et seq.; Karl Doehring, Self-Determination, in: Bruno Simma (ed.), The Charter of the United Nations, Munich 1994, paras 28, 32.

31 Cf. Manfred Mohr, The United Nations and the protection of minorities. Survey, (Note. 13), p. 86 et seq., 96; Hans-Joachim Heintze, The right to self-determination and minority rights in international law, (Note 16), p. 46; D. Murswiek, Die Problematik eines Rechts auf Sezession – neu betrachtet (The problems of a right to secession revisited), in: Archiv des Völkerrechts (Archive of international law) 31 (1993), p. 328.

3. THE CONCEPT OF THE RIGHT TO SELF-DETERMINATION

3.1 Origin and legal content

The concept and objective of the right of peoples to self determination date back to the civic Enlightenment of the 18th century. It achieved its first revolutionary presence in the American Declaration of Independence of 1775, which demanded the right of the people to be liberated from a regime which disregards the inalienable rights of the people and is no longer tolerated by the 'accord of those governed'. Clearer still and in logical connection with the principle of sovereignty of the people, the right to self-determination appeared in the French Revolution, when all peoples who wished to free themselves from their authorities were promised brotherly support and assistance from the French army.[32] Nevertheless, the constitution of June 1793 reaffirmed the principle of non-intervention. The first acid test faced by the right to self-determination was in the colonial question, when in 1790/1791 the 'Mulattos' and 'Negroes' revolted on the island of Saint Domingue in the Caribbean. After intense debates in the National Assembly, in February 1794 it was decided by a large majority to abolish slavery in the colonies.

Yet in the next century, the right to self-determination played no critical role in the colonial question. Only in the twentieth century, at the start of the First World War, was it reintroduced into the debate by American President Woodrow Wilson, as the central principle of a future peace arrangement. In his 'Fourteen Points' statement given on January 1918, he linked the territorial integrity and political independence of all states with the right of peoples to self-determination and the protection of national minorities. It is not the granting of the right to self-determination to peoples which causes wars but its rejection. Nevertheless, the right was still not accepted as an explicit objective in the constitution of the League of Nations.

Only with the fresh attempt, after the Second World War, to resurrect the failed system of collective security in the United Nations organisation, was the right to self-determination also mentioned in the Charter of 1945 (Art. 1 line 2, 55 UN Charter).[33] However, it is clear from the rather obscure and inconspicuous position

32 Decrees of 19 November and 15 December 1792, cf. Norman Paech, Gerhard Stuby, Power politics and international law in international relations, (Note 17), p. 62 et seq., para. 95.

33 Cf. Jörg Fisch, The right of peoples to self-determination, (Note 16), p. 220 et seq.

of the term in the Charter that the authors did not have a clearer idea of either the substantive clarification or the legal importance – there was no reference at all to the protection of national minorities. Accordingly, the right to self-determination in that post-war period was generally also denied any more specific legal force and referred to rather in the area of general objectives.[34]

It was only updated in terms of the content and achieved legal specification in the following phase of the colonial struggles for freedom. What the founding states of the UN had not managed to do, namely permanently free themselves from their colonial legacy, the oppressed peoples had to take into their own hands and carry through in conflicts which were in some cases bloody and involved heavy losses. The basis of the anti-colonial movements in international law formed the right to self-determination, which they consequently linked with the roots and first principles of the civil liberation movement of the close of the 18th century. The more peoples were able to push through their state independence in the fifties against the old colonial powers and were accepted into the UN as sovereign states, the better they were able to enshrine their ideas of independence, equality and self-determination in relevant documents of the UN General Assembly.[35] This was expressed for the first time on 14 December 1960 in the famous decolonisation resolution 1514 of the 15th General Assembly, which in the meantime 18 new independent states had joined:

> '1. The subjection of peoples to foreign subjugation, subordination and exploitation constitutes a denial of basic human rights, is contradictory to the Charter of the United Nations and damages the cause of world peace and international cooperation.
>
> 2. All peoples have the right to self-determination; based on this right, they are free to determine their political status and are free to organise themselves.'

Some authors saw in this resolution a revolutionary attempt to revise the UN

34 Cf. Karl Jürgen Partsch, Selbstbestimmung (Self-determination), in: Rüdiger Wolfrum (ed.), Handbook of the United Nations, Munich 1991, p. 745 et seq.; Karl Doehring, Das Selbstbestimmungsrecht der Völker (The right of peoples to self-determination), in: Bruno Simma (ed.), Die Charta der Vereinten Nationen (The Charter of the United Nations), Munich 1991, p. 15 et seq.

35 Cf. Norman Paech, Gerhard Stuby, Power politics and international law in international relations, (Note 17), p. 706 et seq., paras 165 et seq.

Charter by informal means.[36] More correctly, it was the realisation of a consequence of the right to self-determination under the UN Charter. The resolution was, above all, a breakthrough in justifying the struggle for liberation and from then on it became accepted practice to affirm each year 'the inalienable right to independence and self-determination' of peoples under colonial rule.[37]

For the first time, the resolution had also established a link between subjugation under foreign rule and human rights. As recently as 1948, an application by the Soviet Union to adopt the right to self-determination in the Universal Declaration of Human Rights was refused. In 1966, however, the situation changed and the UN General Assembly placed the right to self-determination at the beginning of each of the two human rights covenants. Art. 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights are worded identically:

> 'All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely organise their economic, social and cultural development.'

This was a double achievement. Adoption of the right to self-determination in two legally binding human rights covenants[38] put its binding legal force beyond all doubt. Contractually secured once more under the UN Charter (and this time in a prominent position), this also meant confirmation of its importance as a principle of customary international law in general. Also, for the first time a legal definition was available which provided clarity to the content and scope of the right to self determination. This development had been supported by the fact that in 1970 the last western countries had given up their opposition to the right to self-determination on its anti-colonial course and had unanimously adopted the basic 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' (so-called Declaration on Principles).[39] It states in the declaration, inter alia:

> 'By virtue of the principle of equal rights and self-determination of peo-

36 Hence, for example, Michla Pommerance, Self-Determination in Law and Practice: The New Doctrine in the United Nations, London 1982, p. 11.

37 As late as December 1960, the right of the Algerian people to self-determination was recognised, and in the years which followed that of the peoples of Angola and South-West Africa.

38 both covenants came into force in 1976.

39 UN General Assembly resolution 2625 (XXV) of 24 October 1970.

> ples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter…
>
> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self determination by the people…'

Since that time, the right to self-determination is no longer regarded merely as a political principle or non-binding agenda in international relations, but as a binding rule of international customary law as part of mandatory legislation (ius cogens). The UN General Assembly has reaffirmed this time and again in numerous resolutions.[40] The International Law Commission recognised the right to self-determination as ius cogens even before 1970 and subsequently cited its breach as an example of an international crime.[41] The International Court of Justice confirmed its mandatory force as a customary law in its report on Namibia[42] and on the Western Sahara[43] and in its legal dispute between Nicaragua and the USA[44].

3.2 Present content and concept

However, the unambiguously anti-colonial background of the content and impact of the right to self-determination has led to its full validity for the post-colonial situation being called into question once more. With the dissolution of the colonial power structures, the right to self-determination has also lost its meaning; in fulfilling its purpose, it has as it were become superfluous.[45] This may be the case

40 Review by Norman Paech, Gerhard Stuby, Power politics and international law in international relations, (Note 17), p. 707, para. 165.

41 ILC Yearbook 1966 II, 247 and 1980 II, 32.

42 V. 21 June 1971, ICJ Reports 1971, p. 16, 31.

43 V. 25 October 1975, ICJ Reports 1975, p. 12 et seq.

44 Judgment of 27 June 1986, ICJ Reports 1986, p. 263.

45 Cf. Daniel Thürer, The right of peoples to self-determination, (Note 4) p. 150 et seq. Similarly Karl Jürgen Partsch, Selbstbestimmungsrecht (Right to self-determination), in: Rüdiger Wolfrum (ed.), Handbook of the United Nations, Munich 1991, p. 395; Jörg Fisch, The right of peoples to self-determination, Note 16, p. 251.

for some elements of its content, such as the call for sovereignty and implementation by means of military force, but not for the right as such. This is because, according to Art. 1 of the human rights conventions, 'all peoples' are bearers of the right to self-determination and not just those who are oppressed by colonialism. Nor does this mean that, after the dissolution of the colonial empires, the right to self-determination passed solely to the constituent peoples, thereby reducing it to a right which merely preserves the current community of states and negates the many national ethnic conflicts. The content and scope of the right may have changed as a result of the end of the colonial age but not its bearers and subjects. In this respect, one speaks of the permanence of the right to self-determination.[46] The adoption of the right to self-determination in post-colonial conventions and declarations clearly supports this. So states Art. 20 of the African Charter on Human and Peoples' Rights of 27 June 1981:

> 'All peoples have a right to exist. They have the incontestable and inalienable right to self-determination. They shall freely determine their political status and pursue their economic, social and cultural development in accordance with the politics which they have freely chosen.'

The adoption of the right to self-determination in 1975 in the Helsinki Final Act demonstrates, moreover, the dependence of the validity of the right to self-determination on a colonial situation, as that agreement relates only to continental Europe, which now has only marginal colonial relations. That is to say, a population does not lose its right to self-determination merely because it has freed itself from a state of oppression and foreign rule. Nor is that right consumed by the fact that the population has constituted itself into an independent state. It merely shifts its focus away from defending itself against external threats to freely organising the internal structure of the state. Thus, the UN Commission on Human Rights calls upon states to also comment in their reports on the right to self-determination under Art. 1 of the International Convention on Political and Civil Rights:

> 'In relation to Art. 1(1), Contracting States should describe the constitutional and political processes which allow this right to be exercised in practice.'

46 Cf. Hans-Joachim Heintze, The right to self determination and minority rights in international law, (Note 16), p. 24.

The population of the colonies was as ethnically unhomogenous as most modern states are. The breakup of the Ottoman Empire after the First World War created no ethnically homogenous individual states from a multi ethnic federal state. Therefore, numerous competing and/or parallel rights to self-determination arose, on which both the national population as a whole and also the different peoples in the federal state can rely. The right of the national population to self-determination is directed against any attempt to make it tolerate any form of control or foreign domination against its will by another state. This applies both to a former colony which has freed itself from colonial rule and set up an independent state, and to a state which has been thrown into a major crisis and risks ending up under the effective control of a powerful state because of its economic and military weakness.[47]

In the case of individual peoples who make up the national population and/or (in its developed political form) a nation, the right to self-determination is principally directed inwards to the organisation of their existence and identity within the federal state. Whilst the Declaration on Principles of 1970 places the emphasis on the external dimension, the international aspect of the right to self-determination, it does at the same time emphasise free choice of political status and structure of economic, social and cultural development. This internal aspect has become for most peoples the most critical starting point of their right to self-determination, in that it relates to their ethnic identity, territorial roots and cultural traditions and to their economic and political participation.

As long as peoples confine themselves to their status within the prescribed limits, it is a problem of autonomy, but where they are inclined to withdraw from the federal state towards an independent state organisation, then it becomes a problem of secession. Both options are not exclusively dependent on the free will of the people in the minority, as in Canada (Quebec) or Spain (Basques, Catalans). The transition from the demand for autonomy to the demand for secession can also be prompted and/or virtually enforced by the intolerable conditions imposed on the people by the state. Just as, conversely, abandonment of the objective of an independent state organisation in favour of remaining in the old federal state under a particular set-up of the international balance of power may be invoked.

47 Cf. Karl Doehring, The right of peoples to self-determination, in: Bruno Simma (ed.), Charta der Vereinten Nationen, Kommentar (Charter of the United Nations, a commentary), Munich 1991, under Art. 1 para. 31, p. 23.

3.3 'Internal' right to self-determination

As already mentioned, the inwardly directed right to self-determination has different dimensions and aspects, which may also be compromised in very different ways.

The territorial dimension of the right to self-determination relates to the settlement area of the people, which it regards as its homeland. This term does not refer to just any homeland which must be offered to a people but to the homeland which is characterised by a particular, historically defined settlement area. History provides numerous examples of the displacement and transplanting of populations in a new 'homeland' for political or economic reasons.[48] The Turks first experienced it by virtue of the Turkish/English Joannina convention of 17.5.1817. The Kurds first became victims of a large-scale forced displacement after their rebellion was quashed in 1925, when deportation had already previously been a means of destroying the Armenians in 1915/1916, and forced displacement had been applied in 1922 in the Greek-Turkish war against the Pontus Greeks.[49] After the last great rebellion of 1937/38 in Dersim (Turkish: Tunceli) was quashed, a forced displacement law was passed which ruled that 'the Kurds to be deported to Western Anatolia must be divided into groups of 5 % relative to the Turkish population, with the objective of assimilation, and they be prohibited by law from organising themselves in groups in villages or city districts as workers or as tradesmen or from living together as a tribe in one place.'[50]

German National Socialism made use of this instrument and in recent times the Balkans were the scene of displacement and ethnic cleansing. The return of the Palestinian refugees, displaced after 1948 from the newly founded state of Israel and after 1967, to their homeland is one of the central problems in the current peace talks between Israelis and Palestinians. In Eastern Turkey, during or because of war, as a result of a state of emergency and systematic repression more than 4 million Kurds have been forced to leave their homeland of Kurdistan.[51] Scattered

48 Cf. Andrew Bell-Fialkoff, A Brief History of Ethnic Cleansings, in: Foreign Affairs, Summer 1993, p. 110 et seq.

49 Cf. Yves Ternon, Der verbrecherische Staat. Völkermord im 20. Jahrhundert (The criminal state. Genocide in the 20th century), Hamburg 1996, p. 139 et seq., 288 et seq.

50 İsmail Beşikçi, Kürtlerin Mecburi İskanı (Forced displacement of the Kurds), quoted by Serdar Çelik, Deutsch-türkische Staatspolitik gegen kurdischen Befreiungskampf (German-Turkish state policy against the Kurdish struggle for liberation), in: Rudolf Bürgel (ed.), Deutsche Türkeipolitik und ihre Auswirkungen auf Kurdistan (German policy on Turkey and its effects on Kurdistan), Stuttgart 1997, pp. 31-45.

51 According to the self-help association for refugees, 'Göç-Der', 4.5 million Kurds (the UN talks of 3.5

over Western and Eastern Anatolia, they have settled on the outskirts of the large cities or have gone into exile abroad. Expulsion and flight have the effect of a forced resettlement and loss of the ancestral homeland.

However, it is not only during or after a war that displacement and resettlement have played a role. The modern-day form occurs in pursuit of large-scale economic and infrastructure projects, such as dams in particular. Be it in the People's Republic of China, India, Africa or Turkey, these types of dam projects always involve the flooding of large settlement areas. In particular, the GAP project in Southeastern Anatolia, involving a number of large-scale dams[52] (Atatürk dam, Ilisu dam) and HES (hydroelectric power station projects)[53] affect the Kurdish population, without involvement on their part in the planning and decision-making in relation to these projects. The projects impact on them in the same way as natural disasters and infringe their right to self-determination, their right to their ancestral homeland. It is not only the collective right of a people to self-determination which is breached by such forced resettlements, as numerous additional individual human rights are thereby illegally restricted.

It is also the issue of the 'freedom of resources', i.e. the right of a people to freely dispose of natural resources within the meaning of Art. 1(2) of the two UN human rights conventions, which we are dealing with here. Minorities essentially do not have such a right. Even attempts by indigenous peoples to rely on such a right to their own resources, as in the Lubicon Lake Band case, have been rejected by the Human Rights Committee and classified as an interference with cultural rights.[54] Then again, if the water resources of the Tigris and Euphrates, which rise in the settlement area of the Kurdish people, do not belong exclusively to it, they

million) have fled, as a result of the decades-long violent conflicts between the Turkish military and the PKK guerillas, from the countryside into the large cities, such as Istanbul, Diyarbakir, Mersin, İzmir and Adana, where they frequently live in the poorest conditions. Some 1 million of those have subsequently fled abroad, predominantly to Europe. See Göç-Der and press, as at: September 2009; cf. on this Civaka Azad, Dokumentation über die Menschenrechtsverletzungen in der Türkei der letzten Jahren in Zahlen (Documentation on human rights breaches in Turkey in recent years, in figures), drawn up on 12.31.2012.

52 In relation to the safety dams, see Ayboga, Staudämme für die Sicherheit oder zur Verschärfung des Konflikts (Dams for safety or to exacerbate the conflict), in: Civaka Azad, Kurdisches Zentrum für Öffentlichkeitsarbeit e.V (Kurdish Centre for Public Relations, registered association); www.civaka-azad.org.

53 Cf. Ayboga, Verwertung und Ausbeutung pur (Pure exploitation), in: Kurdistan Report 172, March/April 2014.

54 Cf. Manfred Mohr, Abgrenzung von Selbstbestimmungsrecht und Minderheitenschutz (Demarcation of the right to self determination and the protection of minorities), in: Hans-Joachim Heintze, Selbstbestimmungsrecht der Völker – Herausforderung der Staaten (Right of peoples to self determination – challenge of the states), Bonn 1997, p. 122 et seq., p. 130.

still have a crucial right of co determination in the use and exploitation of these resources. In his dissenting opinion on the report of the International Court of Justice in The Hague on the Western Sahara, the American judge, Hardy Cross Dillard, wrote: 'It is the people who must decide the fate of the country, not the country which must decide the fate of the people.'[55]

The consequences cannot generally be compensated by damages or by the allocation of some new settlement area. However, if the loss of the homeland as a result of flooding is irreversible, these remain the only form of compensation. In future, early and effective involvement in the decision-making and planning process for such projects should be an indispensable precondition for compliance with the right to self-determination. In the case of displacement as a result of war, the return of the refugees and material support in the rebuilding of their demolished settlements is a necessary consequence of the injustice suffered.

A central dimension of the right to self-determination relates to respect for the ethnic identity of a people and its cultural characteristics. This relates to the preservation and independence of historically evolved characteristics, which include not only the language and religion but all customs, traditions and rites, to the extent that they do not limit or threaten the independence of other cultures. Just as the territorial dimension of the right to self-determination can only be fulfilled by recognition of a collective right of the people to a settlement and homeland, the cultural right to self-determination is also a collective right in the broadest sense. That is to say, such a right is not honoured merely by allowing members of the people to use their own language and their own customs. It is not the individual offer of separate rights for the practice of cultural characteristics which complies with the right to self-determination; only recognition of the collective identity of a people as a historical subject of their own independent development leads to the realisation of this right.

More specifically, this means that the right to self-determination is not limited to counterclaims against attempts by governments and administrations to interfere in their own cultural initiatives and activities, but formulates demands on the state for benefits. Therefore, it is not enough to allow the members of a people to establish their own private schools with lessons in the mother tongue and promotion of their own cultural traditions. The claim extends to equal provision of such opportunities in the state school and education system.

In the theoretical debate, it is common practice to distinguish between the individual orientation of the protection of minorities and the collective nature of the

55 International Court of Justice, Reports 1975, p. 114.

right to self-determination.[56] A minority as a group is, in principle, not granted any rights and the protection of minorities is intended to be structured only as an individual right of the individual members of the minority. This is the position already adopted in the formulation of the UN human rights convention, when a proposal to introduce a protective provision for minorities was rejected by virtue of the fact that minorities are not legal subjects.[57]

This individualisation of the protection of minorities has been widely criticised. However, for those states which either do not recognise their ethnic minorities at all or do not wish to grant them any special rights in the federal state, it forms the basis of the argument against them. Thus, during work on the Minorities Declaration, the Turkish government made a clear statement against the recognition of minorities and referred its members to the individual protection of human rights:

> 'According to the Turkish Constitution and other relevant legislation all Turkish citizens, without any exception, enjoy equal rights and status. Hence, it is impossible to make any discrimination in favour of or against any person or group based on ethnic, religious or linguistic criteria. Apart from that we believe that the rights of the persons having ethnic, religious or linguistic differences should be considered within the framework of individual human rights.'[58]

Apart from the fact that this statement has quite obviously been dictated with the intention of denying the very existence of minorities or minority problems, the reference to the individual protection of human rights offers no solution to the problems of minorities. For these are groups which, like the peoples, also have their own identity which can only be protected in the commonality of the group. Art. 27 of the UN Convention on Human Rights reflects this, albeit imperfectly and inadequately, in the wording which states that members of minorities use the said rights 'jointly with other members of their group'. Indeed, an individual group member can only be adequately protected if the existence of the whole group is protected. It is therefore clear and convincing, if protection for minorities

56 Cf. Manfred Mohr, Delimitation of the right to self determination and protection of minorities (Note 46), p. 131; Manfred Mohr, The United Nations and the protection of minorities (Note 13), p. 97 et seq.; Hans-Joachim Heintze, Right to self-determination and minority rights in international law, Baden-Baden 1994, p. 140 et seq.

57 UN Doc.E/CN.4/641, Annex II.

58 UN-Doc. E/CN.4/1992/48, p. 14

is derived from the wording of Art. 27.[59]

However, if the existence and identity of an ethnic, linguistic or cultural minority is to be protected and guaranteed, then the distinction between individual and collective rights becomes blurred, and then the restriction of the protection of minorities to individual rights is no longer tenable. The protection of identity requires the preservation of its special features, recognition of its special contribution to the shared culture and richness of the shared historical heritage, which can only be achieved by granting collective and/or group rights.[60]

This consequence becomes especially clear in the protection of indigenous and autochthonous peoples and/or natives. The difficulty in including them under the protection of minorities or according them the right of peoples to self-determination is already clear in the definition developed by the UN, which avoids the term 'minority':

> 'Indigenous communities, peoples and nations are those which, having historical continuity with pre-invasion or pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-domination sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as their basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.'[61]

This definition forms the basis of the works of the Working Group on Indigenous Peoples, which in 1994 adopted a 'Draft United Declaration on the Rights of Indigenous Peoples'. In it, natives are expressly recognised as peoples, which is indeed emphasised by the fact that the original designation of 'indigenous populations' was changed to 'indigenous peoples':

> 'by recognizing that the rights of indigenous peoples must be treated as distinct from the minorities issue and by establishing the Working

59 As, for example, in Christian Tomuschat, Protection of Minorities under Art. 27 of the International Covenant on Civil and Political Rights, in: Festschrift für Hermann Mosler (Publication in honour of Herman Mosler), Berlin 1983, p. 960.

60 As also Hans-Joachim Heintze, Right to self-determination and minority rights in international law, (Note 19), p. 143.

61 UN-Doc./CN.4/Sub.2/1983/21/Add.8

> Group, thereby giving indigenous peoples a forum for standard-setting activities as well as a place to raise matters of concern to them.'[62]

This matches the understanding which natives, who have always rejected their classification as a minority, have of themselves.[63] And yet the UN and the individual states have not given effect to this under international law by granting the indigenous peoples the unrestricted right to self-determination and their own sovereign rights (natural resources, sovereignty). As the ILO Convention 169 states in Art. 1. 1(3):

> 'The use of the term "people" in this convention shall not be construed as having any implication as regards the rights which may attach to the term under international law'.

Even if the draft of the Declaration on the Rights of Indigenous Peoples states in Art. 3 that 'indigenous peoples have the right to self-determination', the practice, especially of the Human Rights Committee but also of countries like Canada, tends to keep this right within the scope of application of the protection of minorities under Art. 27 of the UN Covenant on Human Rights. That means, however, that in these cases the distinction between individual right and collective right completely disappears. Whether one then calls the rights of indigenous peoples minority rights or rights to self-determination, their collective character is certain and is within the scope of the 'internal' right of self-determination.[64] This has been expressly acknowledged in discussions about the draft declaration:

> 'Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence…'[65]

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62 UN-Doc./CN.4/Sub.2/1993/29, p. 13.

63 Cf. Rudolfo Stavenhagen, Background Paper, United Nations Seminar on the Effect of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, in: UN-Doc. HR/GENEVA/1989/Sem.1/BP.3, p. 15; Hans-Joachim Heintze, Right to self-determination and minority rights in international law (Note 19) p. 137; Manfred Mohr, The United Nations and the protection of minorities (Note 13) p. 92 et seq.

64 Cf. Catherine Brölmann, Marjoleine Zieck, Indigenous Peoples, in: Catherine Brölmann, René Lefeber, Marjoleine Zieck (eds.), Peoples and Minorities in International Law, Dordrecht 1993, p. 216.

65 UN-Doc. E/CN.4/Sub.2/1993/29, p. 52.

The example of indigenous peoples makes it clear after all that: the theoretical difference between individual and collective rights becomes increasingly irrelevant, especially in the case of ethnic minorities who may claim protection of their existence and identity. Such protection must only be guaranteed in the context of a collective legal right of the community. On the other hand, their legal right is restricted to specific rights of self-determination within the state, which were directed at the protection objective of preserving identity. These include a specific, historical territorial, cultural, economic but also political framework, which must be taken into account and protected by the dominant population in the state.

3.4 Political self-determination – autonomy, self-government

The unrestricted legal right to self-determination to which peoples (and thus also the Kurds) are entitled has above all a political scope of protection which goes beyond simple political participation through associations, organisations and elections and representation in the media. It is best described by the term 'autonomy' or else 'self-administration', in order to make it clear that it involves political organisation within the state. For many authors, this is the only effective form of guarantee of minority rights and of the right to self-determination.[66] However, it should be noted that in the case of the term 'autonomy', just as in the case of the terms 'people' and 'minority', there is no exact definition according to international law. As an indeterminate legal term, it requires building up and defining as to its content by the parties concerned, i.e. the state government and the representatives of the people/minority.[67] Therefore, the state of autonomy should not be defined in a general and abstract way but depends on negotiations between the two parties. Only one thing is the basis of autonomy, irrespective of all characteristics: as diverse as the forms of autonomy arrangements and self-administration of peoples according to historically established relations may be, they all take place within the defined state borders and rule out a separate state organisation.[68]

Beyond this basic decision, there is no established or somehow preferred model of autonomy. All variants include a certain degree of independence from the cen-

66 Cf. Peter Pernthaler, Land, Volk und Heimat als Kategorien des österreichischen Verfassungsrechts (Country, people and homeland as categories of Austrian constitutional law), Vienna o.J., p. 19. Differentiating Jörg Fisch, The right of peoples to self-determination, (Note 16), p. 61 et seq.

67 Cf. Rudolf Bernhardt, Federalism and Autonomy, in: Yoram Dinstein (ed.) Models of Autonomy, Dordrecht 1981, p. 26 et seq.

68 Cf. Hurst Hannum, Documents on Autonomy and Minority Rights, Introduction, Dordrecht 1993, p. XV, who has evaluated 21 current and 10 historical examples of autonomy.

tral and national influence of government. However, certain responsibilities which belong to the sovereign prerogative of central government, such as currency and finance matters, defence and foreign policy, are generally excluded from them. Even here there are fully functioning regulations which do not impair the sovereignty of the government, where the two sections of a people separated by a national border have established separate (foreign) policy relations with each other. An example would be the Azeri, who at the time of the Soviet Union were living in the Republic of Azerbaijan and in the north of Iran and maintained independent political relations with each other.

Any autonomy arrangement will doubtless entail a certain degree of decentralisation, and will therefore usually be rejected by states and their governments which are strongly centralised, such as France (Corsica) or Turkey, or only regarded with extreme mistrust. There is a fear that all forms of autonomy ultimately lead to disintegration of the state and to separation and secession.[69]

For that reason, autonomy is sometimes only recommended for small populations, such as natives living in isolation, who would not be able to live in statehood. There are also those who advocate assimilation, given that any different treatment of people on the basis of their membership of a particular community has led in other groups to resistance and exclusion, which ultimately gave rise to ethnic conflicts.[70] In general, a system with recognised minorities is also economically less effective and efficient, given that these minorities are less flexible and mobile. In any event, sensitivity to autonomy arrangements is still very high, not only in Europe but throughout the world.[71]

Conversely, however, it is argued with great justification and the best examples that autonomy arrangements are just better suited to resolving ethnic conflicts and minority problems.[72] Prominent examples of successful autonomy arrangements

69 Cf. James Crawford, The Creation of States in International Law, Oxford 1979, p. 261; Bengt Broms, Autonomous Territories, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, Vol. I, 1992, p. 312; Stefan Oeter, Minderheiten im institutionellen Staatsaufbau (Minorities in the institutional state structure), in: Jochen A. Frowein, Rainer Hofmann, Stefan Oeter (ed.), Das Minderheitenrecht europäischer Staaten (The law on minorities in European states), Part 2, Berlin 1994, p. 494; Markku Suksi, Autonomy, in: MPEPIL 2011, with numerous examples.

70 Cf. Douglas Sanders, Collective Rights, in: Human Rights Quarterly 13 (1991), p. 375.

71 Cf. Heinrich Klebes, Rahmenübereinkommen des Europarates zum Schutz nationaler Minderheiten (Framework agreement of the Council of Europe for the protection of national minorities), in: Europäische Grundrechtszeitschrift (European journal of fundamental rights) 22 (1995), p. 266, footnote 22.

72 Cf. Hans-Joachim Heintze, Wege zur Verwirklichung des Selbstbestimmungsrechts der Völker innerhalb bestehender Staaten (Ways to realise the right of peoples to self-determination within existing states), in: Hans-Joachim Heintze (ed.), Right of peoples to self-determination – challenge to the nations of the world,

via international agreements or national agreements are the Åland Islands, South Tyrol, Greenland and the Faroe Islands For example, the Premier of the autonomous government of Greenland acknowledged in 1993, 'that developments over the past 11 years had shown that the recognition of indigenous peoples and the right of self-determination were not destructive to State unity'.[73] The same is true of the institution of autonomous communities of Catalans, Basques and Galicians in Spain,[74] even if some of the Basques support secessionist plans including the use of force (Cf. Annex No 1).

The opportunities for political participation are significantly better for members of minorities within the framework of autonomy solutions, as they are first able to effect the organisation of their political will independently and are then better able to introduce it via their own institutions and parties into the overall state process. Thus they avoid the marginalisation, fragmentation and political exclusion caused by majority rule. If the influence of their votes is institutionally guaranteed by a right of co-determination, then their willingness to engage themselves in the democratic process within the state and to play an active part in it will also be greater. In addition to integration of the people who are protected by an autonomy arrangement and recognised, the democracy of a state organisation also gains overall. For that reason autonomy, as an instrument of the 'internal' right to self-determination, is often associated with the demand for democratisation of the state organisation.[75] The granting of autonomy is a factor of democracy.

Since there is no model for autonomy under either constitutional or international law, some authors have attempted to suggest individual forms of organisa-

Bonn 1997, p. 16 et seq., 24.

73 UN-Doc./CN.4/Sub.2/1993/29, p. 13. Cf. I. Foighel, A Framework for Local Autonomy: The Greenland Case, in: Yoram Dinstein (ed.), Models of Autonomy, Dordrecht 1981, p. 26 et seq. On the other hand, a very critical analysis of the autonomy model of the Faroe Islands is delivered by L. Lyck, Lessons to be Learned on Autonomy and on Human Rights from the Faeroese Situation Since 1992, in: Nordic Journal of International Law 64 (1995), p. 484.

74 Cf. Stefan Oeter, Die rechtliche Stellung von Minderheiten in Spanien (The legal position of minorities in Spain), in: Jochen A. Frowein, Rainer Hofmann, Stefan Oeter (ed.), Das Minderheitenrecht europäischer Staaten (Minority rights of European states), Part 1, Berlin 1993, p. 400. On Italy and South Tyrol cf. Karin-Oellers-Frahm, Die rechtliche Stellung der Minderheiten in Italien (The legal position of minorities in Italy), in: Jochen A. Frowein and others (ed.), The minority rights of European states, p. 192 et seq. On Catalonia cf. Annex 1.2 below.

75 Cf. D. Brühl-Moser, Die Entwicklung des Selbstbestimmungsrechts der Völker unter besonderer Berücksichtigung seines innerstaatlich-demokratischen Aspekts und seiner Bedeutung für den Minderheitenschutz (The development of the right of peoples to self-determination, with particular reference to its national democratic perspective and its importance for the protection of minorities), Basle 1994, p. 232.

tion and autonomous institutions. Asbjörn Eide has done this, for example, under the aegis of the UN and proposed the following measures for discussion:

> '(a) Advisory and decision-making bodies in which minorities are represented, in particular with regard to education, culture and religion;
>
> (b) Elected bodies and assemblies ("parliaments") of national or ethnic, religious and linguistic minorities;
>
> (c) Self-administration (functional autonomy, cultural autonomy) on a non-territorial basis by a minority of matters which are essential to its particular identity, such as the development of its language or its religious rites;
>
> (d) Decentralized or local forms of government or autonomous arrangements on a territorial and democratic basis, including consultative, legislative and executive bodies chosen through free and periodic elections without discrimination;
>
> (e) Special measures to ensure minority representation in the legislature and other bodies of the national society…'[76]

In order to put the various forms and regulations of autonomy in manageable order, a distinction between functional, territorial, personal and cultural autonomy is proposed.[77]

Functional is understood as meaning a model in which specific state functions and rights are transferred to private-law associations formed by the minority people. These private associations, foundations, societies and organisations thus take on tasks which relate to areas such as culture, education, training, the media or religion, which are particularly important for the identity of the people and its social development within the state. The government of the state must entrust state tasks to these legal persons who are governed by private law, including some types of indirect state administration. As a successful example of this type, reference is made

76 UN-Doc. E/CN.4/Sub.2/1993/34/Add.4, p. 4, para. 17.

77 Cf. Hans-Joachim Heintze, Wege zur Verwirklichung des Selbstbestimmungsrechts der Völker innerhalb bestehender Staaten (Ways to realise the right of peoples to self-determination within existing states), (Note 68), p. 37 et seq.

to the Danish minority in Schleswig-Holstein which exercises its rights and interests collectively via staff bodies on a voluntary basis. This form of organisation is supported financially by the state government, and at the same time parliamentary representation is guaranteed by the fact that the Danish minority is exempt from the parliamentary 5 % barring clause. The state government of Schleswig-Holstein speaks of the 'internal sovereignty' of the Danish minority. The actual success of this model may also be strongly influenced by the fact that the Danish minority on the other side of the border has protected status and that similar rights are granted to the German minority in Denmark, so with this autonomy arrangement a relatively simple form of protection of minority interests has succeeded.[78]
With territorial autonomy a particular region within the state acquires special status. Thus, in this case, a public regional authority takes on the self-administration tasks assigned to it by central government, which may go far beyond cultural and educational matters. These tasks may extend to measures relating to infrastructure, transport, economic and ecological development, industrial location etc. For these purposes, representative self-governing bodies must be created as well as an elected representative body of the people, in order to guarantee democratic legitimacy. The financing of this form of autonomy may be achieved, for example, by the regional authority being granted its own fiscal sovereignty, so that it is not dependent on financial allocations from central government. For disputes between the government granting the autonomy and the bodies of the autonomous region, special institutions must be created for dispute resolution.

Territorial autonomy is only a form of organisation for peoples or minorities who settle in a territorially delimited area and have a historically developed sense of community. So it only includes the members who live in that area and not those who settle outside the boundaries of the area. However, the autonomous regional authority must also ensure that, from now on, those parts of the population which have become a minority in the autonomous region are guaranteed their rights.

We currently see this type of autonomy arrangement predominantly in Europe, but apart from an independent executive administration and an elected representative body of the people, which in turn have varying responsibilities, they have hardly any other common features. Whilst France, despite strong reservations, has granted Corsica autonomous status to a limited extent in the area of adminis-

78 Cf. Knut Ipsen, Die Minderheitensituation im dänisch-deutschen Grenzraum (The minority situation in the Danish/German border region), in: Manfred Mohr (ed.), Peacekeeping aspects of the protection of minorities, (Note 13), p. 276 et seq.

tration, but still rejects the request for independent legislative powers, Italy has granted legislative powers to South Tyrol (cf. Annex No 2). Finland has gone even further in the Åland Islands, which have effectively left the legal system of the 'mother' state. The Faroe Islands and Greenland, which have already been mentioned, also belong to this type of territorial autonomy. However, they demonstrate that autonomy arrangements are neither static nor legally defined but can be adapted to the particular historical circumstances and future developments.

Personal autonomy is independent of any specifically defined territory and is used where the members of a people do not settle within an enclosed area. Its participation in the political process is also guaranteed by exemptions in the electoral law and endowment of the public corporate body with limited financial autonomy and additional financing from the state. The cultural autonomy in Estonia is cited as an example of such a personal autonomy arrangement.[79]

Cultural autonomy is understood as meaning autonomous self-administration of the cultural affairs of a people, and thus of a part of its life. If the primary concern of the minority is to have its own institutions in the areas of education, training and culture which are free from state control, in order to guarantee its solidarity and identity in respect of those areas, this concept of limited autonomy is applied.

The risk of disassociating the majority culture and isolating and alienating the minority, however, could lead to separatist tendencies, if greater emphasis is placed on the barrier between the cultures than on the unity of a multicultural state organisation. However, this cultural identity will also include the opportunity to maintain unrestricted links with ethnic members on the other side of the state borders. Since cultural identity must not be restricted and cut off by borders, it may even perform an important bridging function between peoples and states.

Despite numerous examples and their positive integrative role, no assumption should be made, however, that peoples and minorities have a legal right to autonomy, as some wish to establish.[80] At present there is no international agreement and also no customary international law which could establish such a right. Even the Copenhagen Document of the CSCE of 29 June 1990, which is very open-minded on minority issues, speaks merely of autonomy as an opportunity and not as a legal right. All efforts to adopt a provision on autonomy in the Euro-

79 Cf. Otto Kimminich, Rechtsprobleme der polyethnischen Staatsorganisation (Legal problems of multi-ethnic state organisation), Mainz 1989, p. 194.

80 For example, Douglas Sanders, Is Autonomy a Principle of International Law?, in: Nordic Journal of International Law 55 (1986), p. 17.

pean framework agreement for the protection of national minorities have failed.[81] Whilst the Badinter Commission affirms in its 1992 report for all ethnic, religious or linguistic groups living within a state 'a right to recognition of their identity under international law', it does not associate it with a right to autonomy.[82] Only native and indigenous peoples are granted a right to autonomy as an expression of their right to self-determination in the draft 'Declaration on the Rights of Indigenous Peoples':

> 'Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.'[83]

This already corresponds to a widespread practice of various states, such as the USA, Canada, Nicaragua and the Philipines, which have given their indigenous peoples autonomous status in one form or another.[84] The well-known resolution 688 (1991), by which the UN Security Council set up an autonomous protection zone in Northern Iraq for the vulnerable Kurds and largely withdrew it from the sovereignty of Iraq, in spite of international acceptance, can hardly be viewed as a breakthrough towards general recognition of autonomy as a legal right.

Lastly, it should be mentioned that the nationality issue in the former Soviet Union has been settled by the establishment of various forms of autonomy (autonomous republics, autonomous regions, autonomous districts) in addition to the republics in admittedly exemplary fashion.[85] The constitution of the Russian Federation of 1993 also contains in Art. 65 a right to autonomy,[86] which it could use as a model for constitutions of multi-ethnic states in this regard.

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81 Cf. H Klebes, Framework agreement of the Council of Europe for the protection of national minorities, in: Europäische Grundrechtszeitschrift (European journal of fundamental rights) 22 (1995), p. 266.

82 Badinter Commission, Report No 2, in: European Journal of international Law 3 (1992), p. 184.

83 Cf. Art. 31; UN-Doc. E/CN.4/Sub .2/1993/29.

84 Cf. R. Lapidoth, Autonomy: Potential and Limitations, in: International Journal of Group Rights 1 (1994), p. 274.

85 Cf. Art. 85 of the 1977 constitution; Hans-Joachim Heintze, Ways to realise the right to self determination (Note 72), p. 33.

86 Cf. European Journal of Fundamental Rights 21 (1994), p. 519.

And yet these examples, trendsetting as they may be, are not sufficient to enable us to speak of a right to autonomy for peoples and minorities under customary international law. There is no long-term general practice of this by the states. The states would also have to be persuaded that they are legally obliged to apply this practice, but that is out of the question. However, the fact that a legal right to autonomy cannot be established does not mean that the right of peoples to self-determination is, as it were, constitutionally and organisationally futile. For autonomy is not the only embodiment of the right of self-determination. Another is federalism which, in many different guises, can also guarantee the protection of peoples as minorities within a state.

3.5 Political self-determination – federalism

Whilst the federal structure of the federal state does also build constitutionally on the principle of autonomy, it realises this in a different way. The key difference is that autonomy only ever constitutes a partial system, whereas federalism integrates the individual states into the overall order of the federal state. Autonomy relies more heavily on the separate independence of a region through self-administration and legislation, federalism combines both with stronger networking and linking of the member states with each other and with the federal state. The bonding of member states with each other and with the unified state, and vice versa, is an essential aspect of federal structure. The independence of the member states is via joint decision making, supervision and executive powers fed back to the federal state. Many matters cannot be determined by the federal state on its own, in the same way as the member states are bound in a kind of vertical division of powers by the decision of the central authority.

The concepts of autonomy and federalism both build on the independence of delimited areas within a unified state. However, federalism includes the obligation to cooperate in all central affairs, which the concept of autonomy does not recognise.[87] Thus the federal policy of the individual member states essentially applies not only to them, as in the case of autonomy, but to the whole federal state. Between the member states a relationship of equality and balance prevails, so as to achieve a balance and equilibrium between the individual sub-states within the framework of the federal state.[88]

In terms of their content, autonomy and federalism differ little in that the transfers of competence from federal level to the member states can be similarly wide-reaching. That means legislation in their own parliaments, self-administration not only in cultural affairs but also in matters relating to the economy, infrastructure and security (police), their own legal jurisdiction and an independent school and university system. Only the connection with the federal level and mutual responsibility in the interaction between the member states and the central state are more pronounced in federalism. Apart from that, monetary, foreign and defence policies in particular are also reserved in this state organisation to the federal state. In accordance with historical conditions, the federal system is also

87 Cf. Rudolf Bernhardt, Federalism and Autonomy, in: Yoram Dinstein (ed.), Models of Autonomy, Dordrecht 1981, p. 26 et seq.

88 Cf. Yoram Dinstein, The Degree of Self-Rule of Minorities in Unitarian and Federal States, in: Catherine Brölmann, René Lefeber, Marjoleine Zieck (eds.), Peoples and Minorities in International Law, (Note 64), p. 235

extremely variable and flexible. The example of Belgium in particular shows the dynamic extent to which federalism can always be adapted to new challenges and developments (cf. Annex No 3).

The common starting point of autonomy and federalism – the independence of the regions – enables us to understand that the respective concepts not only have different variants and forms in reality[89] but also have many overlaps and hybrids. Thus the original model of autonomy, which characterises the 'system of autonomous communities' in Spain, has increasingly developed over the decades into a federal system of decentralisation and self-administration, though with significant independent powers to the autonomous provinces.[90] The former Soviet Union, as a federal state with its togetherness of autonomous regions und 15 republics had developed a hybrid form of ethnic federalism, which admittedly gave the numerous ethnic groups a high degree of independence. Soviet federalism should not be held responsible for the failure of the Soviet Union.[91] The same is also true of the federalism of the former Yugoslavia and the CSFR. Belgium, on the other hand, represents an ethnic federalism structured according to language groups, which over the past decades has developed a clearly centrifugal dynamism as a result of several constitutional changes (cf. Annex No 3).[92] However, the binding elements of even Belgian federalism are still greater than in an autonomy model.

The UN Security Council has again demonstrated the high level of confidence in the integrative power of federalism by its resolution 939 (1994), in which it seeks a federation arrangement for Cyprus. Similarly, on 14 May 1994, the former wartime enemies in Bosnia and Herzegovina, the Croatian and Muslim ethnic groups, decided in favour of the federation model in order to prevent further disintegration of the region and segregation of the warring factions. The fact that this federation came about as a result of pressure from the international contact group is not a shortcoming of the concept but demonstrates its appeal for the resolution of ethnic conflicts and their consequential problems.[93]

89 We find different variants of federalism, for example in Belgium, Germany, Switzerland and the USA; cf. Annex.

90 Cf. Stefan Oeter, The legal status of minorities in Spain, in: Jochen A. Frowein, Rainer Hofmann, Stefan Oeter (ed.), The law on minorities in European states, Part 1, Berlin 1993, p. 369 et seq.; Cf. Annex No 1.

91 Cf. C. Schreuer, The Waning of the Sovereign State: Towards a New Paradigm for International Law?, in: European Journal of International Law 4 (1993), p. 447 et seq., 468.

92 Cf. A. Alen, Belgien: ein zweigliedriger and centrifugal Föderalismus (Belgium: a dual and centrifugal federalism), in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Journal of foreign public law and international law) (ZaöRV) 50 (1990), p. 541.

93 Cf. M.-J. Calic, Der Krieg in Bosnien-Herzegowina, Ursachen – Konfliktstrukturen – Internationale Löungsversuche (The war in Bosnia and Herzegovina, Causes – Conflict structures – International solutions),

Without going into further examples in detail (cf. Annex), it can be said that federalism in general is recognised as having great potential to resolve conflicts which arise from the multi-ethnic situations of the modern state system. No concept appears better suited to guaranteeing the protection of peoples and minorities and realising the right to self-determination than the federal principle. In particular, it is seen as a solution to prevent secession,[94] and for that reason it is also deemed to be the best instrument for the realisation of the right to self-determination,[95] because fear of the secessionist dynamics of the right to self-determination is one of the main reasons for withholding it from peoples. However, the practice of federalism has proved in almost all cases that the tension between the right of peoples to self-determination and the right of states to territorial integrity can best be overcome by a federal organisation.

3.6 'External' right to self-determination – secession

As already indicated several times, the right to self-determination is ultimately the basis for secession according to international law, the right to an independent state organisation. Even if the PKK has expressly renounced this step, there is still a need to deal briefly here with this alternative to realisation of the right to self-determination, because it examines in more detail the scope and content of the 'internal' right to self-determination.

In the already weak wording of the right to self-determination in the UN Charter, secession had no place as an alternative to its realisation. In 1961, in its resolution 169, the UN Security Council condemned the secessionist movement of Katanga as illegal, even though the movement already held control over significant parts of the province. Similarly, the secessionist efforts of Biafra from 1967 to 1969 met with little support from the United Nations. And as recently as 1970 the then UN Secretary General, U Thant, declared:

> 'The UN has never accepted the principle of secession of part of a state and, in my opinion, will never accept it.'[96]

Frankfurt a.M. 1995, p. 196 et seq.

94 Cf. Allen Buchanan, Self-Determination and the Right to Secede, in: Journal of International Affairs 45 (1992), p. 347.

95 Cf. Christian Tomuschat, Self-Determination in a Post-Colonial World, in: C. Tomuschat (ed.), Modern Law of Self-Determination, Dordrecht 1993, p. 16.

96 Cf. L. C. Buchheit, Secession. The legitimacy of self-determination, New Haven, London 1978, p. 87.

This position had already been adopted in 1964 by the heads of state and heads of government of the non-aligned states at their conference in Cairo, where they gave a clear commitment to the territorial integrity of states.[97] The Organisation of African Unity (OAU) essentially maintained this approach until the nineties, as the example of Eritrea demonstrates. The OAU never recognised the Eritrean freedom movement and its struggle for an independent state until in 1993 it was presented with the result of the independence of Eritrea from Ethiopia and the founding of a separate state.

However, the process of decolonisation had shown reality was a step ahead of political positions and was also slow to catch on in the UN. Thus at the same time as its Secretary General was still excluding secession even for the future, the General Assembly in its Declaration of Principles recognised three types of realisation of the right to self-determination: [98]

> 'The founding of a sovereign and independent state, free association with or free integration within an independent state, or the achievement of any other status freely determined by the people.'

Nor is this commitment to sovereignty as a consequence of the right to self-determination[99] contradicted by the following paragraphs, the primary focus of which is territorial integrity:

> 'Nothing in the above paragraphs should be interpreted as authority for or encouragement of any form of action which would partially or completely destroy or damage the territorial integrity or political unity of sovereign states which are guided by the principle, described above, of equality and the right of peoples to self-determination and thus have a government which represents all the people of that territory irrespective of race, faith and colour.'

Conversely, the right to secession will be derived from this sentence, where a government does not represent the whole population but discriminates against parts of it.[100] That is to say that in those cases where peoples, minorities or regions are

97 Cf. Heather A. Wilson, International Law and the Use of Force by National Liberation Movements, Oxford 1988, p. 23.

98 UNGA Resolution 2625 (XXV) of 14 October 1970.

99 Cf. Jörg Fisch, The right of peoples to self-determination, (Note 16), p. 51 et seq., 53.

100 Cf. Hans-Joachim Heintze, Right to self-determination and minority rights in international law, Baden-

subjugated in breach of international law and there is no other way of restoring the rights which have been breached, secession remains the last and only means of realising the right to self-determination. Such is the justification for secession provided by Aureliu Cristescu in his UN study on self-determination with the words:

> 'The right of secession unquestionably exists … in a special but very important case: that of peoples, territories and entities subjugated in violation of international law.'[101]

Another author compares such situations with those of colonialism, which confer a 'right to decolonisation'. He argues that in situations where

> 'a minority within a sovereign state – especially if it occupies a discrete territory within that state – persistently and egregiously is denied political and social equality and the opportunity to retain its cultural identity … it is conceivable that international law will define such repression, prohibited by the Political Covenant, as coming within a somewhat stretched definition of colonialism, even by an independent state not normally thought to be "imperial" would then give rise to a right of "decolonisation"'.[102]

Despite the widespread aversion which states have to recognising a right to secession, their practice continues to be contradictory. One only has to consider the timely recognition of the secession of Slovenia and Croatia from Yugoslavia by the German government in 1991. It occurred even though these provinces were clearly not in a colonial situation or severely repressed.

Conversely, the international community of states never accepted the demands for independence made by Dudayev in the case of the Chechnya conflict. Rather, it endorsed the position of the USA, which declared the territorial integrity of Russia as sacrosanct:

Baden 1994, p. 87 et seq.

101 Aureliu Cristescu, The right of self-determination – Historical and current development on the basis of United Nations Instruments, in: UN-Doc. E/CN.4/Sub.2/404/Rev.1, p. 87. Similarly Karl Doehring, The right of peoples to self-determination, in: Bruno Simma (ed.), The Charter of the United Nations, Munich 1991, p. 15 et seq., para. 54 et seq., and Kay Hailbronner, in: Wolfgang Graf Vitzthum (ed.), Völkerrecht (International law), Berlin, New York, 2004, p. 191 et seq. para. 120.

102 Thomas M. Franck, Postmodern Tribalism and the Right to secession, in: Catherine Brölmann, René Lefeber, Marjoleine Zieck (ed.), Peoples and Minorities in International Law, (Note 64) p. 3 et seq., 13 et seq.

> 'We strongly support the territorial integrity of Russia and would be opposed to any attempt to change its borders either through aggression from outside or through armed insurrection from inside.'[103]

The conflict was declared to be a problem of internal security and, whilst the situation of the Chechen people was deplored, they were not awarded any right to secession.[104] Therefore the level of discrimination under which a people can be expected to remain within an association of states is a matter of proportionality.[105]

When a right to secession is only recognised in a situation where the rights of the ethnic group concerned are seriously breached, permanently and continuously, and the right to protection of identity is denied, consideration must surely be given to finding an acceptable balance between the right to state integrity and the right to self-determination. Such a case is accepted, for example, where the internal conflict between the central government and the people in the minority has assumed forms of genocide.[106]

However, in order to prevent matters reaching this stage of destabilisation and disintegration of sovereign states whilst, on the other hand, also complying with the law on protection of minorities and respecting the identity of peoples, a general reference is made to the concepts of autonomy and federalism. Thus, for the resolution of the Kosovo problem for example, various forms of autonomy are being proposed and only when this fails definitively will independence by means of secession be contemplated.[107]

As a consequence, the 'internal' right to self-determination therefore presents itself in numerous alternative forms of autonomy and federalism, so that a middle way can be found between territorial integrity and the 'external' right to self-de-

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103 United States Information Service, Embassy of the United States of America, Information and Texts of 10. 11. 1994, p. 12.

104 Critical of this is S. Nystén-Haarala, Does the Russian Constitution Justify an Offence against Chechnya?, in: Humanitäres Völkerrecht – Informationsschriften (International humanitarian law – information sheets) 8 (1995), p. 194 et seq.

105 Cf. on the Kurdish question, Richard Falk, Problems and Prospects for the Kurdish Struggle for Self-Determination after the End of the Gulf and Cold Wars, in: Michigan Journal of International Law, Vol. 15, 1994, p. 591 et seq.

106 Stefan Oeter, Selbstbestimmungsrecht im Wandel – Überlegungen zur Debatte um Selbstbestimmung, Sezessionsrecht und ‚vorzeitige Anerkennung' (Changing right to self-determination – reflections on the debate on self-determination, right to secession and 'early acceptance'), in: ZaöRV 52 (1992), p. 741 et seq., 778; Manfred Mohr, The United Nations and the protection of minorities (Note 13), p. 97.

107 Cf. A. Heraclides, Konfliktlösung am Beispiel der Kosovo-Frage (Conflict resolution based on the example of the Kosovo question), in: Internationale Politik (International politics) 50 (1995), p. 37.

termination in the form of secession which is acceptable both to the state and to the minority.

If we make the assumption of an inalienable right to self-determination, then a state can only avoid the most radical option, in the form of secession and independence, if it accepts the 'internal' right to self-determination. This means a guarantee not only of cultural self-determination but also political self-determination within the state borders. In addition to the granting of general political rights, such as the formation of political organisations, foundations, parties and media, constitutional integration of the people in the state as a whole is of particular importance.

The model of autonomy or federalism chosen is irrelevant and is a matter for negotiation between central government and people. All that matters is that it adequately reflects the rights of both the people and the central state and that it agrees these for a lasting coexistence. The solution for a more strongly centralised and unitary state, such as France or Turkey, may look completely different to that for states with a federal tradition, such as Belgium or Switzerland. Key provisions of the arrangement will always be: maximum observance of the independence and right of the people to self-determination with the greatest possible integration into the state as a whole and protection of its territorial integrity.

3.7 Summary

Applying the results of these observations to the Kurdish people, they can be summarised as follows:

- The Kurdish people is the subject and bearer of the right to self-determination. It is the bearer of the right to self-determination both as a people which is ethnically homogenous and based in a defined settlement area and as a minority in the states between which its settlement area has been divided. The fact that the Kurdish people only settles in the individual states as an ethnic minority does not reduce its right of self-determination to mere individual protection of individual members. The Kurdish people in all states is entitled to it as a collective right.
- The content of the right to self-determination aims to preserve the identity of the Kurdish people and to protect its existence in the future. It is opposed by the right of states to territorial integrity. The two rights can be reconciled if the claim to self-determination is restricted to the so-called internal right to self-determination, which is granted and practised within the pre-defined state borders.

- This right to self-determination within the borders of the states concerned encompasses firstly all previously denied rights of the Kurdish people to its own language, education, training, press, radio, television and literature, whether under its own supervision or as a recognised part of the state sector. The institutional safeguarding of these rights also requires state funding to be made available. State funding must also be provided for the reconstruction of homes, villages, infrastructure and agricultural, industrial and business establishments which have been destroyed, in order to facilitate the return of the more than 4 million refugees.
- The political framework of the right to self-determination includes not only the freedom to establish political organisations, parties and foundations and to be able to make use of the right of assembly and right to demonstrate without discrimination but also the creation of a system of self-administration. This may include, for example, its own parliament with legislative power, its own jurisdiction, its own security forces (police) and other local authorities. The scope of the transfer of state functions to the self-administration of the Kurdish people is not prescribed by law but depends on political negotiations. The greater the proportion of functions transferred, the more necessary it becomes to grant financial and fiscal autonomy.
- It is important to establish a state organisation for equal participation in the social and political processes of the state as a whole. It must be ensured both that the central state has an influence on policy and self-administration of the Kurdish people and vice versa. Whether, in this context, the concept of autonomy or federalism is chosen is once again a political question rather than a legal one. However, it should be clear that an autonomous model such as the UN Security Council has created for the Kurds in Iraq is rather a protection and emergency solution than a forward-looking and sustainable model of autonomous self-administration within the borders of Iraq. European experiences argue in favour of federal structures, in order to guarantee independence, cohesion and integration over the long term.
- Given that the Kurdish settlement areas in all states have been largely neglected economically, self-determination also means codecision in the economic development of their areas. This relates initially to projects of the Turkish central state (Southeastern Anatolia dam project, CAP), but to its own initiatives which, for example, also bring foreign investors into the region. Progress of economic development and participation of the Kurdish people in that progress will be crucial factors in the success of the political model of self-determination.

- Opting for a federal solution not only brings advantages for the internal organisation of the individual states, as it hinders rather than promotes secessionist developments, but could also be advantageous in the longer term by making it easier for the Kurdish people to connect with each other and maintain their identity beyond the borders by federalisation of the entire state organisation affected by the Kurdish question. However, this is not a legal issue either and is outside the scope of the report.
- In the event that the governments cannot decide on any of the possible solutions discussed here but continue a policy of repression, military oppression and breach of human rights, the 'internal' right to self-determination will extend once again to 'external' right to self-determination with the consequence of secession to sovereignty. Currently, however, this option is only a legal possibility.

4. CLAIM BY THE KURDS FOR POLITICAL SELF-DETERMINATION

Both the Kurdish Parties which exist legally in Turkey and the PKK see the solution to the Kurdish question as part of the integrity of the Turkey's existing borders and adopt either a decentralised or federal approach. The following discussion will refer to statements by the leaders of the Kurdish parties DTP/BDP[108], HAK-PAR[109] and KADEP[110], which were made in interviews held at the end of 2009.[111]

4.1 Decentralised federal model

The Spanish model is regarded by the majority of representatives of Kurdish society as a realistic, and for the most part suitable and applicable, one. It could be applied in Turkey during transition to a decentralised system. The Spanish constitution, which has been designed as an open model, is regarded as a good foundation. Under this model, responsibilities which should be openly formulated in the constitution are also transferred to the regions in Turkey. Spain is regarded as exemplary, inter alia, because in comparison with other decentralised countries it has decentralised considerably at a regional level.[112]

The process of devolution in Great Britain, on the other hand, is not considered a suitable model. It is rejected because responsibilities which are granted to the parliaments of the regions (Northern Ireland, Scotland, Wales) by central government can be withdrawn again at any time. The devolution model is also rejected because, firstly, the people wish to have the right to exercise political power in their own country and, secondly, do not see this as democratic, given that such a model could lead to patronage. This model is not considered safe.[113]

Since the fall of Saddam Hussein, the Kurds in Iraq have been living in a federally structured state. However, the majority of the Kurdish parties reject using the federal model created in Iraq for the Kurds in Turkey. Rejection of the Iraqi model

108 Political group chairman of the prohibited Kurdish Party of Democratic Society (Demokratik Toplum Partisi, DTP). Since February 2010, leader of the successor Peace and Democracy Party (Barış ve Demokrasi Partisi, BDP). The current leader of the 'Peoples' Democratic Party' (HDP) is Selahattin Demirtaş

109 Leader of the Kurdish Rights and Freedoms Party (Hak ve Özgürlükler Partisi, HAK-PAR).

110 Leader of the Kurdish Participatory Democracy Party (Katılımcı Demokrasi Partisi, KADEP).

111 For interviews, see Topçuoğlu, Dezentralisierung und Selbstverwaltung (Decentralisation and self-administration), Baden-Baden 2012, pp. 360-393.

112 Cf. Demirtaş 2009, p. 364; Bozyel 2009, p. 375, in: Topçuoğlu 2012.

113 Cf. Elçi 2009, p. 387, in: Topçuoğlu 2012.

is based on the fact that formation of regions or member states in a federal Turkey by reference to the 'ethnic' criterion is not deemed possible. Observation of the Iraqi model rather leads to the understanding that a federal model can also be set up in Turkey on the basis of 'regions'. However, the model should correspond to Turkey's social structure and geographical conditions. Moreover, the Iraqi model is not regarded as secure and stable owing to the social, political and religious structure of the country.[114]

4.2 Claim for a decentralised model

The claim by the Kurdish parties for the formation of regions or member states within a federal system includes not only Kurdish territories but the whole of Turkey.[115] This is based on the fact that a solution to the Kurdish question is not deemed possible without democratisation of the state structures. Under democratisation the fundamental characteristics of the state could be changed, guaranteeing the rights of the different cultural, religious and ethnic groups. In this respect, it is necessary to restructure the administrative and political system in Turkey towards a heterogeneous society and to make the system adaptable. Not only the Kurdish territories would benefit from this but also the other regions of Turkey which are particularly characterised by cultural and economic disparities.[116]

The DTP/BDP, HAK-PAR and KADEP take the view that the regions or member states in Turkey should be constituted on the basis of regional diversity.[117] This is directly related to the demographic structure of the country. Apart from the Turkish and Kurdish social groups, which each form the majority in their own territories, there are other, smaller ethnic and religious minorities who live scattered all over the country. So, neither the Kurdish territories nor the other regions of Turkey have an ethnically homogenous structure.

The other regions of Turkey are somewhat more complicated, as here the Kurdish population is relatively scattered. The Kurds are particularly concentrated in Çukurova, Central Anatolia, Istanbul and other western provinces of Turkey. When regions and member states are being formed, it is therefore necessary to take this scattering of the population into account. However, the scattering of the population is not regarded by the representatives of Kurdish society as an obstacle

114 Cf. Demirtaş 2009, p. 366; Bozyel 2009, p. 379; Elçi 2009, pp. 385-392, in: Topçuoğlu 2012.

115 Cf. Demirtaş 2009, p. 362; Bozyel 2009, p. 372; Elçi 2009, p. 385 et seq., in: Topcuoğu 2012.

116 Cf. Bozyel 2009, p. 372; Demirtaş 2009, p. 362, in Topçuoğlu 2012.

117 Cf. Bozyel 2009, p. 370 et seq.; Elçi 2009, p. 384 et seq.; Demirtaş 2009, p. 362, in Topçuoğlu 2012.

to the decentralisation of administrative and state structures. Other peoples are also confronted with this problem within a nation state, including Kurds in Iraq.[118] This reaffirms that the Kurds who live outside their own territory as well as Turks and other ethnic and religious minorities who are established in Kurdish regions are expected to benefit from administrative and cultural rights. The demographic social structure of Turkey must be regarded as one of the most important reasons why a decentralisation model is proposed by representatives of Kurdish society.

Specifically, the question arises as to how to deal with the inequalities between regions. Here the treatment of Spanish and Italian regions, which have each been given different responsibilities, may be cited as an example. The Turkish regions also differ from one another with regard to language, religion, ethnicity, geography and economy.

The Kurdish regions can be defined economically as backward regions of Turkey. They have always been disadvantaged in a targeted way by the state in every respect, with the result that it has not been possible for either a serious economic recovery or a stable infrastructure to emerge there. As a result, the prosperity of the population in the Kurdish regions in comparison to the western regions is relatively low. Added to this are the armed hostilities between the PKK and the Turkish army, ongoing for more than 25 years, which have led to further social, cultural, psychological and economic destruction not only of the Kurdish population but also of the regions.[119] However, the 'backwardness' and poverty of the Kurdish regions does not mean that the regions themselves have no economic resources. Quite the opposite is true. In the past, the Kurdish regions did not benefit from their own resources, because they were excluded from them.

The elimination of regional inequality is one of the basic demands of the Kurds to be made on the Turkish state as part of the planned decentralisation process.[120]In this respect, a comprehensive development plan is proposed for the Kurdish regions; Such a plan has been implemented, for example, in Italy's southern regions. However, this development plan is not intended to be implemented in the long term, merely in the short term to enable the infrastructure to be established.[121]

Belgium provides an example of where the economic divide between prosperous regions can lead. Thus the demand by representatives of Kurdish society for positive discrimination means that the Kurdish regions must be accorded their

118 Bozyel 2009, p. 370, in: Topçuoğlu 2012.

119 Cf. Bozyel 2009, p. 376, in: Topçuoğlu 2012.

120 Cf. Bozyel 2009, p. 376, in: Topçuoğlu 2012.

121 Cf. Elçi 2009, p. 389, in: Topçuoğlu 2012.

own special status, as in Italy and Spain. Here the issue of funding for the regions plays an important role, an issue with which one is always confronted in a federal system: The problem lies mainly in the fact that the rich regions are not always willing to support the underdeveloped regions of their own accord.

Therefore, the representatives of Kurdish society are demanding a form of positive discrimination in which the underdeveloped Kurdish regions are initially funded from the state budget,[122] but this positive discrimination should only continue for as long as it takes to eliminate the inequality between the regions and to establish a uniform state of development. It is important, however, that the country's resources are distributed proportionately and fairly to the regions and populations. Otherwise, the federal system will not be viable by reason of the inequality and disparity between regions.[123]

4.3 The decentralisation project of the DTP (Party of Democratic Society)

The decentralisation project of the DTP[124] provides for a fundamental restructuring of the political and administrative structure of the Turkish central state. The solution project can be described as a decentralised political system which is compared as an alternative to the currently strongly established central state principle. The following points represent the core of this decentralisation project:

a) Analysis of the model of the unified and centralist national state: The Turkish national state, which was established in the first half of the 20th century with the support of the Anatolian peoples, constitutes an obstacle to the qualitative democratisation of the Turkish republic. The unified and centralist model of the national state, which is still used administratively in Turkey, is cited as a significant reason why Turkey's socio-political problems are still very present. The official ideology, which relies on assimilation, elimination and homogenisation of the different peoples and cultures, is rejected by the DTP, because it is deemed to be the underlying cause of the ever-present social, cultural and political crisis. Against this background, the political structure of the Turkish republic is not identified as a democracy but rather only as an oligarchy.

122 Cf. Demirtaş 2009, p. 365 et seq., in: Topçuoğlu 2012.

123 Cf. Bozyel 2009, p. 377, in: Topçuoğlu 2012.

124 The decentralisation project of the DTP was made available in September 2008 in the form of a booklet and included in its party manifesto. This booklet was published in three languages (Turkish, Kurdish and English) and distributed to all Turkish parliamentary representatives, ministers and diplomats. This text is translated as follows: 'DTP – Democratic Society's Project of Democratic Solution to the Kurdish Question'.

A national state as such is fundamentally rejected by the DTP, because it is in no way seen as a model for the future but rather criticised as a political system, since experience shows that it has led to the elimination and destruction of all cultures except the one which prevails at a given moment. The catastrophic consequences of the two world wars and other regional wars may be mentioned as an example.

The decentralisation and federalisation processes, which took place at the end of the Second World War in many European unitary states, are regarded as the result of the overhaul of the unitary and centralist nation state. This also includes the development of the EU, which is restructuring itself under the principle of subsidiarity and thereby also limiting the power of individual nation states. With regard to the oriental nation states, Iraq is mentioned as an example of the catastrophic consequences after the end of the Second World War. There, instead of a democratic, political nation based on subjective criteria, a nation was constructed in terms of ethnic and religious differences, that is to say objective criteria.[125]

b) Democratic autonomy: The DTP interprets the term 'democratic autonomy'[126] as meaning a type of democratic self-administration which is intended to completely democratise the existing republic. The key aspect of this model is that it prescribes the formation of a parliamentary system as a prerequisite. Instead of the understanding of an ethnic and territorial autonomy, the structuring of a regional and local autonomy, which should be based on cultural diversity, is represented as a contemporary model. Whilst under this model the case is made for a flag and an official language for the whole 'Turkish nation', it is stressed at the same time that each region and local unit should set up democratic self-administration with its own symbols. However, research into the demographic structure of Turkey is a precondition for this model, application of which is not limited to the Kurdish regions but is formulated nationwide. The democratic autonomy model still indicates, in particular, the establishment of a decentralised system, which can be described as a system of 'regional parliaments'.[127]

c) The system of regional parliaments: Under democratic autonomy, the administrative model of the DTP stipulates that 20 to 25 regional parliaments should be established throughout Turkey. These must comprise, in particular, neigh-

125 Cf. DTP 2008, p. 7 et seq.

126 For a detailed presentation and evaluation of the democratic autonomy, see Kesen, Die Kurdenfrage im Kontext des Beitritts der Türkei zur Europäischen Union (The Kurdish question in the context of Turkey's accession to the European Union), Nomos publishing house, 1st edition, Baden-Baden 2009, pp. 251–256.

127 Cf. DTP 2008, p. 9 et seq.

bouring provinces which have a socioculturally and economically close relationship with each other. The regional parliaments should be constituted by elections and have full responsibilities at regional level in all areas (except defence, foreign policy and finance, which are the responsibility of central government), such as education, health or culture. Under this system, only areas such as security, policing and justice will be governed in cooperation with central government. Persons who take on duties in the regional parliaments, shall be called regional representatives in this system. Furthermore, in the regional parliament both the president of the regional parliament and the members of the executive council should be elected independently of one another. Presidents and members of the executive council would be obliged to implement the decisions made by the regional parliaments.

The services of the regional parliaments should be financed, firstly, from the budget of central government according to the criteria of total population and state of development of the region and, secondly, by shares in regional income. This system provides for the use of positive discrimination with regard to the underdeveloped and poor regions. It is stressed that this decentralised system is neither federalism nor an autonomy which is established on the basis of ethnicity. Rather, this system is described as a model which is based on a reinforcement and/or stabilisation of the decentralised administration, which should take place between the central government and the regions/provinces. Under this system, the regions should be called either by their previous names or else by the name of the largest province within the bounds of responsibility of a regional parliament.

The system of regional parliaments also holds the provincial governors responsible for implementing decisions which are made by both the central government and the executive council of the regional parliaments. The other administrative units such as the general provincial assemblies, communes and local authorities/mayors should continue under this system.[128]

d) Amendment of the Turkish constitution: Under the solution proposed by the DTP, a fundamental amendment to the Turkish constitution is demanded, in which the terms 'ethnic nation' and 'Turkish nationality' are paramount. It is emphasised that not only Turks live in Turkey but also numerous non-Turkish minorities. Therefore the definition of nationality, which in the Turkish constitution is interpreted according to ethnic criteria, should be replaced by an ethnically neutral definition. It is proposed that the definition 'national of Tur-

128 Cf. DTP 2008, p. 10 et seq.

key' should now be established in the Turkish constitution. Furthermore, the definition of the ethnic Turkish nation which is still enshrined in the constitution should also be replaced with the definition 'nation of Turkey'. Only by removing all ethnically defined terms is it considered possible for the different cultures and peoples to be able to express themselves freely under a new constitution.

Amendment of the constitution should also take into account the fact that in addition to Turkish, as the official language, the other languages of Turkey should also be used both in public life and in education after researching their demographic distribution. In addition, the DTP demands that gender equality should be guaranteed under constitutional law. With double staffing of the party and in local politics, changes will be implemented which specifically facilitate equal participation by women in all political decision-making bodies. In particular, the principle of positive discrimination should be incorporated into the constitution, so that women can actively participate in the cultural, political and economic spheres of life.[129]

e) The need for a decentralised national economic policy: A further aspect which is considered an essential part of the solution proposed by the DTP is the restructuring of the decentralised/national economic policy. For this purpose, particularly for the regions, which are economically weak, targeted national economic development models should be created in order to achieve a certain balance between the centre and the regions. In relation to future national economic development models, the DTP expressly states that these can only be achieved if the sociopolitical background to the Kurdish question is acknowledged. Because a higher standard of living alone, as the example of the Spanish regions of Catalonia and the Basque Country currently demonstrates, will in no way contribute to the establishment of strong and lasting peace in the Kurdish regions.[130]

4.4 Academic debate in Turkey

In Turkey, the debate on subjects such as decentralisation, self-administration, autonomy and federalism is extremely difficult and problematic. The reasons for this are obvious: Turkey has a centralised administrative structure based on the French model and, until now, has stuck rigidly to this state structure. Since the formation

129 Cf. DTP 2008, p.11 et seq.

130 Cf. DTP 2008, p. 13et seq.

of the republic, there has been established in society an understanding that the administrative structure of the state should not be debated. Therefore, until recently even universities scarcely addressed this subject. The Kurdish question was a particular thorn in its side: Anyone who addressed the subjects of federalism and autonomy academically risked prosecution under Kemalist state policy for 'treason' and 'separatism'.[131]

However, the tide has turned. There are now academic studies even in Turkey which address the topics of decentralisation, self-administration and autonomy[132] as well as federalism.[133] Whilst the number of studies may be small, they are nevertheless contributing to discussion of a subject which to date has been raised almost exclusively by the Kurdish side.

The studies differ from one another in one key respect: Some of them are concerned exclusively with models of local, communal and regional self-administration which exist all over the world. However, they do not deal with the question of whether the decentralisation models existing in different forms all over the world could also be applied to resolve the Kurdish question in Turkey. Rather, they refer to the fact that central governance of local, communal and regional administrative units is no longer possible or contemporary. The issue of democracy is cited as a key reason as to why Turkey should promptly transform itself from a centralised state structure into a decentralised one. However, no specific decentralisation model for Turkey is proposed. Rather, it is noted that the responsibilities of local and communal self-government should be extended, specifically in accordance with the criteria of the 'European Charter of Local Self Government'.[134]

Other studies deal with the topic in connection with resolution of the Kurdish

131 The Turkish sociologist, Ismail Besikci, may be cited as an example. He examined Kemalist state policy on an academic basis and as a result had to spend more than 15 years in prison.

132 Cf. Keleş, Yerinden Yönetim ve Siyaset (Decentralisation and politics), Istanbul 2012; Şinik, Karşılaştırmalı Yerel Yönetim Örnekleri (Decentralisation models compared), Istanbul 2012; Nalbant, Üniter Devlet. Bölgeselleşmeden Küreselleşmeye (The unitary state. From regionalism to globalisation), Istanbul 2012; Görmez, Yerel Demokrasi ve Türkiye (Local democracy and Turkey), Istanbul 1997; Koyuncu Yerel Özerklik: Modeller ve Uygulamalar (Local autonomy: Models and applications), Muğla Üniversitesi SBE Dergisi Cilt 1, Sayı 1, 2000, pp. 98-117; Çağdas, Türkiye'de Yerel YönetimlerdeİIdari Özerklik (Administrative autonomy in local administrative bodies in Turkey), Marmara Üniversitesi İİ. İ.B.F. Dergisi, Cilt XXX, Sayı I, 2011, pp. 391-416.

133 Cf. Uygun, Federal Devlet (The federal state), Ankara 2002; Yildiz Ulus Devletin Bunalımı. Federalizm ve Kürt Meselesi (The depression of the nation state. Federalism and the Kurdish question), Istanbul 2010.

134 Cf. Çağdas 2011, p. 412 et seq. Turkey has indeed signed the 'European Charter of Local Self-Government' of 1985, as part of the EU accession process, but has not implemented it to date. Cf. Topçuoğlu 2012, p. 288.

question in Turkey.[135] These are studies by the TESEV Foundation[136], which were composed by well-known scholars. TESEV can be described as a think tank which addresses fundamental social, economic and political issues in Turkey and develops approaches to them. The studies implemented by it include specific proposals to resolve the Kurdish question in social, economic and policy areas.[137] However, below we look only at the study which deals with decentralisation of the state structure.[138] It concerns specific proposals by TESEV to the government as to how the local, communal and regional self-administrations should be defined and enshrined in the new constitution. The core issues are as follows:

a) Justification of decentralisation: The study by TESEV cites a number of reasons why Turkey should decentralise and differentiates between internal and external factors. The change in the economic structure of society, the growth of the cities in the course of urbanisation, the inequality between regions, the inefficient bureaucratic structure of centralism and the demand for a stronger civil society are cited as internal factors whilst globalisation and the accession of Turkey to the EU are cited as external factors. It is stressed that Turkey should not only decentralise in order to resolve the Kurdish question but also seek to create a democratic society.[139]
b) Formation of regions as self-governing units: The study asks on what criteria the regions can be formed as self-governing units. This is one of the most difficult questions which must be answered in the case of administrative reform. In the Turkish administrative system, the province is the highest unit, but the structure of the provinces has fundamentally changed since the republic was founded. Over time, the existing provinces had split up for political reasons and new, smaller provinces have been created. Some large cities, such as Istanbul and Ankara, are still growing both in terms of their populations and in terms of area, whereas the populations of certain provinces are shrinking. The resulting inequality of the regions leads to serious problems.

135 On the matter of federalism in particular, see Yildiz 2010. The author argues that the conditions for a Turkish-Kurdish federation in Turkey have not been met, but puts forward the thesis of decentralisation on the lines of the Spanish model. Cf. pp. 175-193.

136 TESEV, Türkiye Ekonomik ve Sosyal Edütler Vakfi (Turkish Economic and Social Studies Foundation).

137 TESEV, Kürt Sorununun Çözümüne Dair Bir Yol Haritası: Bölgeden Hükümete Öneriler, 2008 (A roadmap for resolution of the Kurdish question. Proposals addressed to the government of the region, 2008); TESEV, Kürt Sorunu'nun Çözümüne Doğru: Anayasal ve Yasal Öneriler, 2010 (On the way to resolving the Kurdish question: constitutional and statutory proposals, 2010).

138 TESEV, Yeni Anayasada Yerel ve Bölgesel Yönetim için Öneriler, 2012 (Proposals for local and regional self-administration in the new constitution, 2012).

139 Cf. TESEV 2012, p. 5 et seq.

It is not just a question of the criteria for the formation of regions but also which side should set the decentralisation process in motion. In this connection, reference is made to Spain, where the process of regionalism has been initiated as a consequence of the demand of the regional entities and the initiative of the central state. Indeed, in the territories of Turkey which are predominantly inhabited by Kurds, regions could be formed without any difficulty, but not in other parts of the country. Here, it may be some time before the desire to form a regional self-governing unit is born. Therefore, the TESEV has proposed that the Grand National Assembly itself establish and form by statute the regional self-governing units, taking into account the wishes of the provinces.[140]

c) Organisational principle of the self-governing units: According to TESEV, the first step is to clarify the principles according to which the regional self-governing units are organised. It is proposed to amend the first three paragraphs of the constitution[141]. The centralist state structure is defined by paragraph 3 of the constitution. The wording of this is 'indivisible union of national territory and national people', which rules out a decentralised and federal structure of the republic.[142] Therefore it is suggested that these paragraphs in the constitution be deleted; centralism should be replaced by decentralisation. The principle of decentralisation should be recognised and protected as a basic principle. The powers of the regional administrative units should also be divided according to decentralist principles.[143]

d) Balance of power: According to TESEV, the powers of the central state should be determined by statute. Powers which do not fall within the jurisdiction of the central state should be transferred to regional self-governing units. Specifically, it is the following powers and responsibilities which should only be taken on by the central state: justice, defence, security, intelligence services, foreign relations, foreign policy, finance, foreign trade, customs services, religious affairs, social security, land registry and cadastral matters, matters relating to persons and citizenship matters and charitable foundations. On the other hand, the following powers and responsibilities should be jointly assumed by both the central state and the regional self-governing units in hybrid form: education, health, environment, social services and programmes and projects at national level which remove inequality between regions. The remaining areas should

140 Cf. TESEV 2012, p. 12 et seq.

141

142 Cf. Topçuoğlu 2012, p. 169.

143 TESEV 2012, p. 14 et seq.

come under the responsibility of local, communal and regional self-governing units. TESEV also stresses that the regional units should be permitted to raise taxes in certain areas. This should, in particular, strengthen the financial autonomy of the regional units.[144]

e) Proposal for a decentralisation model: The administrative system in Turkey is made up of central administration and provincial administration. Districts and sub-districts are subject to provincial administration. At the head of each province is a governor who receives orders from the centre. The district offices, on the other hand, are responsible for administration of the provincial districts and sub-districts, which are under the responsibility of a governor.[145] According to TESEV, this structure of provincial administration should be fundamentally transformed from a centralised to a decentralised one in the following way: a region should be designed as the highest unit of the self-administration and the province should be subordinate to the region; districts and communes should be restructured in accordance with decentralist principles, specifically according to economic, geographic and cultural factors. The region as self-governing unit should be composed of a regional parliament, a president and an executive council. Formation of the regions and their powers should be governed by statute. The members and the president of the regional parliament must be elected either by the voter directly or by members of the regional parliament. The powers of regional self-governing units which consist of only one province will differ from those of regions which consist of a number of provinces.

   The province should be re-established as the second largest self-governing unit after the region. Under the present administrative system, the provinces have neither administrative nor financial autonomy. TESEV therefore proposes to change the name, structure and function of provincial administration and to change the centralistic name of provincial administration to 'local provincial self government', 'provincial assembly' and 'executive council'. Given that under the existing administrative system the governor is the head of the province, his powers should be removed because he is appointed by the centre. Conversely, the president of the local provincial self-government should be elected by the provincial assembly and the members of the provincial assembly should be elected by the citizens of the province.[146]

144 TESEV 2012, p. 17 et seq.

145 Cf. Topçuoğlu 2012, p. 286 et seq.

146 Cf. TESEV 2012, p. 20 et seq.

5. CONCLUDING REMARK

In relation to a decentralised model, the demands of the Kurdish parties differ on the issue of sovereignty. In its model, the DTP demands the transfer of powers to the regions, whilst the HAK-PAR and the KADEP do not renounce the right to sovereignty. Without the exercise of sovereignty, according to the explanation, the delegated powers are not classified as safe in the long term. The non-exercise of sovereignty is seen as a risk for the future, because the delegated powers can also be revoked by central government depending on the political situation.[147]

Based on the demands of the Kurdish parties, it can be established that this is actually a process of legislative decentralisation[148]. The form of administrative decentralisation which deals with administrative tasks via decentralised institutions is rejected but no provision is made to also transfer responsibilities from the centre to the regions. The administrative system of Turkey has been built in accordance with this centralistic French model and has not changed to this day. The form of executive decentralisation which is used in particular in Great Britain and France is deemed by Kurdish representatives not to be sufficient or secure.

The call for the legislative form of decentralisation is linked directly to the fact that administrative powers are transferred in various forms to regional levels and constitutionally guaranteed. Thus the Kurdish parties are calling for a decentralisation of the second level, which has been implemented as regionalism in Spain and Italy.

The third level of decentralisation, which is described as federalism, is a long-term objective of Kurdish parties like HAK PAR and KADEP, whilst the DTP dis-

147 Cf. Bozyel 2009, p. 374; Elçi 2009, p. 386 et seq., in Topçuoğlu 2012.

148 The levels of decentralisation are subdivided as follows: a) the lowest level of decentralisation is the strengthening of communal self-administration. Developments in Poland and Russia may be cited as examples of this; b) the second level of decentralisation is regionalism. Examples of this include Spain and Italy, with France also moving in the same direction; c) the third level of decentralisation is federalism. Examples of this include the USA, Australia and Switzerland; d) the fourth level of decentralisation is the switch from federalism to separatism. Cf. Brünneck, Thesen zum Stand des Föderalismusproblems – Ein Diskussionsbeitrag (Theories on the status of the problem of federalism. A contribution to the debate). In: Föderalismus zwischen Integration und Sezession. Chancen und Risiken bundesstaatlicher Ordnung. Ein internationales Symposium (Federalism between integration and secession. Opportunities and risks of federal structure. An international symposium), Baden-Baden 1993, pp. 291–294; Walkenhorst, Die Föderalisierung der Europäischen Union. Möglichkeiten und Grenzen im Spannungsfeld der drei politischen Gestaltungsebenen EG/EU, Nationalstaaten, Regionen (The federalisation of the European Union. Possibilities and limitations in the area of conflict between the three levels of political organisation, EC/EU, nation states and regions), Oldenburg 1997, p. 19 et seq.; Sturm/Steinhart, Föderalismus. Studienkurs Politikwissenschaft (Federalism. Course of study in political science), Baden-Baden 2005, p. 156 et seq.

tances itself from it. Its decentralisation project provides for powers to be strictly separated between the central and regional governments. Therefore, powers such as defence, foreign policy and finance should be controlled by central government, the rest within the competence of regional government. From this perspective, what DTP is claiming is nothing other than the third level of decentralisation, even if it rejects this on the basis of sovereignty.[149]

149 This is linked to the fact that the idea of Democratic Autonomy dates back to Abdullah Öcalan and he rejects sovereignty as a state instrument of power.

ANNEX

The following examples of autonomy and federalism represent only a first approximation of the many historical experiences of autonomous trends and ethnic conflicts in Europe.[150] The account is limited to institutional and constitutional matters and arrangements and ignores the socio economic framework conditions.

1. Spain

In spite of its centralistic tradition, Spain is an ethnically and culturally very diverse state. The system of autonomous communities developed after the Franco dictatorship offers interesting illustrative material for practical solutions to complicated nationality disputes and language arrangements. At its heart was a process of decentralisation and transfer of power to regional self-governing units, which has still not been completed today after twenty years.

It relates to the non-Castilian ethnic groups, who refuse to refer to themselves as a minority. They are the so-called historical communities in the Basque Country, Catalonia, Galicia and Navarra, as well as the non Castilian speaking population in Valencia and on the Balearic Islands. The forced policy of Castilisation over the last 33 years with its tragic climax at the time of Franco has in many regions effectively turned the traditional language communities into quantitative minorities, but has not managed to extinguish their particular identity and demands for autonomy.

1.1 Basque Country

Thus in the Basque Country today only 25 % still speak 'Euskera' as their mother tongue. Under Franco, use of Basque in public was punishable by fine. Today, the duty to protect and to promote own languages is enshrined in all statutes of autonomy of the communities (particularly Basque and Catalan). Castellano is the official language of the Spanish state; the regional languages are official languages having equal status in the autonomous communities. They are also valid for use by the authorities of the central administration in its relations with the autonomous communities.

The Spanish constitution has introduced two different models of political and

150 Other examples in Markku Suksi, Autonomy (Note 67).

administrative decentralisation for the autonomous communities in Art. 143 and 151. Statutes of autonomy were adopted for the Basque Country and Catalonia in 1979, for Galicia in 1981, for Valencia and Navarra in 1982 and for the Balearic Islands in 1983. In addition, they have adopted their own respective language laws on incorporating the languages into public transport, public authorities, the army, the church etc. by means of development programmes, use in schools and bilingual place names or road signs. The language law for the Basque Country, for example, requires the regional government to enforce the preferential use of Basque in the mainstream media under its control. All language laws promote equality of the community's own language alongside Castellano at the universities of the autonomous communities, although to date this has actually only been achieved in Catalonia. Only the language of the courts is subject to the exclusive legal competence of the central state, which, however, regulates bilingualism and translation.

Since 1976 there have no longer been any penal provisions and prohibitions against separatist activities and associations, except where they are pursued by violent means. Thus, most governments have avoided bringing the Basque Herri Batasuna party, which openly supports the radical nationalist movement ETA, before the courts. Only the conservative government under Prime Minister José María Aznar broke with this restraint and brought charges against the leaders of Herri Batasuna, which ended with condemnation of the entire party leadership. In 2003 the party was banned. ETA largely ended its military activities following the ceasefire of 2011 agreed with the Spanish government.

Political representation of the communities is linked to the history of the nations of the Catalans, Basques and Galicians, whose core settlement areas essentially correspond to the borders of the current autonomous communities. Particularly in the Basque Country and Catalonia, separate party systems have emerged. Their parliaments have special legislative powers and powers of execution in the areas of culture, training and science, economy and agriculture, local administration, regional planning and urban development, social policy, the legal system and public safety. The Basque Country and Catalonia have been given their own civil, criminal and administrative jurisdiction as well as their own police powers. Only in the Basque Country does the community itself have financial and fiscal autonomy and makes a flat-rate contribution to the central state budget.

The process of decentralisation and autonomisation is not yet complete, as the undiminished desire for autonomy in the Basque Country and Catalonia demonstrates. Yet all central governments have left it in no doubt that there are clear boundaries between decentralisation and secession. There is the unfounded fear

that the release of one community from the state formation will inevitably lead to the secession of other communities and thus to the disintegration of Spain.

In October 2003, under Juan José Ibarretxe, the government of the three Basque parties, the 'Basque Nationalist Party' (PNV), 'Basque Solidarity' (EA) and 'United Left' (EB-IU), presented a proposal for a new statute of autonomy for the Basque Country. Under this so-called Ibarretxe Plan it was intended that the statute of autonomy of December 1979, which was then valid, would be superseded by a new statute. It provided even more extensive rights of self-determination for the Basque Country (including its own deputy in the European Parliament, its own representatives in international organisations) and free association with Spain. Critics of this plan, such as the 'People's Party' (PP) and the Socialists (PSOE), accused the government of wanting to achieve independence with the proposal. However, the 1978 constitution provides in Art. 2 that it is based on the indissoluble unity of the Spanish nation as a common and indivisible fatherland, which is unconstitutional. In December 2004, the proposal for the new statute of autonomy of the Basque parliament was narrowly rejected by 39 votes to 35 in the Spanish parliament. However, in January 2005, it had been rejected there as expected by 313 votes to 29. In the Basque Country, currently no more than 35 % of the population is in favour of an independent state. Obviously there is even less interest in a Basque nation state in the French part.

Thus, decentralisation and autonomisation in present-day Spain are still proving to be controversial routes to the integration and cohesion even of different language communities. Without successful economic equality and integration, however, this process will not appease separatist ambitions.

1.2 Catalonia

On 11 September 2013, 2 million out of a total 7 million Catalans took to the streets and formed a chain more than 400 km long. They were linking into the human chain which was formed in protest on the 50th anniversary of the Ribbentrop-Molotov Pact in Estonia, Latvia and Lithuania. Its name, 'Baltic Way' was the inspiration for the 'Catalan Way'. There were no incidents. There were no problems anywhere. It was an impressive demonstration of organisation by the people. Organisation by the people because the organisers were neither parties nor the Catalan government but a grassroots organisation: the Catalan national assembly.

It was not the first time that a grassroots organisation has changed Catalan politics. Between 2009 and 2011 grassroots referenda were held on independence in

cities across the country. An ad hoc voting system was introduced. A national census, polling stations, representatives, an election campaign. One million Catalans voted. It was a proper election: the people queued up in the morning to vote, the political parties held elections, local celebrities went to vote and journalists interviewed them, major headlines on the day after the election. The crucial difference was that organisation of the election process was in the hands of the people. No government or state was behind it, only self-organised citizens. Today in Catalonia we have the largest popular movement for decades: a movement for national independence, but not only that. The people now realise that the movement is also campaigning for democracy. The question is: why do we need a movement for democracy in a democratic country?

Let us not forget the primary objective: national independence.[151] From the Christian Democrats to the anti-capitalists, the coalition in Catalonia is a very unusual one. In the last three years, the Catalan parties have declared themselves in favour of independence as a result of pressure from the streets. The Republican Left (a non-Marxist left-wing grouping) was the traditional pro-independence party in the parliament, the third to fifth strongest party by number of seats. It is currently the second strongest party, and opinion polls suggest that it would be the strongest party if elections were to be held now. Today it is the most important opposition party but supports the government of the 'Convergence and Union' (CiU). CiU is the traditional ruling coalition in the country and unites the Liberal Democrats and the Christian Democrats. Although they were Catalan nationalists, until recently they did not support independence. The president of the CiU, Artur Mas, is now the Catalan president and identifies self-determination and independence as his primary objectives.

The former coalition of communists and greens (ICV) and the anti-capitalist group 'Popular Unity' (CUP) also support the movement, and even the 'Spanish Socialist Party' (PSC in Catalonia) has signed the demand for a referendum, although it is against independence. Only Rajoy's 'People's Party' and a small Spanish nationalist party are against independence. In the current Catalan parliament, 87 deputies are from parties which are committed to the independence movement, 20 socialists support the referendum but reject independence, and 28 deputies are against the movement and the referendum. However, the latest opinion polls indicate that in the next elections the pro-independence parties will have nine or ten more deputies.

151 Cf. also Kai-Olaf Lang, Katalonien auf dem Weg in die Unabhängigkeit? (Catalonia on the route to independence?) In: SWP-Aktuell 50, August 2013.

However, the position of the Spanish state, and what is worse, of the Spanish political parties, is very clear: Catalans are not permitted to vote. Only the 'United Left' recognises that the Catalans must choose. The other parties believe that the Catalans have no right to choose their own future and that it is impossible for them to become an independent state even if that is the wish of the entire population.

A clash of legitimacy was therefore inevitable: between the 1978 constitution, which is still controlled in all matters of 'national unity' by the Franco Generals, and the will of the Catalan population. It is here precisely that democracy is in danger: the process of Catalan independence is ultimately the path along which the legitimacy created by Franco's victory in the war can be broken, a legitimacy which is still alive in the constitution.

In 2003, the Catalan parties of the Left won the election, and the socialist president, Pasqual Margall, decided to renegotiate the relationship between Catalonia and Spain. The Spanish central government, a socialist government at that time, has similarly undermined Catalan autonomy through legislation. The Catalan parliament approved the new Charter of Autonomy by 125 votes to 15. The 15 votes against the Charter came from the 'People's Party'. Under the legislation, the Catalan Charter of Autonomy must be ratified not only by the Catalan parliament but also by the Spanish parliament, in which the Catalan parties form the minority. Although the Spanish parliament has changed a large part of the text and removed the most important amendments which had been approved in the Catalan parliament, there was ultimately an agreement. The Catalan population voted in favour, even if they were disappointed by the lack of dialogue. Yet, the 'People's Party' used the Charter for their own interests and launched a huge campaign 'against the Catalans', not against the Catalan Charter. The 'People's Party' has its roots in the supporters of the Franco regime.

The surprise came when the Spanish constitutional court declared itself willing to review the Catalan Charter in order to assess whether it was in breach of the law, after it had been both adopted by the Catalan and Spanish parliaments and amended by the Catalans and finally affirmed in a referendum. When, in 2010, the constitutional court amended a total of 41 articles of the Charter, thus changing it beyond recognition, that was the start of the pro-independence movement. A huge demonstration was held in Barcelona and, for the first time, the word 'independence' was on everyone's lips. The official Catalan flag was replaced by the flag with the star.

The ideological and practical reasons for this major change can be traced back to the end of the Franco regime. When Franco died, there was a pact between his

regime and the democratic parties. Full democracy was not introduced. King Juan Carlos, who was nominated by Franco himself, was accepted. Control by the army of some matters, in particular the 'territorial issue' was accepted. An institution as repressive as the politically important constitutional court changed only its name and was directed against the Basque nationalists and extreme left-wing groups. The followers of the Franco regime were lawfully permitted to found their own party, the 'People's Party', and to keep their institutions alive.

It is true that democracy blossomed after the failed coup in 1981, particularly during the years under Felipe Gonzales. However, when the 'People's Party' won the elections for the second time in 2000, José Maria Aznar turned the clock back and began a huge nationalist campaign by the far right, which broke the traditional pacts between Catalans and Spaniards. And that is where we are now.

Democratically speaking, the Spanish state is going backwards. The Spanish press and Spanish television spread hatred against the Catalans on a daily basis, and not a single Spanish politician questions it. In the autonomous Catalan communities, the Catalan language is persecuted, even though it is officially permitted there. New laws are being enacted by the Spanish government to hispanicise Catalan-speaking children. It is the aggressive behaviour of the Madrid establishment against the Catalans which is responsible for their disenchantment with Spanish democracy.

This might all be regarded purely as an emotive issue, but it is more than that. The Spanish government is attempting to ruin the Catalan economy, traditionally the most important in Spain. Madrid is its great rival. Between 1986 and 2010, the Spanish state received EUR 213 933 million in taxes from Catalonia which have not flowed back. That amounts to fiscal robbery of between EUR 10 000 and 16 000 million a year. This is because there is no limit on 'fiscal deficit' in Spain as with the 4 % limit in Germany or the 2 % limit in Canada. The 10.2 % fiscal deficit of Catalonia is beyond all reason. The Spanish economy is a veritable nightmare and the Catalans are paying for it. Banks are obtaining credit from the state because they are bankrupt. The 'Economist' described the corruption in Spain as comparable with that in the so-called Third World. The country is bankrupt and yet a very small number of families, often sons and uncles of the profiteers of the Franco regime, are richer than ever before. As one respected economist recently put it, 'they are enjoying the state for themselves'.

The Catalans are currently suffering the worst crisis imaginable. The reason for this is that the Catalan government is running out of money on account of the plundering of the public purse by the Spanish government and the absence of any

institutional loyalty. Putting a stop to this type of government and changing society is also one of the main objectives of the pro-independence movement. Most Catalans realise that the Franco regime has not yet been completely overcome. They see in Catalan independence the best way to end the struggle begun by heroes like the Catalan president Lluis Companys, who was arrested in 1940 by the Gestapo in France and executed by Franco.

I am sure that you will understand after reading these words why Spanish governments have refused to lift the death sentence against Lluis Companys and vindicate him, as all Catalan parties have demanded. Companys is still officially classed as a criminal, even though at the time of the republic he was elected by the people as president of Catalonia. And what is the reason for this incredible behaviour? The official answer is that the killing of the Catalan president was lawful. And this is happening in Europe in 2013.
(by Vicente Partal, Journalist, Member of the Board of the ECJ, Villaweb/Spain)

2. Italy

Italy is linguistically and ethnically more homogenous than Spain, although it distinguishes 12 different language groups in six language families. Yet all of these together make up only 5 % (2.8 million) of the total population. Very few language families have special status with autonomous rights: the Germans and Ladins in South Tyrol do, but not the Sardinians. With 280 000 inhabitants (0.5 % of the total population), Germans make up the largest minority.

Language minorities have constitutional protection (Art. 6 of the Italian constitution). This means, negatively, the prohibition of discrimination and, positively, promotion by special legislation, for example naming of children, bilingualism in nursery schools, school lessons, film subsidies, special rules for radio and TV.

Regional legislation for the protection of minorities has been permitted since 1983. This has led to different regimes, for example in South Tyrol to language separatism between Italian and German, whilst in the Aosta Valley there is complete bilingualism of Italian and French. For South Tyrol, detailed provisions apply in relation to the language regime in dealings with public authorities and courts on the basis of absolute equality and 'ethnic proportional representation' in filling staff posts.

The constitution does not offer any possibility of secession. Ideas for a federal state structure, as were discussed before national unification in the 19th century, failed to establish themselves. The idea of federalism was interpreted as a threat to

national unity. Agreements for separatist purposes are prohibited under Art. 18 I of the Italian constitution. Political representation is guaranteed by way of separate regional parties, hence for example the South Tyrolean People's Party, Slovene Union, Movimento Friuli. The Trentino-South Tyrol region also has political bodies: regional council, regional government and regional president. There are two constituencies, Trento and Bolzano.

However, limited decentralisation and regionalisation have taken place with the transfer of political and administrative responsibilities from the centre in Rome to the 20 regions, 103 provinces, 8 104 communes and 361 mountain communities (Communitá montane). Five of the 20 regions have special status: they are the Aosta Valley, Sardinia, Sicily, Venice and South Tyrol. They have a parliament which is directly elected every five years, a regional committee as executive and a president who chairs that executive. The president and the committee are elected by the parliament.

The so-called South Tyrol problem, the struggle for independence by the German-speaking population, has long been a source of serious political dynamite. Since the Gruber-De Gasperi Agreement of 5 September 1946, Austria and Italy have wrestled to find a political solution to the conflict, which was not just a language conflict. On 17 June 1992, both governments submitted their dispute over South Tyrol by letter to the UN Secretary General. It should be noted that without state backing from Austria this autonomy arrangement for the German-speaking South Tyroleans in Italy would almost certainly never have come about.

3. Belgium

Perhaps the politically most difficult but at the same time the most instructive decentralisation process in Europe is currently taking place in Belgium. Since it was founded in 1831, there have been two large populations there: the Dutch-speaking Flemings (59.1 %) and the French-speaking Walloons (40.2 %), as well as 0.7 % Germans since 1919. Territorially, they are clearly separated from each other: the Flemings in the north, the Walloons in the South of Belgium; only the Brussels region is mixed. On the surface, it involves the opposition of two competing language communities.

To begin with, Belgium was a catholic, homogenous unitary state. The nobility, upper classes and clergy formed the French-speaking high society, whilst in the countryside 60 % of the population was Flemish. In the wake of industrialisation, Walloon was replaced by French. Since high society and the elite of the country

spoke French, in the first half of the 19th century the unitary state regarded itself as monolingual. The language boundary was therefore originally more social than geographical in nature. And so in the mid-19th century the Flemish movement used language to defend themselves against their socio economic discrimination. In 1873, a first language law enforced the use of the Flemish language in criminal proceedings in Flanders. This was soon extended to the whole kingdom and in 1898 Flemish achieved equal status as a second official language. With the language law of 1932 the principle of territoriality was introduced, i.e. monolingualism in both parts of the country. The language problem transformed itself into territorial opposition.[152] Consequently, this language separatism was implemented in the language laws of 1962/63: now there were three monolingual regions in Belgium (French, Flemish, German); only Brussels, as the capital, was bilingual.

The constitutional reform of 1970 divided Belgium logically into four language areas. The linguistic division accelerated Belgium's development from a unitary state to a federal state in several major waves of reforms in 1970, 1980, 1988/89 and 1993. It took a total of 34 constitutional amendments to finally transform the kingdom into a federal state on 23 April 1993 by resolution of the parliament, a federal state which consists of the three autonomous regions of Flanders, Wallonia and Brussels Capital, with the three official languages, French, Dutch and German.

The federal state structure has a doubly complicated regional structure. It consists of three communities and three regions. The organisation of the communities dates back to the demand of the Flemish movement. In 1970 they were established as language and cultural communities with limited cultural autonomy. Their responsibilities extend to cultural matters, education, staff matters, health policy, welfare services but also inter-community and international cooperation (agreements with foreign states). The concept of culture is very wide and includes museums, libraries, radio, TV, press, youth policy, recreation, sport, tourism etc.

In 1980, the regions were created as purely territorial authority units. Firstly the Flemish and Walloon regions, followed in 1988/89 by a separate Brussels-Capital region. The German language community is integrated within the Walloon region. The regions have been allocated responsibility for education, science, planning, environmental protection and conservation, water management, economic policy, energy policy, supervision of local authorities, transport and employment

152 Cf. Freiburghaus / Gehl, Föderalismus – Leitbild für die Europäische Union? (Federalism, a model for the European Union?) (Akademiebeiträge zur politischen Bildung/Akademie für politische Bildung (Academic articles on political education/ Academy for political education), Tutzing; Vol. 34), Munich 2004, p. 89.

policy. The national legislature continues to have sole responsibility for the judiciary and the army. The state as a whole is also responsible for finances. Unlike many other federal states, in which the member states have financial autonomy, financial resources are allocated to the regions and communities by the state as a whole.[153] The regions may also conclude agreements with third countries. The language regime here operates according to the principle of territoriality with protection for minorities. A permanent language commission monitors their compliance. The communities and regions each have a parliament as legislative body and a council and an executive as governing body. Only in Flanders are community and region integrated. The legal instruments of the state as a whole, of the communities and of the regions are basically of equal value in relation to their respective local and objective responsibilities. To date the communities and regions have only responsibilities which have been allocated to them and which are exclusive in each case.

The question of finances is currently one of the main reasons why the conflict persists between the two communities in spite of federalisation. It concerns the distribution of wealth. Because the Flemish region is economically stronger than the Walloon region, it also contributes more to the federal finances than the Walloon region. This causes an ongoing dispute between the communities. For the prevention of disputes, there is a Consultation Committee and the Court of Arbitration, as the country's constitutional court, but the Senate also has overriding responsibility at federal level to manage conflict between the regions.

40 % of all public expenditure is actioned by the regions and communities. They receive their finances by way of remittances from federal taxes, and they are also permitted to levy certain regional taxes. At federal level, there is a system of equal public administration (staffing), with guarantees for the French minority in the state as a whole and the Flemish minority in Brussels. This means that the council of ministers is made up of French speaking and Dutch-speaking ministers with equal representation of the language groups, effectively a coalition government qua constitution. The federal parliament, in certain constitutionally established cases, is split into two language groups with specially qualified majorities for certain laws. Meanwhile, there are no longer any national parties to represent the interests of both communities at national level. Regional parties have been formed, which each focus on their own regional interests. There is unrestricted freedom of

153 Cf. Freiburghaus / Gehl 2004, p. 87 et seq.; Delmartino, Eine unvollendete Föderation (An unfinished federation), in: Föderalismus – Leitbild für die Europäische Union? (Federalism, a model for the European Union?) (Akademiebeiträge zur politischen Bildung/Akademie für politische Bildung (Academic articles on political education/ Academy for political education), Tutzing; Vol. 34), Munich 2004, p. 69 et seq.

association for minorities and there is virtually no control over secessionist activities, provided they are peaceful. The radical right-wing Vlaams Blok, for example, campaigns without restriction for Flemish sovereignty.

There is no doubt that the model brings with it strong integrative as well as centrifugal forces. Federalisation by way of the three state reforms has promoted and accelerated the separation between Flemish and Walloon identity. Flemish cultural awareness has grown in strength to a cultural and ultimately political nationalism. There is no mistaking the fact that the Belgian nation is gradually giving way to Walloon and Flemish ethnic identity. At the same time this has kindled a process of establishing a new nation, which is taking over from the Belgian nation and threatens to replace it. This process has not yet been completed, and the monarchy appears to be gaining ever greater importance to the national cohesion of the diverging communities. However, there are quite a few who say that it is considerably more difficult to give a guarantee for the Belgian nation today than it was in the 1970s or early 80s. The project for a federal monarchy has yet to be guaranteed. On the other hand, however, Belgium is unable to exist without its monarchy and without federalism.

4. United Kingdom

The process of decentralisation is referred to in Great Britain as devolution[154] (regionalisation). Whilst devolution is directly related to political sovereignty, it differs fundamentally from federalism, where all levels are based on the principle of sovereignty of the people, by virtue of the principle of parliamentary sovereignty.

Under the British system of government, responsibilities are allocated centrally to the parliaments of the regions (Northern Ireland, Scotland, Wales), which in an extreme case could in theory lead to the parliaments being dissolved and the powers being withdrawn. Thus in the United Kingdom, even after regionalisation of the exercise of political power, the parliament in Westminster continues to be the only source of legitimacy for the state.

A key feature of devolution is that it proceeds asymmetrically in terms of time and quality:[155] on the one hand, the devolution processes are not taking place con-

154 For more information on this see: Sturm, Devolution – Der pragmatische Weg zur Anerkennung regionaler Vielfalt im Vereinigten Königreich (Devolution: the pragmatic way to acknowledge regional diversity in the United Kingdom), in: Föderalismus – Leitbild für die Europäische Union? (Federalism, a model for the European Union?) (Akademiebeiträge zur politischen Bildung/Akademie für politische Bildung (Academic articles on political education/ Academy for political education), Tutzing; Vol. 34), Munich 2004, pp. 181–199.

155 For a more detailed explanation, see Sturm/Steinhart 2005, pp. 159–163; Jeffery, Devolution und Europa-

currently in all British regions, and on the other, the forms of devolution differ from each other to such an extent in some respects that they can only be described as having a very different character to those which triggered the process. The identity of the ethnic groups having British nationality varies considerably. For example, the Irish and the Scots clearly identify themselves with their nationalities more strongly than is the case in Wales. This can only be explained by the process of integration from a historical perspective. Wales had already been integrated by conquest in the 16th century and, apart from its own language, was not permitted to retain any national characteristics. Therefore, to this day, the Welsh identify themselves less strongly with a Welsh identity than the Scots or Irish do with theirs. The trigger for devolution in the United Kingdom is not greater administrative efficiency or the search for democratic forms of government which are more people-oriented, but the drive to guarantee the stability of the political system.[156]

Great Britain has four territories in total (Northern Ireland, Scotland, Wales and England), with more than 85 per cent of the total population of the United Kingdom living in England. The existence of corresponding 'Offices', the Northern Irish Office, the Scottish Office and the Welsh Office, each having its seat in the region in question, reflects an administrative decentralisation. The three territories are also each represented by one minister in the government. Scotland also benefits from the privilege of its own higher education system, and its legal system has a certain autonomy vis-à-vis the English system. In spite of this decentralised structure, Great Britain can be described as a unitary state with special arrangements for certain parts of the country.[157]

However, in the context of devolution, Northern Ireland is a special case. This is because when devolution led to the founding of the Irish Free State in the south of the island by military force, the path of legislative devolution was chosen for Northern Ireland in its wake with the setting up of the Stormont Parliament in 1924. However, as a result of the violent conflicts and irreconcilable confrontation

politik im Vereinigten Königreich (Devolution and European policy in the United Kingdom), in: Europapolitik und Bundesstaatsprinzip. Die Europafähigkeit Deutschlands und seiner Länder im Vergleich mit anderen Föderalstaaten. Schriftenreihe des Europäischen Zentrums für Föderalismus-Forschung (European policy and the federal principle. The European credentials of Germany and its states in comparison with other federal states. Series of publications by the European Centre for Research on Federalism), Vol. 17, 2000, p.176 et seq.

156 Cf. Sturm/Steinhart 2005, p. 158; Jeffery 2000, p. 176 et seq.

157 Cf. Goetschel, Die Vielfalt der föderalen und regionalen Strukturen in Europa (The diversity of the federal and regional structures in Europe), in: Die Kantone und Europa (The cantons and Europe). Published by Dieter Freiburghaus, Berne inter alia 1994, p. 45; Walkenhorst 1997, p. 68.

between the warring factions in Northern Ireland, legislative devolution was suspended again after 1972.

Scotland was the first region to have functions transferred to it in connection with devolution. Here a Minister for Scotland was appointed in the British government as early as 1885, and this was followed by the establishment of a Scottish Office. This ministry was cross-cutting, because the competent minister was responsible for incorporating Scottish interests in British legislation. Yet, to begin with the Minister for Scotland had few powers and in practice was of only secondary importance. The post only acquired cabinet status in 1926, and the headquarters of the Scottish Office were relocated from London to the Scottish capital city of Edinburgh in 1940. This first phase was therefore administrative devolution. In contrast to Scotland, this did not happen in Wales until the sixties of the 20th century, because the potential for regional interest was much less pronounced there. The establishment of the Welsh Office can largely be explained by the fact that the Labour Party had promised in its election campaign not to treat its Welsh stronghold any less favourably than its Scottish one.[158]

The designation of Great Britain as a unitary state is directly related to the fact that the decentralisation attempt at the end of the seventies failed because the arrangements proposed by the Labour government in the referenda in Scotland and Wales did not obtain the necessary majorities. The proposals of the British government fell a long way short of putting a form of regional autonomy and federal distribution of power to the vote. For example, the Assemblies (parliaments) were not given the right to take responsibility themselves for raising taxes for the new functions. Legislation in the area of economic policy also remained exclusively in the hands of central government. Furthermore, administration and parliament remained subordinated to the respective central powers and, in particular, the Westminster parliament had an absolute right of veto over the Scottish and Welsh Assemblies (parliaments).[159] This means that only the British nation state has national status, not its territorial subdivisions.[160]

Whilst in Scotland and Northern Ireland devolution has reached the legislative stage, so far Wales has been given only executive powers. From the devolution processes in Scotland, Northern Ireland and Wales, it can generally be seen that

158 Cf. Sturm/Steinhart 2005, p. 159.

159 Cf. Schultze, Föderalismus als Alternative? Überlegungen zur territorialen Reorganisation politischer Herrschaft (Federalism as an alternative? Reflections on the territorial reorganisation of political rule), in: Der Staat der Autonomen Gemeinschaften in Spanien (The state of autonomous communities in Spain), Opladen 1992, p. 201 et seq.

160 Cf. Sturm 2004, p. 181.

devolution represents a reaction to the pursuit of national independence and/or an attempt to resolve regional disputes.[161]

However, the current efforts on the part of the Scots and Irish to gain independence should be seen as an indicator that the forms of administrative, executive and legislative decentralisation are by no means sufficient to resolve ethnic/national tensions in Great Britain. The referendum planned for 2014 will determine whether Scotland leaves the United Kingdom and becomes an independent state or not.

Thus, the British system of government, with its process of federalisation (devolution), is a system in which power is delegated from the centre to the parliaments of the said regions. Devolution is a decentralised system which differs fundamentally from a federal system in which sovereignty is irreversibly divided between the state and member states.

These examples alone show the variety and diversity of minority problems, which have in each case spawned a corresponding diversity of autonomous solutions. The European states also have an essential agreement and commonality with Turkey and its neighbouring states: they reject any separation and insist on the inviolability of their territorial unity. However, the examples also show that democratisation without a political concept of the coexistence of the different peoples in Turkey remains incomplete and uncertain, indeed that democratisation depends on acceptance of the Kurdish people as an equal social element. Without some form of decentralisation, autonomy, redetermination of the provinces and federalism, above all Turkey will not succeeded in implementing the democratisation of state and society.

Hamburg, September 2014
Prof. Dr Norman Paech / Dr Sebahattin Topçuoğlu

• It should be added that in the referendum held on 19 September 2014 more than 55 per cent of the Scottish population voted against separation from Great Britain.

161 Cf. Sturm/Steinhart 2005, p. 160.

• The political future of Catalonia should have been decided by a referendum on independence planned for 9 November 2014. More than 100 000 people demonstrated on 19 October in Barcelona and called on the Catalan head of government, Artur Mas, to hold early elections to the regional parliament within three months.

However, since the Spanish constitutional court had prohibited this initiative, Mas opted not to hold the referendum. Instead, he proposed to organise a non-binding opinion poll on the same day.

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