THE IMPLICATIONS OF THE COPENHAGEN POLITICAL CRITERIA ON THE LANGUAGE RIGHTS OF THE KURDS IN TURKEY

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ABSTRACT

In recent years, the attention is being increasingly drawn to the role of the European Union on the development of minority rights in the candidate countries. The adoption of the Copenhagen political criteria, which also require "respect for and protection of minorities," as preconditions that applicants must have met before they could join the Union has inevitably led to some policy changes to the minorities in Eastern Europe. This policy shift is particularly directed at minority language rights, because one of the most important aspects of the protection of minorities is the recognition of their linguistic identity. The aim of this study is to explore to what extent this development has influenced the situation of language rights of the Kurds in Turkey. In order to answer this question, it first examines the relationship between the Copenhagen criteria and international and European standards protecting minority language rights. Secondly, considering those standards, it assesses the achievements and failures of the recent legislative amendments which are directed to bring the language rights of the Kurds within the line of the Copenhagen criteria. The case of Turkey reveals the vast potential of the European enlargement process on the development of minority language rights, but also its limits in situations where there is a lack of political will to respect and protect diversity.

RÉSUMÉ

Au cours des dernières années le rôle de l'Union Européenne dans la promotion du développement des droits des minorités des pays candidats a pris une place de choix. Ainsi, l'adoption des critères politiques de Copenhague, qui exige en outre le "respect pour et la protection des minorités" comme l'une des conditions à accomplir par les pays aspirants à l'Union a conduit un changement des politiques concernant les minorités dans l'Europe orientale. Cette modification des politiques concerne plus précisément le domaine des droits des minorités à la langue, puisque l'un des aspects le plus importants de la protection des minorités se forme par la reconnaissance de l'identité linguistique de la personne appartenant à une minorité. L'ambition de notre travail est d'explorer l'étendue de ces développements et leur influence dans la situation des droits langagiers des Kurdes en Turquie. Dans le but d'éclaircir ces questions, nous examinerons de prime abord le rapport existant entre les critères établis par Copenhague et les standards européens et internationaux concernant la protection des droits à la langue des minorités. En second lieu, et à partir de ces standards, nous nous pencherons sur les succès et les échecs des réformes législatives entreprises dans le but de rendre conformes les droits langagiers des Kurdes aux lignes définies selon les critères de Copenhague. Ainsi, le cas de la Turquie place la lumière sur le potentiel énorme du processus d'agrandissement de l'Europe dans le développement des droits langagiers, tout en permettant de comprendre ses limites, surtout par rapport aux cas dans lesquels il est question de manque de volonté politique pour protéger et respecter la diversité.

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Introduction

Today, one of the most important issues regarding the improvement of democracy and human rights in Turkey is the implementation of international minority language rights standards, because it is directly connected with the just and sustainable solution of the Kurdish problem. Since the foundation of the Republic in 1923, Turkey has adopted a very strict assimilation policy against the Kurds mostly living in the Southeastern part of the country. This policy has lead to suppression of the ethnic Kurds by all means, including legal and extra-legal methods. Thus, the use of the Kurdish language in publications, radio and television broadcasting, education, and political and cultural activities is harshly restricted, and people demanding the removal of these prohibitions and recognition of Kurdish identity were prosecuted for breaking national unity. As a result of this policy, although the Turkish Republic was built on the idea of transformation of the traditional Eastern Ottoman society to a modern and Western nation, the Turkish state could not develop, through its internal dynamics, a sufficient democratic political structure respecting human rights and diversity within the lines of European standards.

In the improvement of democracy and human rights, Turkey's main motivation has always been the integration of the Turkish state into the European political and economic system. Turkey is a member of the most important political and military organizations of Europe, such as the North Atlantic Treaty Organization [NATO], the Council of Europe [CoE] and the Organization for Security and Co-operation in Europe [OSCE]. In 1963 Turkey also signed an Association Agreement with the European Community [EC]. From the perspective of the Turkish elites, of those organizations, the most important one is the EC, which later became the European Union [EU], because it is considered that the membership of the Union represents the last stage of Turkey's modernization and Westernization project. However, due to the shortcomings of the Turkish political and legal system, the relationship between Turkey and the Union has been quite problematic. Turkey applied for membership in April 1987, but the Commission's opinion, issued in December 1989, was against the immediate opening of negotiations. Nonetheless, Turkey's economic integration with the EU continued and in 1995 the final stage of the customs union started to be implemented. While the customs

union was functioning well, the disagreements between Turkey and the EU on the issues related to human rights and democracy persisted.

These issues became much more crucial in Turkey's accession to the EU, after the 1993 Copenhagen Council defined certain political and economic criteria (Copenhagen criteria) which applicants would have to meet before they could join the Union. The political criteria required that the candidate countries must have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Although those political criteria were adopted under the conditions of the early 1990's and they were mainly targeting the former communist countries in Central and Eastern Europe, they have very significant implications on the situation of minority rights in Turkey. Through the adoption of these criteria, the EU explicitly declared that there is an inherent relation between democracy, human rights and the protection of minorities. This means that unless the Kurds are entitled to the internationally recognized language and cultural rights, Turkey cannot become a member of the EU. Therefore, Turkey launched a series of reforms recognizing certain language rights of the Kurds.

The aim of this study is to describe and analyze, from a legal point of view, to what extent the Copenhagen political criteria influenced the scope of language rights of the Kurds in Turkey. For this purpose, in the first chapter the relationship between these criteria and international and European standards protecting minority language rights is analyzed. In this regard, at first, historical and conceptual aspects of the development of minority language rights in Europe are sough to be described. Special attention is given to the examination of the influence of this development on the adoption and implementation of the Copenhagen criteria. Secondly, I have focused on one of the most controversial issues of the international protection of minorities: the definition of the term "minority" and the characterization of a linguistic minority. Thirdly, I have dealt with the implications of universal human rights norms on the language rights of minorities. Finally, I studied the special minority language rights recognized under various international and European instruments.

The second chapter of this paper deals with the language rights of the Kurds under the domestic law of Turkey. Therefore, I have first sought to describe the key issues

regarding the situation of the Kurdish language in Turkey. In this regard, the sociolinguistic position of the Kurdish language in Turkey, the problem of definition of minorities in Turkish law and the official status of Turkish under the constitution are discussed. Secondly, I have worked on the dialogue between Turkey and the EU on the scope of minority language rights in Turkish law. In this part of the study, I have mainly analyzed how the EU influenced the Turkish policy towards the language rights of the Kurds. A special attention has been given to the Accession Partnership Document prepared for Turkey by the Commission, the Annual Reports and the National Report of Turkey. Finally, I have tried to give a detailed picture of minority language rights in Turkish law, after the recent legislative amendments seeking to meet the Copenhagen political criteria. As a conclusion, I found that although these reforms represent the most significant steps forward that have been taken towards the expansion of the linguistic freedoms in Turkey, Turkish law is still in need of improvement.

Chapter I: The Accession Criteria and International and European Standards regarding Minority Language Rights

1. Conceptual and Historical Framework

1.1. Minority Language Rights and the Accession Criteria

The development of "respect for and protection of minority language rights," as one of the accession criteria to the EU, is a recent phenomenon. With the exception of various activities of the European Parliament in support of minority languages and cultures, the protection of minorities was almost completely absent from the EC agenda in the pre-Maastricht era. The essentially economic nature of the Community (now the Union), coupled with the conservative approaches of some states, in particular France and Greece,[1] towards the recognition of minority rights in their own territories, were obviously conducive to that effect. Therefore, until the Amsterdam Treaty, there had not been a single provision dealing with the protection of minorities. However, the end of Cold War, with the resulting new challenges posed by the dissolution of the Soviet Union and Yugoslavia, were inevitably to bring about change in the perception of the significance of minority rights on the EU agenda.[2]

The increasing tension between various ethnic groups and new states in Central and Eastern Europe, which were in a transition period from communism to liberal democracies, prompted the international community to give a constructive response to the minority problems in order to protect the stability of the European continent. In particular, after the outbreak of civil war in Former Yugoslavia, the EU, together with other regional organizations, such as the CoE and the OSCE, felt an urgent need to devise adequate

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[1] France is well-known for its reservation to article 27 of the International Covenant on Civil and Political Rights, which does not allow the application of this provision in the territories of the Republic. Parallel to this approach , in 1995 the Conseil d'Etat decided that the ratification of the European Charter for Regional and Minority Languages was incompatible with the constitution. Nicole Guimezanes, "Fransa ve Azınlıklar" in İbrahim Ö. Kabaoğlu (ed.) *Ulusal, Ulusalüstü ve Uluslararası Hukukuta Azınlık Hakları: Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması* (Istanbul: İstabul Barosu İnsan Hakları Merkezi, 2002) 285 at 286. Likewise, the Greek law does not recognize the existence of minorities, except the Muslim minorities recognized under the Lausanne and Sevres treaties. In this regard, Macedonian and Bulgarians in Greece are not considered as minorities. See Achilles Skordas, "Yunanistan'da Azınlıkların Korunması ve Liberal Reform Zorunluluğu" in İbrahim Ö. Kabaoğlu (ed.) *Ulusal, Ulusalüstü ve Uluslararası Hukukuta Azınlık Hakları: Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması* (Istanbul: İstabul Barosu İnsan Hakları Merkezi, 2002) 311 at 312.

[2] Gaetano Pentassuglia, "The EU and the Protection of Minorities: the Case of Eastern Europe" (2001) 12 EJIL 1 at 6.

ways and means of committing those countries to minority protection.[3] The Declaration on Human Rights adopted by the Luxemburg Summit in June 1991 signaled this new attitude, announcing that the protection of minorities was ensured in the first place by the effective establishment of democracy. Following that in 1992 the Council decided to convene a conference concerning a "Stability Pact in Europe." According to the Presidency's Conclusions adopted in Brussels on 11 December 1993, the initiative was aimed at assuring in practice the application of the principles agreed by the European countries regarding respect for borders and "rights of minorities."[4] However, the EU would make its major contribution to this process through the enlargement of the Union towards the East, adopting the principle "respect for and protection of minorities" as one of the political criteria (besides democracy, rule of law and human rights) that all candidate countries were to meet to become a member state.[5]

In assessing applications for accession, the EU has developed basically three procedures: the First Opinions of the Commission on the 10 candidate countries, Accession Partnership Documents, and Annual Reports on the progress of the candidate countries towards accession. In these procedures, the Commission has paid particular attention to the situation of linguistic freedoms in each country. In the First Opinions, under an autonomous chapter entitled "Minority Rights and the Protection of Minorities," the concerns of the EU regarding the protection of the rights of linguistic minorities were worded. In this context, the use of minority languages in education and mass media, as well as in contacts with public authorities and before courts was discussed at some length. In addition, the right to maintain personal and place names in minority languages was mentioned. The Commission also stressed the importance of protecting persons belonging to linguistic minorities against discrimination based on language.[6] In the Accession

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[3] Adam Biscoe, "The European Union and Minority Nations" in Peter Cumber and Steve Wheatley (eds.) *Minority Rights in the 'New' Europe* (The Hague/London/Boston: Martinus Nijhoff Publishers, 1999) 89 at 96-97.

[4] Gabriel von Toggenburg, "A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for its Minorities" in Snežana Trifunovska, *Minority Rights in Europe: European Minorities and Languages* (The Hague: TMC Asser Press, 2001) 205 at 222-23.

[5] EU, European Council in Copenhagen, *Presidency Conclusions* 180/93 of 22 June 1993.

[6] See for example EU, *Commission Opinion on Bulgaria's Application for Membership of the European Union*, Doc. 97/11 (15 July 1997) at 18 [*Commission Opinion on Bulgaria's Application*]; EU, *Commission Opinion on Estonia's Application for Membership of the European Union*, Doc. 97/12 (15 July 1997) at 20-21; EU, *Commission Opinion on Lithuania's Application for Membership of the European Union*, Doc. 97/15 (15 July 1997) at 18-19 [*Commission Opinion on Lithuania's Application*].

Partnership Documents, certain short-term and medium-term priorities regarding the improvement of the situation of linguistic minorities were indicated. Slovakia, for instance, was requested to adopt legislation on the use of minority languages. Through the Annual Reports, the Commission monitored the achievements and failures of the candidate countries in meeting the short and medium term priorities.[7]

Although the adoption of "respect for and protection of minority rights" as one of the political criteria for the accession has played a very significant role in prompting the candidate countries to implement international standards, this criterion has not, to date, reached to the honour of the Primary Law of the Union. The Amsterdam Treaty transposed all the Copenhagen criteria–except the one regarding minority protection– into Primary Law, giving the criteria a clear legal quality and defining them as the founding principles of the Union. The exclusion of the minority clause indicates that the EU did not desire to provide it with a clear binding force. Thus, the accession condition regarding the protection of minority rights has remained merely of political nature.[8] Similarly, so far no legal provision which explicitly requires the protection of minority rights in the member states has been adopted. The latest version of article 151 (1) (ex article 128), as amended by the Amsterdam Treaty, states that the Community shall contribute to the flowering of the cultures of the member states, while respecting their regional and cultural diversity. At the same time, in the forth paragraph of the same article the Community is required to take cultural aspects into account in its actions under other provisions of the EC Treaty, "in particular in order to respect and promote the diversity of its cultures."[9] However, in none of these provisions, the terms "minority" or "minority rights" have been employed.

The general EU approach towards minority protection in the candidate countries is basically concerned with facilitating the implementation of internationally recognized minority rights standards and as part of a pragmatic policy to promote stability in the region. Thus, the Commission can demonstrate a certain amount of flexibility when addressing different minority problems in Central and Eastern Europe, instead of being bound by strictly legal considerations. This inevitably leads to a case-by-case approach in the analysis of the situation of minorities in each candidate country. It seems that the EU

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[7] von Toggenburg , *supra* note 4 at 224.
[8] Pentassuglia, *supra* note 2 at 20.
[9] EU, *The Treaty of Amsterdam*, [1997] O.J.C. 340.

is not interested in the implementation of all minority rights in those countries; it rather focuses on more serious minority problems which may threaten international and internal stability. In this regard, while the Commission expressed its grave concerns on the Slovak Language Law which restricts the use of the Hungarian language in contacts with public authorities and in education, it described the complaints of Lithuania's Polish minority regarding the obstacles to the use of their own language as an isolated problem.[10]

This approach of the EU has been questioned by many scholars on the ground that it lacks consistency. According to these authors, the practice of the EU indicates that when it comes to the economic and political benefits of the Union in its external relations, the minority clause of the Copenhagen criteria can be easily ignored. In the issue of the recognition of Croatia, for example, although the Arbitration Committee expressed its concerns regarding the situation of minorities, the EU recognized this new state in 1992. There is the same inconsistency in the relations of the Union with the Russian Federation. In 1995, in the face of gross human rights violations in Chechnya, the European Parliament urged the Community to use the human rights clause and endorsed the Commission's decision to suspend the ratification of the interim trade agreement with Russia, but the EU did not regard these opinions and ratified the interim agreement.[11] The EU has been also subjected to criticism, in particular by authors from Central and Eastern Europe, because accession criteria regarding minority rights represents a sort of double standard, as the Union still does not clearly oblige member states to respect and protect minority rights.[12]

Yet, the anticipatory character of the Copenhagen political criteria has made a significant contribution to preventing some minority problems from turning into serious internal or international conflicts. In order to benefit from the enlargement of the EU, the new Slovakian government, for example, made the required amendments in the Language Law of Slovakia, granting its Hungarian minority important linguistic autonomy.[13] Likewise, the situation of the Hungarian minority in Romania is greatly improved

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[10] EU, *Commission Opinion on Slovakia's Application for Membership of the European Union*, Doc. 97/16 (15 July 1997) at 18-19[*Commission Opinion on Slovakia's Application*]; *Commission Opinion on Lithuania's Application, supra* note 6 at 19.
[11] Pentassuglia, *supra* note 2 at 27.
[12] von Toggenburg , *supra* note 4 at 221.
[13] Pentassuglia, *supra* note 2 at 26.

following the signature of the bilateral treaty with Hungary in 1996. In the 2001 Annual Report, the Commission pointed out that the Romanian law provides extensive rights for the use of minority languages in education and administrative affairs in the areas where a minority group compactly inhabited.[14] It must be noted that these two countries have not been included in the "first wave" of the EU enlargement, because of their shortcomings in the protection of human and minority rights.

The minority clause of the Copenhagen criteria has also served to raise minorities' consciousness on their rights. Following the adoption of the criteria, various minority groups intensified their lobbying activities in order to attract the attention of the international community. In particular, the Roma minorities in Central and Eastern European countries have become highly well-organized since the late 1990's.[15] Even some members of smaller minorities, such as the Pomaks in Bulgaria and the Laz in Turkey, started to take initiatives to protect their distinctive cultures. Thus, the discussions on minority issues have become a very important part of political discourse. This contributes, in the long term, to the clarification of international minority rights standards and their implementation.

Nonetheless, it must be noted that the EU has, to date, not assumed any norm creating role in the field of minority rights. Therefore, the analysis of the Commission on the progress of the candidate countries towards the accession is largely dependent on the norms and findings produced by other international and regional organizations. This explains why the Commission mostly focuses on the ratification of various international instruments adopted by the CoE and the OSCE. The most frequently referred international instruments are the European Framework Convention for the Protection of National Minorities [Framework Convention on Minorities] and the Recommendation 1201 of the Parliamentary Assembly of the Council of Europe. In addition, according to the tripartite Council-Commission-European Parliament Declaration on Human Rights of 1977, all candidate states have to be party to the European Convention on Human Rights

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[14] EU, *Commission Opinion on Romania's Application for Membership of the European Union*, Doc. 97/13 (15 July 1997) at 19 [*Commission Opinion on Romania's Application*]; EU, Commission, *the 2001 Regular Report from the Commission on Romania's Progress towards Accession* (Luxembourg: EC, 2001) at 29 [*the 2001 Regular Report from the Commission on Romania's Progress*].

[15] Peter Vermeersch, "EU Enlargement and Minority Rights Policies in Central Europe: Explaining Policy Shifts in Czech Republic, Hungary and Poland" (2003) online: JEMIE <http://www.ecmi.de/jemie/specialfocus.html> (last visited 19 August 2003).

[ECHR] and accept the right to individual petition under it. In the Annual Reports, the OSCE instruments concerning minority rights, such as the Helsinki Final Act and the Recommendations on minority language rights and the use of minority languages in education are also mentioned. The European Charter for Regional and Minority Languages [the European Charter for Minority Languages], on the other hand, has been very rarely referred to, probably because it has been ratified by only few European states. As to the International Covenant on Civil and Political Rights, since this instrument was ratified by all candidate countries, except Turkey, its ratification was required only in the documents related to the accession of the Turkish Republic.

International and European instruments include several norms regarding the protection of minority language rights, although there is no exact consensus on the content of some of those rights. Minority language rights are still a relatively new area, developing within the general framework of human rights. Therefore, in order to comprehend the content of those minority rights, we should first step back in time and examine how various recent international instruments influenced the development of language rights of minorities.

1.2. Development of Minority Language Rights in International and European Law

In international law, the adoption of provisions explicitly protecting the rights of linguistic minorities is arguably a recent phenomenon. Until end of World War I, the protection of minority rights had remained mainly restricted to religious minorities, although the protection of religious rights and freedoms occasionally had some linguistic ramifications.[16] Following the end of the war, with the emergence of new nation-states from the remnants of the Hapsburg and Ottoman Empires in Eastern Europe, the issue of language as a marker of national identity turned into a very important element threatening

[16] The 1881 Treaty between the Ottoman Empire and Greece ensuring the free exercise of Islamic faith and the maintenance of Islamic courts and other community structures also implicitly provided for continued use of Turkish language in religious matters. Fernand de Varennes, "The Linguistic Rights of Minorities in Europe" in Snežana Trifunovska (ed.) *Minority Rights in Europe: European Minorities and Languages* (The Hague: TMC Asser Press, 2001) 3 at 5.

international peace and stability.[17] In this new era, the League of Nations sought to develop an effective response to the minority problems.

However, under the League of Nations a universal mechanism protecting minority rights, including their linguistic freedoms, could not be established. Despite various proposals, no provisions dealing with the protection of minority rights were incorporated in the constitution of the League, probably because the founding states avoided undertaking such obligations. Instead, a number of so-called minority treaties protecting the rights of certain minorities living in certain countries were signed and subsequently monitored by the League of Nation.[18] This system was essentially based on three categories. The first category included special minority clauses in the peace treaties with the defeated states of Austria, Hungary, Bulgaria and the Ottoman Empire. The second consisted of special minority treaties binding new born states or the states whose boundaries were altered in Central and Eastern Europe (Czechoslovakia, Romania, Poland, Yugoslavia and Greece), the last category dealt with five unilateral declarations on their admission to the League by Albania, Lithuania, Latvia, Estonia and Iraq.[19]

In the period of the League of Nations, although there were no identical documents with respect to minority language rights, the minority treaty with Poland served as a model for other instruments. In those treaties, two issues were generally emphasized: namely the prohibition of discrimination based on language and protection of the identity of the persons belonging to linguistic minorities. In order to protect the linguistic identity of minorities, the states that signed minority treaties were obliged to place no restriction in the way of the free use of minority languages in commerce, in religion, in the press, in minority schools or at public meetings. Moreover, it was required that in towns and districts where considerable proportions of a linguistic minority resided, adequate facilities would be provided to ensure that at least in the primary schools instruction shall be given to the children of persons belonging to this minority through the

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[17] See Eric Hobsbawm, "Language, Culture and National Identity" (1996) 63 Social Research 1063; John Hutchinson and Anthony D. Smith, *Nationalism*, vol. 2 (London/New York: Routledge, 2001) at 1341-55; George Schöpfin, *Nations, Identity, Power* (New York: New York University Press, 2000) at 116-27.

[18] Fernand de Varennes, *Language, Minorities and Human Rights* (The Hague/Boston/London: Matinus Nijhoff Publishers, 1996) at 26 [*Language, Minorities and Human Rights*].

[19] Lauri Malksoo, "Language Rights in International Law: Why the Phoenix is Still in the Ashes" 12 Fla. J. Int'l. L. 431 at 435-36.

medium of their own language, although the teaching of the official language could be made obligatory in minority schools.[20]

While the minority protection system of the League of Nations set forth the general principles of minority language rights, since it did not create a universal mechanism, the system could not provide an effective international protection for linguistic minorities. Most minority groups were outside the protection of the League, because its minority protection system was limited to certain minorities living in certain countries. In particular, minorities who did not have a kin state, such as the Jews and the Roma, were in a considerably weaker position, given that the Council of the League mainly dealt with disputes between the minority state and the kin state concerning the minority itself. In addition, the fact that only small or medium-sized states were bound by minority treaties and the Great Powers did not undertake any obligation regarding their own states caused a sense of injustice in the states subject to minority obligations. This lack of equality between states brought as a result reluctance among the minority states to fulfill their international obligations towards their minorities. The weakness of the minority protection system of the League was also easily abused by the Nazis who sought to justify the occupation of their neighboring countries based on the violation of the rights of German speaking minorities in these countries. Therefore, it is generally accepted that the minority protection system failed to reduce ethnic tension before World War II.[21]

Following the end of World War II, the rhetoric was seen to shift from the minority treaties to one emphasizing universal protection of individual rights and freedoms. The approach was such that whenever someone's rights were violated or restricted because of his or her religion, ethnicity or language, the matter could be addressed by the concept of protection of individual human rights and the principle of non-discrimination. Accordingly, in both the Charter of United Nations [UN] and the Universal Declaration of Human Rights, language was recognized as one of the prohibited grounds of discrimination, but the norms protecting language as an element of

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[20] Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (The Hague/Boston/London: Martinus Nijhoff Publishers, 2000) at 5.

[21] See Peter Leuprecht, "Minority Rights Revisited: New Glimpses of an Old Issue" in P. Alston ed., *Peoples' Rights* (New York: Oxford University Press, 2001) 111 at 116-17; Tore Modeen, *The International Protection of National Minorities in Europe* (Ekenäs: Åbo Akademi, 1969) at62-65.

minority identity were completely omitted by the earlier human rights instruments of the United Nations.[22]

Nonetheless, it soon became apparent that protection of the linguistic identity of minorities was an essential part of the international protection of minorities. In the 1949 Memorandum on the definition and classification of minorities, submitted by the Secretary-General, it was pointed out that if certain language rights of minorities were not recognized, they could not feel that they were actually equal within the state.[23]

However, to reach a global consensus on the right to protect one's own linguistic identity took some time. At the first hand, in 1957, some language rights of persons belonging to indigenous peoples, such as the right to learn and preserve their own language, were granted in the International Labor Organization Convention (no. 107) concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries [ILO Convention 107].[24] Subsequently, the language rights of national minorities in the field of education were recognized in article 5 of the 1960 Convention against Discrimination in Education, stipulating that the right of members of national minorities to carry out their own educational activities, with the right to use or teach their own language, is essential.[25] Finally, in 1966, a general norm applicable to all minority groups was adopted. In article 27 of the 1966 International Covenant on Civil and Political Rights, it was acknowledged that persons belonging to ethnic, religious or linguistic "minorities shall not be denied the right, in community with other members of their group, (...) to use their own language."[26] In the formulation of article 30 of the 1989 UN Convention on the Rights of Child, the same formulation has

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[22] In the discussions of the Universal Declaration of Human Rights, the proposal of Danish delegation stating that "members of various minority groups have right to establish their own schools and receive teaching in the language of their own choice" was rejected. Another proposal presented by a Byelorussian representative providing that "the right of the accused to use his own language in court" also could not gain enough support from other representatives. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Philadelphia, 1999) at 105.

[23] Memorandum Submitted by the Secretary-General, *Definition and Classification of Minorities*, UN ESCOR, 2nd Sess., UN Doc. E/CN.4/Sub.2/85 (1949) at 4.

[24] *Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries* (ILO No.107), 72 ILO Official Bull. 59, 26 June 1957, (entered into force 2 June 1959).

[25] Convention against Discrimination in Education, 14 December 1960, 429 U.N.T.S. 93 (entered into force 22 May 1962).

[26] *International Covenant on Civil and Political Rights*,19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [*ICCPR*].

been adopted fo the situation of children belonging to minorities.[27] Although the adoption of this provision was a very significant step towards the recognition of the right to linguistic identity at the global level, its formulation remained quite vague and it gives an impression that the rights of linguistic minorities are restricted to the negative obligations of states. Nonetheless, until the end of the Cold War, no more far-reaching norms protecting minority language rights could be adopted.

Following the end of the Cold War, the OSCE, a regional security organization established under the Chapter VIII of the UN Charter, started to play a leading role in the development of international minority rights standards. In 1990, in response to serious ethnic problems that emerged in Central and Eastern Europe after the collapse of the communist regimes, the states in Europe, Central Asia and North America convened a meeting in Copenhagen on the Human Dimension of the Conference on Security and Cooperation in Europe. In this meeting, the participating states reached a consensus on a document (the Copenhagen Document), which contained the most comprehensive set of standards regarding the rights of persons belonging to minorities adopted up to that date at the multilateral level.[28] In paragraphs 31, 33 and 34 of the Copenhagen Document, besides the recognition of the right to linguistic identity, the need for positive measures in the protection of the minorities' language rights was clearly stated.[29] While the OSCE documents created only politically binding, , but not legally binding obligations, since these obligations were adopted by the consensus of states, they obtained very significant authority in international law.[30]

The standards set forth in the Copenhagen Document had a considerable impact on the development of modern legal standards at both global and regional levels. At the global level, the standards set by the participating states of the OSCE indirectly

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[27] Convention on the Rights of Child, 20 November 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), (entered into force 2 September 1990) [CRC].

[28] Mario Amor Martín Estébanez, "Minority Protection and the Organization for Security and Co-operation in Europe" in P. Cumber and S. Wheatley (eds.) *Minority Rights in the 'New' Europe* (The Hague/London/Boston: Martinus Nijhoff Publishers, 1999) 31 at 31-35.

[29] Athanasia Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law* (London/The Hague/Boston: Kluwer Law International, 1997) at 274-277.

[30] It must be also noted that under the framework of the OSCE, several bilateral agreements protecting minority rights in Central and Easter Europe were signed. See Istvan Pogany, "Bilateralism versus Regionalism in the Resolution of Minorities Problems in Central and Eastern Europe and in the Post-Soviet States, in Peter Cumper and Steven Wheatley (eds.) *Minority Rights in the 'New' Europe* (The Hague: Martinus Nijhoff Publishers, 1999) 105 at 107.

influenced the interpretation of article 27 of the ICCPR. The 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities [Declaration on Minorities], which was drafted in order to clarify the meaning of article 27 of the ICCPR, adopted the recent standards formulated by the OSCE. Since article 9 of the Declaration on Minorities states that all UN bodies, including the Human Rights Committee and the Committee (the monitoring body of the ICCPR), should take the provisions set forth under the Declaration into account within their relevant fields of competence,[31] these recent standards will be influential in the implementation of article 27. It must be noted that, although the Declaration, like the Copenhagen Document, does not create legally binding obligations, its authority is highly respected because it is also based on consensus.

At the European level, the Copenhagen Document and other OSCE Documents made a considerable contribution to the development of the language rights of national minorities. In 1995 the CoE decided to transform the commitments of the OSCE into legally binding obligations, through the adoption of the Framework Convention on Minorities. In those documents, not only negative obligations, but also positive obligations of states towards persons belonging to linguistic minorities have been worded.[32] In fact, in the 1992 European Charter for Minority Languages, the positive obligations of states have already been worded in detail under the auspices of the Council of Europe. However, since the overriding purpose of the Charter is cultural, mainly the protection of the linguistic heritage of Europe, it aims directly at the language, not at the speakers. Therefore, the standards in this document were not formulated as legal rights of minorities, but only as state obligations.[33]

This historical perspective shows that the content of minority language rights cannot be fully comprehended, if we look at the relevant international instruments as isolated documents. In fact, from drafting to implementation those documents influence

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[31] *Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities*, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993) [*Declaration on Minorities*].

[32] Edwin Baker, "Linguistic Rights and the Organization for Security and Cooperation in Europe" in Snežana Trifunovska (ed.) *Minority Rights in Europe: European Minorities and Languages* (The Hague: TMC Asser Press, 2001) 241at 245.

[33] Rhona K.M. Smith, "Moving towards Articulating Linguistic Rights: New Developments in Europe" (1999) 8 MSU-DCL J. Int'l. L. 437 at 444.

each other. Therefore, a dynamic interpretation method which focuses on the effectiveness of norms should be employed in the clarification of the scope of minority language rights.

1.3. Dual Dimension of Minority Language Rights

In international and regional instruments, language has been used as both a prohibited ground of discrimination and a protected element of identity. This usage is based on the idea that an effective international protection of persons belonging to linguistic minorities must include two principles: prohibition of discrimination based on language, and protection and promotion of linguistic identity of minorities. As the Permanent Court of International Justice (hereinafter PCIJ) held in its advisory opinion on Greek minority schools in Albania, these two principles aim at the integration of minorities into the whole society, while allowing them to preserve their ethnic, religious or linguistic identity.[34] The same approach was worded in the 1991 Declaration on Human Rights of the EU in the Luxemburg Summit. In this declaration, after the European Council stressed the need to protect human rights whether or not persons concerned belonged to minorities, it reiterated the significance of respecting the cultural identity of such persons.[35] Similarly, in the Framework Convention on Minorities, the OSCE documents and the Comments of the Human Rights Committee these two aspects of minority language rights have been frequently emphasized.

Prohibition of discrimination based on language is directly related to the equality problem. However, equality in this regard does not require that the legal status of a minority language be the same as that of the official language(s). Instead, it entails that members of a linguistic minority should not be subject to any discrimination in the enjoyment of universal human rights and fundamental freedoms (formal equality).[36] In its General Comment on Non-Discrimination, the Human Rights Committee noted that the term "discrimination," as used in the ICCPR, should be understood to imply any distinction, exclusion, restriction or preference which is "based on any ground such as

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[34] *Case of the Minority Schools in Albania* (1935) Advisory Opinion, PCIJ (Ser.A/B) No.64 at 17.
[35] Pentassuglia, *supra* note 2 at 8.
[36] See E.W. Vierdag, *The Concept of Discrimination in International Law with Special Reference to Human Rights* (The Hague: Martinus Nijhoff, 1973) at 92-94.

(...) language" and has the purpose or effect of impairing or nullifying recognition or exercise by all persons, on equal footing, of all rights and freedoms.[37]

Protection and promotion of linguistic identity of minorities is, on the other hand, connected with the right to be different.[38] In this regard, it seeks to develop positive attitudes towards linguistic diversity in a society. For devising appropriate means to retain and promote the distinctive characteristics of minorities, differential treatment is indispensable, because universal human rights norms alone are insufficient to protect the linguistic identity of minorities. Compared to the speakers of a majority language, speakers of a minority language are in a disadvantageous position to preserve and develop their own language. Therefore, special minority language rights should be granted to the members of a linguistic minority. Those rights do not constitute some privileges, but create substantial equality between minorities and majorities.[39] Special minority language rights thus complete the principle of non-discrimination based on language.

The two dimensions of the protection of linguistic minorities are closely interlocked, because, without one of these dimensions, minority language rights cannot be effectively protected. If the equality of individuals in the enjoyment of universal human rights is not guaranteed, linguistic minorities may be subject to segregation, even though their separate identity is recognized. On the other hand, restriction of the rights of linguistic minorities to individual human rights will leave them defenseless against forced assimilation policies of states. These principles clearly show that an effective protection of minority language rights can be ensured only in democratic and pluralist political systems respecting human rights and cultural and linguistic diversity.[40]

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[37] Committee on Human Rights, *General Comment on Non-Discrimination (Art. 2)*, UN ESCOR, 37th Sess., CCPR General Comment 18, UN Doc. HRI/GEN/1/Rev.1 (1989)at 26.

[38] See Patrick Thornberry, *International Law and the Rights of Minorities* (New York: Clarendon Press, 1994) at 392.

[39] Henrard, *supra* note 20 at 8-11.

[40] See Fernand de Varennes, *A Guide to the Rights of Minorities and Languages* (Hungary: COLPI, 2001) at 6 [*A Guide to the Rights of Minorities and Languages*].

2. Definition of a Linguistic Minority

2.1. Significance of Definition

One of the most critical issues of international protection of minority language rights is the definition of a linguistic minority. While everyone is entitled to fundamental freedoms and human rights, only persons who are members of a linguistic minority can enjoy the special rights protecting and promoting their linguistic identity. Therefore, exclusion of a group from the scope of the term "linguistic minority" may easily leave them defenseless against the assimilation policies of states.

However, although in international instruments, linguistic minorities are mentioned, along with other minority categories, such as ethnic, national and religious minorities, neither the definition of "linguistic minority," nor the definition of the term "minority" is provided. This situation is usually sought to be justified, by arguing that the conditions and characteristics of each minority in the world are so diverse that any attempt to give a global definition of minority would inevitably lead to exclusion of some minorities from the scope of the international minority protection. Therefore, after a number of proposals to adopt a universal definition of minorities in the course of the drafting of article 27 of the ICCPR and the Declaration on Minorities were rejected, the issue of definition has been postponed to an indefinite date. The international community has thus adopted a pragmatic approach, concluding that which groups are linguistic minorities should be decided on a case-by-case basis, and focused on the formulation of the rights of minorities.[41] Parallel to this, in order to avoid failing to cover the complexity and particularity of each linguistic situation in the word, the proposal of the Austrian representative asking the Sub-Commission to undertake a study concerning the meaning of "the use of their own language by persons belonging to linguistic groups" mentioned in the draft Art. 27 of the ICCPR was abandoned.[42]

Although such an approach seems practical, it must be noted that without putting at least the corner stones of a minority concept, implementation of minority language rights in concrete cases would be very problematic. In particular, a state considering the

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[41] Henrard, *supra* note 20 at 24.

[42] Commission on Human Rights, *Report of the Eighteenth Session*, UN ESCOR, 34th Sess., Supp No. 8, UN Doc. E/CN.4/832/Rev.1, (1962) at 26-27 [*The Human Rights Commission Report of the 18th Sess.*].

existence of a certain minority as a threat to its national and territorial unity can easily deny language rights of that minority group. This situation thus may create discrimination in the enjoyment of language rights among different minorities and subject some of them to harsh assimilation policies. On the other hand, the disagreement on the issue of definition should not be exaggerated. It must be noted that while there is no provision exactly defining the term "minority" and the meaning of "linguistic minority," there is still an emerging consensus on the certain aspects of those definitions.[43]

In order to make a working definition of linguistic minority we should first clarify the meaning of the term "minority," and then focus on the constituting elements of linguistic minorities.

2.2. Definition of the term "minority"

Today, it is generally accepted that a definition of minority should be based on certain objective and subjective criteria. The objective criteria are basically related to the social, demographic and political situation of a certain group of people. The common will of these people to maintain the existence of their group, on the other hand, comprises the subjective criteria. In the development of these criteria the proposed definitions of Capotorti and Deschênes are very influential, although none of them were adopted by the UN Human Rights Commission.[44]

The objective criteria first of all require the existence of a group of people which is ethnically, religiously or linguistically different from the rest of the population. This implies that in international law mainly three minority categories are recognized. Although these categories are separately mentioned, it must be noted that they usually overlap.[45] Accordingly, an ethnic or religious minority can also be considered as a linguistic minority, if their language is different from the language of the rest of the population. The same is true for indigenous peoples, because while they constitute a distinct category as a people with their right to self-determination, they can also be

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[43] See John Packer, "Problems in Defining Minorities" in Deirdre Fottrell and Bill Bowring (eds.) *Minority and Group Rights* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999) 223 at 231-32

[44] Francesco Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1, (1991); Jules Deschênes, *Proposal concerning a definition of the Term "Minority"* UN Doc. E/CN.4/Sub2/1985/31 (1985).

[45] Thornberry, *supra* note 38 at 163.

defined as minorities, provided that they meet other objective and subjective criteria.[46] The other category which is frequently mentioned together with ethnic minorities in the European instruments is national minorities. Although there is no provision defining the meaning of national minority, in the European context, this usually means historical minorities in a country. In the Proposal for an Additional Protocol to the ECHR concerning Persons belonging to National Minorities, the Parliamentary Assemble of CoE has suggested a definition of national minority. In this definition, longstanding, firm and lasting ties with the state of which they are the citizens were defined as one of their characteristics.[47] The main problem in this definition is that it is very difficult to determine a justifiable period of time that qualifies a group of people as a national minority.[48]

Secondly to be considered as a minority, the group concerned must constitute less than fifty per cent of the population of the state. The reference to "the population of the state" here indicates that in the determination of a minority, the whole state, but not sub-states structures, such as provinces or autonomous regions, should be considered. In this respect, although a group of people constitutes a majority in a province, if its population is inferior to the population of the country, it must be still characterized as a minority. In the *Ballantyne at al v. Canada*, the Human Rights Committee explicitly has stated that article 27 would only apply to minorities at the national level. Therefore, it did not define English-speaking persons in Quebec, the French-speaking province of Canada, as a minority, on the ground that English-speaking Canadians constitute the majority nationwide.[49]

Thirdly, it is required that a minority must be in a politically non-dominant position in a state. This criterion is relevant to the situation of oppressed majorities by

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[46] Packer, *supra* note 43 at 232-40.

[47] Council of Europe, P.A., 22nd Sitting, Recommendation No 1201 on an Additional Protocol to the ECHR concerning Persons belonging to National Minorities, Doc 6742 (1993).

[48] In practice, the term "national minorities" serves to make a distinction between European and Non-European minorities. In this regard, even though the Arabs, for example, lived in England for several generations, they are not considered as a national minority. As it will be discussed at length in the following pages, national minorities have been traditionally entitled to larger positive and collective minority rights than the "new" minorities do. Therefore, it is frequently argued that the current distinction between national and "new" minorities leads to an unjustifiable discrimination. See also Naz Çavuşoğlu, "Azınlık Nedir?" (1997-1998) 19-20 TODAİE İnsan Hakları Yıllığı 98 at 99.

[49] *Ballantyne, Davidson and McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989 (31 March 1993), Committee on Human Rights, UN Doc. CCPR./C/47/D/359/1989 and 385/1989/Rev. 1 (1993).

dominant minorities, as in the case of the former apartheid regime in South Africa. It is generally accepted that in this situation, the oppressive minority which imposes a segregationist or racist regime on the majority of the population should not be entitled to minority rights. [50]

In their proposed definitions of a minority both Capotorti and Deschênes added the citizenship requirement to the objective criteria. However, whether non-citizens should be excluded from the concept of minority is a very controversial issue. Although in European there is a general tendency to restrict the concept of minority to citizens, this approach is subject to harsh criticism because it leads to exclusion of immigrants and refugees from the scope of the international minority protection system. The European Commission does not also apply the citizenship requirement to every situation. In the Baltic states, for example, although most of the Russophones were deprived of citizenship, it defined them as a minority.[51] At the global level, the Human Rights Committee has developed a broader definition of minority. In its General Comment on the rights of minorities, the Committee clearly stated that the scope of the definition of a minority in article 27 of the ICCPR is not limited to the citizens of a state; migrant workers, refugees, and even visitors are entitled not to be denied the exercise of their linguistic rights.[52]

The subjective criterion, on the other hand, indicates that the definition of a group as a minority depends on the will of concerned group, provided that it meets the objective criteria. In the *Greco-Bulgarian Communities case*, the PCIJ, stated that to be defined as a minority, a group should "be united by the identity of their own race, religion, language

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[50] *Contra* de Varennes, *Language, Minorities and Human Rights, supra* note 18 at 169.

[51] Pentassuglia, *supra* note 2 at 21.

[52] Committee on Human Rights, *General Comment on the Rights of Minorities (Art. 27)*, UN ESCOR, 50th Sess., CCPR General Comment 23, UN Doc. HRI/GEN/1/Rev.1 (1994) at 2-3 [*General Comment on the Rights of Minorities*]. According to Nowak, this interpretation is consistent with both plain wording of article 27 and its preparatory work. If the states parties had intended to exclude foreigners from the concept of minority, they would have done it, using the term "citizens" instead of "persons," as they did in article 25. However, in the drafting process, although the Indian representative proposed that the word "persons" be replaced with "citizens," the rejection of this proposal clearly indicates that states parties conferred these rights on all individuals belonging to a minority group, without making a distinction between citizens and non-citizens. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, Strasbourg, Arlington: N.P. Engel Publisher, 1993) at 489. In its Commentary to the Declaration, Eide also supports the same conclusion. Asbjørn. Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN ESCOR, 7th Sess. of Working Group of Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2001/2 at 9, para. 2.

and tradition in a sentiment of solidarity" with a view to preserving their traditions, and ensuring the upbringing of their offspring "in accordance with the spirit and tradition of their race."[53] Likewise, Capotorti stresses that besides having a distinctive ethnic, religious or linguistic characteristic, a minority should also implicitly or explicitly show a sense of solidarity which is directed towards preserving their culture, traditions, religion or language.[54] The statement in the report of the OSCE meeting of experts on national minorities, which notes that all ethnic, cultural, religious and linguistic differences do not necessarily lead to the creation of national minorities, may also be interpreted as the implication of the necessity of a subjective element in the definition of minority.[55] In the Copenhagen Document, it is also stated that to be member of a minority is a matter of choice and no disadvantage may arise from the exercise of such choice. Similarly, this subjective element is emphasized at the individual level in article 3 (1) of the Framework Convention on Minorities, stipulating that every person belonging to a national minority is entitled to freely choose to be treated or not to be treated as such.[56] The main importance of the subjective criterion is that it protects members of a distinct group from the rest of population against ascriptive classifications and ensures the freedom of the individual to completely assimilate in the surrounding society.[57]

It must be noted that as long as a group meets these objective and subjective criteria, it must be considered as a minority, independently of the definition of minority in accordance with the domestic law of the state concerned. Therefore, recognition by the state where a minority resides is not a constituting element of the definition of minority. This issue has been clarified in its General Comment on article 27, by the Human Rights Committee. According to the Committee, the existence of a linguistic minority in a given state party does not depend upon a decision by that state, but requires to be established by established objective criteria.[58] This approach represents one of the major innovations of

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[53] *Case of the* Greco-Bulgarian Communities (1930) Advisory Opinion, PCIJ (Ser. B) No. 17 at 21.
[54] Capotorti, *supra* note 44 at 30.
[55] *Document on the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 2nd Conference on Human Dimension of the OSCE (5 June-29 June 1993) [*Copenhagen Document*].
[56] *The European Framework Convention for the Protection of National Minorities*, 1 February 1955, ETS no 157 (entered into force 1 February 1998) [*Framework Convention on Minorities*].
[57] See Jevaid Rehman, "Uluslararası Hukukta Azınlık Hakları" in İbrahim Ö. Kabaoğlu (ed.) *Ulusal, Ulusalüstü ve Uluslararası Hukukuta Azınlık Hakları: Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması* (Istanbul: İstabul Barosu İnsan Hakları Merkezi, 2002) 95 at 99.
[58] *General Comment on the Rights of Minorities, supra* note 52 at 2-3.

the UN minority protection system. While in the League of Nations system minority protection is completely based on the recognition of certain minorities though bilateral or multilateral treaties, in the UN era the recognition by the state is not considered as a constituent element of minority concept.

2.3 Definition of a Linguistic Minority

In international law, there is no universally recognized definition of a linguistic minority. The only international instrument defining the term "minority language" which is inherently related to the existence of a linguistic minority is the European Charter for Minority Languages. According to article 1 of the Charter, a minority language mean languages that are traditionally used within a given territory of a state by nationals of the state concerned who form a group numerically smaller than the rest of the state's population and different from the official languages and dialects of the official languages of that state.[59] Since the Charter does not deal with the protection of all minority language rights in Europe, but instead focuses on the promotion of autochthonous European languages, this definition is quite restrictive. It does not include immigrant and refugee languages into the scope of Charter. Although this definition gives an impression that minority languages which have been given official status are also left out from the concept of European minority languages, with an additional provision, less widely used official languages on whole or part of a state's territory are again brought within the scope of the Charter.[60] Since the Charter is not a right-oriented, but a culture-oriented instrument, in the definition of language, it has given no importance to the self-perception of the speakers of such languages. Thus, the Charter's definition is based on only some objective criteria.

In international law a broader approach towards the definition of minority language has been developing. At present, besides numerical inferiority of its speakers, the most frequently mentioned restriction regarding the definition of a minority language is the distinction between an actual language and a mere dialect of the majority

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[59] *The European Charter for Regional and Minority Languages*, 5. November 1992, E.T.S. no. 148 (1 March 1998) [*European Charter for Minority Languages*].

[60] Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (The Hague/London/New York; Kluwer Law International, 2002) at 51.

language.[61] Although from a sociolinguistic point of view, mutually intelligible dialects are deemed as the sub-idioms of a common language, in many situations drawing a line between a language and a dialect is not an easy task. Therefore, it is generally accepted that in the definition of a minority language a flexible and pragmatic approach should be adopted, considering the social and political conditions of each country. Except the exclusion of dialects, there is no qualification regarding a minority language. As it was stated at the Seminar on the Multinational Society held at Ljubjana, Yugoslavia, in 1965, not only the standard languages, but the languages which might not have developed to the point of having a written tradition can be regarded as minority languages.[62]

Considering all these tendencies in international law regarding the definitions of the terms "minority" and "minority languages," it is possible to make a general definition of linguistic minorities. In this regard, a linguistic minority can be defined as a group of individuals, constituting a numerical minority in a non-dominant position in a country, possessing a language which is different from the language(s) of majority population, and who show a sense of solidarity directed towards preserving this language. As it may be noticed, in pursuant with the Comments of the Human Rights Committee, this definition does not include the citizenship requirement.

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[61] See the discussions during the drafting process of article 27 of the ICCPR in *the Human Rights Commission Report of the 18th Sess., supra* note 42 at 26.

[62] Capotorti, *supra* note 44 at 39.

3. Language Rights as Human Rights

As discussed earlier, an effective international protection of minority language rights should first guarantee the equality of individuals belonging to linguistic minorities in the enjoyment of universally recognized human rights. In some situations, when certain human rights norms are read together with the right to non-discrimination, they provide significant protection for the members of linguistic minorities. In this regard, the rights to non-discrimination, to privacy, to freedom of expression, to liberty and to fair trial have very significant implications on the protection of the language rights of persons belonging to minorities.[63]

Since these norms are universal norms in their character, they set forth the minimum standards concerning the protection of language rights of persons belonging to linguistic minorities. Therefore, they must be applied to everyone, regardless of being recognized as a member of a linguistic minority, by the country in which they live.[64] One cannot be deprived of enjoying these rights, because he or she is not considered as a member of a recognized minority.[65] Although the Human Rights Committee noted that one's enjoyment of language rights protected under the ICCPR does not depend on belonging a minority recognized by the government, because of the lack of a consensus on the definition of the term "minority," members of many linguistic groups may not in practice exercise their language rights. Accordingly, if universal human rights norms concerning language issues are appropriately interpreted, they may provide a significant protection for the linguistic groups who are refused to be defined as minority, by the states that they inhabit.

In this respect, the ECHR and the case-law of the European Court of Human Rights and the European Commission of Human Rights are of paramount significance. Since one of the membership conditions of the CoE is ratification of the ECHR and acceptance of the right of individual petition, and only the states which are the members of the Council can apply for accession to the EU, the implementation of the ECHR in the

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[63] Henrard, *supra* note 20 at 33-129.

[64] See Rainer Enrique Hamel, "Linguistic Human Rights in a Sociolinguistic Perspective" (1997) 127 IJSL 1 at 1-2.

[65] See Fernand de Varennes, "Language Rights as an Integral Part of Human Rights" (2000) online: MOST <www.unesco.org/most/vl3n1var.htm>.

field of language rights must have very important implications on the accession process of the candidate countries.

Before the beginning of an analysis of the case-law of the European Court of Human Rights, it must be noted that like the Universal Declaration of Human Rights [UDHR], the ECHR does not include any specific minority rights provision. In 1961, a proposal suggesting the adoption of a protocol recognizing the right to use one's own language and to receive teaching in the language of one's choice was refused by the Committee of Experts.[66] After that, in 1993, the Parliamentary Assembly of the Council of Europe, in Recommendation 1201, proposed a new protocol to the Convention providing for minority rights. However, Recommendation 1201 was not taken in the Heads of State and Government meeting of the Council at its Vienna Summit in October 1993.[67] Consequently, European Human Rights case-law currently does not directly deal with the issue of protection of the linguistic identity of individuals belonging to a linguistic minority. It addresses the issues of language, as long as one's language is relevant to the implementation of the said universal human rights norms.

3.1. The Right to Non-Discrimination

As in the UN Charter and the UDHR, the ECHR determine language as one of the prohibited grounds of discrimination. Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the Convention is to be "guaranteed without discrimination on any ground such as (...) language".[68]

The European Court of Human Rights clearly stated that the prohibition of discrimination adds a separate control of the exercise of fundamental freedoms and human rights.[69] In other words, it constitutes one particular element of each of the rights safeguarded by the Convention. Accordingly, the language element of the right to non-discrimination shows that the words "everyone" and "no one" also include persons

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[66] Mala Tabory, "Language Rights As Human Rights" (1980) 10 Israel Yearbook on Human Rights 167 at 204-205.
[67] Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights" (2002) 24 HRQ 736 at 737.
[68] The European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, E.T.S. no. 005, (entered into force 19 September 1953) [the *ECHR*].
[69] James Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Clarendon, 1987) at 297.

belonging to linguistic minorities.[70] For example, everyone, including persons whose mother tongue is different from the official language of the country in which he or she resides, has the right to respect for his private and family life (article 8), or no one including persons belonging to linguistic minorities shall be denied the right to education (article 2 of Protocol I). Therefore, in the implementation of all human rights norms, the question of equality in the context of persons belonging to linguistic minorities should be considered.

However, it must be borne in mind that the scope of the right to non-discrimination is limited to the objective of other human rights norms. In other words, since unlike article 26 of the ICCPR, article 14 of the ECHR is not a "free-standing provision," it creates no additional rights.[71] This means that until Protocol 12 providing a general prohibition of discrimination comes into force, there can be room for the application of article 14, only if the facts at issue fall within the ambit of other human rights norms recognized in the Convention.[72] In the *Belgian Linguistic Case*, while applying the right to non-discrimination based on language (article 14) to the right to education (article 2 of Protocol I), the European Court of Human Rights analyzed this issue in detail.

In this case, one of the claims of the applicants was that the compulsory use of Dutch language in public and private schools located in Dutch speaking areas caused discrimination against French speaking children and their parents. Article 2 of Protocol to the ECHR provides that no one shall be denied the right to education. In addition, in the following sentence of this provision, it is stipulated that during their educational activities, the state parties shall respect parents' religious and philosophic convictions. According to the applicants, article 2 of the Protocol in conjunction with article 14 of the Convention also guarantees the right to be educated in the language of one's parents by public authorities or with their aid.[73]

The Court found this interpretation contrary to the objective of article 14 of Protocol I. According to the Court, expansion of the meaning of the words "parents'

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[70] See *Airey v. the Republic of Ireland* (1979) 31 Eur.Ct.H.R. (Series A) 4 at 16, 2 E.H.R.R. 241.
[71] Tabory, *supra* note at 195.
[72] Gilbert, *supra* note at 741.
[73] *Belgian Linguistic Case* (1968) E.H.R.R. 252.

religious and philosophical convictions" towards "parents' linguistic preferences" was not possible, considering the drafting process of this article. In June 1951, the Committee of Experts which had the task of drafting the Protocol set aside a proposal including a provision regarding language preference, because they believed that this issue concerned an aspect of the problem of minorities and it fell outside of the scope of the Convention.[74] Therefore, the Court held that the purpose of article 2 is limited to ensure that the right to education shall be secured by each state party to everyone, including linguistic minorities, within its jurisdiction. This article in conjunction with article 14 does not ensure to a child or to his parents the right to obtain education in a language of his choice.[75]

The jurisprudence of the Court shows that the prohibition of discrimination in the ECHR is limited to the objective and scope of each right recognized under the Convention. Since there is no provision in the ECHR directly protecting the linguistic identity of minorities, the application of the non-discrimination provision is quite restricted in many situations related to such minorities. Yet, in any event, prohibition of discrimination is very important for linguistic minorities. In particular, it makes a significant contribution to the integration of members of linguistic minorities into the whole society, preventing states from depriving some persons of fundamental rights, only because their mother tongue is different from the official language.[76]

3.2. The Right to Privacy

The right to privacy can also provide significant protection for the use of a minority language in the private sphere of persons belonging to a minority. Like article 12 of the UDHR, article 8 of ECHR stipulates that everyone has the right to respect for his private and family life, his home and his correspondence.[77] These articles do not directly refer to language, but it is generally acknowledged that the obligation of states not to interfere in one's private and family life, his home and his correspondence also cover the right to use one's own language in these fields of life. Therefore, persecution of people because they speak a minority language at home or in their private relations or because they write

[74] *Ibid.* at 282.
[75] *Ibid.* at 285.
[76] Henrard, *supra* note 20 at 60-62.
[77] *The ECHR, supra* note 68.

letters in that language constitutes a serious violation of the right to privacy. In these situations, language, as a tool of communication, cannot be isolated from the exercise of the right to privacy.

Although there is no case directly referring to language in the implementation of article 8 of the ECHR, some judgments of the European Court on Human Rights indicate that the right to privacy may also be relevant to personal identity. In *Noack and Others v. Germany*, the Court held that while the Convention did not guarantee rights that were peculiar to minorities, for the purposes of article 8, a minority's way of life was, in principle, entitled to the protection guaranteed for an individual's private life, family life and home.[78] Accordingly, the Court stated that the transfer of this minority group from the village directly concerned their private lives.[79] In various cases related to the measures of the U.K. which allegedly threatened home and family life of the Roma, the Court reached the same conclusion.[80] In *Smith v. U.K.*, for example, the Court found that the applicant's occupation of her caravan was an integral part of her ethnic identity, reflecting the long tradition of the Roma of following a traveling lifestyle. According to the Court, measures which affected the applicant's stationing of her caravans also affected her ability to maintain her identity and to lead her private and family life in accordance with that tradition.[81]

The issue of the relationship between the right to privacy, identity and language is particularly important in the context of personal names given in a minority language. There is no case directly relevant to personal names in a minority language, but in some cases, the Court has emphasized that the choice of a personal name was related to one's private sphere. In *Burghartz v. Switzerland*, for instance, the Court pointed out that although article 8 did not contain any explicit provisions on names, as a means of personal identification and linking to a family, a person's name concerned his or her private and family life.[82] Furthermore, in *Guillot v. France*, the Court held that the choice of a child's forename by its parents is a personal, emotional matter and therefore comes

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[78] *Noack and Others v. Germany* (2000) VI Eur.Ct.H.R. (Series A) 535 at 550.
[79] *Ibid.* at 541-45.
[80] *Smith v. U.K.* (2001) 33 E.H.R.R. 30; *Chapman v. U.K.* (2001) 33 E.H.R.R. 18; *Beard v. U.K.* (2001) (2001) 33 E.H.R.R. 19; *Coster v. U.K.* (2001) 33 E.H.R.R. 20; *Lee v. U.K.* (2001) 33 E.H.R.R. 29.
[81] *Smith v. U.K.* at 735-36.
[82] *Burghartz v. Switzerland* (1994), 280B Eur.Ct.H.R. (Series A) 19 at 28, 37 Y.B.Eur. Conv.H.R.166.

with their private sphere.[83] Therefore, there is no doubt that prohibition of *de facto* use of a name given in a minority language at home or in family violates the provisions of article 8.[84] However, as to official registration of these names, whether the right to privacy covers also the right to register children's names in their parents' own language is quite arguable, because official registration is mostly regarded as a public matter.

3.3. The Right to Freedom of Expression

Universal human rights norms do not guarantee the right to use a minority language only in private, but they can also provide significant protection for persons who wish to use a minority language in public. The right to freedom of expression is very important, in this respect.

Article 19 of the UDHR and 10 of the ECHR stipulate that everyone has a right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[85] It is argued that although in the formulation of this freedom, the issue of the language of choice is not specified, the protection of the message includes both its content and its form (or instrument).[86] The connection between language and freedom of expression was stressed by Laloux, in his report to the Commission in *Inhabitants of Leeuw-St. Pierre v. Belgium*. He stated that it was impossible to express one's thoughts in words or writings, without at the same time enjoying linguistic freedom. Furthermore, he argued that there was no reason why freedom of expression should be limited to philosophic expression and not cultural expression.[87]

The Commission also implied that freedom of expression covers the right to use a minority language in public, out of governmental affairs. In *Fryske Nasjonale Partji and Others v. the Netherlands*, an application involving a complaint about the prevention of a Frisian political party from registering its candidates for election in Frisian, not in Dutch, the Commission made a clearer distinction between the private use of a minority language

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[83] *Gillot v. France*, (1996) V Eur.Ct.H.R. (Series A) 1593 at 1602-03.
[84] Henrard, *supra* note 20 at 105-107.
[85] *The ECHR*, *supra* note 68.
[86] Hamel, *supra* note 64 at 4.
[87] *Inhabitants of Leeuw-St. Pierre v. Belgium* (1968) 11 Y.B.Eur. Conv.H.R.228 at 246-48.

and the governmental use of it. In its decision, while the Commission concluded that freedom of expression did not guarantee the right to use the language of one's choice in administrative matters, it noted that freedom of expression and language preference might be relevant if the applicants had demonstrated that they were also prevented from using the Frisian language for other purposes. The Commission thus implicitly stated that if this application was related to the use of the Frisian language for political speech, for example, the decision may have been different.[88]

The freedom to express oneself in any language in non-official activities encompasses various aspects of the social, cultural and political life of minorities. It allows them to use their own language not only among themselves, but in situations where the rest of the population may be exposed to the speech of a minority language. The right to freedom of expression thus protects the right to publish newspapers and books in a minority language, to perform a theatre or concert in that language or to use a minority language at a political meeting.[89]

3.4. The Right to Liberty and to Fair Trial

Universal human rights norms protect the use of a minority language before public authorities in very exceptional situations. These situations are directly related to the exercise of the right to liberty and the right to fair trial which involve the right to be informed of the reason for one's arrest and of the nature and cause of one's accusation and the right to defense. It is obvious that in the enjoyment of these rights, language is a crucial factor. Therefore, article 5 (2) of the ECHR provides that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. Similarly, in article 6 (3) (a) of the Convention, it is stipulated that everyone charged with a criminal offence has right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. Paragraph (e) of the same article also adds that everyone is

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[88] *Fryske Nasjonale Partji and Others v. the Netherlands* (1986), 45 Eur.Comm.H.R. D.R. 240, 9 E.H.R.R. 235 at 242-43.

[89] *Language, Minorities and Human Rights*, *supra* note 18 at 44-49.

entitled to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[90]

The case-law of the European Court has made very a significant contribution to the clarification of the scope of the right to liberty and to fair trial. In *Kamasinski v. Austria*, the Court pointed out that this right applies not only to oral statements made at the trial hearing but also to documents in the proceedings instituted against him which are necessary for him to understand in order to have the benefit of a fair trial.[91] In addition, in the judgment in *Luedicke, Balkacem and Koç v. Germany*, it was stated that according to article 6 (3) (e), an accused person does not bear interpretation costs, even though he or she is convicted at the end of the trial.[92] Furthermore, in *Kamasinski v. Austria,* the Court also underlined the relevance of the quality of interpretation to the right to fair trial, by noting that to guarantee this right in a practical and effective way, the obligation of the competent authorities to provide an interpreter may also extend to a degree of subsequent control over the interpretation.[93] These judgments of the Court show what the right to liberty and the right to fair trial include.

However, what those rights do not include is also very important. The formulation of articles 5 and 6 indicates that the right to use a minority language before public authorities is granted to persons belonging to a linguistic minority in very restrictive circumstances. Fist of all, this right can be claimed only during criminal processes before courts and security forces. In civil law issues therefore no one is entitled to have free assistance of an interpreter. Secondly, since only an accused person has these rights, the assistance of an interpreter for the witnesses may not be free. Thirdly, this right is exclusively granted to accused people who cannot comprehend the official language.[94] As it was implied in *Zana v. Turkey*, under the Convention, a person belonging to a linguistic

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[90] *The ECHR, supra* note 68.
[91] *Kamasinski v. Austria* (1989) 168 Eur.Ct.H.R. (Series A) 4 at 35, 32 Y.B.Eur. Conv.H.R.201.
[92] *Luedicke, Balkacem and Koç v. Germany* (1978) 29 at 17 Eur.Ct.H.R. (Series A) 4, 21Y.B.Eur. Conv.H.R.630. See also *Öztürk v. Germany* (1984) 73 Eur.Ct.H.R. (Series A) 4 at 22, 27 Y.B.Eur. Conv.H.R.270.
[93] *Kamasinski v. Austria* at 35.
[94] See Piether van Dijk and Fried van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2. ed. (Deveter/ Boston: Kluwer law and Taxation Publishers, 1990) at 272.

minority cannot claim the right to use his or her mother tongue before court, if he or she has sufficient knowledge of the language of court.[95]

[95] *Zana v. Turkey* (1997) VII Eur.Ct.H.R. (Series A) 2533 at 2551.

4. Language Rights as Minority Rights

As the preceding analysis has confirmed, although human rights norms are undeniably important for the protection of members of linguistic minorities against discrimination and very extreme forms of assimilation, since these norms protect the use of a minority language, only if this usage is in the scope of a fundamental right, their application to the situations related to minority languages remains very limited. The foundation and operation of private minority schools where their own language can be used, for instance, is not protected under any human rights norms. Therefore, it is often postulated that individual human rights alone cannot provide an affective protection of minority language rights. For such a system, they must be completed with special language rights granted to the members of these communities in order to protect and promote their linguistic identity.[96]

The complementary character of minority language rights is particularly important for linguistic minorities in full enjoyment of universal human rights. Human rights scholars and international law theorists have long recognized that although one's linguistic identity is closely linked to the concept of human dignity and the right to freely develop one's personality, individual human rights norms do not provide sufficient protection for the protection of the linguistic identity of members of a linguistic minority.[97] These norms basically guarantee formal equality between members of minorities and those of majorities. Since minorities are in a disadvantageous position in the protection and promotion of their linguistic identity, compared to the speakers of a majority language, persons whose mother tongue is a minority language should be granted certain special rights, for the realization of substantial equality between the speakers of these languages.[98] This approach was formulated in paragraph 31(2) of the Copenhagen Document, announcing that the states parties will adopt, where necessary,

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[96] Hamel, *supra* note 64 at 8.

[97] Richard A. Goreham, *Group Language Rights in Plurilingual States* (LL.M. thesis) McGill University, Institute of Comparative Law (1980) [unpublished] at 10.

[98] See Pádraig Ó Riagáin and Niamh Nic Shuibhne, "Minority Language Rights" (1997) 17 Annual Review of Applied Linguistics 11 at 18.

special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the enjoyment of human rights.[99]

This issue has also been emphasized by the EU documents addressing international minority rights standards. In the 1991 Declaration on Human Rights, the European Council pointed out that members of minorities are entitled to cultural identity and they should be able to exercise this right in common with other members of their group.[100] Moreover both in its First Opinions and Annual Reports, the Commission noted the importance of recognition of specific minority language rights, such as the right to use their own language in education and media, in dealings with public authorities and before courts.

Minority language rights have two important characteristics: first of all, unlike individual human rights, minority language rights include collective elements in their character; secondly, those rights are not limited to non-intervention obligation of states, but they also require positive action of states.

4.1. Collective Aspect of Special Minority Language Rights

In doctrine, minority language rights, along with other minority rights, have been classified into a distinct category of rights containing certain aspects of both individual rights (universal human rights) and group rights (the right to self-determination). They therefore are defined, by some authors, as a hybrid between those two categories.[101] The formulation of article 27 of the ICCPR reflects this hybrid character of special minority language rights the best, stipulating that "persons belonging to (...) linguistic minorities" shall not be denied their right to use their own language "in community with other members of their group."

The use of words "persons belonging to (...) linguistic minorities," instead of only the word "linguistic minorities" in article 27 clearly indicates that the holders of these rights are individuals, not groups as a whole. The preparatory work of article 27 reveals that during the drafting of article 27, the states intentionally refused the recognition of legal personality of minorities as a group in order to avoid stimulating secessionist

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[99] *Copenhagen Document*, *supra* note 55.
[100] Pentassuglia, *supra* note 2 at 8.
[101] Thornberry, in particular, characterizes special minority language rights as a hybrid between individual and group rights. See *supra* note 38 at 173.

movements.[102] In addition, it has been also construed that this formulation of the article was adopted to guarantee the protection of members of a minority not only against the majority, but also against the minority group itself which one belongs to. According to this approach, every human being is an end in himself or herself, and therefore, an individual must never be treated as a mere means to achieve the well-being of a group.[103]

On the other hand, the words "persons belonging to (...) linguistic minorities," also indicate that although special minority language rights are granted to individuals, they are not accorded to all people, but only to those who belong to a certain community.[104] The phrase "(the) right to use (one's) own language in community with other members of their group" also shows that the right to use a minority language recognized in article 27 is a common right which requires the consideration of its collective aspect in the exercise of this right. It is pointed out that since participation in common activity is one of the main conditions for one's self-development, it follows that individuals have *prima facie* equally valid claims or rights to such opportunities for participation in joint activity.[105] This is particularly important for minority language rights. For a communication in any language, there must be at least two people who can comprehend and speak it. This means that minority language rights cannot be exercised by individuals alone.[106] In its General Comment on article 27, the Human Rights Committee emphasized this issue, by noting that although the rights guaranteed under Art. 27 are individual rights, they depend in turn on the capacity of a minority group to maintain its culture and language.[107]

The hybrid character of minority language rights requires a reasonable balance between the benefits of individuals and the group they belong to. In any case, the center

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[102] Nowak, *supra* note at 483.
[103] Niamh Nic Shuibhne, "Ascertaining a Minority Linguistic Group: Ireland as a Case Study" in Deirdre Fottrell and Bill Bowring eds., *Minority and Group Rights in the New Millennium* (The Hague/ Boston/ London: Martinus Nijhoff Publishers, 1999) 87 at 93.
[104] Will Kymlicka, "Individual and Community Rights" in Judith Baker (ed.) *Group Rights* (Toronto: University of Toronto Press, 1994) 17 at 18-19.
[105] Carol C. Gould, "Group Rights and Social Ontology" in Christine Sistare at al. (eds.) *Groups and Group Rights* (Kansas, University Press of Kansas, 2001) 43 at 46-47.
[106] Leuprecht, *supra* note 21 at 122-123.
[107] *General Comment on the Rights of Minorities, supra* note 52 at 3. The same approach has been adopted by Asbjørn Eide, the Chairperson of the Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights, clearly points out in her Commentary to the Declaration on Minority Rights. See *supra* note 52 at 3.

of special minority language rights is individuals, not the group as a whole. These rights provide a common right for members of a linguistic minority to preserve their linguistic identity through educational and cultural institutions and other means. This does not entail, however, that the linguistic minority could insist that all of its members were required to be educated only in that language, but rather that the choice to be educated in this way would be available to its members.[108] It must be borne in mind that belonging to a minority is based on personal choice of individuals who share the objective characteristics of a group. A linguistic minority cannot prevent some of its members from benefiting their collective rights, such as the right to be educated in their own language, unless there is a reasonable and objective justification for the survival and development of minority. In *Kitok v. Sweden,* the Human Rights Committee pointed out that a restriction upon the rights of an individual member of a minority must be shown to have a legitimate and objective reason and to be necessary for the continued viability and welfare of the group as a whole.[109]

It must be noted that although beneficiaries of minority language rights are individuals, the collective aspect of these rights makes the issue of definition of a minority very important in the exercise of language claims. To be entitled to minority language rights, first a linguistic minority must exist in a country and secondly a person who claims these rights must be a member of such a community. Accordingly, any restrictive response regarding the questions of what is a linguistic minority and who belongs to this minority group may lead to deprivation of language rights of some individuals. To avoid this consequence, states should appropriately apply objective and subjective criteria constituting a linguistic minority.

In the evaluation of the situation of minorities in the associate countries, the European Commission has paid special attention on whether collective minority rights are recognized or not. Therefore, in all its First Opinions, it noted if the relevant state has subscribed to the principles of Recommendation 1201 of the Parliamentary Assembly of the CoE providing for the recognition of collective rights for minorities, although this text is not legally binding. In 1997 the Commission also criticized the Lithuanian Constitution

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[108] Gould, *supra* note at 48.

[109] Committee on Human Rights, *Report on the Forty-Third Session*, UN GAOR, 1988, Supp. No. 40, UN Doc. A/43/40 at 221. Case referred to as Communication No. 197/1985.

on the ground that although it recognizes the individual rights of persons belonging to minorities (in terms of language, culture and traditions), it provides no collective rights which would enable minorities to be recognized as politically organized communities.[110] Similarly, the refusal by the Slovakian Parliament to grant collective rights to the Hungarian minority was noted by the Commission as an insufficiency of the domestic law of Slovakia in the protection of minority rights.[111]

4.2. Negative and Positive Minority Language Rights

The other characteristic of minority language rights is that the content of these rights is not limited to negative obligations of states. Today, in increasing number of international instruments, it has been recognized that an effective protection of minority language rights also requires to some extent positive action of states.[112]

Negative minority language rights are primarily based on states' non-intervention obligation in the common use of a minority language by the members of a linguistic minority. In fact, these rights originate from the application of universal human rights and freedoms in specific situations. They basically protect the right of members of minorities to use their own language in private and public for non-governmental purposes, without the intervention of states. In this regard, they may also be considered as fundamental linguistic freedoms. These linguistic freedoms preclude any attempt to prohibit the use of a minority language and to prevent the transmission of that language to the next generations, constituting minimum conditions for a tolerance regime towards linguistic minorities.[113] Thus, negative minority language rights set forth universal standards applicable to all minorities in the world.

Historically, owing to its negative formulation, the content of article 27 of the ICCPR has long been considered, by some authors and some states, as limited to negative minority rights.[114] However, the negative formulation of this article does not necessarily

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[110] *Commission Opinion on Lithuania's Application, supra* note 6 at 19.
[111] *Commission Opinion on Slovakia's Application, supra* note 10 at 18.
[112] See Leslie Green, "Are Language Rights Fundamental" (1987) 25 Osgoode Hall Law Journal 639 at 660-62.
[113] Denise G. Réaume, "The Group Right to Linguistic Security: Whose Right? What Duties?" in Judith Baker (ed.) *Group Rights* (Toronto: University of Toronto Press, 1994) 118 at 129; See also Green, *supra* note at 660-62.
[114] See Nowak, *supra* note at 500; de Varennes, *Language, Minorities and Human Rights, supra* note 18 at 150-52. The countries, such as the USA, Japan and Mexico, consider this provision limited with negative

mean that states do not have any positive obligation at all under the minority protection system of the Covenant. Because of the horizontal effects of negative rights, the states are also required to take legislative, judiciary and administrative measures in order to protect individuals against violations of their fundamental freedoms by private actors. This means that negative minority language rights do not only require states not to intervene with the free use of a minority language among members of a linguistic minority, but also oblige states take positive measures in order to prevent non-state actors from hampering the use of their own language.[115] The words "freely and without interference or any form of discrimination" which are used at the end of article 2 (1) of the Declaration more clearly stipulate that the use of a minority language must be safeguarded against any interferences, including the interferences of private persons.[116] Consequently, even though a state does not directly prohibit the use of a minority language, if it does not take legal measures against a company which inhibits the use of such language during lunch break, the non-action of states in this situation would constitute a violation of article 27 of the Covenant.

On the other hand, today there is also a growing tendency among states towards the recognition of positive rights in the protection of minority language rights. It has been increasingly acknowledged that since in many situations minorities do not have sufficient human and financial resources to promote their languages, leaving minorities completely to their own devices in the preservation of their linguistic identity could in reality amount to an indirect forced assimilation.[117] Therefore, it is required that through the recognition of positive minority language rights, states take effective measures against the social and economic disadvantages of linguistic minorities which may prevent them from developing their language. In this respect, financial assistance of states and official use of a minority language are considered very important.

This trend can be particularly observed in the provisions of the Declaration of the Rights of Minorities, which reflect the recently developed standards by the OSCE. The affirmative formulation of article 2(1) of the Declaration, replacing the words "shall not

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rights. See Sharon Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Dordrecht/Boston/London: Martinus Nijhoff Publishers,1992) at 412.

[115] Nowak, *supra* note at 502.

[116] *Declaration on Minorities*, *supra* note 31.

[117] Capotorti, *supra* note 44 at 37.

be denied the right to (...)" used in article 27 of the ICCPR and article 30 of the CRC with the words "have right to (...)" indicates that the scope of minority language rights should not be restricted to negative rights only. Moreover, the end of article 1(1), explicitly requires the states to encourage the conditions for the promotion of the linguistic identity of minorities. Parallel to this, article 4(2) stipulates that states shall take measures to create favorable conditions to enable persons belonging to linguistic minorities to express their characteristics and to develop their language. More important, article 4(3) requires states to take certain measures in order to promote the linguistic identity of a minority in the field of education.[118]

As aforementioned, since in accordance with article 9 of the Declaration, all UN bodies are required to take the provisions of the Declaration into account within their relevant fields of competence, this trend has also some implications on the implementation of article 27 of the ICCPR. Therefore, in its General Comment on the rights of minorities, the Human Rights Committee noted that although the rights protected under article 27 are individual rights, positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to develop their culture and language.[119] In addition, in his examination of state reports and recommendations of the Human Rights Committee, Cholewinski has shown that in the implementation of article 27, promotion-oriented minority language rights are often considered.[120]

This trend has also influenced the EU's approach towards the evaluation of the situation of minorities in the candidate countries. In the 2000 Report on Romania, for example, the Commission noted the Romanian government's policy which actively

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[118] *Declaration on Minorities, supra* note 31.

[119] *General Comment on the Rights of Minorities, supra* note 52 at 3.

[120] See Ryszard Cholewinski, "State Duty Towards Ethnic Minorities: Positive or Negative?" (1988) 10 HRQ 344 at 348-61. For example, in the 1980's information was requested from the representative of Venezuela "on the special measures required for the protection of indigenous peoples." Committee on Human Rights, *Report on the Thirty-Sixth Session*, UN GAOR, 1981, Supp. No. 40, UN Doc. A/36/40 at 13-14. In addition, the Danish representative was asked whether his government considered it necessary to adopt positive measures to ensure the rights of minorities. Committee on Human Rights, *Report on the Forty-Third Session*, UN GAOR, 1988, Supp. No. 40, UN Doc. A/43/40 at 45. In the 1990's the Committee asked about "assistance" given by the governments of Sri Lanka to the Tamils, the Muslims and the Hindus in order to preserve their cultures, languages and religions. Committee on Human Rights, *Report on the Forty-Sixth Session*, UN GAOR, 1991, Supp. No. 40, UN Doc. A/46/40 at 123. Finally, Algeria was asked to provide information regarding Berbers and "on any measure taken to foster and preserve their culture and language." Committee on Human Rights, *Report on the Forty-Sixth Session*, UN GAOR, 1994, Supp. No. 40, UN Doc. A/47/40 (1992) at 64.

promotes and protects minority languages in public education as a positive development.[121] Likewise, in its First Opinions on Slovakia, the inclusion of some funding into the state budget in order to encourage cultural and educational activities of minorities was shown as an example of a constructive attitude towards minorities.[122]

However, as to the content of positive minority language rights, international law does not provide a uniform set of actions which all states must undertake. It is generally accepted that the needs of each minority and the socio-political conditions of each state vary so dramatically from one country to another that far-reaching norms in this area would contain in themselves the seeds of potential conflict.[123] Therefore, unlike negative rights, positive minority language rights do not constitute universally applicable rights. Instead, implementation of these rights is subject to certain qualifications. Accordingly, they are defined by some authors as program type rights.[124] In this regard, whether there is a minority group historically or in substantial numbers living in a region, and whether they have a demand for a positive right is of importance. In addition, available resources of states and the framework of their legal systems should also be considered. This means that in the exercise of these rights, all minority groups in a country may not be subject to equal treatment. Generally, the speakers of national minorities receive more state support than the speakers of new minorities, i.e. immigrants.[125]

In the formulation of positive rights, as a result of words like "wherever possible", "when appropriate", "adequate opportunities" and the verb "should" instead of "shall" in the Universal Declaration on Minorities, a broad margin of appreciation is left to states to determine the scope of their obligations. Yet, this does not mean that states can arbitrary use their discretion. The provisions regarding positive minority language rights provide basic guidelines indicating general direction of states efforts.[126] These guidelines require the development of a robust dialog between minorities and majorities in order to establish a fair balance between the demands of a linguistic minority and the social, economic and

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[121] EU, Commission, *the 2000 Regular Report from the Commission on Romania's Progress towards Accession* (Luxembourg: EC, 2001) at 26.
[122] *Commission Opinion on Slovakia's Application*, *supra* note 10 at 18.
[123] Capotorti, *supra* note 44 at 39.
[124] See F. de Varennes, *To Speak or not to Speak: The Rights of Persons Belonging to Linguistic Minorities*, Working Group on Minorities, UN ESCOR, 3rd Sess., UN Doc. E/CN.4/Sub.2/AC.5/1997/WP.6 [*To Speak or not to Speak*].
[125] Eide, *supra* note 52 at 9.
[126] Thornberry, *supra* note 38 at 199.

the development of a robust dialogue between minorities and majorities in order to establish a fair balance between the demands of a linguistic minority and the social, economic and political conditions of the state. In article 2(3) of the Declaration, it is stated that at both national and regional levels, members of minorities have the right to effectively participate in decisions concerning the minority to which they belong.[127] The European Commission has frequently emphasized the importance of this issue, giving the examples of minority participation in legislative bodies, and education and broadcasting boards in the candidate states.[128]

4.3. Content of Negative Minority Language Rights

Negative minority language rights cover various aspects of the lives of persons belonging to linguistic minorities. They include the right to use one's own minority language in private and public, the right to be taught in that language in private schools, and the right to publish and broadcast in a minority language. In addition, the right to speak a minority language in political and cultural activities of a linguistic minority and the right to have a personal name given in the mother tongue of one's parents are also considered within the scope of negative minority language rights. Although it is generally acknowledged that article 27 of the ICCPR and article 30 of the CRC contain all negative minority language rights, because of their general formulation, these articles do not separately mention each of these rights. Therefore, the specific provisions of the 1990 Copenhagen Document and the 1995 European Framework Convention on Minorities have made very a significant contribution to the clarification of the content of negative minority language rights.

4.3.1. The Right to Use a Minority Language in Private and in Public

The core of tolerance-oriented minority language rights is based on the right of individuals belonging to a linguistic minority to use their own language, without any

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[127] *Declaration on Minorities*, supra note 31.

[128] See EU, Commission, *The 1999 Regular Report from the Commission on Slovakia's Progress towards Accession* (Luxembourg: EC, 1999) at 17-18 [*the 1999 Regular Report from the Commission on Slovakia's Progress*].

interference, in private and public, out of governmental affairs. All the other more specific negative minority language rights are derived from this right.

The use of a minority language contains both oral and written communications which may occur in private and public spheres of life.[129] In the private sphere, the use of a minority language takes place only among the members of a linguistic minority. For example, people belonging to such minority can speak in their mother tongue with their relatives at home, or they can write a letter in that language to their parents. According to article 27 of the ICCPR, states cannot prohibit these activities of minorities.[130] In these situations, the right to privacy also protects individuals belonging to a linguistic minority against the persecution of government. The use of a minority language in public, on the other hand, occurs where the rest of the population may be exposed to this use. If members of a minority group use their language at a meeting in a park, for instance, speeches in that language can also reach to the outside this group. The same is true where a poster or sign is erected in the view of public. Both the right to use a minority language in public and the right to freedom of expression prevent states from intervening in this sort of use of a minority language.[131]

It must be noted that the right to use a written minority language also includes the right to use a script which may differ from that sanctioned by the state concerned. Script is intimately related to the concept of language, so that a difference in script can render a language unintelligible or difficult to understand among the speakers of that language. Therefore, prohibition of a particular script in the use of written form of a minority language constitutes a violation of article 27 of the ICCPR.[132]

4.3.2. The Right to Use a Minority Language in Private Minority Schools

It is a long-established rule that the right for linguistic minorities to use their own language among themselves must also include the right to establish, manage and operate their own educational institutions where their language is taught or used as the medium of

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[129] Nowak, *supra* note at 495.
[130] *A Guide to the Rights of Minorities and Languages, supra* note 40 at 11.
[131] *To Speak or not to Speak, supra* note 124.
[132] *Language, Minorities and Human Rights, supra* note 18 at 162-63.

instruction.[133] In many minority treaties in the period of the League of Nations, this right was explicitly granted to minorities. In article 67 of the Treaty of Peace with Austria, for example, it was stated that Austrian nationals belonging to minorities were entitled to establish, manage and control at their own expense their schools and other educational institutions, with the right to use their own language.[134]

This tradition has been followed in the period of the UN. Therefore, while the ICCPR does not overtly speak of the right to use a minority language in private minority schools, it is generally accepted that article 27 also covers this right. In the work of the Human Rights Committee, educational possibilities for the use of minority language have been one of the most frequently questions directed to the representatives of states. In 1981, for example, Italian government was requested to give information on whether its Albanian minority had the right to maintain and operate schools where teaching was conducted in their own language. In 1988, Denmark was asked if the German-speaking minority had the possibility of arranging for their children to be educated in the German language.[135]

In the 1995 Framework Convention on Minorities, this right has been explicitly recognized. In article 13, it is stated that within the framework of their educational systems, states parties shall recognize the right of persons belonging to national minorities to set up and control their own educational and training establishments at their own expense. Article 14(1) adds that members of linguistic minorities have the right to learn their own language.[136] The same right had been recognized in article 32(2) and (3) of the 1990 Copenhagen Document.[137]

In this regard, the EU has paid special attention on whether the candidate countries respect and protect the right of persons belonging to a linguistic minority to establish and operate private schools where they can use their language. In its First Opinion on Romania, for example, the Commission noted that relations with the Hungarian minority improved appreciably since the signing of a bilateral treaty with

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[133] These schools may operate in various levels of education, including pre-primary, primary, secondary and even university levels. See Capotorti, *supra* note 44 at 87.
[134] *Ibid.* 370.
[135] Åkermark, *supra* note 29 at 142-43.
[136] *Framework Convention on Minorities*, *supra* note 56.
[137] *Copenhagen Document*, *supra* note 55.

Hungary in September 1996 and after that, a new education act granting Romania's minorities the right to be educated in their own languages was adopted.[138] The EU prompts the associate countries to recognize the right of minorities to use their own languages at all levels of the education system, including universities. The Commission has mentioned this issue especially in relation with the situation of Hungarian minorities in the neighboring countries of Hungary. In its annual reports regarding Slovakia and Romania, the Commission has encouraged them to remove any legal obstacles preventing the establishment of minority universities teaching in Hungarian language.[139]

It must be noted that the right to establish minority schools where their own language can be used never removes the authority of states to control the curriculum and activities of these educational institutions in accordance with their education laws. Unless this control does not lead to impede the right of minorities to be educated in their own language in private minority schools, it is not considered as a violation of the related international standards.[140]

In addition, states can make teaching of official language(s) mandatory in these schools. Thus, both the national unity of a country is strengthened and equal opportunities for the members of linguistic minorities can be guaranteed.[141] Teaching of official language(s) may also require the instruction of certain courses in that language in order to improve the fluency of pupils. However, in this situation, states should not oblige minority schools give so many courses in the official language of the state that it will make the function of minority schools meaningless.

4.3.3. The Right to Use a Minority Language in Private Media and Publishing

It is generally accepted that the right to use a minority language in public also covers the right to publish books, magazines and newspapers, and to broadcast radio and television programs in that language in private channels. The right to freedom of expression is intimately related to this right. Therefore, in article 9(1) of the Framework Convention on Minorities, it is stipulated that the right to freedom of expression includes freedom to hold

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[138] *Commission Opinion on Romania's Application*, *supra* note 14 at 17.
[139] T*he 2001 Regular Report from the Commission on Romania's Progress*, *supra* note 14 at 29; T*he 1999 Regular Report from the Commission on Slovakia's Progress*, *supra* note at 16-18.
[140] Malksoo, *supra* note 19 at 438-39.

opinions and to receive and impart information and ideas in a minority language, without interference by public authorities and regardless of frontiers. Parallel to this, the third paragraph of the same article requires the states parties not to hinder the creation and use of printed media, and radio and television broadcasting by persons belonging to national minorities.[142]

While this right basically prevents states from interfering in the use of a minority language through private mass media, a much more complicated problem occurs when one considers the issue of governmental control and allocation of radio and television frequencies. In most countries, these frequencies are regarded as public goods, and states which permit private broadcasting require that a license to broadcast be obtained from a public authority. This means that members of linguistic minorities do not have an unfettered freedom to use any frequency they please. Nonetheless, in providing broadcasting licenses, states are obliged not to make any discrimination. Therefore, refusal to grant a license for private radio and television stations using a minority language would be considered as a violation of the right to non-discrimination based on language.[143] For this reason, in 1993, when the government prohibited Creole-language broadcasts, the Human Rights Committee solemnly criticized the Dominican Republic.[144] In all documents regarding the evaluation of applications for accession to the EU, the Commission has also taken this issue into account.

The right to access to mass media broadcasting in a minority language also includes the right to access to radio and television programs transmitted from a neighboring country where this minority language is used by the majority of the population. This right is clearly recognized in article 9(1) of the Framework Convention on Minorities, where it is stated that members of a national minority have the right to receive and impart information in their own language, "regardless of frontiers." Article 17 of the Convention, which recognizes the right of such persons to establish and maintain free and peaceful contacts across frontiers, also protects this right.[145] Therefore, as mentioned in the Oslo Recommendations Regarding the Linguistic Rights of National

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[141] Capotorti, *supra* note 44 at 87-88.
[142] *Framework Convention on Minorities*, *supra* note 56.
[143] *Language, Minorities and Human Rights, supra* note 18 at 163-64.
[144] Åkermark, *supra* note 29 at 142-43.

Minorities and Explanatory Note, prohibition of listening and watching these programs and refusing to give cable licenses to these channels are regarded as a breach of the fundamental linguistic freedoms of minorities.[146]

4.3.4. The Right to Use a Minority Language in Political, Social and Cultural Activities of a Linguistic Minority

The right of persons belonging to a linguistic minority to use their own language in community with other members of their group, and the right to freedom of assembly and association can be joined together in such a way as to suggest that states refrain from intervening in the collective use of a minority language in political, social and cultural activities of minorities.[147]

This right is closely related with the sufficiency of the democratic and pluralist socio-political system in a country. In a pluralistic democracy, not only political ideas, but also linguistic and cultural identities must be freely expressed in the public area. This means that a political party defending the rights of a minority group is entitled to freely use the language of that group during its election campaign. Similarly, an association or a foundation established by the members of a linguistic minority can organize a concert or a theatre performance in their own language. Those organizations and organizers should not be prosecuted on the ground that a minority language is used as language of operation during their activities.[148]

Minority associations and political parties can also use their own language in their records and correspondence with other non-governmental organizations. In this case, states may require them to translate these documents into the official language.[149]

4.3.5. The Right to a Personal Name Given in a Minority Language

Another negative minority language right is the right to have a personal name given in a minority language. It can be argued that within the scope of negative rights, states'

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[145] *Framework Convention on Minorities*, *supra* note 56.
[146] See OSCE, *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities and Explanatory Note*, (1998) [*Oslo Recommendations Regarding Linguistic Rights*].
[147] Eide, *supra* note 52 at 6.
[148] *A Guide to the Rights of Minorities and Languages*, *supra* note 40 at 21.
[149] Åkermark, *supra* note 29 at 142-46.

undertakings regarding minority names are limited to not intervening with the use of these names among members of a minority, but this obligation does not require states to officially register them, because governmental use of a minority language is based on positive minority language rights.

However, this approach is not accurate. Actual names of persons are the names that are used in their private lives. Therefore, forcing individuals to change their names, when they wish to officially register them constitutes an indirect interference in their privacy. This would also constitute discrimination between persons whose mother tongue is the official language and persons whose mother tongue is different from that language. In addition, prohibition of registration of minority names is an element of assimilation policy and it indicates the refusal of recognition of the linguistic identity of a minority by the state. Accordingly, in article 11(1) of the Framework Convention on Minorities, it is stated that states should recognize that every person belonging to a national minority has the right to use his or her surname and first name in the minority language and the right to official registration of them, in accordance with modalities provided for in their legal system.[150]

In the registration of personal names in a minority language, the script differences between the official language and the minority language may create some problems. Since the use of all minority groups' scripts in the official records may not be economically possible, states may prefer to register these names, using the script of the official language. In this situation, the spelling of personal names in a minority language should be carefully suited to their original pronunciation.[151]

The EU also emphasizes the importance of respect for the right of persons belonging to minorities to have given and family names in their own language. In the 2001 Report on the Progress of Bulgaria towards accession, the Commission noted the amendments to the Civil Registration Act as an appreciable development, because it simplifies the procedure which ethnic Turks in Bulgaria, coercively renamed under the

[150] *Framework Convention on Minorities*, *supra* note 56.
[151] See *Oslo Recommendations Regarding Linguistic Rights*, *supra* note 146.

communist regime, should follow to get their names back.[152] The Commission also pointed out that in Slovakia the Hungarian minority is no longer obliged to translate their family names into Slovak language.[153]

4.4. Content of Positive Minority Language Rights

The content of positive minority language rights is based on two types of state action which are directed to support the linguistic identity of minorities: states can subsidize private cultural and educational activities of minorities, and/or they can allow the use of minority languages in public affairs. In this regard, subsidizing private minority schools and teaching minority languages in public schools; promotion of private media broadcasting in minority languages and the use of these languages in state-owned media; the use of minority languages before courts and administrative authorities are especially relevant.

4.4.1. State Support for Private Minority Schools and the Use of Minority Languages in Public Education

In international law, it is universally recognized that persons belonging to a linguistic minority are entitled to learn and develop their own language in their private minority schools and institutions. This right does not automatically oblige states to use public resources for the support of minority language education. However, since minority language education is a very expensive involvement requiring adequate school buildings, the printing of text books and training of teachers, members of a minority group that have no sufficient human and economic resources cannot enjoy this right, in practice. In this situation, positive action of the state is indispensable to the realization of the right of persons belonging to a minority to learn and develop their own language.[154]

Today, there is an increasing trend in international law towards the recognition of states' active role in minority language education. In article 4(3) of the Universal Declaration on the Rights of Persons Belonging to Minorities, it is stipulated that states should take suitable measures in order for that, wherever possible, members of linguistic

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[152] EU, Commission, *the 2001 Regular Report from the Commission on Bulgaria's Progress towards Accession* (Luxembourg: EC, 2001) at 24 [*the 2001 Regular Report from the Commission on Bulgaria's Progress*].
[153] *Commission Opinion on Romania's Application*, *supra* note 14 at 19.
[154] See Henrard, *supra* note 20 at 257-61.

minorities can have adequate opportunities to learn their mother tongue.[155] In addition, article 29(1) (a) of the CRC clearly stipulates that one of the objects of the education of the child is the development of respect for the child's parents, his or her own cultural identity and language. In the field of education, this requires states consider the needs of children belonging to a linguistic minority.[156]

In this regard, if it is necessary, states should subsidize private minority schools in order to promote minority language education. This is a very common practice among states. Even countries that have a very restrictive approach towards minority language rights have started to support minority schools. France, for example, has recently adopted legislation that not only recognizes the German-speaking minority's right to establish private schools, but also provides financial assistance for these institutions in the regions of Alsace and Moselle.[157] Similarly, Poland subsidizes 50 per cent of the costs of private minority schools.[158] In Greece, the Turkish speaking minority operates its own schools completely at the expense of the Greek state, although only half of the syllabus can be taught in Turkish.[159]

The main problem with regard to subsidization of minority schools is that in most countries, while some long-established and larger minorities can obtain a certain amount of state support, new and smaller minorities are completely left on their own recourses. In England, for example, the government provides funding for Catholic and Jewish schools, but refuses it for Muslim schools.[160] This situation obviously creates discrimination between different minority groups. However, this does not mean that all minorities should be subject to identical treatment. Certain minorities, in particular the national minorities that were the object of past assimilation policies, may receive more funding than others, while the latter are still entitled to a reasonable amount of subsidy.

In international law, there is also a long-standing recognition that in the areas where a linguistic minority constitutes a significant proportion of the population, states

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[155] *Declaration on Minorities*, *supra* note 31.
[156] See Gerladine van Bueren, "Of Minors and Minorities" in Deirdre Fottrell and Bill Bowring (eds.) *Minority and Group Rights in the New Millennium* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999) 75 at 82-83.
[157] *Language, Minorities and Human Rights, supra* note 18 at 220.
[158] The OSCE, *Report on the Rights of Persons belonging to National Minorities in the OCSE Area*, (1999) [*Report on the Rights of Persons belonging to National Minorities in the OCSE Area*].
[159] *Language, Minorities and Human Rights, supra* note 18 at 220.

should provide for public schooling in the language of this minority. During the League of Nations era, the minority treaties included various provisions dealing with the use of a minority language in public schools. In article 9 of the 1920 Treaty Concerning Protection of Minorities in Greece, it was required that in primary public schools that were located in towns and districts where a considerable number of Greek nationals of non-Greek speech resided, the government should provided for the use of their language as the medium of instruction.[161]

More recent international instruments also contain provisions concerning the use of minority languages in public schools where warranted by the number of speakers. In article 14(2) of the European Framework Convention, it is stipulated that in areas traditionally or in substantial numbers inhabited by members of national minorities, if there is sufficient demand, the states parties shall "endeavor" to guarantee, "as far as possible and within the framework of their education systems," that such persons have sufficient opportunities for learning their own language or for receiving instruction in this language.[162]

As stated in article 8 of the European Charter for Minority Languages, education in a minority language or studying this language as a separate course can take place at every level of education. Many states use minority languages at pre-school education or primary level, but fewer at the secondary level.[163] In the Slovak Republic, for example, in "zero-classes" -the classes preparing the Roma children for the regular Slovak schools- the Romany language is used as the medium of instruction, together with the official language.[164] In the Friesland of the Netherlands, on the other hand, Frisian is taught as a subject at both primary and secondary levels of public education.[165] In some countries, such as Macedonia and Romania, a minority language can be used even in university education.[166] It must be noted that at every level of public schooling where a minority

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[160] van Bueren, *supra* note 156 at 83.
[161] *Language, Minorities and Human Rights, supra* note 18 at 363.
[162] *Framework Convention on Minorities, supra* note 56.
[163] *Report on the Rights of Persons belonging to National Minorities in the OCSE Area, supra* note 158.
[164] Marcia Rooker, "Non-Territorial Languages: Romany as an Example" in Senžana Trifunovska (ed.) *Minority Rights in Europe: European Minorities and Languages* (The Hague: T.M.C. Asser Press, 2001) 31 at 47.
[165] Floris von Laanen, "The Frisian Language in the Netherlands" in Senžana Trifunovska (ed.) *Minority Rights in Europe: European Minorities and Languages* (The Hague: T.M.C. Asser Press, 2001) 67 at 81-82.
[166] *Report on the Rights of Persons belonging to National Minorities in the OCSE Area, supra* note 158.

language is used, education is, in fact, bilingual, because official languages are also taught in these schools.

The EU also encourages the candidate countries to take some positive measures to support the use of minority languages in their educational systems. Therefore, in its 2001 Report on Romania, the Commission pointed out that although there was a functioning private Hungarian University in Romania, no progress was made regarding the establishment of a public university teaching in Hungarian, German and Romanian.[167] In its First Opinions on Poland, the Commission also mentioned that while Poland was trying to develop teaching in minority languages in public educational establishments, progress in this direction was blocked as a result of the shortage of financial resources.[168]

4.4.2. Subsidizing Private Media Using a Minority Language and the Use of Minority Languages in State-Owned Media

International law also recognizes the significance of states' role in the promotion of the linguistic identity of minorities through the media. Article 9 of the Framework Convention on Minorities states that "in the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities."[169] Moreover, in article 17 of the CRC, it is more clearly stipulated that the states parties are required to encourage the mass media to have particular regard to the linguistic needs of the child belonging to a minority group or indigenous peoples.[170] Article 11 of the European Charter for Minority Languages also obliges the parties to promote the creation of at least one radio station and/or one television channel in the regional or minority languages.[171]

As in the case of promotion of minorities' linguistic identity through education, the norms determining the role of states in encouraging media in minority languages are quite flexible. In the implementation of these provisions, considering the situation of each language and depending on the capacity of states in this field, it is expected that states

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[167] *The 2001 Regular Report from the Commission on Bulgaria's Progress*, *supra* note 152 at 23-24.
[168] EU, *Commission Opinion on Poland's Application for Membership of the European Union*, Doc. 97/8 (15 July 1997) at 17-18.
[169] *Framework Convention on Minorities*, *supra* note 56.
[170] *The CRC*, *supra* note 27.
[171] *European Charter for Minority Languages*, *supra* note 59.

provide public funds for encouraging private media in minority languages or give a fair share for the use of these languages in public media.[172] In Canada, for example, various funds have been provided under the Northern Native Broadcast Access Programme for television and radio broadcasting in indigenous languages.[173] Similarly, in article 14 of the Italian Draft Bill on Linguistic Minorities, it is stipulated that regions, provinces and municipalities may grant financial aid to the media in order to realize the use of minority languages.[174] In Finland, Germany and Austria, on the other hand, linguistic minorities are represented in the administrative bodies of national channels.[175] Public media minority language broadcasting in Hungary, Italy and England to some extent reflects the demographic weight, needs and interests of their respective linguistic populations.[176] Moreover, the annual reports of the Commission on candidate countries indicate that the use of minority languages in public radio and television channels has been expanding in Central and Eastern Europe. Bulgarian National TV, for example, broadcasts news in Turkish and has two programs addressing minority issues and produced by minorities' representatives.[177]

It is important to note that proportional representation of minority languages in public television and radio broadcasting should never lead to complete exclusion of smaller minorities. Therefore, in the Oslo Recommendations regarding the Linguistic Rights of National Minorities, which are developed by a group of international experts under the OSCE mandate, it is stated that in the case of smaller minorities, "consideration must be given to the viable minimum of time and resources without which a smaller minority would not meaningfully be able to avail itself of the media."[178] This implies that there is a minimum threshold that states should respect irrespective of the size of the minority.[179]

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[172] *Oslo Recommendations Regarding Linguistic Rights*, *supra* note 146.
[173] Eide, *supra* note 52 at 15.
[174] Francesco Palermo, "A Never-Ending Story? The Italian Draft Bill on the Protection of Linguistic Minorities" in Senžana Trifunovska (ed.) *Minority Rights in Europe: European Minorities and Languages* (The Hague: T.M.C. Asser Press, 2001) 55 at 61.
[175] The Council of Europe, *The Protection of Minorities: Collective Texts of the European Commission for Democracy through Law* (Strasbourg: Council of Europe, 1994) at 69 [*Collective Texts of the European Commission for Democracy through Law*].
[176] *Language, Minorities and Human Rights, supra* note 18 at 236.
[177] *The 2001 Regular Report from the Commission on Bulgaria's Progress*, *supra* note 152 at 24
[178] *Oslo Recommendations Regarding Linguistic Rights*, *supra* note 146.
[179] Henrard, *supra* note 20 at 271.

4.4.3. The Use of Minority Languages in Courts and in dealings with Administrative Authorities

In international law, there is also a developing trend towards the recognition of a degree of linguistic autonomy in the areas where a minority language is spoken by a significant number of people. Various regional and sub-regional human rights instruments in Europe acknowledge that when authorities at the local level face a sufficiently high number of individuals whose first language is an unofficial minority language, states should appropriately respond to their demands for the use of their own language in courts and in dealings with administrative authorities. In article 10(2) of the Framework Convention on Minorities, it is stated that in the regions traditionally or in substantial numbers inhabited by members of national minorities, states are required to guarantee, as far as possible, the use of minority languages before administrative authorities if those persons so request and where such a request corresponds to a real need.[180] The same principle has been reiterated in paragraph 34 of the Copenhagen Document,[181] articles 9 and 10 of the European Charter for Minority Languages,[182] and article 12 of the Central European Initiative Instrument for the Protection of Minority Rights.[183]

These international instruments recognize that the scope of this right may vary from one state to another, depending on the demographic structure and the socio-political situation of each country. In articles 10 of the European Charter for Minority Languages, for example, it is pointed out that in the districts where the speakers of a minority language are concentrated, local authorities should provide for an increasing level of services in this language, from the lower and to the higher end, considering the situation of each language and socio-political system of each state.[184] These services may include providing speakers of a territorial minority language with widely used official documents in their own language or the acceptance of oral and written application in that language, and response thereto in the same language. States can also require public service

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[180] *Framework Convention on Minorities*, *supra* note 56.
[181] *Copenhagen Document*, *supra* note 55.
[182] *European Charter for Minority Languages, supra* note 59.
[183] Central European Initiative, *CEI Instrument for the Protection of Minorities*, (19 November 1994).
[184] *European Charter for Minority Languages, supra* note 59.

employees to have a sufficient knowledge of a regional language to be appointed in the territory where that language is widely used.[185]

The same principle is applied to the use of a minority language in communications with judicial authorities in the areas where a territorial minority language is spoken. A minority language, in this situation, can be used in criminal, civil, or administrative proceedings. During those proceedings, an accused or a litigant may be allowed to use his or her own language orally and in written, or may be permitted to provide evidence in that language. The courts in these areas can decide to conduct even all legal proceedings in the regional language, if one of the parties requests so. Unlike in the protection of the right to fair trial, in these cases, the knowledge of the official language is not relevant. Persons belonging to such linguistic minorities can claim the right to use their language in the courts, even though they can also speak and understand the official majority language.[186]

Some individual state practices also represent the diversity of positive responses of states to the existence of a linguistic minority concentrated in a certain region. In the autonomous communities of Spain, for instance, a minority language widely spoken in these areas can be used in court proceedings, provided that none of these concerned objects because he or she cannot understand it.[187] On the other hand, in Italy, the local authorities may publish their official acts in the regional language, but at their own expense.[188] In the land of the Sorban minority in Germany, both Sorban and German languages can be used in judicial and administrative matters.[189] When central government grants local linguistic communities an extensive array of legal, judicial and administrative powers, the speakers of regional languages benefit from the highest level of linguistic autonomy. As in the cases of the Swiss cantons, the Åland Islands of Finland and the Belgian cultural communities, a territorial language may be recognized as the solely official language of the region.[190]

In the assessment of accession applications, the EU also looks at whether or not the candidate countries allow minorities to use their own language in their contacts with

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[185] *Language, Minorities and Human Rights, supra* note 18 at 181-92.
[186] *Report on the Rights of Persons belonging to National Minorities in the OCSE Area, supra* note 158.
[187] *Oslo Recommendations Regarding Linguistic Rights, supra* note 146.
[188] Palermo, *supra* note 174 at 61.
[189] *Collective Texts of the European Commission for Democracy through Law, supra* note 175 at 59.
[190] *To Speak or not to Speak, supra* note 124.

administrative and judicial authorities in the areas where the minority concerned constitutes a significant proportion of the population. In this respect, the Commission has criticized the Slovakian state on the ground that it repealed the earlier provisions of the 1995 Law on the National Language, which allowed the use of a minority language for official communications in any town or village where the minority represented more than 20 percent of the population.[191] Upon this critique, the Slovakian government has made some amendments, re-enacting the previous provisions of the relevant law. Similarly, the Bulgarian government was criticized by the Commission, because the Turkish minority cannot receive any public services in their own language in the regions where they compactly resided.[192] Moreover, in the First Opinions on Lithuania, the Commission noted that while minority languages in this country were permitted to be used for local administrative affairs, it was not allowed to express oneself in a minority language before the courts, except via interpreter.[193]

4.4.4. The Official Use of Place Names in a Minority Language

In areas where a minority language is recognized as an official language in legal and administrative procedures, the official status of topographic and place names in that language is also generally recognized. This recognition, which is encouraged by international law, seeks to reverse the negative effects of the past assimilation policies where traditional local names of a region were replaced by new names in the official language.[194] Article 11(3) of the Framework Convention on Minorities therefore states that in regions inhabited by significant numbers of persons belonging to a national minority and when there is sufficient demand, public authorities shall make provision for the display of local names in the language of that minority.[195] The EU prompts the candidate countries to implement this provision.[196]

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[191] *Commission Opinion on Slovakia's Application*, *supra* note 10 at 16.
[192] *Commission Opinion on Bulgaria's Application*, *supra* note 6 at 18.
[193] *Commission Opinion on Lithuania's Application*, *supra* note 6 at 19.
[194] In the early 1900's, for example, Sami place names in Norway were removed as much as possible from official maps and replaced by a translation into Norwegian or by an entirely new Norwegian name. See Gudmund Sandvik, "Non-Existent Sami Language Rights in Norway, 1850-1940" in Sergij Vilfan (eds.) Ethnic Groups and Language Rights (Dartmouth: New York University Press, 1990) 269 at 280.
[195] *Framework Convention on Minorities*, *supra* note 56.
[196] The Commission noted that Slovakian and Lithuanian laws allow the appearance of minority languages in road signs, along with their official languages, in the areas where a minority group represent a significant

However, the implementation of this provision may vary, depending on the demographic structure and historical conditions of each state and each national minority. In many countries, bilingual place names are used in the areas which are known as the historical settlement of a national minority. In Italy, for example, in the province of Bolzano, German; in Trieste, Slovene and Croat languages; in Valle d'Aosta, French are used in road signs together with Italian.[197] In some countries, on the other hand, monolingual place names in the language of a national minority are preferred. In Moldova, in the areas populated the by the Gagauz, topographic terminology and inscriptions are in Gagauz language only.[198] States may also use a numerical threshold for the adaptation of place names in minority languages. The Romanian Draft Bill on Minorities provides that in the areas where a national minority represents 20 per cent of the population bilingual place signs will be displayed.[199] In some countries, however, place names can be indicated in a minority language without requiring any numerical threshold. According to article 7 of the Treaty of Saint-Germain-en-Laye, which has been incorporated into the Constitution, in the districts of Carinthia, Burgenland and Styria of Austria, traditional Slovene and Croat place names shall be designated along with German ones.[200]

Traditional place names of a region where a minority compactly resides are part of the linguistic identity of that minority group. Therefore, replacement of these names with the names in the majority language will threaten its member's language rights and will cause resentment among the members of the group. In addition, as it was stated in a

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portion of the population. See *Commission Opinion on Slovakia's Application*, *supra* note 10 at 18; *Commission Opinion on Lithuania's Application*, *supra* note 6 at 19.

[197] *Report Submitted by Italy Pursuant to Article 25(1) of the European Framework Convention for the Protection of National Minorities*, ACFC/SR(1999)007 <http://www.coe.int/T/E/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/3._State_reports/ACFC_SR(1999)007%20E%20state%20report%20Italy.asp#P1473_132952> (last visited 10 July 2003).

[198] *Report Submitted by Moldova Pursuant to Article 25(1) of the European Framework Convention for the Protection of National Minorities*, ACFC/SR(2000)002 <http://www.coe.int/T/E/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/3._State_reports/ACFC_SR(2000)002%20E%20state%20report%20Moldova.asp#P483_64522> (last visited 10 July 2003).

[199] *Report Submitted by Romania Pursuant to Article 25(1) of the European Framework Convention for the Protection of National Minorities*, ACFC/SR(1999)011 prov. <http://www.coe.int/T/E/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/3._State_reports/ACFC_SR(1999)011%20E%20state%20report%20Romania.asp#P1236_87657> (last visited 10 July 2003).

working paper of the UN Group of Experts on Geographical Names, since place names in minority languages constituted cultural heritage of a country, the loss of such topographic names would be an erosion of cultural diversity of that country and the world.[201]

[200] Capotorti, *supra* note 44 at 82.
[201] See F. J. Ormeling, Jr., *Minority Toponyms*, UN ESCOR, 12th Sess., Working Paper No. 19 (1986) at 5-6.

Summary

Although the EU has to date undertaken no standard-setting role in the development of international protection of minority language rights, adopting the principle "respect for and protection of minorities" as one of the political conditions for the EU membership, it has made a significant contribution to the implementation of international standards that already exist. The anticipatory character of this principle has prompted the candidate countries in the East to become a party to the international instruments protecting minority language rights and to make necessary amendments in their domestic laws to put those norms into practice. While there is no exact consensus on the content of some of those rights and the definition of linguistic minority, the EU has also indirectly contributed to the clarification of international minority language rights norms, to some extent, through remarking the failures and accomplishments of candidate countries in the field of minority protection.

Nonetheless, it must be noted that the EU approach towards the implementation of the minority clause of the Copenhagen criteria is not strictly based on legalist considerations, but rather pragmatist and flexible. In the determination of priorities of the candidate countries regarding the protection of minority language rights, the EU takes the conditions of each country into account. However, in practice this sometimes creates inconsistency in its external minority policy, because the principle "respect for and protection of minorities" has yet to be inserted into Community law. Due to the refusal of the French and Greek states to recognize the collective minority rights in their territories, the development of minority protection in the internal relations of the EU is still rather slow. Therefore, within the Union, minority cultures and languages are mostly protected through program type measures, such as the activities of the European Bureau for Lesser Used Languages and the EUROMOSAIC project. In this regard, it cannot be said that the EU completely ignores international minority language rights standards inside the Union.

Today, it has been generally accepted that an effective international protection of linguistic minorities can be realized only through the recognition of their right to integration into the whole society, while allowing them to preserve their linguistic identity. This primarily requires the prohibition of discrimination based on language in the enjoyment of universal human rights. Thus, universal human rights norms, in

particular the rights to privacy, freedom of expression, fair trial and liberty, along with the right to non-discrimination play an essential role in the protection of rights of members of linguistic minorities. Secondly, special rights protecting the linguistic identity of minorities should be granted to persons belonging to such groups. Special minority language rights seek to complete formal equality recognized by universal human rights with substantial equality. Since these rights protect the right to be different, they prohibit forced assimilation in the name of equality. They thus require states to avoid forbidding the use of minority languages and to respect linguistic diversity.

Minority language rights differentiate from universal human rights norms mainly in two respects. First of all, unlike universal human rights norms, these rights have not been given to everyone, but only to persons belonging to linguistic minorities. In the exercise of minority language rights, therefore, their collective aspect is of paramount significance. The right to establish and operate private minority schools where their own language can be used as language of instruction is not, for example, a right that can be enjoyed by individuals alone. Secondly, special minority language rights are not limited to a non-intervention obligation of states, but they also require states to take positive measures in order to effectively protect the linguistic identity of minorities. Since minorities are in a disadvantageous position to protect and develop their language compared to the speakers of a majority language, these measures do not constitute privileges, but rights serving the realization of substantial equality between minorities and majorities.

It must be noted that negative minority language rights, together with human rights norms concerning the use of one's mother tongue, constitute the minimum international standards regarding minority language rights. Those standards can be considered as the universal linguistic freedoms of minorities. In this regard, in the implementation of these norms, states' margin of appreciation is quite limited. On the contrary, the implementation of positive minority language rights is largely left to the discretion of states. Since the conditions of each minority and the country they live in vary, it is impossible to set forth uniform standards regarding the positive obligations of states. However, this does not mean that states can arbitrarily decide on the scope of positive minority language rights, or that they can completely ignore them. In the

determination of the scope of these rights, democratic mechanisms guaranteeing active participation of minorities must be created.

As to the issue of definition of a linguistic minority, the lack of a universal provision exactly defining what constitutes a linguistic minority should not be used as an excuse for refusing the language rights of some groups. In this respect, the emerging standards regarding the definition of minority cannot be ignored by the states which are committed to implement their obligations in good faith. It should be remembered that in the UN era, the recognition by states is no more a constituting element of the concept of minority. Therefore, all minorities meeting the objective and subjective criteria must be allowed to enjoy their internationally recognized rights, disregarding whether or not they are defined as a minority in the domestic law of the country concerned. It must also be noted that in international law "linguistic minority" has been recognized as a separate category, along with other minority categories. All those principles and norms have very significant implications on the development of minority language rights in Turkey, as a candidate country to the EU.

Chapter II: The Language Rights of the Kurds in Turkish Law

1. Turkish Nation-State and the Kurdish Language

The main problem in Turkish law regarding the implementation of international and European standards protecting minority language rights is the recognition of the Kurds' language rights. Since in the domestic law of Turkey only the Non-Muslim Turkish citizens –namely the Greeks, the Armenians, and the Jews– are considered as minorities, the groups other than those communities have not been entitled to minority language rights. Any right claims of the Kurds based on their cultural and linguistic differences have been firmly refused and regarded as incompatible with the national unity principle. Thus, the Turkish state has adopted a quite strict assimilation policy against its Kurdish-speaking citizens, severely restricting the use of Kurdish in public and even for private purposes.

1.1. The Sociolinguistic Situation of the Kurdish Language in Turkey

In Turkey, the most widely spoken non-official language is the Kurdish language.[202] However, due to the lack of available updated data regarding the mother tongues of Turkish citizens, today we cannot know exactly how many people in Turkey speak the Kurdish language. Only until 1965, were the findings of censuses on first and second languages spoken at home and in religious activities published. After that, no outcome on these questions was allowed to be published. In the 1985 census, such questions were completely excluded from the list of census questions.[203] Nonetheless, some linguists sought to estimate the number of Kurdish speakers in Turkey, although their figures are quite controversial because of the political concerns of all parties involved. In 1992, Özsoy estimated that in Turkey, 7,224,402 people, who composed approximately 10 per cent of the population, spoke Kurdish as their mother tongue and their second language.[204] Yıldız, on the other hand, argued in 1999 that the Kurdish-speakers

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[202] See Philip G. Kreyenbroek, "On the Kurdish Language" in Philip G. Kreyenbroek and Stephan Sperl (eds.) *The Kurds: A Contemporary Overview* (London/New York: Routledge, 1992) 68 at 71.

[203] Kutlay Yağmur, "Languages in Turkey" in Guus Extra and Durk Gorter (eds.) *The Other Languages of Europe: Demographic, Sociolinguistic and Educational Perspectives* (Clevedon: Multilingual Matters Ltd., 2001) 407 at 415-16.

[204] Ali Erman Özsoy, İsmet Koç, Aykut Toros, "Türkiye'nin Etnik Yapısının Anadil Sorununa Göre Analizi" (1992) 14 Hacettepe Üniversitesi Nüfus Bilim Dergisi 101 at 112-13.

constituted 20 per cent of the whole population of Turkey. [205] The Kurdish language is spoken almost everywhere in Turkey, but its speakers are mostly concentrated in the Southeast, the historical land of the Kurds.

In Turkey many dialects and sub-dialects of Kurdish, such as Kurmanji, Sorani, Behdini, Herki, Hakkari, and Judicani, are spoken, but the main Kurdish dialect used in the southeast of the country is Kurmanji. While Kurmanji includes extensive Arabic and Turkish loans, due to the long-standing contact between speakers of these languages, Kurmanji is a separate language. Unlike the Ural-Altaic Turkish language, this vernacular belongs to the Iranic branch of the Indo-European language family. In the northwest of the Kurmanji-speaking areas in Turkey (i.e. southeastern Central Anatolia), there is another language, Zaza, which is associated with the Kurdish language by the Kurdish nationalists. However, from both linguistic and historical point of views, this is incorrect. Since the Zaza and Kurmanji languages are not mutually intelligible, sociolinguists consider them as separate languages. Historically, the speakers of Zaza are the descendants of Gorani people who lived in the south and west of Lake Van, before they were forced out and driven westwards by advancing Kurdish tribes from northwest Iran.[206]

Although at the present almost all Kurds, except those living in very rural and isolated areas, are bilingual and the Kurds where immigrated to the west of Turkey mostly forgot their own language, they are well conscious of their distinct culture and language. As one of the autochthonous peoples of Turkey, they have demonstrated a strong solidarity to preserve and promote their linguistic and cultural identity.[207] They developed a long-standing written tradition in their own language. While they used Arab scripts until the foundation of Turkish Republic, in 1932 they started to write in Latin scripts, imitating the Turkish alphabet reform. This alphabet is almost the same as the Turkish Latin alphabet, but the Kurdish Latin alphabet also includes some extra letters,

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[205] Kerim Yıldız, "Human Rights and Minority Rights of Turkish Kurds" in Deirdre Fottrell and Bill Bowring (eds.) *Minority and Group Rights in the New Millennium* (The Hague/Boston/London: Martinus Nijhoff Publishers, 1999) 163 at 163

[206] Yağmur, *supra* note 203 at 417.

[207] David N. MacKenzie, "The Role of the Kurdish Language in Ethnicity" in Peter Alford Andrews (ed.) *Ethnic Groups in the Republic of Turkey* (Wiesbaden: Dr, Ludwing Reichert Verlag, 1989) 541 at 542.

such as "w, q, and x."[208] Using this alphabet, both in Turkey and abroad they published many books, newspapers and dictionaries. In addition, Kurdish NGOs are very active in lobbying for radio and television broadcasting in the Kurdish language, and the use of their own language in education.

1.2. Turkey's Definition of Minority and the Principle "Unity of the Nation"

The most crucial issue concerning the enjoyment by the Kurds of internationally recognized minority language rights is whether or not they constitute a linguistic minority. Although there is no global agreement on the exact definition of the term "minority," it is generally accepted that the Kurds demonstrate basic characteristics of a linguistic minority. As aforementioned, the Kurdish-speakers in Turkey constitute a numerical minority and they are definitely not in the dominant position in respect of protection of their linguistic identity. In addition, the Kurdish language is definitely not a dialect of Turkish. Finally, it is an obvious fact that the Kurds are willing to preserve and promote their linguistic heritage. However, in Turkish law, these characteristics of the Kurdish-speakers have no meaning, because the concept of "ethnic, religious and linguistic minorities" was categorically refused and the term "minority" employed only in relation to the Non-Muslims living in the country. Therefore, the Kurds have been traditionally not considered as a minority.

In various Judgments of the Constitutional Court of Turkey on closing down the political parties supporting the idea that the Kurds constitute an ethnic and linguistic minority and a distinct people, the Court pointed out that in Turkey there are no ethnic, religious or linguistic minorities, but only the Non-Muslim minorities clearly recognized under the international agreements to which Turkey was a party. In the Judgment of the Socialist Party [*the SP case*], it asserted that in the country the use of some languages other than the official language by certain ethnic groups did not mean that those groups constituted a minority. Besides this, their special rights for the protection and maintenance of their differences from other sections of the population had to be clearly

[208] Kreyenbroek, *supra* note 202 at 73.

recognized.[209] In the *Socialist Party of Turkey case* [*the SPT case*], the Court stated that the source of these rights were international agreements. From the viewpoint of the Court, for Turkey, the content of minority rights and their right holders were defined under the 1923 Lausanne Peace Treaty and the 1925 Friendship Agreement between Turkey and Bulgaria.[210]

Under the third section of the Lausanne Treaty, which was entitled "Protection of Minorities," following the recognition of various language rights of Turkish citizens, such as the rights to use one's own language in public meetings, publications, education and before courts, in article 44(1) it was clearly stipulated that in so far as those provisions affected Non-Muslim nationals of Turkey, they would constitute obligations of international concern and shall be placed under the protection of the League of Nations.[211] This provision was adopted as a result of the decisive opposition of the Turkish delegation against the Allied Powers proposal suggesting to bring all ethnic, religious and linguistic minorities in Turkey under the international protection. During the negotiations, the Turkish delegation insisted that the concept of minority in the country historically covered only Non-Muslim citizens. The common traditions, moral values, customs shared by all Muslims created a perfect unity. According to them, in a Muslim country, Muslims could not be considered as a minority; any part of Muslim population categorized as a minority would feel that they were isolated from the Muslims and associated with the Non-Muslims. Therefore, they claimed that, unlike the Non-Muslims, Muslim groups in Turkey never demanded any international protection under the concept of minority rights. As to the Kurds, the Turkish delegation emphasized that they were one of the founding elements of Turkey and there was no need for concern about a special protection for them.[212] Similarly, in the Protocol to that treaty, the Bulgarian minority in Turkey was defined as the Non-Muslim Turkish nationals of Bulgarian speech and it was stipulated

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[209] See, *Anayasa Mahkemesi Kararı*, (10/07/1992) E1991/2 (SPK), K1992/2, AYMKD 28/2 at 792 [*the SP case*].
[210] *Anayasa Mahkemesi Kararı*, (30/11/1993) E1993/2 (SPK), K1993/3, AYMKD 30/2 at 1039 [*the SPT case*].
[211] See the text of the Treaty in Lawrence Martin, *The Treaties of Peace* (New York: Cornegie Endowment for International Peace, 1924) at 970-73.
[212] See the records of the discussions and the decisions in the sub-commission on minorities in Seha L. Meray, *Lozan Barış Konferansı: Tutanaklar, Belgeler,* Takım I, Cilt I, Kitap II (Ankara: SBF Yayınları, 1970) at 178-340.

that they were entitled to the all rights granted to the Non-Muslims in the Lausanne Treaty.[213]

The origin of this approach is deeply rooted in the Ottoman *Millet* System. "*Millet*," which is the Turkish word for "nation," had a very different meaning in the Ottoman era than it does at present. It meant a community including all adherents of a religion in the world. In this respect, all Muslims, including the Turks, the Arabs, the Albanians and the Kurds, were identified as the members of the same *Millet*, disregarding their linguistic and ethnic differences. Similarly, the identities of Non-Muslim populations were also built on the basis of their religions. Since the Ottoman Empire was an Islamic state, the Muslims altogether constituted the dominant group, and therefore, no one belonging to this population was considered as minority either by the people or by the state.[214] In the formation of new Turkey, after the collapse of the Ottoman Empire, this notion of *Millet* was also adapted into the characterization of Turkish nation, defining all Muslim elements living in Turkey as part of the nation.

According to the Constitutional Court, the expansion of the definition of minority to the ethnic and linguistic Muslim groups is incompatible with the principle "unity of the nation," which is emphasized in several articles of the constitution. In article 3 (1), for instance, it is stated that the Turkish state with its territory and borders is an indivisible entity. Similarly, article 5 places safeguarding the integrity of the Turkish nation among the first aims and duties of the state.[215] From the viewpoint of the Court, the principle "unity of the nation" requires every individual belonging to the nation to be subject to the same law. Therefore, although the Court recognizes that there are a variety of ethnic and linguistic Muslim groups within the Turkish nation, it stresses that these differences cannot be a basis for the recognition of their special right claims. In the *SPT case*, it concluded that when an ethnic group demands to be entitled to some special rights other than human rights, in the context of citizenship, this means that this group is not only claiming that it is an ethnic group within the unity of the nation, but also a separate

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[213] Reha Parla, *Belgelerle Türkiye Cumhuriyeti'nin Uluslararası Temelleri* (Lefkoşe: Tezel Ofset ve Matbaacılık, 1985) at 206-207.

[214] See T. Tankut Soykan, *Osmanlı İmparatorluğu'nda Gayrimüslimler* (Istanbul: Utopya Kitabevi, 2000) at 251.

[215] *Türk Anayasası*, K. No: 2709, Tarih: 18.10.1982 (R.Gazete, Sayı: 17863, Tarih: 09.11.1982) [*Türk Anayasası*].

national group, which contradicts the unity of the nation.[216] It must be noted that the Turkish nation, which defined as an indivisible entity by the constitution, here covers only Muslim Turkish citizens; traditionally, although the Non-Muslims are citizens, they are not considered as part of the nation. Therefore, recognition of their minority rights is not regarded as a violation of the principle "unity of the nation."

In Turkish law expression of ideas and opinions which are considered violating the principle "unity of the nation," are strictly prohibited and punished, even when they do not include any incitement to violence. In article 14 (1), for example, it is stipulated that none of the rights and freedoms set forth in the constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation. Likewise, article 26 provides that the exercise of "the right to freedom of expression may be restricted for the purposes of protecting (...) the indivisible integrity of the state with its territory and nation."[217] In this regard, expression of views supporting the expansion of scope of groups in the status of minority is also firmly forbidden. In article 81 (a) of the Act on Political Parties, it is required that political parties may not claim that in the territories of the Turkish Republic there are minorities based on national or religious culture or sect or language differences. The following paragraph added that they may also not aim to protect and develop languages and cultures other than the Turkish language and culture, "thereby creating minorities and leading to the destruction of integrity of the Turkish nation."[218] Similarly, in article 5(6) of the Act on Associations, the foundation and activities of associations have been restricted in the same manner.[219]

Similarly, in the ratification of the subsequent international agreements regarding minority rights, the Turkish state strictly followed the definition of minority under the Lausanne Peace Treaty and the Friendship Agreement between Turkey and Bulgaria. In 1992 Turkey declared through interpretive statements to the Copenhagen Document and Helsinki Decisions that the Turkish Republic recognized as minorities only groups

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[216] *The SPT case*, *supra* note 210 at 1036
[217] *Türk Anayasası*, *supra* note 215.
[218] *Siyasi Partiler Kanunu*, K. No: 2820, Tarih: 22.04.1983 (R.Gazete, Sayı: 18027, Tarih: 24.04.1983) [*Siyasi Partiler Kanunu*].
[219] *Dernekler Kanunu*, K. No: 2708, Tarih: 06.10.1983 (R.Gazete, Sayı: 18184, Tarih: 07.10.1983) [*Dernekler Kanunu*].

defined in bilateral and multilateral treaties to which Turkey is a party.[220] In addition, in the negotiations of the Declaration on Minority Rights, the observer of Turkey made the same statements.[221] Those statements implicitly refer to the provisions of the Lausanne Treaty and the Agreement between Turkey and Bulgaria. In Turkey's reservation to certain provisions of the Convention on the Rights of Child regarding the protection of the rights of children belonging to a minority, Turkish government explicitly declared that those provisions will be construed and implemented according to the letter and the spirit of the Lausanne Treaty.[222]

1.3. The Status of Turkish in the Constitution and the Kurdish Language

The status of Turkish in the Constitution of Turkey has also played a very significant role in the restriction of the use of Kurdish in public life. In the constitution, the Turkish language is defined not only as the official language, but also as the national language of Turkey. This status of Turkish has been emphasized in many decisions of the Constitutional Court. In the *United Communist Party of Turkey case*, the Court has pointed out that the amendment of the proposed article 3 of the 1961 Constitution, which states that the official language was Turkish, as "the language was Turkish" demonstrates that the function of Turkish is beyond that of an official language.[223] The same provision was also included in the 1982 Constitution. Therefore, in the Judgment on the Labor Party of Turkey, the Court has stressed that article 3 means that, besides official correspondences, education and national culture are based on the Turkish language, in other words, the sole national culture in the country is the Turkish culture.[224] This status of the Turkish language in the field of education is so important that in article 42 of the Constitution, it is stipulated that no language other than Turkish can be taught to the Turkish citizens as their mother tongue in any educational or training institutions.[225] Thus,

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[220] Communication No. CSCE/CHDC/Inf.7, Journal No. 50, 8 July 1992.
[221] UN ESCOR, 48th Sess., 38th Mtg., UN Doc. E/CN.4/1992/SR.38 (1992) at 7.
[222] UN ESCOR, 1995, UN Doc. CRC/C/51/Add. 18 at 1.
[223] *Anayasa Mahkemesi Kararı*, (16/07/1991) E1990/2 (SPK), K1991/1, AYMKD 28/2 at 956.
[224] *Anayasa Mahkemesi Kararı*, (08/05/1980) E1979/1 (SPK), K1980/1, AYMKD 18 at 30 [*the LPT case*].
[225] *Türk Anayasası*, *supra* note 215.

the Turkish language has been imposed on all Turkish citizens, including the Kurds, as their mother tongue.[226]

This status of Turkish stems from the historical role of language in building Turkish national identity. Turkish nationalism, highly influenced by the ideas of the French Revolution, gave a central role to language in the constitution of Turkish national identity.[227] In French nationalism, the French language was seen as the symbol of a nation that was '*une et indivisible.*' Similarly, Atatürk, the leader of reforms, defined Turkish as one of the basic elements constituting and maintaining national identity. In one of his speeches in 1931, he stated that one of the very noticeable characteristics of nationality was language. According to him, one who proclaimed that he was Turkish had to foremost and absolutely speak Turkish.[228] This issue had been also emphasized in the 1927 party program, declaring that spreading the Turkish language and culture to be a guiding principle. Likewise, at the second party congress in 1931, any individual within the Republic who spoke Turkish, grew up with Turkish culture and adopted the Turkish ideal was defined as a Turk.[229] The significance of language here originates from the fact that language was equalized with culture. A nation could have only one national culture and this culture could be based on only one national language. Accordingly, the Turkish language should not be considered merely as an official language, but as the national language of Turkey.

The designation of Turkish as the national language of Turkey led to a restriction of the use of the languages other than Turkish as much as possible. Thus, Ottoman tolerance policy towards all linguistic groups was completely abandoned.[230] In 1926, a new law entered into force which made the use of Turkish obligatory in all transactions, contracts, communications and accounts. Moreover, a number of campaigns under the

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[226] See also Bülent Tanör, *Türkiye'nin Demokratikleşme Perspektifleri* (Istanbul: TÜSİAD Raporu, 1997) at 84.

[227] Şerafettin Turan, *Atatürk'ün Düşünce Yapısını Etkileyen Olaylar, Düşünürler, Kitaplar* (Ankara: TTK Basımevi, 1982) at 43.

[228] Zeynep Kormaz, *Atatürk ve Türk Dili: Belgeler* (Ankara: TTK Basımevi, 1992) at 361.

[229] Erik Jan Zürher, "Young Turks, Ottoman Muslims and Turkish Nationalists: Identity Politics" in Kemal H. Karpat (ed.) *Ottoman Past and Today's Turkey* (Leiden, Boston, Köln: Brill, 2000) 150 at 176.

[230] Under the Ottoman Empire, although the Muslims were not considered as minorities, they were never subject to assimilation policy. Therefore, like the Greeks or Armenians, the Kurds, the Arabs, and the Albanians were free to use their own languages in their own educational institutions. In the areas, where compactly inhabited by the Arabs, for instance, it was not unusual to submit petitions written in Arabic. See, Soykan, *supra* note 214 at 26-33.

"Citizen Speak Turkish" slogan were initiated by the Turkish Guilds in the late 1920's and 1930's. In 1937, some municipalities prohibited speaking a language other than Turkish within their boundaries.[231] This nationalist policy had the most devastating effects on the linguistic freedoms of Muslim linguistic groups, in particular the Kurds. Following the adoption of the Act on the Unification on the Unification of Education, all Kurdish religious schools which used their own languages as a medium of instruction were closed down. The Kurdish place names were replaced by Turkish ones. Similarly, the laws on family names and registration prohibited the use of Kurdish in personal names. The use of Kurdish in publications, broadcasting, political and cultural activities was also strictly banned.

This approach has been criticized by many Turkish scholars, on the ground that it actually conflicts with the provisions of the Lausanne Treaty. According to them, although under the Treaty only the Non-Muslims were recognized as minorities that would be protected by the international community, the language rights of Muslims whose mother tongue is different than Turkish were not completely denied.[232] In article 39 (4), for example, it was stipulated that all Turkish nationals –not only the Non-Muslims– were free to use any language in private intercourse, in commerce, religion, in press, or in publications of any kind, or at public meetings. The fifth paragraph of the same article also requires Turkey to provide "Turkish nationals of Non-Turkish speech" with adequate facilities for the oral use of their own language before courts. While these provisions do not create any international obligation regarding the Muslim linguistic groups, due to the explicit provision of article 44 (1), since article 37 defined all articles under the section of protection of minorities as the fundamental laws of Turkey and the Lausanne Treaty was incorporated into Turkish law, article 39 constitutes part of the domestic law of Turkey. Therefore, any laws, bylaws, order, and practice which are incompatible with these provisions violate the fundamental norms of Turkish law. Nonetheless, this approach has so far not been adopted by the Turkish public authorities.

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[231] Rıdvan Akar, "Cumhuriyet Dönemi Azınlık Politikaları" in Nazan Aksoy and Melek Ulugay (eds.) *Modernleşme ve Çokkültürlülük* (Istanbul: İletişim Yayınları, 2001) 16 at 18.

[232] See Baskın Oran, "Bir İnsan Hakları ve Çokkültürcülük Belgesi olarak 1923 Lausanne Barış Antlaşması" in İbrahim Ö. Kaboğlu (ed.) *Kopenhag Kriterleri* (Istanbul, İstanbul Barosu Yayınları, 2001) 210 at 210-19.

In none of the judgments of the higher courts, any reference to article 37 and 39 has been made in this respect.[233]

Yet, since the late 1990's, this restrictive approach towards the language rights of the Kurds started to be changed. In this development, the accession process of the Turkish Republic has played the major role.

[233] Zeynep Aydın, "Lozan Antlaşmasında Azınlık Statüsü: Fakli Kökenlilere Tanınan Haklar" in İbrahim Ö. Kabaoğlu (ed.) *Ulusal, Ulusalüstü ve Uluslararası Hukukuta Azınlık Hakları: Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması* (Istanbul: İstanbul Barosu İnsan Hakları Merkezi, 2002) 209 at 215-17.

2. Turkey's Accession Process to the EU and the Language Rights of the Kurds

As in the improvement of human rights and democracy, the EU has made a very significant contribution to the development of minority language rights in Turkey. Although there are serious doubts about whether the European states have really any intention to accept Turkey as a member country, Turkish public opinion strongly supports the idea of becoming a member of the EU. It is generally believed that the participation in the Union constitutes the last stage of Turkey's modernization project. Therefore, there is a very common consensus on the necessity of meeting European standards. Nonetheless, as to the issue of minority rights, the concerns about the national and territorial unity of the Turkish state make any steps towards the expansion of the scope of these rights quite difficult.

2.1. Accession Partnership Document and the Annual Reports of the Commission

Ensuing the acceptance of Turkey as a candidate country at the 1999 Helsinki Summit, on 8 November 2000 the Commission of the European Communities announced the Accession Partnership Document for Turkey. This document presents a road map for Turkey's accession to the EU. It has prescribed the necessary legislative amendments that the Turkish government should make in short and medium terms so as to meet political and economic criteria of the Union.[234] As mentioned earlier, "respect for and protection of minorities" is defined as one of the political conditions of EU membership. Therefore, among those amendments, besides Turkey's other shortcomings in the field of democracy and human rights, the issue of protection of language rights of all Turkish citizens has been also addressed. In this respect, the document has required that in short term the Republic of Turkey remove any legal provisions forbidding the use by Turkish citizens of their mother tongue in television and radio broadcasting. In long term, the Turkish state

[234] According to the document, short term means a period of one year, while long term indicates a period of four years. Oktay Uygun, "Azınlık Hakları Açısından Katılım Ortaklığı Belgesi ve Ulusal Program" in İbrahim Ö. Kabaoğlu (ed.) *Ulusal, Ulusalüstü ve Uluslararası Hukukuta Azınlık Hakları: Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması* (Istanbul: İstanbul Barosu İnsan Hakları Merkezi, 2002) 337 at 337.

should also guarantee cultural diversity and protect cultural rights for all citizens irrespective of their origin.[235] Therefore, any legal provisions preventing the enjoyment of these rights should be abolished, including in the field of education. Moreover, the document stipulated that the Turkish state should ratify the ICCPR and its Fist Protocol and the ICESCR.[236]

It must be remembered that this document is not a legal, but a political text. Therefore, in the formulation of these short and medium term priorities regarding language issues, the Commission has employed a very diplomatic language, seeking to establish a balance between the sensitiveness of Turkey and the European standards. Therefore, in the document no reference has been made to the Kurds, nor has the term "minority rights" been used. In addition, while Turkey is explicitly required to ratify the ICCPR and the ICESCR, neither the Framework Convention on Minorities nor the European Charter for Minority Languages is mentioned. However, this does not mean that those issues are not important in the evaluation of the performance of Turkey in meeting the Copenhagen political criteria.

The emphasis of the document on the equality of all Turkish citizens in the enjoyment of language rights indicates that those rights should be granted not only to the persons belonging to the recognized minorities under the Lausanne Peace Treaty, but also those outside the scope of treaty. It is obvious that since the Kurds in Turkey are the most active non-recognized minority group in demanding the protection of their linguistic identity, this provision primarily concerns the Kurds. Therefore, in the 2000 Report from the Commission on Turkey's Progress towards Accession, after the Commission stated that neither legislation, nor practice should prevent the enjoyment of cultural rights of all Turkish citizens, disregarding their ethnic origin, it added, "This is of particular importance for the development of the situation in the Southeast, where the population is predominantly of Kurdish origin."[237] Likewise, in the 1998 Report, the Commission had criticized Turkey on the ground that there was a difference in the treatment between the

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[235] See Tarık Ziya Ekinci, *Avrupa Birliği'nde Azınlıkların Korunması Sorunu, Türkiye ve Kürtler* (Istanbul: Sümer Yayıncılık, 2001) at 83-115.

[236] EC, *Council Decision 2001/235 of 8 March 2001 concerning the Principles, Priorities, Intermediates Objectives and Conditions Contained in Accession Partnership with the Republic of Turkey*, [2001] O.J.L. 58 at 17 and 19.

recognized minorities under the Lausanne Peace Treaty and those –in particular the Kurds– outside its scope. According to the Commission, Turkey should find a civil solution to the problem in the Southeast, which includes recognition of certain forms of Kurdish cultural identity and greater tolerance of the ways of expressing that identity.[238]

The Commission has also stressed that the issue of whether the Kurds constitute a minority is closely related with the right to freedom of expression. Since in the Accession Partnership Document, it has been clearly stated that in the short term, Turkey should strengthen the legal and constitutional guarantees for the right to freedom of expression in line with article 10 of the ECHR, the Kurds, individually or collectively, must be free to express their thoughts on this issue. Therefore, in the 2001 Report, the Commission criticized Turkey, on the ground that there had been no improvement in the ability of members of ethnical groups with a cultural identity and common traditions to express their linguistic and cultural identity.[239]

This clearly shows that although the document has avoided using the term "minority rights" and explicitly defining the Kurds as a minority, it favors the idea that the Kurds should be entitled to minority language rights recognized in various international and regional multilateral agreements, if they wish so. In this regard, the meaning of cultural rights in the document differs from and goes beyond the basic civil and political rights that are protected in the ECHR and the ICCPR, and even the broader cultural rights set out in the ICESCR. Therefore, "cultural rights" should be understood as "minority rights" found in other international instruments, such as the Copenhagen Declaration, the UN Declaration on Minorities, the Framework Convention on Minorities and even the European Charter for Minority Languages. According to the Commission, regardless of whether or not Turkey is willing to consider the Kurds as a minority, certain basic minority language rights recognized under those instruments must be granted to them. Therefore, in the 2001 Report the Commission noted that Turkey had not yet signed

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[237] EC, Commission, *the 2000 Regular Report from the Commission on Turkey's Progress* (Luxembourg: EC, 2000) at 18.
[238] EC, Commission, *the 1998 Regular Report from the Commission on Turkey's Progress* (Luxembourg: EC, 1998) at 20.
[239] EC, Commission, *the 2001 Regular Report from the Commission on Turkey's Progress* (Luxembourg: EC, 2001) at 29.

the Framework Convention on Minorities.[240] Similarly, in the 2002 Report, it recommended Turkey to engage in a dialogue with the OSCE High Commissioner on Minority Issues.[241]

As to the implementation of the rights recognized in those instruments, it appears that the Commission gives priority to negative rights. This approach is particularly suitable for the reality of Turkey because although in international law the non-intervention obligation of the states constitute basic minority language rights, in Turkish law the use of Kurdish in public, even for private purposes, has been strictly restricted. Therefore, in the Accession Partnership Document, Turkey's priorities regarding the use of minority languages in radio and television broadcasting and in educational institutions have been negatively formulated. It must be also noted that since negative minority language rights are in essence based on the application of some human rights norms to specific areas, compared to positive rights, their implementation for all Turkish citizens, including the Kurds, is easier. In Turkey, if the negative language rights of the Kurds are fully recognized and the right to freedom of expression is effectively protected, the issues of definition of minority and the recognition of positive minority language rights can be settled with less difficulty.

2.2. The National Program of Turkey and the Recent Reforms

To see the effects of the European Accession Process on the minority language rights in Turkey took some time. At the beginning, the then Turkish government, a coalition of three political parties, did not show any political will to change Turkey's traditional approach towards this issue. The two biggest partners of this coalition, the Democratic Leftist Party [the *DSP*] and the Nationalist Movement Party [the MHP], represent the conservative and nationalist opinions in Turkish political life, while its smaller partner, Motherland Party [the ANAP] has relatively more liberal ideas. This coalition was established, with the support of the military and civil elite, after the resignation of the previous coalition which was dominated by an Islamic party. Therefore, although the

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[240] *Ibid.* at 29.

[241] EC, Commission, *the 2002 Regular Report from the Commission on Turkey's Progress* (Luxembourg: EC, 2002) at 43.

government declared that it accepted the Accession Partnership Document, in the National Program, which defined how the Turkish state would fulfill its priorities to meet the conditions of the EU, nothing but only Turkey's long-established minority policy was reiterated. In the section where the issue of minority language rights was addressed, the National Program intentionally avoided using the concept "cultural rights." Instead, the concepts "cultural life and individual freedoms" were employed.[242]

At first glance, this approach may give an impression that the rights generated from cultural differences were sought to be formulated as "individual rights," not as "group rights" or "collective rights." However, this impression is completely misleading. In fact, the National Program was based on an approach which definitely defied the idea that cultural differences could create a right claim.[243] Under the title "Cultural Life and Individual Freedoms," it was clearly stated that the official and education language of the Turkish Republic was the Turkish language. Thus, the then government made it clear that it had no plan to meet EU conditions regarding minority language rights either in short term, or in medium term. Through the statement that the use by the citizens of different languages and dialects in their daily lives was not prohibited, provided that such freedom was not abused for separatist and divisive purposes, it also demonstrated that the National Program still favored the restrictions on the use of languages other than Turkish in public life, even for private purposes.[244]

As to the international instruments protecting minority language rights, the coalition government did not show any intention to undertake any obligations which extend the scope of rights recognized under the Lausanne Peace Treaty. Therefore, when it mentioned that the Turkish state had already signed the ICCPR and the ICESCR, it also pointed out that in the course of ratification of these treaties, Turkey might put the same reservations which restricted its undertakings under the relevant provisions of the Lausanne Treaty. It must be noted that the National Program did not include any statement about whether or not Turkey would become a party to the First Protocol of the

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[242] *The National Program of Turkey*, (2000) at 25, online: the European Union <http://europa.eu.int/comm/enlargement/turkey/pdf/npaa_full.pdf> (last visited 25 June 2003) [*National Program*].
[243] Uygun, *supra* note 234 at 339.
[244] *National Program, supra* note 242 at 25.

ICCPR; nor did it mention that Turkey would sign the Framework Convention on Minorities.[245]

The government followed the same conservative approach, when it addressed the issue of freedom of expression. In the National Program, it stated that Turkey was to review the provisions in the Constitution and other legislation in the light of article 10 of the ECHR, considering also the criteria regarding the protection of territorial unity and national security and the principles "secular and democratic republic, the unitary structure of the state and protection of national unity."[246] Thus, the Turkish government announced that Turkish law would continue to prohibit the ideas and opinions which were not compatible with the indivisibility of the nation, even though they did not include any incitement to violence.

Nonetheless, following early 2002, the government commenced to take some steps to meet certain aspects of the Copenhagen political criteria. For this purpose, three reform packages were prepared. Among those packages, the second one addressed the issues of using languages other than Turkish in broadcasting and education. For the first time, the use of Kurdish in public radio and television channels and teaching this language in private language schools were allowed. However, during the adoption of these reforms, disagreements among the coalition parties increased, and at the end, the coalition government had to resign without having time to implement these amendments.[247]

After the 2002 general election, gaining a landscape victory, the Clear Party [the *AKP*] obtained the majority of seats in the Parliament and established a single party government. The *AKP* government, which is associated with moderate political Islam, was much more willing to meet the Copenhagen political criteria, because its leaders thought that their party could operate more freely under a political system based on European standards. Therefore, the new government accelerated the reform process that had been reluctantly started by the previous one. It prepared four more reform packages that were enacted by the National Assembly. These reforms contained various provisions regarding minority language rights and freedom of expression. However, since the civil

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[245] *Ibid.* at 26.
[246] *Ibid.* at 21.
[247] See Ömer Laçiner. "Geçen Ayın Birikimi" (2000) 115 Birikim Dergisi 3 at 5-6.

and military bureaucratic elites of Turkey were quite suspicious about the real intentions of the *AKP*, the government had to deal with the reforms, without making any radical changes on the constitutional structure of Turkey. Accordingly, although the new legislative amendments were directed to expand the scope of linguistic freedoms in public life, they did not address the issue of definition of minority and the constitutional status of the official language.

For the same reasons, the new government is still reluctant to ratify the ICCPR and its First Protocol, as well as the ICESCR. As mentioned earlier, there is a big gap between the approaches of the Turkish state and the Committee on Human Rights towards the definition of the term "minority," and the Committee has made it clear that the implementation of minority provisions of the Covenant do not depend on the state parties own definitions of a minority. Therefore, it appears that even though the Turkish government puts some reservations restricting the implementation of those provisions concerning the minorities recognized under the Lausanne Treaty, such reservations will probably be considered invalid. In this situation, pursuing the French example, the Turkish government may put a general reservation, stating that article 27 of the Convention will not be implemented in Turkey.[248]

Under the current conditions, it seems that, following the approach of the Commission, the Turkish government has primarily focused on broadening the scope of negative minority language rights. This perspective is formulated in the explanatory reports of the legislative amendments, with the words "the expansion of the area of cultural life, in the framework of individual rights and freedoms." It must be noted that considering the rigid approach of the Turkish state towards minority language rights, even this moderate goal is a quite challenging task and it has been faced with a strong resistance.[249] Therefore, the EU accession process has very significant implications on the language rights of Turkish citizens, in particular those of the Kurds.

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[248] See Chapter I. 2, above, for more on this issue.
[249] See Mesut Yeğen, "1980'den Bugüne Kürt Sorunu" (2001) 152 Birikim Dergisi 182 at 182-89.

3. The Scope of the Language Rights of the Kurds in the Domestic Law of Turkey

In order to better comprehend the effect of the EU accession process on the development of language rights of the Kurds in Turkey, we should track the regulation of language issues by Turkish law in various areas. Today, Kurdish language rights in Turkey are in a transition period. Accordingly, the regulations regarding minority language rights can bear the elements of both new and old trends together. While some areas of law have been deeply influenced by the EU accession process, some other areas have remained out of the influence of this process.

3.1. Prohibition of Discrimination Based on Language and the Right to Use of One's Own Language in Private

Prohibition of discrimination and the right to use one's own language in private are among those areas for which the EU accession process has no significant implication. As discussed earlier, those rights are the language rights that everyone, including the Turkish citizens of Kurdish origin, has long been enjoying in Turkey.

The Turkish Constitution explicitly prohibits any discrimination based on language in the enjoyment of the rights recognized therein. In article 10 of the Constitution, it is stipulated that everyone is equal before law without any discrimination "based on (...) language." In the last paragraph of the same article, it is also required that state agencies and administrative authorities must respect the principle "equality before the law."[250] The interpretation of the scope of this principle in Turkish law is parallel to the case law of the European Court of Human Rights regarding article 14 of the ECHR.[251] In this respect, article 14 does not create additional rights to the rights that have already been recognized under the Constitution. According to this provision, for example, one cannot be deprived of the right to education guaranteed in article 42, only because his or her mother tongue is not Turkish, but this provision does not give that person the right to be educated in his or her own language at public schools, unless this right is recognized by the Constitution.

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[250] *Türk Anayasası, supra* note 215.
[251] See Chapter I.3.2, above, for more on this issue.

Similarly, in Turkish law, it is unanimously recognized that Turkish citizens of Kurdish origin have the right to use their language in their private lives. This right has been derived from the right to privacy formulated in article 20 of the Constitution. According to this provision, everyone has the right to demand respect for his private and family life.[252] Therefore, in the Judgment of the Democracy Party, the Constitutional Court held that the use of regional languages in indoor or outdoor private environments was not prohibited.[253] Likewise, in the *Socialist Party case*, it emphasized that the citizens of Kurdish origin could not be prevented from keeping their language, customs and traditions in their private lives.[254] In this respect, the approach of the Constitutional Court is very similar to the approach of the European Court of Human Rights which recognizes that the right to privacy also includes the right to maintain one's way of life.[255]

In the implementation of these norms, there is no serious problem, because the Turkish Republic is not a racist state. It must be noted that Turkey has been a party to the ECHR since 1954 and in 2002 it also ratified the UN Convention on the Elimination of All Forms of Racial Discrimination. In Turkey, all public services and positions are open to every Turkish citizen disregarding which language he or she speaks as a mother tongue. The Kurds can freely speak their language at home or on the streets in their private relations.

3.2. The Kurdish Language in Publications

The actual influence of the EU accession process on the development of Kurdish language rights in Turkey has occurred in the public area. The release of restrictions on the use of Kurdish in printed media is the turning point in this regard. In 1991, the draconian law banning any publications printed in Kurdish was abolished, as a result of growing domestic and international opposition.[256] Following this development, in 1994 the Constitutional Court emphasized that in Turkish law no language was specifically

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[252] *Türk Anayasası*, *supra* note 215.
[253] *Anayasa Mahkemesi Kararı* (16.06.1994) E1993/3 (SPK), K1994/2 AYMKD 30/2 at 1201 [*the DEP case*].
[254] *The SP case*, *supra* note 209 at 808.
[255] See Chapter I.3.2, above, for more on this issue.
[256] *Terörle Mücadele Kanununun Bazı Maddelerinde Değişiklik Yapılmasına Dair Kanun*, K. No: 3713, K. Tarihi: 12.04.1991 (Resmi Gazete Sayı: 20843 Tarih: 12.041991).

prohibited.[257] However, until 2001 articles 26 (3) and 28 (2) of the Constitution, which stated that a language prohibited by law could not be used for the expression, dissemination and publication of thoughts and ideas, remained in force. Finally, together with other constitutional amendments on 3 October 2001, these provisions were removed by articles 9 and 10 of the Law on the Amendment of Certain Provisions of Turkish Constitution.[258] In the brief explanation of this law, it was stated that one of the aims of the recent changes was to meet the universal human rights standards.[259]

The main problem regarding the implementation of these amendments stems from the fact that in Turkish law freedom of expression –in particular the expression of Kurdish identity- was extremely restricted. Therefore, in 1993, Human Rights Watch reported that since the abolishment of the law forbidding the use of Kurdish in publications, only one paper had been allowed to be published and distributed. It also noted that many books, cassettes and films were banned by the governors in charge in the southeast part of the country.[260] In 2000, the organization emphasized that the issues of Hevi (Hope), a weekly newspaper in Kurdish known for its non-violent stance, were confiscated forty-three times during the first nine months of the year.[261] In those prohibitions, the content of text has played a more important role than its language. In a case involving the distribution of bilingual invitation letters (Turkish and Kurdish) by a teachers trade union for the celebration of world teachers day, the State Security Court in Diyarbakır District also sough to make a distinction between the language and the content of expression. According to the Court, as long as the content of invitation letters did not violate any Turkish laws in force and the relevant celebration was not an official event, the use of Kurdish language in those invitation letters was not incompatible with article 3

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[257] *The DEP case, supra* note 253 at 1199.
[258] Anayasanın Bazı Maddelerinde Değişiklik Yapılması Hakkında Kanun, K. No: 4709, K. Tarihi: 03.10.2001 (Resmi Gazete Sayı: 20843 Tarih: 17.10.2001).
[259] *Kanun Tasarıları Bilgileri,* online: TTBM, <http://www.tbmm.gov.tr/develop/owa/tasari_teklif_sd.onerge_bilgileri? kanunlar_sira_no=17799> (last accessed: 16 July 2003).
[260] The 1993 Report on Turkey, online: Human Rights Watch, <http://www.hrw.org/reports/1993/WR93/Hsw-08.htm#P564_202642> (last visited 16 July 2003).
[261] The 1999 Report on Turkey, online: Human Rights Watch, <http://www.hrw.org/worldreport99/europe/turkey.html> (last visited 16 July 2003).

of the Constitution, which provided that the official language of the Turkish state was Turkish.[262]

However, it must be noted that there is a very close relationship between freedom of expression and the right to use one's own language in publication. In article 9 (1) of the Framework Convention on Minorities, it is stated that the right to freedom of expression also includes the right to use minority languages in receiving and imparting information, ideas and opinions. Similarly, the third paragraph of the same article requires states not to hinder the creation and the use of printed media by the members of minorities.[263] In this respect, the states should not make the right to use one's own language in publication meaningless, by prohibiting political discussions on the status and the rights of minorities. This issue is equally important for the use of Kurdish language in other fields of public life, such as broadcasting, education, political and cultural activities.

Today, depending on the developments in the field of freedom of expression, the respect of the right of members of minorities to use their own language in printed media has been gradually improving. The growing number of publications in Kurdish language verifies this situation. According to the manager of Media Publication, a Kurdish publication company, last year 2,500 Kurdish books were published in Turkey.[264] In addition, there are many music cassettes recorded in this language.

3.3. The Kurdish Language in Radio and Television Broadcasting

The EU accession process has a direct effect on the development of linguistic freedoms in radio and television broadcasting. As aforementioned, this issue was listed in the APD among the short term priorities of Turkey. However, since radio and television broadcasting was accessible to a larger number of people than printed media, the Turkish state was more reluctant to broaden the scope of linguistic freedoms in this area. Therefore, in the annual reports of the Commission, the failure of the Turkish state to recognize the right to broadcast in one's mother tongue was frequently criticized. In response this, in the 2002 and 2003 amendments, the National Assembly of Turkey

[262] *Diyarbakır 2. Devlet Güvenlik Mahkemesi Kararı,* E.2000/304, K.2000/274 (12.12.2000).
[263] *Framework Convention on Minorities*, *supra* note 56.

adopted some provisions allowing the use of Kurdish language in radio and television programs.

Before these amendments, in article 4 (1) of the Law on the Founding and Broadcasts of Radio and Television, it was stated that as a general rule radio and television broadcasting was to be in Turkish language. The article recognized only one exception of this general rule: "for the purposes of teaching the languages which have contributed to the universal works of culture and science or airing news bulletins in those languages, such languages can be used, as well."[265] Since every language makes a contribution to the development of word culture and science, this provision could be interpreted broadly and at least Kurdish language courses and news bulletins in this language could be permitted.[266] However, as the scope of linguistic freedoms in public for the members of non-recognized minorities was kept very narrow in Turkish law, this exception was restricted to global languages such as English and French. When the 10th Division of the Council of State was construing the meaning of article 4 (1) concerning a case which involved the broadcast by a local television channel (Can TV) of an interview in Kurdish language, the Court recognized only a very narrow area of linguistic freedom for this language. It held that during a television program presented in Turkish, televising such an interview, where the content of the program required so and where the length of interview was insignificant compared to the length of the whole program, did not violate the principle that the broadcast of radio and television had to be in Turkish language.[267]

In 2002, Turkey started to relax this restrictive approach towards the broadcast of radio and television programs in the Kurdish language. In article 8 (A) of the 2002 Law concerning the Amendment of Certain Laws, it was stated that broadcasting in different languages and dialects traditionally used by the Turkish citizens in their daily lives was

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[264] Interview with Selahattin Bulut (22 August 2002) online: Ozgür Politika, <http://www.ozgurpolitika.org/2002/08/22/hab18.html> (last visited 16 July 2003).

[265] *Radyo ve Televizyonların Kuruluş ve Yayınları Hakkında Kanun*, K. No: 3984, K. Tarihi: 13.04.1994 (Resmi Gazete Sayı: 21911, Tarih: 20.04.1994).

[266] See Sultan Tahmazoğlu Üzeltürk, "Bölgesel veya Azınlık Dilleri Avrupa Şartı ve Türkiye" in İbrahim Ö. Kabaoğlu (ed.) *Ulusal, Ulusalüstü ve Uluslararası Hukukta Azınlık Hakları: Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması* (Istanbul: İstanbul Barosu İnsan Hakları Merkezi, 2002) 147 at 179.

[267] *Danıştay 10. Daire Kararı*, E.1997/3210, K.2000/244.

free.[268] In order not to give the impression that Turkey granted minority status to the linguistic groups other than those recognized under the Lausanne Peace Treaty, in the formulation of these provisions, the term "minority language" was not used. In various platforms, the Turkish government frequently stressed that the recent reforms were directed at meeting the European standards, by broadening the scope of cultural rights in the framework of individual rights and freedoms.

When the Turkish government commenced to expand the scope of cultural and language rights in the field of radio and television broadcasting, it initially sought to allow the use of Kurdish only in state-owned media under certain circumstances. In article 5 of the Bylaw on the Language of Radio and Television Broadcasting, it was provided that the broadcast of different languages and dialects traditionally used by the Turkish citizens in their daily lives would be carried out by the Radio and Television Association of Turkey [*TRT*], an autonomous state institution governing official radio and television channels.[269] The main reason of the Turkish government for permitting only state-owned media to broadcast Kurdish programs was to provide more effective control of the content of these programs.

However, the bylaw set forth many additional restrictions on the use of Kurdish language in radio and television broadcasting. In article 5 (3), it was stated that the programs in the languages and dialects traditionally used by the Turkish citizens in their daily lives was to be only for adults, not for children. The article also stipulated that radio and television broadcasts aiming at teaching these languages and dialects were not allowed. Moreover, the length and form of these programs was to be subject to very strict rules. In the last paragraph of the same article, it was required that in these languages radio programs would not extend forty five minutes a day and four hours a week; similarly, television programs would not take longer than thirty minutes a day and two hours a week. In addition, these television programs had to be broadcast with Turkish subtitle and the Turkish recap of these radio programs had to be provided right after the end of the program. Interestingly enough, in article 8 (2), it was stated that during the

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[268] *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun*, K. No: 4771, K. Tarihi: 03.08.2002 (Resmi Gazete Sayı: 24841 Tarih: 09.08.2002) [*4771 Sayılı Kanun*].

[269] *Radyo ve Televizyon Yayınlarının Dili Hakkında Yönetmelik*, Resmi Gazete Sayı: 24967, Tarih: 18.12.2002.

broadcast of such programs, studio design for other programs could not be changed, and reporters had to be dressed in modern style, in other words, they should not wear their traditional costumes.[270]

These regulations concerning the right to broadcast in one's own language satisfied nobody. Not surprisingly, minorities' rights defenders found the bylaw extremely restrictive. In a case involving the broadcast of a radio program, by a local private channel, "*Radyo Dünya,*" on the Kurdish language and literature, the restriction of broadcasting in Kurdish with only state owned media was challenged. It was argued that this approach violated the constitutional principle of equality.[271] There were also a significant number of bureaucrats criticizing it on the ground that broadcast in minority languages should not be a business of the state. More important, the *TRT* appealed to the Council of State for the annulment and suspension of implementation of the relevant bylaw, claiming that obliging the association to broadcast in minority languages was incompatible with its autonomy guaranteed by the Constitution. The Court endorsed the concerns of the *TRT*, and decided to halt the implementation of the bylaw.[272] Upon these developments, in 2003 the government had to reconsider the issue, and finally made some new amendments regarding article 4 (1) of the Law on the Founding and Broadcasts of Radio and Television.

In article 14 of the 2003 Law concerning the Amendment of Certain Laws, it was stated that not only public radio and television channels but also private channels could broadcast in different languages and dialects traditionally used by the Turkish citizens in their daily lives.[273] Actually, although this provision allowed both public and private channels to broadcast in those languages, after lengthy discussions, both the government and the majority of parliament had come to conclusion that it was better to leave the broadcast of such programs to the private sector. In an interview, the minister of foreign affairs stated that since responding to all demands from many linguistic groups would be very difficult, there are serous drawbacks of broadcasting in those languages by the *TRT*.

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[270] *Ibid.*

[271] "Broadcast Editor of Adana's local "Radyo Dünya" Öziç is tried for airing a program in Kurdish, titled 'Kurdish Language and Literature,'" online: Bianet <http://www.bianet.org/2003/05/02_eng/news18585.htm> (last visited on 19.07.2003).

[272] *Danıştay 10. Daire Kararı*, E.2002/3210, K.2003/244.

He stressed that in pursuant with market mechanisms, private channels could more accurately determine which languages other than Turkish should be used in broadcasting.[274] During the discussions on the proposal regarding the 2003 Amendments, many parliamentarians also opposed the idea of using minority languages in public radio and television channels. They emphasized that the state should be neutral to all non-official languages.[275]

However, although in the Turkish doctrine the permission of radio and television broadcasting in Kurdish by private channels is generally supported, the complete withdrawal of state involvement from any minority language broadcasting has been criticized by many scholars. Some authors argued that broadcasting is in essence a public service, even though it is performed by private actors. Therefore, they concluded that states should always play a leading role in the performance of these services for public good. According to them, the concept "public good" here includes the preservation and promotion of cultural diversity as part of the national heritage. In addition, they noted that since one of the principles of public broadcasting is to respect pluralism, not only private radio and television channels, but also public channels should embrace diversity, protect cultural values and promote pluralism.[276]

In the doctrine, it is also emphasized that for the effective protection of the right to use one's own language in radio and television broadcasting, the new bylaw which will be drafted for the implementation of the 2003 Amendments should be formulated in a more liberal understanding. In this regard, the programs in those languages must be longer than it was required in the previous bylaw. In fact, in the medium term, article 4 (1) of the Law on the Founding and Broadcasts of Radio and Television, which states that that the language of broadcast is Turkish is the rule should be abolished for private media.

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[273] *Çeşitli Kanunlarda Değişiklik Yapılmasına İlişkin Kanun*, K. No: 4928, K. Tarihi: 15.07.2003 (Resmi Gazete Sayı: 25173 Tarih: 19.07.2003) [*4928 Sayılı Kanun*].

[274] Interview with Abdullah Gül (18.06.2003) online: milliyet <http://www.milliyet.com/2003/06/18/yazar/bila.html> (last visited on 20.07.2003)

[275] *Türkiye Büyük Millet Meclisi Genel Kurul Tutanağı*, 22. Dönem, 1. Yasama Yılı, 96. Bileşim (19.06.2003) at 35.

[276] See Üzeltürk, *supra* note 266 at 179-80; Naz Çavuşoğlu, "Azınlık Hakları: Avrupa Standartları ve Türkiye Bir Karşılaştırma" in İbrahim Ö. Kabaoğlu (ed.) *Ulusal, Ulusalüstü ve Uluslararası Hukukta Azınlık Hakları: Birleşmiş Milletler, Avrupa Birliği, Avrupa Konseyi, Lozan Antlaşması* (Istanbul: İstabul Barosu İnsan Hakları Merkezi, 2002) 124 at 131-34 ["Azınlık Hakları: Avrupa Standartları ve Türkiye Bir Karşılaştırma"].

Thus, private radio and television channels should be allowed to broadcast in only Kurdish. In addition, there is no reason for prohibiting these channels from broadcasting programs directed to the children. These channels should also be able to prepare some educational programs for the purpose of teaching their own language. However, there are some signals from the government that the new bylaw will bear the same restrictions that the previous one had. It must be noted that as long as article 4 (1) of the Law on the Founding and Broadcasts of Radio and Television remains in force, it is impossible to establish radio and television stations broadcasting in only Kurdish language.

The other important issue is cross-border broadcasting in minority languages. The statements of the government indicate that a more tolerant approach to this issue has been developing in Turkey. While in the past Turkey made several attempts to stop the broadcasting of *Medya TV*, a television station supporting the *PKK* terrorist organization, recently the foreign ministry of Turkey announced that the Turkish state would not obstruct the televising of *KTV*, a TV station founded by Mesut Barzani in Northern Iraq, provided that it did not expose any harm to Turkey.[277] This approach is more consistent with article 9(1) of the Framework Convention on Minorities, which stated that members of a national minority have the right to receive and impart information in their own language, "regardless of frontiers."[278]

3.4. The Kurdish Language and Education

The EU accession process has also stimulated the relaxation of restrictions on the use of the Kurdish language in the field of education. As mentioned earlier, article 42 of the Constitution does not allow Kurdish language to be taught as a mother tongue, on the ground that it is not the language of a recognized minority under the Lausanne Peace Treaty. In this situation, the Kurdish language could be taught at least as a foreign language, because the article allows the instruction of foreign languages which are determined by law.[279] In accordance with this provision, in article 2 (c) of the Law on Foreign Language Education and Training, it is provided that foreign languages to be

[277] Üzeltürk, *supra* note 266 at 190.
[278] See Chapter I.4.3.3, for more on this issue.
[279] See *Türk Anayasası*, *supra* note 215.

taught in Turkey shall be determined by a decision of the Council of Ministers, obtaining the opinion of the National Security Council.[280] However, the Council of Ministers has never listed Kurdish language among the foreign languages that can be taught in Turkey.[281] Considering the fact that the APD requires Turkey to remove, in medium term, any legal provisions preventing Turkish citizens from enjoying cultural rights, including in the field of education, in 2002 the Turkish government decided to make some amendments on this restrictive approach towards the use of the Kurdish language in education.

The new amendments have allowed the Kurdish language to be taught in private language schools as one of the languages that are traditionally used by Turkish citizens in their daily lives. It must be noted that in the wording of this right, the term "mother tongue" has intentionally not been used, because article 42 of the Constitution explicitly states that no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. The same provision has been also reiterated in article 2(a) of the Fundamental Law on National Education.[282]

As it has been stated in the explanatory report, in order to broaden the scope of cultural life, in the framework of individual rights and freedoms, in article 11 (A) of the 2002 Law concerning the Amendment of Certain Laws, the title of the Law on Foreign Language Education and Training has been changed as "the Law concerning Foreign Language Education and Training and Learning of Different Languages and Dialects of Turkish Citizens." Following that, in paragraph (C) of the same article, a new provision which states that private language courses for the purpose of learning the languages and dialects that are used in the daily lives of Turkish citizens can be established has been added to article 2 (1) (a) of the aforementioned law.[283] According to article 8 of the Bylaw on Learning of the Languages and Dialects that Turkish Citizens Traditionally Used in their Daily Lives, which was adopted for the implementation of the 2002 Amendments, to be enrolled in such courses, one has to graduate from at least primary

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[280] *Yabancı Dil Eğitim ve Öğretimi Kanunu,* K. No: 2923, K. Tarihi: 14.10.1983 (Resmi Gazete Sayı: 18196, Tarih: 19.10.1983).

[281] Rober Dunbar and Fiona McKay, *Denial of a Language: Kurdish Language Rights in Turkey* (London: Kurdish Human Rights Project, 2002) at 36.

[282] Milli Eğitim Temel Yasası, K. No: 17329, K. Tarihi: 14.06.1973 (Resmi Gazete Sayı: 14574, Tarih: 24.04.1973).

school.[284] Thus, the Turkish government has sought to guarantee that the students attending Kurdish language schools are fluent in Turkish.

In the formulation of these new provisions, the government has implicitly recognized the right to learn one's own language, without undertaking any positive obligation towards the minorities. Therefore, although private language schools are allowed to open Kurdish language courses, this language still cannot be taught in public schools even as an optional language course. This situation has been questioned by the Kurdish language rights defenders, on the ground that the Turkish state only formally recognizes the right of the Kurds to learn their own language. They argued that in practice many Kurds will not be able to enjoy this right, because they cannot afford to enroll in those private language schools.[285] Even during the discussions of the amendments in the National Assembly, some parliamentarians insisted that for the implementation of the new provisions of the Law concerning Foreign Language Education and Training and Learning of Different Languages and Dialects of Turkish Citizens, the involvement of the state is, more or less, inevitable. They noted that in pursuant with the Law on Private Education Institutions, persons who would be employed by the private language schools had to be certified language teachers, but at the present, there were no such teachers in Turkey. Accordingly, they suggested that, in order to solve this problem, the universities should establish some departments which would educate Kurdish language teachers.[286]

Moreover, it must be noted that the new amendments have not removed *de jure* and *de facto* difference between the recognized and non-recognized minorities in the enjoyment of their linguistic rights in the field of education. While at any levels of education, the Kurds are still not entitled to establish and operate private schools, where they can use their own language as a medium of instruction, the Non-Muslim minorities can freely enjoy this right, because their linguistic identity is protected under the Lausanne Peace Treaty. In the Bylaw on Private Educational Institutions, it is provided

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[283] *4771 Sayılı Kanun*, *supra* note 268.
[284] *Türk Vatandaşlarının Günlük Yaşamlarında Geleneksel Olarak Kullandıkları Dil ve Lehçelerin Öğretilmesi Hakkında Yöetmelik*, Resmi Gazete Sayı: 24882, Tarih: 20.09.2002.
[285] "KÜRTKAV Öğretmen Yetiştiriyor" online: Özgür Politika <http://www.ozgurpolitika.org/2002/08/07hab04.html> (last visited on 07.08.2002)
[286] *Türkiye Büyük Millet Meclisi Genel Kurul Tutanağı*, 21. Dönem, 4. Yasama Yılı, 125. Bileşim (02.10.2002) at 116-17.

that except the courses related to the Turkish literature and the history of Turkey, all courses in the private schools of Non-Muslims can be taught in their own languages.[287]

Yet, to be fair, in spite of all these insufficiencies of the recent reforms, the recognition of Kurds' right to learn their own language in private language schools is a very significant step forward towards the development of minority language rights in Turkey, considering the fact that ten years ago even the existence of the Kurdish language as a distinct language was denied.

3.5. The Use of Kurdish in Political and Cultural Activities

Unfortunately, unlike in the areas of broadcasting and education, the EU accession process has not so important implications on the improvement of minority language rights in the field of political and cultural activities. Turkey has, to date, made very little effort to remove the legal provisions preventing the Kurds from using their own language in this area. Those restrictions are based on various provisions of the laws on political parties, elections, foundations and associations.

The use of the Kurdish language, in particular by political parties, has been strictly prohibited by Turkish law. In article 81 (b) of the Law on Political Parties, it is stated that political parties may not aim at the destruction of the integrity of the Turkish nation, creating minorities by means of protecting and developing languages and cultures other than the Turkish language and culture.[288] The formulation of this provision establishes a very straightforward relation between the ideas supporting the preservation and promotion of languages other than Turkish and the ideas defending the separation of an ethnic or linguistic group from the rest of the population. It automatically assumes that political parties defending the protection and development of minority languages seek to destroy the national unity. Thus, it prohibits the expression of even the ideas arguing that the national unity of Turkey can be better protected by recognizing cultural and language rights of everyone. This approach was best represented, by the Constitutional Court, in the judgment of the Laborer Party of Turkey. In this case, the relevant political party

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[287] M. Hidayet Vahapoğlu, *Osmanlı'dan Günümüze Azınlık ve Yabancı Okulları* (Istanbul: MEB, 1997) at 244-45.

[288] *Siyasi Partiler Kanunu*, *supra* note 218.

argued that the removal of restrictions on the use of the Kurdish language would make a better contribution to the integrity of the national unity of Turkey. However, the Court held that the arguments which claimed that a political party aiming at creating minorities might not go against the integrity of the nation, but might in fact seek to strengthen the national unity was not acceptable under the current structure of the constitution.[289]

This approach also has led to the prohibition of using languages other than Turkish in all activities of political parties. Therefore, in article 81 (c), it has been stated that party rules and regulations and programs, banners, placards, records, audio and visual recordings, brochures and bulletins must be in Turkish, and only Turkish can be used in congresses, public meetings, rallies and propaganda, although it is possible to translate party rules and regulations and political programs into foreign languages.[290] In addition, according to article 43, it is stated that during the selection process, candidates cannot use any language other than Turkish whether in spoken or written form. Finally, article 58 of the Law on General Provisions concerning Elections and Electoral Registration provides that all election propaganda, including radio and television broadcast, must be in Turkish.[291]

Similar restrictions have been put on the activities of foundations. Article 74 (2) of the Turkish Civil Code stipulates that the registration of foundations aiming at supporting political views which are against the law, or against moral or national values, or which support members of a certain race or community should not be carried out.[292] The breadth of this article is so great that it can be easily used as a basis for rejecting the registration of foundations directed at preservation and promotion of minority languages.[293] All those provisions both regarding political parties and foundations are still in force.

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[289] *The LPT case, supra* note 224.
[290] *Siyasi Partiler Kanunu, supra* note 218.
[291] *Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkında Kanun*, K. No: 298, K. Tarihi: 26.04.1961 (Resmi Gazete Sayı: 10796, Tarih: 02.05.1961).
[292] *Türk Kanunu Medenisi*, K. No: 743, K. Tarihi: 17.02.1926 (Resmi Gazete Sayı: 339, Tarih: 04.04.1926).
[293] However, in practice although the local authorities always sought to ban the foundations supporting the Kurdish language and culture, the Turkish courts adopted a more tolerant approach towards those foundations. For example, in 1995 the Foundation of Kurdish Culture and Research was registered upon the decision of the 3. Fist Instance Civil Court of *Beyoğlu* District. The appeal of the General Administration of Foundations against this decision was refused by the Court of Appeals and the registration of the relevant foundation was approved. See "Azınlık Hakları: Avrupa Standartları ve Türkiye Bir Karşılaştırma", *supra* note 276 at 143.

So far the only progress regarding the use of the Kurdish language in political and cultural activities has been made in the field of the law of associations. In article 17 of the 2003 Amendments,[294] the provision of article 5 of the Law on Associations[295] which prohibited the foundation of associations aiming at the preservation and promotion of languages other than Turkish has been abolished. Thus, although the provision which bans the foundation of associations aiming at the creation of minorities has been preserved, the direct connection between the protection of languages other than Turkish and the creation of minorities, thereby targeting the integrity of the nation, has been cut. In addition, article 6 (4) of the same law stipulating that in both indoor and outdoor meetings organized by associations, the use of banners, placards, records, audio and visual recordings, brochures and bulletins in the languages prohibited by law is forbidden has been replaced with the provision which only provides that foundations shall use Turkish in their official correspondence.[296] In this situation, associations in Turkey are free to use the Kurdish language in their activities. It is hoped that these recent amendments also affect the implementation of article 74 (2) of the Turkish Civil Code.

Again, it must be emphasized that as long as the provisions prohibiting the expression of views which claim that in Turkey there are minorities other than those recognized under the Lausanne Treaty are in force, the effect of recent amendments on the development of language rights will be very limited. Language is part of freedom of expression and cannot be completely isolated from its content. The literature of minority languages inevitably includes various discussions on the scope of minority language rights. Members of linguistic groups should be free to express their opinions on whether they consider themselves as a minority or not. In a democratic state, all political ideas, even shocking and disturbing ones, should be expressed freely, as long as they do not directly encourage the use of violence.

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[294] *4928 Sayılı Kanun, supra* note 273.
[295] *Dernekler Kanunu, supra* note 219.
[296] *4928 Sayılı Kanun, supra* note 273.

3.6. Personal and Place Names in the Kurdish Language

The other important issue regarding the language rights of the Kurds is the use of the Kurdish language for personal and place names. In Turkey, the registration of both personal and place names in Kurdish was strictly restricted for many years. However, the effect of the EU accession process has been so far limited to only the issue of personal names.

In Turkey, each person's name consists of at least two parts: given name and family name. After the foundation of the Turkish Republic, the obligation to bear a family name was adopted along with other legal reforms directed to the creation of a modern Turkish nation-state. In articles 5 and 7 of the 1934 Bylaw on Family Names, it was stated that newly adopted family names shall be in the Turkish language; the names of foreign races and nations cannot be used as family names.[297] Thus, the family names which referred to the Kurdish ethnicity or which were in the Kurdish language were forbidden. As to the given names, article 16 (4) of the Registration Law states that names that "do not conform to our national culture, our rules of morality and our customs and traditions" or "names that offend public opinion" may not be given.[298] Although this provision does not explicitly prohibit the use of Kurdish for personal names, until the late 1980's, it was used as a basis of the prohibition of names given in the Kurdish language. However, this restrictive interpretation of article 16 (4) has been successfully challenged on a number of occasions in the courts, including in the Court of Appeal.

In 1989, the Court of Appeal dealt with a case involving the cancellation of a Kurdish name, "*Berfin,*" by a court of first instance, on the ground that it violated the Registration Law. In this case, the Appellate Court sought to interpret the meaning of the words "our national culture" and "our customs and traditions." According to the Court, our national culture, traditions and customs do not include only Turkish elements; in fact they were historically influenced by various "foreign elements." Therefore, the court concluded that the names originating from languages other than Turkish were not inconsistent with our traditions and customs.[299] Similarly, in another case before the Court in 2000, it recognized that Eastern and South Anatolia "is a part of the mother land

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[297] *Soyadı Yönetmeliği*, Tarih: 21.12.1934, Sayı: 2/1759.
[298] *Nüfus Kanunu*, K. No: 1587, K. Tarihi: 05.05.1972 (Resmi Gazete Sayı: 14189, Tarih: 16.05.1972).
[299] *Yargıtay 3. Hukuk Dairesinin Kararı*, 1989/1520.

where people of various ethnic origins live, not of just one ethnic origin," and that "there is no doubt that such a deep-rooted situation constitutes part of our national culture and traditions." Accordingly, the Court held that "besides Turkish words as personal names, there are names derived from words in foreign languages, such as Arabic and Persian that have taken root in our national culture and customs." This approach can be also applied to the issue of family names and place names.

In 1992, in a different case regarding the annulment of the registration of a Kurdish name, "*Rojda*," the Court approached to the issue from a human rights perspective. It stressed that "name is a personal right which is closely tied with the person; on the basis of this right, no agent or organ, including the courts, can annul the name of a person." The Court added that the right to a name was in essence a personal right, like the right to life or to dignity. "Since in pursuant with article 2 of the constitution, our country is a state of law, which respects human rights," the courts cannot deprive individuals of this right, by annulling their personal names.[300]

However, despite all these decisions of the Court of Appeal, many local registrars continued to refuse the request of parents to register their children's names in the Kurdish language. The prosecutors also kept charging those parents with breaking various provisions of criminal law, mostly related to supporting a terrorist organization or threatening the integrity of the nation. Even the registration of quite common names, such as "*Berivan*," which is also the name of a very popular TV series, was prosecuted by the public prosecutor.[301] In July 2002, a case was opened in Siirt against some parents to force them to change the Kurdish names of their children.[302]

In order to end those practices, considering the increasing critiques from the EU, the Turkish government decided to include the issue of personal names into the 2003 Amendments. In article 5, the references to "national culture, customs, traditions" under article 16 (4) of the Registration Law were removed. In the new provision, it was only stated that the names that do not conform to moral rules and offend public opinion cannot

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[300] *Yargıtay 18. Hukuk Dairesinin Kararı*, 1992/1351.
[301] "Burası Türkiye... Berivan İsmi Mahkemelik oldu" online: Milliyet <http://www.milliyet.com.tr/2002/05/29> (last visited on 29.05.2002).
[302] *The 2003 Report on Turkey*, online: Amnesty International <http://web.amnesty.org/report2003/Tur-summary-eng> (last visited on 20.07.2003).

be registered.[303] After this amendment, it is hoped that the right of the Kurds to have personal names in their own language will be better protected.

With regard to place names, there has been a longstanding policy in Turkey of replacing Kurdish place names by Turkish ones and prohibiting the use of Kurdish place names in official documents. In article 2 of the 1949 Law on Provincial Administration, it was stated that village names that are not Turkish or that give rise to ambiguity were to be changed to Turkish. Thus, many Kurdish village names were changed to Turkish-sounding names. Although the minister of interior announced in 1991 that the restoration of Kurdish names to towns and villages would be permitted, this has not been implemented.[304] The EU also has to date made no commend on this issue, probably because the restoration of place names in minority languages is a quite complicated problem. Yet, it must be noted that in Turkish law, there is no prohibition on the private use of Kurdish town and village names. In this regard, in Kurdish newspapers and books, the Kurdish names of those places can be freely used.

3.7. The Use of Kurdish in dealings with Public Authorities and Courts

The EU accession process has no implication on the use of Kurdish in dealings with public authorities and courts. As mentioned earlier, since article 3 of the Constitution, which provides that the language of the state is Turkish, is interpreted to mean that no language other than Turkish can be used in official correspondence, the Kurdish language is completely excluded from all public services, regardless of where they are provided or who benefits from them. This may create some problems, where the health or freedom of a monolingual Kurdish-speaking Turkish citizen is at stake.

In particular, in the western cities of Turkey where a significant number of the Kurds emigrated from the Southeast, the monolingual Kurdish-speakers have serious hardship in gaining access to adequate health care service, because there is no trained medical staff capable of using Kurdish as a medium of communication. It must be noted that although most Kurds in Turkey are bilingual, in the rural areas there are still a significant number of uneducated women and old men who are unable to understand and

[303] *4928 Sayılı Kanun, supra* note 273.
[304] Dunbar and McKay, *supra* note 281 at 67.

speak Turkish. When those people had to move to the West, because of the armed conflict in their region, they could not learn Turkish easily. Therefore, they have faced many problems in communicating with doctors and other hospital personnel.[305] As to the areas in the south of Turkey, where the Kurdish language is spoken by a considerable number of people, it appears that the problem is not quite as acute, because there are usually some medical personnel who can speak Kurdish or act as interpreters. Nonetheless, in this case, the use of Kurdish in health services is completely unofficial and based on the good will of doctors and hospital management.

In the administration of justice, the Kurdish language can be used only in very exceptional situations. In article 252 of the Code of Criminal Procedure, it is provided that if an accused does not understand Turkish, an interpreter shall inform him, at least, of the results of final accusations and defense of the public prosecutor and defense council.[306] Although the approach of this provision is very similar to the provisions of articles 5 (2) and 6 (3) of the ECHR, because the use of languages other than Turkish is restricted to criminal law cases and the situations where the accused does not comprehend the official language of the court, its scope is much narrower. For example, unlike article 5 (2) of the ECHR, there is no provision in Turkish law, which stipulates that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. In addition, as it has been demonstrated in the *Kamasinski v. Austria case*, when an accused does not understand the language of proceedings, not only the results of final accusations and defense of the public prosecutor and defense council, but all oral statements and documents used in the proceedings against him, which are necessary to understand in order to have benefit of a fair trial, must be translated into the language that the accused comprehends. In this case, the court also emphasized the importance of the quality of translation in the protection of the right to fair trial.[307] However, since in Turkey there is still no educational institution training certified interpreters in Kurdish, the adequacy of translation services in this language at the court is quite questionable.

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[305] *Ibid.* at 53.
[306] *Ceza Muhakemeleri Usulu Kanunu*, K. No: 1412, K. Tarihi: 04.04.1929 (Resmi Gazete Sayı: 1172, Tarih: 20.04.1929).
[307] *Kamanski v. Austria, supra* note at 35.

With regard to the civil courts and other non-criminal tribunals, there is no right to use the Kurdish language either orally or in written form during legal proceedings, nor is there a right to benefit from a translator, even though a litigant or other participant in the process or witness does not understand Turkish at all. Again, in the Southeast, with the own initiatives of the judges, the court clerks can be occasionally used as translators, but this is simply an ad hoc solution. It must be noted that in most of these situations, Kurdish-speaking lawyers also act as interpreters, informing their client on the court proceedings in Kurdish.

The issue of using the Kurdish language in administrative and judicial proceedings of the Turkish state has so far never been mentioned by the European institutions and member states as one of the conditions of Turkey's accession process. The main reason for this is that as discussed in the first chapter, the norms regarding this issue are so vague that in practice they almost create no obligation on the states. The only clear cut obligations, in this respect, originate from the provisions of article 5 (2) and 6 (3) of the ECHR. However, even for the full implementation of these norms, the EU has not underlined the shortcomings of Turkish judiciary system. It also appears that the prior concern of the EU is not the use of the Kurdish language in governmental affairs, but the removal of legal provisions preventing the Kurds from using their language in public for private purposes.

Summary

In Turkish law, the main problem regarding the application of international minority language rights for the Kurds is that since this ethnic and linguistic group has not been recognized as a minority, they are not entitled to any special minority language rights. Therefore, the language rights of the Kurds have been limited to only certain human rights norms, such as the right to protection against discrimination, the right to privacy and the right to fair trial, which may have some implications on the use of minority languages. Unfortunately, as the Turkish constitutional law does not effectively protect the right to freedom of expression, it has been impossible to improve individual linguistic freedoms, through the broader interpretation of the right to freedom of expression. This has led to the prohibition of the use of Kurdish in public, even for private purposes. Thus, until the early 1990's no negative language rights in the field of public life were granted to the Kurds. The use of Kurdish in publications, radio and television broadcasting, education, and political activities was strictly prohibited. Under these circumstances, their positive language rights could not be developed, because any demands for such rights have been prosecuted, on the ground that these demands support the idea that the Kurds constitute a minority, and thereby violate the principle "unity of the nation."

The accession process to the EU has made a very significant contribution to the change of this extremely restrictive approach towards minority language rights. It has prompted the Turkish state to remove all legal provisions preventing private persons from using their own languages in public. Since negative minority language rights are considered as fundamental linguistic freedoms, the Republic of Turkey could not meet the Copenhagen criteria, unless it fully respects these freedoms. Therefore, in the Accession partnership document and the annual reports, the Commission has focused on the use of minority languages, including Kurdish, in mass media and education. Although at the beginning Turkey's attitude was quite reluctant, since late 2000 the Turkish government has taken some steps to broaden the scope of linguistic freedoms in public, out of governmental affairs. Thus, new provisions allowing the use of the Kurdish language in private radio and television broadcasting and the teaching of this language in private language schools were adopted. Turkey also made some legislative amendments permitting the registration of personal names in Kurdish. As it may be remembered,

considering the reaction of the EU states and institutions, in 1991 Turkey had already abolished the law proscribing the use of Kurdish in publications. Moreover, in the recent reforms aiming at the adaptation of Turkish law to the European standards, the Turkish state has also taken some legal measures in order to protect freedom of expression more effectively.

It must be noted that these recent reforms have been made in the framework of individual rights and freedoms. In this regard, the Turkish state has neither recognized the Kurds as a minority nor granted them any positive rights regarding the protection and promotion of their linguistic identity. This character of the reforms has been criticized by many Kurdish NGOs and activists, on the ground that without any state support, the rights to broadcast in a minority language and to use such language for educational purposes cannot be fully enjoyed by the members of linguistic minorities. Moreover, whether these reforms meet Turkey's non-intervention obligations regarding the free use of minority languages, by private persons, in the public area is also arguable. In the current situation, only private language schools can provide Kurdish language courses. Private secondary schools and universities are not authorized to use the Kurdish language either as a medium of instruction, or as a subject. Similarly, it is highly likely that the new bylaw regulating broadcasting in the traditionally used languages and dialects in Turkey will include the same restrictions as the previous one did. This means that they may be obliged to broadcast in Kurdish only for one or two hours a day and to translate those programs into Turkish.

Conclusion

In its policy towards the situation of language rights of the Kurds in Turkey, the EU has employed a pragmatic and flexible approach. Since in Turkish law, even most of the negative minority language rights are not granted to the Kurds and the expression of the Kurdish identity is strictly prohibited, the Union has primarily focused on the expansion of negative rights and the full protection of the right to freedom of expression. In response to this, the Turkish government has launched a series of reforms. Considering the expectations of the EU, it is possible to make an account of the achievements and failures of the Turkish state in meeting the Copenhagen criteria regarding the respect for and protection of minorities.

Turkey's accomplishments are mainly related to the use of the Kurdish language in public life, outside governmental affairs:

1) Today, in Turkey there is no language prohibited by law, and after the 2001 constitutional amendments, prohibition of any language is unconstitutional;
2) Turkish law allows the use of Kurdish in all publications, including books, newspaper and music and video cassettes;
3) The radio and television broadcasting in the Kurdish language by private and public channels is also free, under certain circumstances;
4) According to the recent reforms, the Kurdish language can be taught in private language schools;
5) Personal names given in Kurdish can be officially registered;
6) Parallel to the expansion of freedom of expression, the restrictions on the foundation of associations aiming at the preservation and promotion of languages other than Turkish have been abolished.

Although these reforms have made a significant contribution to the protection of negative minority language rights of the Kurds, in many respects, the Turkish state has failed to adopt a completely liberal approach:

1) According to the Turkish constitution and the new law on language education, the teaching of a language other than Turkish to the Turkish citizens as their mother tongue is still forbidden;

2) The Kurdish language can be taught only in private language schools. The use of Kurdish in general private schools, including private universities, either as a subject, or as a medium of instruction is not allowed;
3) Although the right to use the Kurdish language in radio and television broadcasting is recognized, if the previous bylaw is adopted, which is very likely, this right will be extremely restricted;
4) Political parties cannot claim that the Kurds are entitled to minority rights, and they cannot use the Kurdish language in their political activities;
5) While the Turkish Republic has signed the ICCPR and the ICESCR, it has yet to ratify those instruments. It must be remembered that the First Protocol of the ICCPR has not been signed by Turkey, although in the Accession Partnership Document this was required;
6) The Turkish state has shown no intention to be a party to the Framework Convention on Minorities and the European Charter for Minority Languages;
7) Turkey has taken no positive measures to realize the right to use Kurdish in broadcasting and the teaching of this language in schools;
8) There are also problems regarding the implementation of the recent reforms. Although almost one year has passed since the adoption of the relevant amendments, neither a single private language school, nor a radio or television station has been allowed to use these rights.

This indicates that Turkey needs to do more in order to expand linguistic freedoms in the field of minority rights. In fact, in Turkish law, the inherent relationship between language and human rights has not been established yet. The concept of human dignity which lies at the heart of human rights protection is fundamentally linked to language as an essential part of personality. Language shapes intellectual and cultural views of individuals and signals their membership in a community. Therefore, as an element of identity, it must be respected and protected. Moreover, today it is generally accepted that languages comprise cultural heritage and wealth of a country. The loss of a language in this regard impoverishes the national culture. The concept of democracy also requires respect for the right to be different and protection of diversity. Unless these principles are

incorporated into the Turkish constitution, an effective protection of minority language rights cannot be achieved in Turkey.

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