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„The Kurds in Turkey from a European Perspective –
The Situation of the Kurds in Turkey and the European
Standards of the Protection of Minority Rights and
Human Rights“

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TO MY PARENTS

Foreword

The European Union is characterised by diversity. It consists not only of 27 different states, but also of a population with many distinct characteristics such as nationality, language, ethnicity, religion, cultural and political heritage and traditions. This diversity of the EU's population results in many different identities united by common values, interests and ideas, and is a defining feature of the EU as political Union.

Such a diverse, heterogeneous community can only exist and co-operate in peace and harmony if the distinct characteristics of its members are not considered as a threat or reason for rejection, but as a positive feature and enrichment for society as a whole. Accordingly, the EU is based on certain general principles and values with the ultimate aim of ensuring mutual tolerance and respect as a pre-requisite for long-lasting peace and the individual's free development and well-being in a pluralist society. These values are enshrined in Art 2 of the Treaty on the European Union: *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

The numerous minorities existing within the Member States of the EU contribute considerably to the diversity of the Union's population, and the reference to the values of the EU, including the *"rights of persons belonging to minorities"*, is an express commitment that the features of minorities within the EU are a particular value which needs the protection of additional human rights. Thus, the protection and promotion of the identities of persons belonging to national minorities are among the general principles on which the EU is based.

In recent years, the protection and promotion of minorities has increasingly become a matter of concern to the international community. As part of the system of protection of human rights, effective minority rights protection must not be left to the sole discretion of the national states, but has to be promoted and ensured on an international level, and it is within the framework of the EU that the protection and promotion of minority rights is capable of providing unprecedented opportunities both for the minorities and for the society in which they live. However, this obliges the EU and its Member States to take these values seriously, to scrutinise their protection and promotion within the existing borders of the EU, and to closely examine the situation in candidate countries for future membership.

Turkey's accession to the EU provides unique possibilities to all the parties involved, and the prospect of EU accession has already led to considerable reforms in Turkey. However, it seems that Turkey still has work to do, involving in particular questions of its treatment of the minorities on Turkish territory. In view of the EU's commitment to the fundamental values described above, the EU and its Member States should also examine the issues concerning legal status and factual situation of the ethnic, linguistic and religious minorities in Turkey. In particular, Turkey's treatment of the largest minority on its territory, the Kurds, should be a matter of special interest in the course of the accession negotiations, as it is an indication in how far Turkey is in fact willing not only to become part of an economic community, but also of a pluralist community of values.

The prospect of EU-accession provides Turkey with an unprecedented chance to implement a more liberal legal framework and a more tolerant approach towards minorities which would finally allow the peaceful co-existence of Turks and Kurds in an atmosphere of mutual tolerance and respect. Criticism of past and present Turkish policies or legal provisions relating to the situation of the Kurds should therefore not be seen as an attempt to disparage Turkish values, traditions or history, but as a contribution to an open debate and discussion of possible reforms with one final aim: the creation of a political, legal, economic and social framework where Turks, Kurds and other individuals with a partly distinct identity may live and develop their personal identity in full freedom in a region committed to tolerance and peace.

It is against this background that this thesis is to be understood: As a small contribution to a lively discussion and an open debate on the situation of a minority group within a state and on the development of a European community of values where diversity is seen as an enrichment of and not as a threat to society.

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Axel Guttman

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1 Introduction

In the years and decades following the Second World War the international community of states, and in particular European states, made intensive efforts to create international organisations and elaborate legal and political instruments for the protection of human rights and fundamental freedoms. The events and actions which had finally resulted in the war proved that the effective protection of certain fundamental rights and freedoms which are inherent to every human being could not be left to the sole discretion of individual states, but could only be guaranteed by way of international cooperation and monitoring.

At the same time the protection of ethnic, linguistic and religious minorities, which had been one of the major issues within the system of the League of Nations, was totally neglected. The belief was that the specific needs of minorities were catered for through the protection of universal human rights which guaranteed the same level of protection to everyone. However, the history of Europe and other parts of the world, in particular the events following the dissolution of Yugoslavia and the USSR, showed that minority groups within existing states need specific protection, as universal human rights may be insufficient to respect the specific characteristics of persons belonging to such minorities and to protect them from assimilation and violence. Consequently, international organisations and institutions for the protection of human rights such as the Council of Europe and the Organisation for Security and Cooperation in Europe began to focus on specific minority protection as well, which resulted in the elaboration of legal and political documents and monitoring mechanisms for the protection and promotion of the rights of persons belonging to ethnic, linguistic and religious minorities.

The need for the protection and promotion of minority groups and the corresponding idea that cultural diversity resulting from the existence of many different groups should be seen as an enrichment for the community was also reflected within the framework of the European Union, which has developed from a simple economic community to a political and legal union based on common political and legal values. This development is probably most evident in the conclusions of the European Council in Copenhagen of June 1993 (the so-called Copenhagen Criteria), according to which membership of the European Union *“...requires that the candidate country has achieved institutions guaranteeing democracy, the rule of law, human rights and **respect for and***

protection of minorities...¹ The idea that minority protection as an important aspect of human rights protection is one of the core values of the EU and its Member States was finally also incorporated into the Treaty on the European Union: *“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and **respect for human rights, including the rights of persons belonging to minorities.** These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”*²

Since the foundation of the Republic of Turkey, the Turkish State has always sought to establish and maintain close contacts with Europe and has aimed for greater integration in the European community of states. As early as 1949, Turkey became a member of the Council of Europe, in 1952, she joined the North Atlantic Treaty Organisation (NATO), and in 1975 she entered the Organisation for Security and Cooperation in Europe (OSCE). Efforts for integration with the European Economic Community resulted in an Association Agreement in 1963 and a customs union later on. A formal application for full accession to the European Community, submitted by Turkey in 1987, was rejected by the European Community in December 1989 on the grounds of economic, legal and political deficiencies of the Turkish State.³

The Helsinki European Council of 1999⁴ concluded that Turkey was a candidate for EU membership on the basis of the same criteria as the other candidates, which meant that it would have to fulfil the political Copenhagen Criteria before formal accession negotiations would commence. On 6 October 2004 the European Commission expressed its opinion that Turkey had sufficiently fulfilled the necessary criteria to open accession negotiations, subject to the condition that it implemented further legislative reform packages.⁵ On December 17, 2004, the European Council followed the Commission’s recommendation, declaring that Turkey had fulfilled the political elements of the Copenhagen Criteria to begin accession negotiations.⁶ Finally, on 3 October 2005, accession negotiations between Turkey and the EU commenced.

¹ European Council in Copenhagen, Conclusions of the Presidency, 21-22 June 1993, SN 180/1/93, 7.A.3 (emphasis added).

² Art 2 of the Treaty on the European Union, C 83/13 of 30.03.2010 (emphasis added).

³ Compare: Yildiz, Kerim: *The Kurds in Turkey: EU Accession and Human Rights*, London: Pluto Press 2005, 20-22; Yildiz, Kerim/Muller, Mark: *The European Union and Turkish Accession – Human Rights and the Kurds*, London: Pluto Press 2008, 20-24.

⁴ Helsinki European Council, 10 and 11 December 1999, Presidency Conclusions.

⁵ Commission of the European Communities: *Communication from the Commission to the Council and the European Parliament – Recommendation of the European Commission on Turkey’s progress towards accession*, 06.10.2004, COM (2004) 656 final.

⁶ Council of the European Union: *Brussels European Council, 16/17 December 2004, Presidency Conclusions*, 17.12.2004.

The issue of Turkey's possible EU membership has given rise to a very controversial and intensive debate all over Europe. The possibility of Turkey's accession to the EU has been criticised for a variety of reasons, including Turkey's economic situation and the fact that the majority of its population are Muslims. One of the major focal points, however, has been Turkey's bad record on the protection of human rights and fundamental freedoms and the State's treatment of the numerous minority groups living in Turkey. In this regard, it has even been argued that the EU organs' conclusion that Turkey had sufficiently fulfilled the political Copenhagen Criteria was premature, and that the decision to open accession negotiations had been mainly influenced by economic and geo-strategic considerations instead of an objective analysis of Turkey's human rights record and its treatment of minorities.⁷

In particular the situation of the Kurdish population, which constitutes the largest minority group in Turkey, is still a major cause for concern and should be seen as a decisive criterion in the assessment of whether Turkey fulfils the political criteria of Copenhagen. The conflict between the Turkish security forces and the Kurdish PKK, the numerous human rights violations committed by the Turkish State in the fight against "terrorism", and the economic difficulties of the Kurdish population have made the "Kurdish question" a very complex issue. Despite these different factors, however, the "Kurdish question" should not primarily be seen as a question of terrorism and security, but as a question of how a state should treat the members of a group with distinct ethnic, linguistic and cultural characteristics, as a question of human rights and minority protection.

The international instruments for the protection of national minorities elaborated within the framework of international bodies such as the Council of Europe and the OSCE have defined a number of specific rights of persons belonging to national minorities and corresponding obligations of the states. These rights and obligations have been further specified by the monitoring bodies and mechanisms established by these instruments as well as through the practice of European States in the protection and promotion of minorities. Since the requirement of minority protection qualifies as a prerequisite for membership in the European Union, it is possible to identify certain minimum standards of minority protection that a state should fulfil in order to be admitted to the European Union and its community of values.⁸

⁷ Compare, for example: Yildiz/Muller (2008), 29-38.

⁸ As the EU itself has not yet produced a coherent body of norms regarding minority protection and only has limited legal powers in this area, it appears adequate to resort to other sources of minority protection in international law and the national law and practice of EU Member States in order to assess European standards and definitions in minority protection; compare: Ahmed, Tawhida: *The Impact of EU Law on Minority Rights*, Oxford: Hart Publishing 2011, 8.

It is the purpose of this study to assess these European standards of minority rights and to compare them to the Turkish legal framework governing issues of particular relevance to the Kurdish minority. Based on this comparison and a corresponding analysis of the factual situation of the Kurdish minority, deficiencies in the Turkish legal and political system in respect of minority protection and minority rights shall be identified and possible solutions will be offered which have the potential to ameliorate the situation to the benefit of everyone concerned, the Kurdish as well as the Turkish population.

In order to be able to appropriately monitor the problems of the Turkish political and legal system in respect of minority groups and of the Kurdish population in particular, it is necessary to understand the historical developments and specific pre-conditions which have resulted in the present situation. The first part of the thesis will therefore start with an overview of the historical development of the “Kurdish Question” from the end of the Ottoman Empire to the present day. In addition, some factual information about the Kurds will be given, including data about the estimated total number of Kurds in Turkey, their traditional settlement areas and their linguistic, ethnic and cultural characteristics. The Kurdish question has been particularly marked by the violent conflict between the PKK and the Turkish security forces in south-east Turkey, which has resulted in numerous human rights violations committed on the part of the Turkish State in the “war against terrorism”. Chapter 2 will therefore also discuss the issue of violence and the human rights situation in south-eastern Turkey. As violent conflicts between a state and a minority group within that State are often addressed in the discussion of a peoples’ right to self-determination, and the declared aim of the PKK and parts of the Kurdish population has long been the establishment of an independent Kurdish State, Chapter 2 also contains an excursus on the right to self-determination of peoples and its implications for the situation of the Kurds in Turkey.

In the second part of the thesis, the concept of a (national) minority under international law is analysed and an attempt is made to identify an appropriate definition of a minority under international law. Based on this definition, an assessed is made as to whether the Kurds in Turkey qualify as a (national) minority under international law, entitled to claim protection under international instruments for the protection of minorities. Following this analysis, the Turkish concept of a minority is described and compared to the international concept. The aim of the second part of the thesis is to identify whether the Turkish understanding of a minority is compatible with the internationally acknowledged concept of minority protection and therefore capable of providing an appropriate basis for the application of the European instruments and mechanisms for the protection of minorities to the Kurdish population.

In the third part of the thesis, the various rights and obligations provided for in European instruments for the protection of national minorities will be analysed and compared to the Turkish constitutional and legal framework. The aim is to assess whether the legal and the factual situation of the Kurdish minority group in Turkey complies with European standards of minority protection. Where deficiencies are identified, proposals for the improvement of the situation of the Kurdish population will be provided.

Due to the variety of international instruments for minority protection, which differ slightly from each other in terms of both their exact contents and their legal nature, it is difficult to define exact standards in the field of minority protection. However, there are many issues which are addressed identically in every document on minority protection, and certain rights of individuals and obligations of states have been included in every one of these instruments. In addition, the work of international monitoring bodies and scholars has contributed considerably to the specification of the contents of these rights and obligations. Finally, guidance can be found in the implementation of the international instruments in the national legal orders of various European states. Thus, while there may be different ways of effectively protecting minorities and different levels of protection within the Member States of the European Union, it is nevertheless possible to identify those rights and obligations which are crucial for the protection of minorities, and to define certain minimum standards of protection which must be applied in every European state.

The Framework Convention for the Protection of National Minorities⁹ (FCNM) is the first international document containing legally binding obligations for states in the field of minority rights. While it has to be admitted that many of the provisions of the Framework Convention are formulated in an extremely vague manner, leaving the State parties with too much discretion in the implementation, it is nevertheless possible to deduce specific rights and obligations from this document. Interpretative guidance as to the exact content of the rights and obligations under the FCNM is provided not only by the Explanatory Report¹⁰, but also by the Advisory Committee on the Framework Convention for the Protection of National Minorities (Advisory Committee), which was established as the monitoring body of the Framework Convention. In its Opinions, the Advisory Committee analyses the periodic reports provided by the state parties to the FCNM and issues extensive comments on the nature and scope of states' obligations and their compliance with the standards set by the Framework Convention. While the

⁹ Framework Convention for the Protection of National Minorities, Strasbourg, 01.02.1995, Council of Europe ETS no. 157.

¹⁰ Explanatory Report to the Framework Convention for the Protection of National Minorities (ETS no. 157).

legally binding nature of these opinions may be contested, there is consent among many important voices in international law who argue that such comments of international supervisory bodies have a normative value and may be considered as “soft law”.¹¹ While the normative quality of soft law will not be discussed in detail here, it appears evident that the interpretation of an international document by the competent monitoring body, consisting of international experts in minority rights, needs to be respected when interpreting the rights and obligations provided by such a document. Since the Framework Convention has been signed and ratified by the vast majority of the Member States of the Council of Europe and almost all of the Member States of the European Union, its provisions should be seen as the principle guidelines for the identification of European standards of minority protection.¹² The Turkish State should be encouraged to sign and ratify the Framework Convention for the Protection of National Minorities, and any assessment of the Turkish legal system and the factual situation in Turkey with regard to minority protection issues should be based on these standards.¹³

Many of the provisions of the Framework Convention may also be found in the documents elaborated within the framework of the OSCE (CSCE), in particular the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE¹⁴ (the Copenhagen Document). These documents are often considered as being only of a political nature and without legally binding force, but it has been argued that these documents are nevertheless binding on states, irrespective of their qualification as political or legal documents.¹⁵ As these documents are seen as political commitments, their provisions for minority protection are sometimes even more extensive than those contained in the FCNM. Accordingly, they may provide useful guidance in establishing internationally accepted minority rights and corresponding obligations of states within the European framework. In addition, The Hague Recommendations Regarding the Education Rights of National Minorities¹⁶ (The Hague Recommendations), the Oslo Recommendations Regarding the Linguistic Rights of

¹¹ In respect of the normative quality of soft law and CSCE/OSCE-documents compare: Bloed, Arie: *The Conference on Security and Co-operation in Europe – Analysis and Basic Documents*, Dordrecht: Kluwer Academic Publishing 1993, 23; compare: Ahmed (2011), 45.

¹² France is the only Member State of the EU which has not signed the FCNM.

¹³ The European Commission has implicitly criticised Turkey for not having signed the FCNM: European Commission: *Turkey 2009 Progress Report*, 28; similarly, ECRI recommended that the Turkish authorities sign and ratify the FCNM and the European Language Charter (ECRI: *Third report on Turkey*, 2004, Para 7).

¹⁴ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990.

¹⁵ Bloed (1993), 22-23.

¹⁶ The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note, October 1996.

National Minorities¹⁷ (Oslo Recommendations), and The Lund Recommendations on the Effective Participation of National Minorities in Public Life¹⁸ (Lund Recommendations), elaborated by international minority rights experts under the mandate of the OSCE High Commissioner on Minority Rights, provide interpretative guidance in respect of useful measures for the effective protection and promotion of national minorities.

In issues relating to the use and the learning of a minority language, the European Charter for Regional or Minority Languages¹⁹ (European Language Charter) can be used to further define the European minimum requirements for the protection of minority languages. While it has to be acknowledged that the European Language Charter was not created as a tool for minority protection, it was nevertheless the intention of the drafters that the Charter and the Framework Convention should both be signed and ratified by the European Member States of the Council of Europe, with the Charter imposing more specific obligations on states in respect of the protection and promotion of minority languages. As language is often one of the most important aspects of a minority's identity, the European Language Charter can thus provide additional guidance in the interpretation of European states' obligations in matters of minority protection.

The European Convention for the Protection of Human Rights and Fundamental Freedoms²⁰ (ECHR) is the most important international covenant for the protection of universal human rights in Europe. In particular, the interpretative powers of the European Court of Human Rights (ECtHR), which make the ECHR a living instrument, as well as the fact that the decisions of the ECtHR are legally binding and enforceable within the Member States, have made the ECHR an international instrument for the protection of human rights of unprecedented importance. The ECHR does not contain specific rights for the protection of persons belonging to national minorities, but due to the far-reaching provisions of the Convention and its Protocols and their innovative interpretation by the ECtHR, the rights and freedoms they protect can produce favourable effects and result in the specific protection of persons belonging to national minorities in relation to certain rights. Due to the normative quality of the ECHR and the decisions of the ECtHR, even limited additional guarantees and rights for persons

¹⁷ The Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note, February 1998.

¹⁸ The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note, September 1999.

¹⁹ European Charter for Regional or Minority Languages, Strasbourg, 05.11.1992, Council of Europe ETS no. 148.

²⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 and 14, Rome 04.XI.1950, CETS no. 005.

belonging to national minorities resulting from these instruments appear to be of particular importance in the analysis of European standards of minority protection.

International instruments for the protection of minorities are necessarily very abstract in their formulation. To identify an appropriate level of minority protection and adequate measures for the promotion of minorities' identities, it is therefore appropriate to look at the national legal systems of various European States. As the individual circumstances within a state and the specific situation of various minorities within a state may vary considerably, a comparison of the measures adopted by different states for the protection and promotion of minorities may provide useful guidance in the assessment of means which appear adequate for the specific situation of the Kurds and the Turkish State.

It is evident that it will not be possible to discuss every detail of the situation of the Kurds in Turkey, and that some of the proposals for amendments will be difficult or even impossible to implement in practice. However, it is the aim of this thesis to identify the principal issues of concern in respect of the Kurdish question from the point of view of European minority rights law, and to provide examples for appropriate amendments and possible solutions in order to bring the Turkish legal system into line with the European standards of minority protection, for the benefit of all the people living in Turkey, be they of Turkish, Kurdish or any other ethnic or linguistic origin.

2 The Kurdish Question

2.1 The Historical Development of the Kurdish Question in Turkey

2.1.1 The Decline of the Ottoman Empire and the Rise of Turkish Nationalism

2.1.1.1 The Islamic Concept of the Ottoman Empire

The population of the Ottoman Empire was ethnically heterogeneous and consisted of Turks, Kurds, Arabs, Greeks, Armenians, Bulgarians, Serbs and other ethnic groups. The majority of them were Muslims, but there were also many Christians and a Jewish minority. Due to the universalistic Islamic concept of empire, which most ostensibly manifested itself in the fact that the sultan was at the same time caliph and therefore religious leader of all Muslims, the population of the Ottoman Empire was divided in two groups: Muslims and members of non-Muslim confessions (the so-called “Milleten”). Correspondingly, ethnic affiliation had no political, legal or social importance.²¹

The separation of the population into Muslims and members of other confessions had far reaching consequences for a person’s political and legal status. Only Muslims were seen as citizens with corresponding rights and duties, whereas Non-Muslims were only granted a certain degree of legal protection.²² To give some examples: only Muslims were allowed to work in the administration or pursue a military career, and Non-Muslims were not allowed to testify before court. The latter were only conceded the legal protection of certain basic rights, such as the right to life and property. They had to pay higher taxes than Muslims, but within the framework of numerous legal restrictions, they were also entitled to establish their own autonomous administrations and jurisdictions under the responsibility of certain religious leaders.²³

As ethnic background came second to religious affiliation, there were no ethnic references in political, legal or social matters, and terms such as “Turk” or “Kurd” had no specific meaning and were not used. Accordingly the notion of a “Turkish Nation” did not exist in the Ottoman Empire. The Kurds were part of the Muslim community,

²¹ Agüicenoğlu, Hüseyin: *Genese der türkischen und kurdischen Nationalismen im Vergleich: Vom islamisch-osmanischen Universalismus zum nationalen Konflikt*, Münster: LIT-Verlag 1997, 60.

²² Agüicenoğlu (1997), 61; Kartal, Celalettin: *Der Rechtsstatus der Kurden im Osmanischen Reich und in der modernen Türkei: der Kurdenkonflikt, seine Entstehung und völkerrechtliche Lösung*, Hamburg: Kovac 2002, 31.

²³ Agüicenoğlu (1997), 62.

although some Kurdish tribes within the Empire were granted a certain degree of autonomy.²⁴

2.1.1.2 The “Young Turks” and the Emergence of Turkish Nationalism

In the course of the 19th century the first nationalist tendencies and movements emerged in the European territories of the Ottoman Empire. These movements led to numerous uprisings, as in Serbia, Bulgaria, Crete and Armenia, and eventually led to the formation of independent states, such as Greece in 1829.²⁵ The disintegration of the empire aggravated the already existing economic difficulties from which the empire suffered.

As these developments threatened the existence of the Ottoman Empire, the second half of the nineteenth century was marked by various attempts by the sultans as well as parts of the population to find a solution to the problems and save the Empire. However, all the efforts, the reforms and counter-reforms, proved insufficient or inadequate to solve the economic problems of the Empire. Additionally, Western-European nation states were interested in engaging economically in some parts of the empire and sought to gain influence in these regions by protecting the Non-Muslim minorities living there. The division of Muslims and Christians and the dissolution of the Ottoman Empire became inevitable.²⁶

The strict reign of Sultan Abdülhamid II at the end of the nineteenth century saw the emergence of a political movement called the “Young Turks” among Turkish intellectuals and students who were later joined by several young army officers. At the beginning, the aim of this movement did not differ much from previous political projects, the principal objective being the preservation of the integrity of the Ottoman Empire.²⁷ With the help of the army, which was very dissatisfied because of poor pay, and with the support of the population, the “Young Turks” organised an uprising and on 24 July 1908 they forced the Sultan to reintroduce the constitution which had previously been in force. Finally, in 1909, the Sultan was forced to resign and the “Young Turks”, who had organised themselves as a political party, the “Committee for Union and Progress”, assumed power.²⁸

²⁴ For a more detailed study on this topic, see: Kartal (2002), 31.

²⁵ Seufert, Günter/Kubasek, Christopher: *Die Türkei - Politik, Geschichte, Kultur*, 2nd Edition, München: C. H. Beck 2006, 72.

²⁶ Seufert/Kubasek (2006), 72; for a more detailed study on the attempts to save the Ottoman Empire see: Agücenoglu (1997), *Genese der türkischen und kurdischen Nationalismen im Vergleich*.

²⁷ Agücenoglu (1997), 129.

²⁸ Agücenoglu (1997), 139.

Although at first the “Young Turks” wanted to preserve the Ottoman Empire, they created a new concept in the course of their activities: “Turkism”. Originally, “Turkism” was a cultural idea aimed at strengthening the part of the Empire’s population which came from a Turkish ethnic background. It soon however became the main political concept of the “Committee for Union and Progress” after the Ottoman Empire lost almost all its European lands in the Balkan wars in 1913.²⁹ The Balkan peoples had gained independence by fostering the idea of the nation, and the nation state was also the model in many other European countries. It appeared obvious that the only alternative to the multi-ethnic Ottoman Empire which had disintegrated was the formation of a state in Anatolia based on the idea of a single Turkish nation. At first the “Committee for Union and Progress” tried to realize the idea of a so-called “Pan-Turkism”, which meant the creation of a single state for all Turkish peoples. But these efforts, which included forced assimilation and was one of the reasons for the “Armenian Tragedy”, proved to be in vain.³⁰

The end of the First World War was also the end of the Ottoman Empire, which had taken part on the side of the Axis powers. The dream of a Pan-Turkish nation was over, but the idea of the Turkish nation remained.

2.1.2 The Turkish War of Independence and the Establishment of the Republic

At the end of World War I the territory of the former Ottoman Empire was occupied by the allied forces according to the provisions of the “Armistice of Mudros” signed in October 1918.³¹ The Sultan dissolved the parliament, the “Party for Union and Progress” disbanded, and a new government, which was supported by the British Empire, was formed in Istanbul. The war had ruined the Empire, its population was demoralised and there was no basis for resistance against the allied occupation forces and their demands.³²

US President Wilson’s Fourteen Point Programme, published on 8 January 1918, provided that non-Turkish minorities should be granted the right to autonomous development.³³ Accordingly, these mainly Christian minorities were by no means opposed to the occupation, and their nationalist desires seemed on the verge of

²⁹ Kartal (2002), 72.

³⁰ Kartal (2002), 140; Seufert/Kubasek (2006), 77.

³¹ Kirisci, Kemal/Winrow, Gareth M.: *The Kurdish Question and Turkey: An Example of a Trans-state Ethnic Conflict*, London: Cass 1997, 68; Seufert/Kubasek (2006), 81.

³² Aguicenglu (1997), 149.

³³ Gunter, Michael M.: *The Kurds in Turkey – A Political Dilemma*, Boulder, Colo.: Westview Press 1990, 11; Yildiz (2005), 7.

realisation. They started to reclaim the lands and workshops which had been given to the local Muslim population during the reign of the “Party for Union and Progress” and the party’s “Turkification” efforts.³⁴

In spring 1919 the young General Mustafa Kemal, a former member of the “Committee for Union and Progress”, was sent to Anatolia to unite and then disarm the dispersed Ottoman troops in the region³⁵. But Mustafa Kemal had other intentions. Having realised that he lived in a time of national movements with no place for multi-ethnic empires, he was convinced that there was no other alternative for the Turks than to found their own national State on a territory where they formed the majority of the population.³⁶

Mustafa Kemal made contact with the Ottoman officers and local Turkish, Kurdish and religious leaders.³⁷ At this stage he did not mention the foundation of a republic, but presented himself as a loyal general who wanted to liberate the empire and the Sultan from foreign occupation.³⁸ Mustafa Kemal and the newly formed leadership began to mobilize the population, campaigning with Islamic symbolism and promoting religious values rather than nationalist motives, because the Anatolian population was religiously homogeneous but ethnically heterogeneous, and because Mustafa Kemal needed the support of the Kurds, who traditionally lived in armed tribes.³⁹

However, the terminology slowly shifted, and during two regional Congresses in Erzurum and Sivas, all the decisions made by Mustafa Kemal and the other leaders were adopted on behalf of the whole “Nation”, which was to be defended against any foreign intervention or occupation.⁴⁰

In March 1920 the allied forces once again occupied Istanbul and the Ottoman parliament was dissolved. As a consequence, many former deputies and members of the army moved to Ankara, which became the new centre of political power. The “Nationalists” around Mustafa Kemal suddenly became the most important political factor. At the elections held on April 23, 1920 the “Nationalists” constituted the “Grand National Assembly”, which declared itself the highest political organ of the country. Mustafa Kemal was elected chairman of the newly formed government.⁴¹

On August 10, 1920, the last Sultan signed the Treaty of Sevres. During the negotiations the Kurdish delegation under Sharif Pasha demanded the establishment

³⁴ Aguicenoğlu (1997), 150.

³⁵ Seufert/Kubasek (2006), 81.

³⁶ Aguicenoğlu (1997), 157.

³⁷ Seufert/Kubasek (2006), 82.

³⁸ Kirisci/Winrow (1997), 76.

³⁹ Aguicenoğlu (1997), 161.

⁴⁰ Aguicenoğlu (1997), 165-166.

⁴¹ Id., 168; Kirisci/Winrow (1997), 77.

of an independent Kurdish State.⁴² Article 62 of the Treaty of Sevres finally provided local autonomy for the Kurds and Article 64 even foresaw the possibility of independence at a later stage.⁴³ According to the treaty, most parts of the remaining territory of the Ottoman Empire were ceded to the victorious powers, leaving only a small part of central Anatolia to the Turks. However, the Treaty of Sevres was never ratified by Turkey.⁴⁴

As early as 1916 France and Great Britain had secretly signed the “Sykes-Picot-Agreement” which provided that France should occupy the Lebanon, Syria and the province of Mosul, while Britain would try to secure its influence in the region between Palestine and the Persian borders.⁴⁵ At the time the “Armistice of Mudros” was signed, Britain occupied most parts of the Kurdish-populated areas, including the province of Mosul, which was of particular interest to Britain because of its oil resources. For fear of losing control over these resources, but also for strategic reasons, Britain became more and more reluctant to support Kurdish independence in the region.⁴⁶

After the “Grand National Assembly” had been established in Ankara, the nationalist military officers under Mustafa Kemal united the remnants of the dispersed Ottoman Army under their command and the so-called war of National liberation began.⁴⁷ The Turkish army defeated the occupying forces, and on July 24, 1923, the Treaty of Lausanne was signed, which superseded the treaty of Sevres. Turkey was internationally acknowledged as an independent state.⁴⁸

In 1926 the long-lasting conflict over the region around Mosul was settled by a tripartite agreement between Britain, Turkey and Iraq, which finally separated the Kurds in Iraq from those in Turkey, as the region around Mosul remained part of the territory of Iraq.⁴⁹ The division of Kurdistan was completed when Syria was able to establish its borders under French mandate, and Turkey and Iran signed an agreement of friendship and non-aggression in which they acknowledged the frontiers that had existed between the Ottoman and the Persian Empire.⁵⁰

On October 29, 1923 Mustafa Kemal proclaimed the foundation of the Republic; the Sultanate had already been abolished on November 1, 1922.⁵¹

⁴² Horst-Günther Siegwart/Burchard Brentjes, *Die Kurden – Ein Abriss zur Geschichte und Erfahrungsberichte zur aktuellen humanitären Situation*, (Ethnos, Vol. 59, 2001), 28.

⁴³ Gunter (1990), 11; Kartal (2002), 87.

⁴⁴ Kartal (2002), 88.

⁴⁵ Siegwart/Brentjes (2001), 28.

⁴⁶ Kirisci/Winrow (1997), 69; Kartal (2002), 79.

⁴⁷ Seufert/Kubasek (2006), 83.

⁴⁸ Id.; Kirisci/Winrow (1997), 78.

⁴⁹ Kirisci/Winrow (1997), 72.

⁵⁰ Kirisci/Winrow (1997), 74.

⁵¹ Kirisci/Winrow (1997), 78; Aguicenoğlu, 171.

The Nationalists had finally achieved their goal: The formation of a nation-state. At the beginning of their struggle for independence Mustafa Kemal and his leadership had not made any reference to their intention to create a Turkish nation-state. In order to mobilize the masses and ensure the support of the Kurds, the Nationalists had claimed their aim to be the liberation and protection of Sultan and Caliph. All their emphasis was on religious symbols and values and the brotherhood between Turks and Kurds.⁵² There was no mention of a “Turkish Nation” or a “Turkish State” before the end of the war. Mustafa Kemal did not reveal all of his intentions from the beginning, but proceeded step by step to achieve his goal, which was the establishment of a Turkish nation-state.⁵³ After the “Nationalists” had assumed power, followed by military successes against the occupying forces, they used their popularity to abolish the Sultanate and proclaim the Republic. They claimed to be the only representatives of the nation and maintained control by suppressing any form of political opposition. The Turkish Nation-State had been established, but the Turkish Nation still had to be created.

Before the Republic was proclaimed the majority of the Kurds had felt loyal to the Turks, with Islam as the primary source of their solidarity, and there were only some smaller rebellions at tribal level. Apart from a few members of the Kurdish elite who promoted the idea of Kurdish autonomy or an independent Kurdish State, one can say that there was hardly any ethnic or national self-awareness among the Kurds.⁵⁴ Tribal adherence and Islamic unity were more important than ethnicity, and these two factors constituted the major impediments to the development of Kurdish nationalism. This lack of Kurdish nationalism, strategic considerations by the occupying forces as well as Mustafa Kemal's call for Islamic unity among Turks and Kurds in the fight against the Christian invaders must be considered to be the main reason why the Kurds missed their chance to establish an independent state at the end of the First World War.⁵⁵

2.1.3 The Creation of a Turkish Nation and the Beginning of Kurdish Resistance

The proclamation of the Republic took place after parliamentary elections had been held in August 1923. The new parliament consisted almost exclusively of handpicked members of Mustafa Kemal's “People's Party”, and the abolition of the Sultanate and

⁵² Barkay, Henri J. /Fuller, Graham E.: *Turkey's Kurdish Question*, Lanham: Rowman & Littlefield 1998, 9; Agucenoglu, 226; Kirisci/Winrow (1997), 91.

⁵³ Agucenoglu, 162.

⁵⁴ Kirisci/Winrow (1997), 79.

⁵⁵ Kartal (2002), 81.

the establishment of a republic were discussed in the course of one session.⁵⁶ Mustafa Kemal was elected first President of the Republic of Turkey, and in 1924, a new constitution was passed.⁵⁷

The new constitution set out new ideological premises for governing Turkey, which constitute the ideological foundation of the Turkish State to the present day.⁵⁸ Based on the idea of the nation state, Mustafa Kemal and his followers created a specific form of Turkish nationalism with the aim of establishing a unified, homogeneous state with a single identity. In order to achieve this, the innovation process that had already begun in the second half of the 19th century to shape the Ottoman Empire along Western European lines was continued. Notions such as the “Turkish government” or the “Turkish Nation” appeared in legal texts and speeches, although their definition was far from clear. At the same time, dramatic new reforms were introduced to change the existing Ottoman balances of power, which had been based on religious structures and rules to a system based on new secular doctrines and to promote the idea of “Turkishness” which was to become the source of the new national identity.⁵⁹

The new nation state, which had been established on the ruins of the Ottoman Empire, still had a multi-ethnic population. To create a homogeneous nation with a single Turkish identity, Mustafa Kemal and the Nationalists in parliament took a series of steps aimed at the suppression and destruction of alternative ethnic identities. At the beginning, the measures adopted consisted of legal acts which directly or indirectly banned or impeded the use of different languages or other manifestations of a different ethnic cultural heritage. These legal acts were followed by acts of forced assimilation and the forced dissolution of communities with a different ethnic background than Turkish.

As the largest and most prominent non-Turkish people in Turkey, the Kurds suffered the most under these policies. During the struggle for independence, the Kurds had fought alongside the Nationalists against the Christians and the occupation forces and their participation had been crucial to the overall nationalist victory. As the majority of the Kurds were Muslims and religion played an important role in the everyday life of Kurdish tribes and families, the liberation of the Caliphate from the occupation of Western Christian forces was an imperative. Mustafa Kemal's tactics to present the war for national independence as a religious war proved to be effective especially among the Kurdish people. But their engagement was also a consequence of the Armenian threat in the north-east of Anatolia. The Anatolian population in the east had suffered

⁵⁶ Kirisci/Winrow (1997), 79.

⁵⁷ Yildiz (2005), 13.

⁵⁸ Yildiz (2005), 13.

⁵⁹ Kirisci/Winrow (1997), 93.

from Armenian attacks in the past, and it seemed likely that with the help of the allied forces, an Armenian Empire was close to realisation. The threat of loosing their homeland and property to the Christian Armenians strengthened the belief in the necessity of fighting with the Nationalists. Mustafa Kemal and his followers therefore campaigned for the Unity of all Islamic people and presented the new state as the homeland for Turks and Kurds. The first nationalist parliament in Ankara included 75 Kurdish deputies.

When the war was over and the nation-building process began, the Kurds were the first to suffer under the new policies of unification and forced assimilation. At the beginning, it was the measures that were aimed at secularisation and restraining Islamic institutions that particularly met with resistance not only from the Kurds but also from religious Turks. The Caliphate was abolished in 1923, religious decisions were made by the parliament, new authorities were established to control religious life, and the fact that Islam was no longer the basis and identity of the State was incomprehensible to many Muslims. But the Nationalists' reforms to extinguish Kurdish ethnic and cultural identity went far beyond.

The Treaty of Lausanne included provisions committing Turkey to guarantee its national minorities certain rights and cultural freedom, but the text of the treaty only covered religious minorities.⁶⁰ Although the relevant provisions seemed to grant every Turkish citizen the right to use to use his own language, the Turkish officials interpreted these terms as if they only applied to non-Muslim minorities⁶¹. The Turkish government perceived them as a threat to the creation of a Turkish nation with a single ethnic identity, and hence prevented ethnic minorities from claiming minority rights on the basis of the Treaty of Lausanne. As a consequence, the Kurds were not recognized as a national minority and their cultural rights, in particular the protection of their language, were denied.⁶²

As early as March 1924 a decree was issued banning all Kurdish schools, organizations and publications, and also religious schools, which were the only source of education for many Kurds, were closed.⁶³ Many Kurds who had engaged in the National movement were forced to leave the country after being suspected of treason. Dissatisfaction among the Kurds about Mustafa Kemal's change of policies after the war and about the reforms grew, and Kurdish nationalism began to take shape. It has

⁶⁰ Kartal (2002), 92; the Treaty of Lausanne will be discussed in more detail in Chapter 3.

⁶¹ Kartal (2002), 107.

⁶² Strohmeier, Martin/Yalcin-Heckmann, Lale: *Die Kurden: Geschichte, Politik, Kultur*, 2nd Edition, München: C. H. Beck 2003, 93.

⁶³ Gunter, Micheal M.: *The Kurds and the Future of Turkey*, Basingstoke: Macmillan 1997, 5.

been argued that the emerging Kurdish nationalism was primarily a reaction to Turkish nationalism and forced assimilation.⁶⁴

The first major Kurdish uprising took place in 1925 under the religious leader Sheik Said.⁶⁵ The uprising was violently suppressed by the Turkish military and Sheik Said and his leadership were arrested and sentenced to death by a so-called “Independence Tribunal”. This trial was only the beginning of a series of measures of “Turkification” and “Secularisation” adopted by the Turkish government in the eastern provinces. Martial Law was imposed, Kurdish villages were destroyed and Kurdish people were deported to western provinces. These violent measures led to further insurgences because in their efforts to fight Kurdish Nationalists and the supporters of the Said-rebellion, the military did not differentiate between rebels and neutral citizens.

The government’s reactions to the uprising were not limited to security measures in the east. Mustafa Kemal and the officials of his “People’s Party” (CHP) also took advantage from it on a political level in order to ban civil opposition throughout the whole country. As early as March 1925 Law No. 578 for the “Maintenance of law and order” was issued and served as the legal basis for the autocratic regime for the next twenty years. Many newspapers were forced to cease publication, opposition parties were banned and the universities were purged of liberal academics.⁶⁶

The violent military actions and the measures of forced assimilation in the east and south-east of Anatolia led to further Kurdish revolts, among them a major uprising at Mount Ararat in 1928, but they were all brutally crushed. Since the Turkish government saw the very existence of the Kurds within Turkey’s borders as synonymous with national disunity, and ultimately with separatism, the State was eager to suppress all manifestations of a Kurdish identity. The Kurdish people represented the largest ethnic group along Turkey’s sensitive borders with Iraq, Iran and Syria, which were also inhabited by an oppressed and frustrated Kurdish community. In order to suppress Kurdish nationalist tendencies and to facilitate assimilation, the Turkish State tried to neutralize their regional dominance in the south-east. On the basis of Law No. 2510, introduced in June 1934, the government therefore started to disperse the Kurdish population to areas where it would constitute a small minority of the total population.⁶⁷ After the first riots in the south-east, special tribunals, the so-called “Independence Tribunals” were established. Their official duty being the preservation of the unity and integrity of the State, these tribunals were used by the government to sentence political opponents and people suspected of nationalist and separatist activities.

⁶⁴ Kirisci/Winrow (1997), 103.

⁶⁵ Kirisci/Winrow (1997), 104.

⁶⁶ Seufert/Kubasek (2006), 88.

⁶⁷ Compare: Kirisci/Winrow (1997), 98; Gunter (1997), 5.

During the 1930s, the six basic principles of “Kemalism” were laid down: “Republicanism”, “Secularism”, “Nationalism”, “Populism”, “Statism” and “Revolutionism”.⁶⁸ Among these principles, nationalism and secularism in particular had far-reaching consequences for the Kurdish people.

Turkish nationalism was introduced by the regime in a way which left no place for any expression of Kurdish ethnic awareness. The official Turkish historical thesis claimed that the world’s civilisation had been founded by the Turks and that the Turkish language was the source from which all other languages had developed. As the Kurds had lived in the mountains for a long time, isolated from the Turkish civilization, they had simply forgotten their mother tongue. The official doctrine was that “Kurdish” contained fewer than 800 words and was therefore not a language, and the Turkish Kurds were referred to as “Mountain Turks”. One theory went as far as to argue that the word “Kurd” was nothing more than the corruption of the sound a person made when walking on snow-covered mountain-paths.⁶⁹

As well as its nationalist doctrines the government also continued its policies of secularisation. In 1925 a new law obliged men to wear Western hats instead of the “fez”. At the same time Islamic orders which had played an important role in the everyday life of religious Muslims were closed. Women were given parity with men in most legal domains, the Suisse code of civil law was introduced in 1926, polygamy and religious weddings were forbidden by law, and in 1928 parliament removed the passage which declared Islam the state religion from the constitution. From 1932 onwards the call for prayer was only permitted in Turkish and no longer in the Arabic.⁷⁰

It has been noted above that the Kurds live in tribal structures where religion played an important part in everyday life. It is therefore understandable that the Kurds not only opposed the reforms aimed at creating a Turkish nation and abolishing any other ethnic identity, but that they were also against the measures of secularisation.⁷¹

After another major Kurdish uprising in the region of Dersim (Tunceli) had been suppressed by the Turkish military, the government declared a state of emergency in the south-east and introduced a special administration for those provinces where the Kurds represented the majority of the population. The Dersim-Uprising was the last major Kurdish revolt at this early stage in the history of the Turkish Republic. For the following two decades the Kurds stayed relatively calm, although the government’s reforms and measures of “Turkification” continued.⁷²

⁶⁸ Gunter (1997), 6.

⁶⁹ Gunter (1997), 6.

⁷⁰ Compare: Seufert/Kubasek (2006), 89; Kirisci/Winrow (1997), 101.

⁷¹ Strohmaier/Yalcin-Heckmann (2003), 99.

⁷² Strohmaier/Yalcin-Heckmann (2003), 98.

Mustafa Kemal, who had the title “Atatürk” (“Father of the Turks”) conferred on him by the Turkish parliament in 1934, had finally created the “Turkish Nation”.⁷³ His reforms and the principles which he established and which are known under the term of “Kemalism” have constituted important guidelines for the subsequent Turkish governments and they have an enormous influence on Turkish policies to the present day. As the Turkish Nation had to be created out of an ethnically heterogeneous population, Atatürk championed the Turkish language and citizenship and tried to avoid any reference to cultural heritage and other ethnic criteria. Manifestations of different ethnic identities were perceived as a threat to the unity and integrity of the State and the nation and were therefore violently suppressed.

2.1.4 The Beginning of Democratisation

Atatürk died in November 1938, but the principles of his policies and his vision of a modern, secular, independent and ultimately democratic Turkish State remained.⁷⁴

It was Atatürk's successor as chairman of the “Republican People's Party” (CHP) and “National Leader”, İsmet İnönü, who took an important step towards democratisation, when he allowed the formation of the “Democrat Party” (DP) in 1946.⁷⁵

In 1950 the DP won the national elections because she had been able to mobilize the population in the east and to build political organisations there. Other parties followed the DP's example. In the following years the Kurds began to identify with Turkish party-politics and there were even Kurds, mainly Sheiks and Agas from a conservative background who actively participated in Turkish politics. As the DP was more liberal than the CHP, military control over the south-east became less restrictive and many Kurds who had been deported to the west of the country returned to their traditional homelands.⁷⁶

The DP supported the agricultural as well as the industrial sector and the first five years of its government saw enormous economic growth. But despite this the economic situation of parts for the population, especially in the agricultural sector, worsened. Social dissatisfaction among the population was mixed with “Kemalist” opposition.⁷⁷ The government reacted with authoritarian measures, aided by the fact that the constitution of 1924 contained no checks and balances such as bicameralism or a constitutional court. Political control over the bureaucracy, press, universities and

⁷³ Seufert/Kubasek (2006), 89.

⁷⁴ Gunter(1997), 7.

⁷⁵ Gunter(1997), 7.

⁷⁶ Strohmaier/Yalcin-Heckmann (2003), 102.

⁷⁷ Seufert/Kubasek (2006), 94.

judiciary was extended. Finally, all political activity outside parliament was banned. Student demonstrations and riots finally led to a military coup on May 27, 1960, which put an end to the DP government.⁷⁸

The Turkish military has always seen itself as the guardian of the State and the “Kemalist” principles. One of the main reasons for its intervention in 1960 was the participation of prominent Kurds in the DP, which was seen by the military officers as evidence of a growing regionalism that might finally lead to a disintegration of the State.⁷⁹ The DP was dissolved, many of its members were arrested and its leadership was executed. As a counter to the threat of growing Kurdish influence the military detained about 485 Kurds and exiled 55 influential Kurds to western Turkey for a period of 2 years.⁸⁰

One year after the coup the military presented a new constitution which provided checks and balances to avoid an excessive concentration of political power. Proportional representation was introduced, a second parliamentary chamber was created, the powers of the president were extended, the position of the judiciary within the political system was strengthened and an independent constitutional court was established. At the same time, the new constitution extended the range of civil liberties, permitting new possibilities for political activity, such as the right to strike for trade unions. However, the new constitution also provided a political role for the military by establishing the National Security Council (NSC). Consisting of an even number of military members and members of government, the constitutional task of the NSC was to advise the government on matters of internal and external security. But the NSC extended its powers the following year to become the decisive political power in matters of security. The NSC was to play a crucial role in the Kurdish question, in particular during the fighting between the PKK and the Turkish government forces in the 1990s.⁸¹

As subsequent governments proved unable to solve the country’s social problems during the 1960s, political groups and forces from the left of the political spectrum, supported by parts of the military, started to mobilize the population, which led to demonstrations that were violently suppressed by the government. Parts of the Turkish left saw the “Kurdish Question” as simply an example of economic under-development and thought of it as part of the national, anti-imperialist struggle, whereas others emphasized the ethnic or even national character of the problem. Controversial debates about ethnicity lead to a division and conflict between Turkish and Kurdish

⁷⁸ Gunter (1997), 7-8.

⁷⁹ Strohmaier/Yalcin-Heckmann (2003), 102.

⁸⁰ Gunter (1990), 15.

⁸¹ Gunter (1997), 8-9.

intellectuals.⁸² However, many Kurds joined Turkish leftist movements because Kurdish organisations were banned. On the streets, violence increased with terrorist acts and clashes between demonstrators of the political left and the political right.⁸³ On March 12, 1971, the military intervened again, presenting a Memorandum with their political demands to the Prime Minister. Within hours, the government resigned.⁸⁴

During the 1960s, parts of the Kurdish population became politically active as more and more Kurds became aware of their ethnic identity.⁸⁵ Meetings were organised where the participants called for more schools, economic development in the south-east and an end to the policies of suppression and assimilation.⁸⁶

In response to the country's economic and social problems, the CHP under Bülent Ecevit developed a party programme of policies that were fairly social-democratic in nature and won the majority in the elections of 1973, after a cabinet of technocrats had ruled the country as an interim government. Because of its social-democratic leanings the party was also supported by many Kurdish leaders.⁸⁷

Turkey's invasion of Cyprus in 1974 had far-reaching consequences. The USA declared a weapons embargo and European countries also stopped their economic subsidies. As Turkey's military expenditure increased, the country's existing economic problems worsened, and a change of economic policies introduced by the government only aggravated existing social problems, leading to demonstrations and strikes. Once again violent clashes occurred between armed, radical left-wing groups and fascistic armed forces such as the "Grey Wolves". Numerous political assassinations took place and the government seemed incapable of stopping the terrorist actions committed by the political opposition (MHP= and its radical organisations, as well as by the radical leftist groups.⁸⁸ The military coup of September 12, 1980 finally put an end to the conflict.

⁸² Strohmaier/Yalcin-Heckmann (2003), 105.

⁸³ Gunter (1990), 17.

⁸⁴ Seufert/Kubasek (2006), 95.

⁸⁵ Kirisci/Winrow (1997), 107.

⁸⁶ Strohmaier/Yalcin-Heckmann (2003), 106.

⁸⁷ Gunter (1990), 19.

⁸⁸ Seufert/Kubasek (2006), 96; Strohmaier/Yalcin-Heckmann (2003), 108; for a more detailed analysis of the violence in the 1970s see: Gunter (1990), 23-37.

2.1.5 The Consequences of the Military Coup of 1980 and the Rise of the PKK

2.1.5.1 The Constitution of 1982

The military intervention of 1980 differed from those of 1960 and 1971. As politics had reached almost all classes of society, the military did not only remove the political elite from power but resorted to more extensive measures to impose its economic and political line. Parties, unions and many organisations were prohibited, politicians were banned, many people were imprisoned and prosecuted, and political liberties were restricted.⁸⁹

In 1982 the new constitution which had been drawn up by the military was adopted. It conferred a considerable amount of political influence and power to the military and subjected political rights and freedoms to far-reaching restrictions. Since many Turkish citizens had started to redefine themselves as Kurds in the course of the 1970s, the military imposed heavy restrictions on any manifestation of identities that differed from the Turkish identity.⁹⁰

Without using the word “Kurdish”, the new constitution also contained a number of provisions aimed at limiting any expression of a separate Kurdish culture and identity (or that of the cultures and identities of other minority groups). Its intentions were clear right from the preamble which declared “...*the determination that no protection shall be afforded to thoughts or opinions contrary to Turkish national interests, the principle of the existence of Turkey as an indivisible entity with its state and territory, Turkish historical and moral values, or the nationalism, principles, reforms and modernism of Atatürk*”. Article 11 of the Constitution emphasized the indivisible integrity of the nation and its territory, and Article 14 prohibited “...*violating the indivisible integrity of the state...or creating discrimination on the basis of language, race religion or sect, or of establishing by any other means a system of government based on these concepts and ideas*”. Article 26 provided that “*no language prohibited by law shall be used in the expression and dissemination of thought. Any written or printed documents, phonograph records, magnetic or video tapes, and other means of expression used in contravention of this provision shall be seized*”. And according to Article 28 “...*publication shall not be made in any language prohibited by law*”.⁹¹

On October 22, 1983 Law No. 2932 declared that it was “...*forbidden to express diffuse or publish opinions in any other language than the main official language of states*

⁸⁹ Seufert/Kubasek (2006), 97.

⁹⁰ Kirisci/Winrow (1997), 110.

⁹¹ Gunter (1990), 45; Gunter (1997), 9; a more detailed analysis of the Turkish Constitution in its present form and its consequences for the situation of the Kurds in Turkey will follow at a later stage.

recognized by the Turkish state". Furthermore, it was prohibited "... to use as a mother tongue any other language than Turkish, ... and to carry, at public gatherings and assemblies, placards, banners, signs, boards, posters and the like written in a language other than Turkish".⁹²

For the following two decades these provisions were the basis of the government's policy of suppression of the Kurdish culture, and the constitutional restrictions on other fundamental rights legitimized a violent campaign against any display of Kurdish identity, which was perceived by the Turkish State as a threat to the integrity of the Turkish nation and the indivisibility of its territory. Even today, after a series of reforms, the Constitution of 1982 seems to be one of the main obstacles to further democratisation and the introduction of additional minority rights in Turkey.

2.1.5.2 The Inter-State Application against Turkey under the ECHR in 1982

In 1982 Denmark, France, Norway, Sweden and the Netherlands filed Inter-State applications against Turkey with the ECtHR. These applications related to the situation in Turkey between the military coup on 12 September 1980 and 1 July 1982.⁹³

The applications referred to the dissolution of the Turkish Parliament in September 1980 and the transfer of its powers to the National Security Council as well as the transfer of full executive power to the Chairman of the Council. In general, the applicant governments submitted that the then-applicable law of the Constitutional Order of 27 October 1980 and a number of laws and decrees made under it abrogated the constitutional protection of fundamental rights. The applicant Governments alleged violations of

- Art 3 of the ECHR, in that detainees were tortured or subjected to inhuman or degrading treatment in a widespread and constituted practice
- Arts 5 and 6 of the ECHR with regard to the detention and criminal proceedings under martial law; and
- Arts 9, 10 and 11 of the ECHR with regard to restrictions on political parties, trade unions and the press.⁹⁴

⁹² Gunter (1997), 10.

⁹³ Application No. 9940/82 *France v. Turkey*, Application No. 9941/82 *Norway v. Turkey*, Application No. 9942/82 *Denmark v. Turkey*, Application No. 9943/82 *Sweden v. Turkey*, and Application No. 9944/82 *Netherlands v. Turkey* (joined).

⁹⁴ Applications No. 9940/82, 9941/82, 9942/82, 9943/82 and 9944/82 (joined), *Report of the Commission*, adopted on 7 December 1985, Para 5-7; a summary can be found in: Rumpf: "Die gütliche Einigung im Staatenbeschwerdeverfahren gegen die Türkei", in: Europäische Grundrechte Zeitschrift (EuGRZ), Kehl/Strasbourg: N.P. Engel Verlag 1986, 177.

In addition, the applications also referred to the notice of derogation made by the Turkish Government under Art 15 ECHR. They argued that irrespective of the situation in Turkey prior to the military coup, a public emergency threatening the life of the nation did not exist in July 12, 1982; that legislation, administrative measures and practices complained of went beyond what was strictly required by the exigencies of the situation; and that the right of derogation under Art 15 could not be invoked to justify violations of Art 3 ECHR.⁹⁵

The Turkish government contested these allegations and argued that the derogation was justified due to a state of veiled war and public emergency threatening the life of the nation, prevailing during the respective period.⁹⁶

In its decision of 6 December 1983, the Commission declared the applications admissible.⁹⁷ Following long-lasting proceedings with numerous submissions and meetings, including a visit to Turkey by a delegation of members of the parties involved, the parties finally reached a friendly settlement which brought proceedings to an end in December 1985.⁹⁸ The friendly settlement mainly focused on the alleged violation of Art 3 ECHR through systematic torture and Turkey agreed to introduce and comply with certain monitoring mechanisms in order to prevent cases of torture or inhuman or degrading treatment of detainees. In respect of the derogation under Art 15 of the Convention, reference was made to the gradual lifting of martial law and to the numerous Turkish laws and decrees which had been criticised by the applicant governments had already been amended by the time the friendly settlement was reached.⁹⁹

The military coup and subsequent events had obviously been of concern to other European states. However, the Inter-State application only focused on events and general restrictions on certain human rights relating to a limited period of time under martial law. But apart from these problems, which were limited to a specific time, the military coup and the introduction of a new constitution which provided for a restrictive human rights regime and suppression of minority groups had far-reaching and long-lasting consequences, in particular for the Kurdish population and the situation in the Turkish south-east.

⁹⁵ Applications No. 9940/82, 9941/82, 9942/82, 9943/82 and 9944/82 (joined), *Report of the Commission*, adopted on 7 December 1985, Para 8.

⁹⁶ Applications No. 9940/82, 9941/82, 9942/82, 9943/82 and 9944/82 (joined), *Report of the Commission*, adopted on 7 December 1985, Para 9-11.

⁹⁷ European Commission on Human Rights: “Applications/Requêtes N° 9940-9944/82 (joined/jointes) – Decision of 6 december 1983 on the admissibility of the applications”.

⁹⁸ Applications No. 9940/82, 9941/82, 9942/82, 9943/82 and 9944/82 (joined), *Report of the Commission*, adopted on 7 December 1985, Para 36.

⁹⁹ Applications No. 9940/82, 9941/82, 9942/82, 9943/82 and 9944/82 (joined), *Report of the Commission*, adopted on 7 December 1985, Para 37-41; Rumpf (1986), 180.

2.1.5.3 The Rise of the PKK and the Conflict in the South-East

The aim of introducing the new Constitution and subsequent legal measures in 1982 which restricted the use of languages was, among others, the suppression of any cultural identity that differed from the Turkish one. The Kurds in particular were the target of these restrictions. Speaking about “Kurds” was prohibited, as was claiming “Kurdish interests” or forming a political party representing “the Kurdish people”. Nevertheless the Kurds seemed to re-discover their common cultural and national interests. The military coup had put an end to the movements of the political left and right, and the model of the communist and socialist struggle against capitalism and imperialism seemed obsolete.¹⁰⁰ As a consequence, the ethnic, cultural and national aspects of the Kurdish struggle began to take precedence amidst continuing economic and social concerns.

It was against this background that the “Kurdistan Workers’ Party” (*Partya Karkeren Kurdistan*), the PKK, which was founded by Abdullah Öcalan in 1978, began and expanded its activities and became the most influential Kurdish organisation in Turkey. The party’s aim was the establishment of an independent Kurdistan, and in 1984 its members carried out their first violent actions, attacking military posts and police stations in the south-east of Turkey. At first the government in Ankara thought the movement to be a small group of extremists that could be dealt with by the local police. But the PKK attracted more members and extended its activities to civilian targets, even killing teachers and doctors and fighting rival movements. Prime Minister Turgut Ozal who had won the elections of 1983 as head of the “Motherland Party” finally realised that the PKK constituted a serious threat to security in the south-east and he instituted the “Village Guards System” by arming Kurdish people or even whole tribes to support the security forces in the fight against the PKK. By 1994 the number of “village guards” who were paid by the Turkish state had reached more than 60,000.¹⁰¹ In response to the escalating conflict between the PKK and the Turkish security forces and the deterioration of the security situation, the Turkish Parliament declared a civil state of emergency in south-eastern Turkey. Specific state of emergency legislation was introduced which established an emergency civil administration headed by a regional governor vested with full administrative powers. These unrestricted, overall

¹⁰⁰ Seufert/Kubasek (2006), 154.

¹⁰¹ Seufert/Kubasek (2006), 154.

powers, that were not open to judicial review, contributed substantially to multiple human rights abuses and the breakdown of the rule of law in the region.¹⁰²

Despite the Turkish State's military and administrative efforts, the PKK could not be defeated. In 1993 the organisation reached the peak of its power and was able to establish a kind of parallel-administration in parts of the Turkish south-east.¹⁰³ In the same year Tansu Ciller, head of the True Path Party (DYP), became Prime Minister in a coalition government with the Social Democratic Populist Party. But the new government was unable to reach an agreement on an adequate policy on the "Kurdish Question" and the conflict with the PKK. In the same year President Turgut Ozal, who seemed to have adopted a fairly liberal attitude towards the Kurds, died and was succeeded by Suleyman Demirel. The military took advantage of the government's weakness and implemented a plan for a solely military solution to the "Kurdish Problem". By 1994 one quarter of Turkey's army was stationed in the south-east raising the number of security forces fighting the PKK to about 300.000.¹⁰⁴ The war escalated further and the military's actions included arbitrary arrest, execution, torture, the destruction of villages and the burning of forests. But the village guards too, armed and funded by the State, were responsible for many violent acts including theft, beatings and rape.¹⁰⁵ In total, the security forces destroyed and/or evacuated more than 2,500 villages and about 3 million civilians fled or were forcibly displaced to the west of the country.¹⁰⁶ At the same time, the conflict exacerbated Turkey's existing economic problems.¹⁰⁷

In 1995, the PKK declared a unilateral ceasefire and Abdullah Öcalan declared that an independent state was not his goal. The PKK continued to launch attacks and occasional fighting continued, but the war seemed to be over. On February 16, 1999, Abdullah Öcalan was finally arrested in Kenya, after political pressure from Ankara had forced him to leave Syria. He was sentenced to death by a Turkish court but the European Court of Human Rights declared that the Turkish court had seriously violated Öcalan's procedural rights. In 2002 state of emergency legislation was finally lifted in the south-east. Following Öcalan's arrest, the PKK at first stopped its attacks and tried

¹⁰² Yildiz (2005), 16; for a detailed description of the laws and decrees enacted in connection with the State of Emergency in the south-east see: *Akdivar and others v. Turkey*, Judgement of the ECtHR of 16.09.1996, Reports 1996-IV, Para 28-43; the problem of human rights violations in the Turkish fight against terrorism will be described later in this chapter.

¹⁰³ Seufert/Kubasek (2006), 155.

¹⁰⁴ Seufert/Kubasek (2006), 155.

¹⁰⁵ Yildiz (2005), 17.

¹⁰⁶ These figures vary depending on the source; e.g. Seufert/Kubasek (2006), 155; Yildiz (2005), 17; Oguz Berk, *Kurdenpolitik der Türkei ab 1999 – Auswirkungen der Beitrittsbestrebungen zur EU* (2005), 47.

¹⁰⁷ Seufert/Kubasek (2006), 155.

to form a political organisation, but as this proved unsuccessful, it returned to its policies of violent attacks in 2005.¹⁰⁸

2.1.5.4 Turkish Policies regarding the Kurdish Question in the Course of the 1980s and 1990s

It has already been shown that the constitution of 1981 and many laws enacted on its basis imposed severe new restrictions on Kurdish cultural and political expression. The introduction of the System of Emergency Rule and the military operations which often not only targeted the PKK but also the civilian population also seemed to be part of an overall Turkish policy aimed at the forced assimilation of the Kurds and the extinction of a distinct Kurdish identity. In 1990 the regional governor was granted extraordinary powers to censor the press, to exile people who presented a “danger to law and order”, to remove judges and public prosecutors, and to suspend trade union rights.¹⁰⁹

Although it seemed as if the government under Turgut Özal was willing to continue the strict traditional Turkish policy of suppression towards the Kurds, there were signs of a reassessment of the Turkish authorities’ position. In October 1989 and April 1990, Özal admitted that the State had committed mistakes in its treatment of the Kurds and he indicated that the government was willing to seek a political solution to the “Kurdish Question”.¹¹⁰

On Özal’s initiative, legal provisions prohibiting the use of the Kurdish language, which had been introduced by the military in 1983, were partly lifted and the Kurdish language was now permitted in everyday conversation. It was only a partial legalization and using Kurdish in public agencies, in newspapers, radio broadcasts or in school remained a criminal offence, but it was a sign that Özal acknowledged the existence of a separate Kurdish language and identity within Turkey. The reform provoked controversy among politicians. While some of them described it as a “positive step”, others declared it to be an “attempt at dividing the country” and refused to accept the existence of a discrete Kurdish language.¹¹¹

Turgut Özal, who became President in 1989, was not the only Turkish politician who was willing to take a more liberal approach to the “Kurdish Question”. In 1990 the Social Democratic Populist Party issued a comprehensive policy report on the “Kurdish

¹⁰⁸ Seufert/Kubasek (2006), 155.

¹⁰⁹ Gunter (1997), 61.

¹¹⁰ Gunter (1997), 61; Strohmaier/Yalcin-Heckmann (2003), 110.

¹¹¹ Gunter (1997), 62-63.

Problem” that called for the abolition of all restrictions on the use of the mother tongue and for the right to use the mother tongue in every situation of daily life.¹¹²

This change in the Turkish authorities’ attitude began for various reasons. Perhaps the most important factor was the Gulf War of 1991 which forced hundreds of thousands of Iraqi Kurds to flee and look for refuge in Turkey. Suddenly the world’s attention focused on the situation of the Kurds in Turkey and Iraq, and even the fighting between Turkey and the PKK seemed to become a matter of international concern. Özal realised that Turkey was perceived by the international community as an important ally in the war against the regime in Iraq. He knew that by changing its policy towards the Kurds Turkey would be seen as a responsible partner by the international community and would therefore be involved in finding a solution regarding the Kurds in Iraq.¹¹³

The partial legalization on the use of the Kurdish language and some of Özal’s public statements seemed to initiate the beginning of a liberalisation in Turkey’s policies on the Kurds, but at the same time the government took legal measures which facilitated the suppression of any expression of Kurdish identity and punished those who claimed Kurdish rights. Article 8 of the Anti-Terrorism Law, introduced in 1991, provided that: *“Written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with its territory and nation are prohibited, regardless of the methods, intentions and ideas behind such activities”*. The broad and imprecise formulation of this provision enabled the authorities to consider any person speaking up for Kurdish rights to be engaging in terrorist acts. Similarly, verbal or written support for Kurdish rights often lead to charges under Article 312 of the Turkish Penal Code for *“...provoking hatred or animosity between groups of different race, religion, region or social class”*. In particular academics, intellectuals and journalists who referred to a “Kurdish people” or dared to claim Kurdish rights often faced charges under these provisions.¹¹⁴

In 1990 former members of the Social Democrat Party, who had been expelled from parliament for attending a conference on “Kurdish National Identity and Human Rights” in Paris, founded the Peoples Labour Party (HEP). This party was designed to be a legal, political organisation representing the Kurds in Turkey and the simple fact that its foundation was tolerated by the Turkish authorities was a clear sign that Turkey seemed willing to follow a new policy towards the Kurds. As the founding congress of the HEP could not be held in time for the party to participate in the 1991 national elections, some of its members rejoined the Social Democrat Party and were elected to

¹¹² Gunter (1997), 61.

¹¹³ Gunter (1997), 61; Strohmaier/Yalcin-Heckmann (2003), 110-111.

¹¹⁴ Gunter (1997), 10.

parliament. When the new members of parliament were sworn in, two of these Kurdish deputies, Hatip Dicle and Leyla Zana, provoked uproar as they wore the Kurdish national colours and used the Kurdish language. While this behaviour caused turmoil among Turkish deputies, President Özal and Prime Minister Demirel seemed eager to calm the situation.¹¹⁵ The 14 HEP deputies later resigned from the Social Democrat Party after the party had concurred with its coalition partner, the DYP, in renewing emergency rule in the Kurdish populated south-eastern provinces, which was a breach of the promises the party had made in its electoral programme.¹¹⁶

2.1.5.5 Kurdish Policies under Prime-Minister Demirel

When Prime Minister Suleyman Demirel assumed office in 1989 it seemed as if he was willing to continue the more liberal and democratic policies in relation to the Kurds that had begun under Prime Minister Özal. He publicly acknowledged the existence of different ethnic groups in Turkey and declared that these groups should be allowed to express their identity and culture. Deputy Prime Minister Erdal Inönü went so far as to declare that the Kurdish citizens' cultural identity had to be recognized. In a joint report the government even affirmed that diversity did not weaken a democratic and unitary state and that basic human rights such as everyone's right to develop his mother tongue, culture, history and religious beliefs would be guaranteed within the framework of the law.¹¹⁷

These declarations were accompanied by several positive measures by the new government during the following months. More than 200 Kurds who had lost their citizenship for political reasons regained it, a newspaper in Kurdish was permitted, a Kurdish Institute was established in Istanbul, parents were allowed to give their children Kurdish names, the censorship of some films was lifted and the notorious prison of Eskişehir was closed. In December 1991 Demirel and Inönü, accompanied by the chief of the general staff and four ministers, travelled to five provinces in the south-east to study the situation "in the field" and demonstrate their honourable intentions. In the presence of thousands of cheering Kurds, Demirel declared that Turkey had recognized the Kurdish reality, but at the same time, he made it clear that he expected terrorism to end and for Kurds to be loyal to the Turkish government. The government

¹¹⁵Gunter (1997), 65-66; Strohmaier/Yalcin-Heckmann (2003), 111

¹¹⁶Kirisci/Winrow (1997), 137.

¹¹⁷Gunter (1997), 66-67.

really seemed to have changed its position and policy on the Kurds, and even the PKK asked its supporters to respect the government's mission through the south-east.¹¹⁸

The government's initiative and its reforms proved to have poor results and the situation in the south-east did not improve. Violence once again escalated during the Kurdish Newroz holiday in March 1992, and although the government officially claimed that terrorists had launched an attack against the State, the Social Democrat Party reported that there were indications that excessive use of force and provocation by the security forces had been the reason for the confrontation, which resulted in the deaths of more than 70 people.¹¹⁹

At the same time the mysterious killings of Kurdish leaders and Kurdish civilians continued. Among the victims were members of pro-Kurdish parties and organisations, pro-Kurdish activists, Kurdish journalists with critical views, or ordinary civilians who had refused to join the village guards. It was argued that these murders were committed by groups of armed radical right-wing activists (the so-called "Hizbullah-contras") or members of so-called special teams which were part of the Turkish military and trained for close-combat. Although the government denied any involvement in the killings, it can be assumed that the counter-guerrillas had close links to the Turkish authorities and acted with the government's secret approval. This theory is also based on the fact that the killings of Kurdish leaders and sympathizers hardly ever resulted in arrests or prosecutions, whereas at the same time many Kurds who were suspected of "separatist propaganda" were detained and prosecuted.¹²⁰

While the government publicly declared that it was willing to reassess its position regarding the "Kurdish Question" it continued its traditional policies of violent suppression, giving precedence to "national security" over basic human rights. In their war against PKK terrorism the Turkish authorities did not hesitate to use the methods and instruments of the terrorists and the Turkish military did not differentiate between PKK fighters and Kurdish civilians during its operations.¹²¹

But even the political reforms that were introduced did not bring the expected positive results for the Kurds as they mostly existed on paper and were never actually carried out. While the use of the Kurdish language was partly legalized, at the same time the authorities began to treat claims for Kurdish cultural rights as terrorist acts under the newly introduced Anti-Terror Law. The government theoretically allowed the publication of newspapers in Kurdish, but the first Kurdish newspaper was quickly forced to stop

¹¹⁸ Gunter (1997), 66-67.

¹¹⁹ Gunter (1997), 68.

¹²⁰ Gunter (1997), 69.

¹²¹ Gunter (1997), 73.

publication. In a similar move, a few hours after a Kurdish Institute had been opened the police tore down its bilingual sign.¹²²

The fact that Turkey banned any legal Kurdish political activity by closing down pro-Kurdish political parties and arresting politicians who spoke up for Kurdish cultural rights was perhaps the most important factor preventing any improvement in the “Kurdish Question”. In November 1992 the Ankara State Security Court prosecutor announced that he would seek the death penalty for 18 HEP-members of parliament for subversive statements they had made at their recent congress. They were accused of chanting slogans praising the PKK, calling certain parts of Turkey “Kurdistan” and describing the Turkish army in the south-east as an “illegal occupation force”. The HEP was dissolved by the Turkish authorities in 1993, but its members founded the Democracy Party (DEP) to continue their political activities. In March 1994 the Turkish parliament lifted the immunity of six DEP members, among them party chairman Ahmet Turk, Leyla Zana and Hatip Dicle. They were arrested and charged under Article 125 of the Turkish Penal Code which provided that: *“Any person who carries out any action intended to destroy the unity of the Turkish state or to separate any part of the territory from the control of the Turkish state shall be punished by death.”* Five of these DEP-members were finally found guilty and were sentenced to prison terms of between seven and a half and 15 years. The following year the high court upheld the 15-years sentence of Zana, Dicle and two other DEP members and reduced the remaining sentence to the time served. According to the court’s argument the aims of the sentenced DEP members were identical to those of the PKK.¹²³

On June 16, 1994 the DEP was formally banned by the Turkish Constitutional Court. Its successor, the People’s Democracy Party (HADEP), participated in the parliamentary elections of 1995 but only gained 4.2 % of the votes and could not take a seat in parliament because of the national 10% minimum threshold. The HADEP claimed to stand for the peaceful co-existence of Turks and Kurds and a democratic solution to the “Kurdish Question”.¹²⁴

On April 17, 1993 President Turgut Özal died and, after a short period of political instability, Suleyman Demirel emerged as his successor, while Tansu Ciller, head of the True Path Party became Prime Minister. As Özal had appeared to be the only Turkish politician willing to find a political solution to the “Kurdish question”, his death seemed to put an end to Kurdish hopes for cultural rights and peace in the south-east. The authorities in Ankara, who perceived the Kurdish issue rather as a matter of

¹²² Gunter (1997), 73.

¹²³ Compare: Gunter (1997), 14-15; Kirisci/Winrow (1997), 138.

¹²⁴ Strohmaier/Yalcin-Heckmann (2003), 112.

national security than as a political question, saw the declaration of the ceasefire in 1993 as a sign of the PKK's weakness and did not accept Abdullah Öcalan's proposal for negotiations. The army's campaign continued and when the PKK killed a group of Turkish soldiers in May 1993, the ceasefire ended and the fighting once again escalated.¹²⁵

At the beginning of her period of office Tansu Ciller seemed nevertheless willing to continue a peaceful and liberal policy in respect of the "Kurdish Question". However, her proposals for additional cultural rights met with harsh criticism from the Turkish authorities and even from members of her own party. She finally withdrew them, leaving the Kurdish issue completely in the hands of the military which increased its efforts in combating the PKK.¹²⁶

In 1995 Turkey achieved a major breakthrough in its efforts to achieve further European integration when it joined the European Customs Union on March 6. One of the major points in the negotiations between the Turkish authorities and the European institutions was Turkey's poor human rights record. The European Commission called for improvements in Turkey's human rights standards while the European Parliament even demanded the fulfilment of certain human rights criteria. The Turkish Parliament finally amended fifteen Articles and the preamble of the Constitution and made changes to its Anti-Terrorism Law. The imprecise formulation of Article 8 of the Anti Terror Law was amended. By removing the phrase "*...regardless of the means, purpose or intention*", the requirement of a conscious intent to commit acts of separatism was introduced in order to avoid criminal liability for advocating a political solution to the Kurdish Question. Although some of the reforms were judged as simply cosmetic and the desired improvements to the human rights standards were not achieved the treaty was signed by the European Union. One of the main arguments that were brought forward was that Turkey could only progress with strong European support and that the refusal of the EU to sign the treaty would make the human rights situation in Turkey even worse.¹²⁷

2.1.5.6 The Islamic Welfare Party and the Renaissance of the Idea of Islamic Unity

The national elections of December 1995 resulted in the formation of a weak coalition government, which resigned shortly after its formation, providing Necmettin Erbakan of

¹²⁵ Gunter (1997), 77-79; Kirisci/Winrow (1997), 138-139.

¹²⁶ Gunter (1997), 80; see also note 82.

¹²⁷ Yildiz (2005), 22; Kirisci/Winrow (1997), 140.

the Welfare Party (RP) with the opportunity to become Turkey's first Islamic Prime Minister by forming a coalition government in 1996.¹²⁸

In the south-eastern provinces the Islamic RP had competed for votes by campaigning for Islamic unity and promoting the idea of an Islamic solution to the Kurdish Question. It is not entirely clear if Erbakan gained many votes from the Kurds, or how much he benefited from the fact that the numerous supporters of the pro-Kurdish HADEP were unable to vote for their party because they had been forcibly displaced in the course of the state's military campaign, but the RP was the only apparent winner of the 1995 elections.¹²⁹

Although Erbakan was the first Islamic Prime Minister and seemed to be willing to take a liberal approach towards the "Kurdish issue" he did not dramatically change Turkey's policies once he was in power. Instead of questioning the principle of laicism, which would have inevitably led to a reaction by the military resulting in his resignation, the new Prime Minister continued Turkey's traditional political lines by presenting Islam more as an assertion of Turkish national identity.¹³⁰

The RP prepared a package of measures for the south-east which included the lifting of restrictions on Kurdish radio and television broadcasts, and promoting the development of Kurdish language and culture. According to the terms of this package of reforms, the RP intended to isolate the problem of terrorism from the general problems in the south-east. Emergency Rule was only to be continued in four provinces, the village guard system would be abolished, a partial amnesty would be applied to people who had cooperated with the PKK, and the economic situation in the south-east would be improved by public resources and the promotion of private investment. At the same time the State would continue its fight against terrorism. As the RP's coalition-partner, the DYP, and the National Security Council were against the implementation of these measures, the RP finally gave in to their pressure and did not present the whole package of reforms to parliament. Only the measures in respect of security concerns were adopted. Erbakan was unable to fulfil his election promises and the intended government programme, and no important reforms in respect of Kurdish cultural rights were introduced. Instead, he supported the military's demands in respect of their concerns for national security and the application of the Emergency Rule and special legislation continued in the south-east. Due to opposition from the military, the

¹²⁸ Seufert/Kubasek (2006), 112; Gunter (1997), 85.

¹²⁹ Gunter (1997), 84-85.

¹³⁰ Gunter (1997), 84-85.

President and other political parties, the Erbakan administration also stopped its attempts to start indirect negotiations with the PKK.¹³¹

2.1.6 Recent Developments

The 1990s saw a degree of enthusiasm for EU enlargement all over Europe. The Copenhagen European Council Presidency concluded in 1993 that the associated countries in Central and Eastern Europe could become members of the EU as soon as they were able to assume the obligations of membership by satisfying the economic and political conditions required.¹³²

As Turkey's economic performance improved and violence died down in the south-east the Helsinki European Council of 1999 concluded that Turkey was a candidate for EU membership on the basis of the same criteria as the other candidates, which meant that it would have to fulfil the Copenhagen Criteria before formal accession negotiations would commence. These minimum standards also included a political element requiring that the candidate country had achieved institutional stability guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.¹³³ This political requirement has proved to be a significant impediment to Turkey's accession to the EU. However, the prospect of full membership has led to a package of reforms and a slight improvement in Turkey's human rights standards and its treatment of the Kurds.¹³⁴

In 2002, Recep Tayyip Erdogan and his "Justice and Development Party" (AKP) gained 34.2% of the votes in the national elections and, due to Turkey's electoral system, achieved an absolute majority of the seats in parliament. The AKP presented itself as a "pro-European" democratic party with Islamic leanings, uniting non-radical Islamist, nationalist and secular interests.¹³⁵

Motivated by the prospect of EU membership the AKP introduced an unprecedented package of reforms including legislative amendments as well as practical measures aimed at a change in the behaviour of public authorities. Many of the legislative changes, which included amendments to the constitution and the penal code, concerned the protection of human rights and an improvement of the situation of minorities such as the Kurds. To give some examples: the restrictions on freedom of

¹³¹ Kirisci/Winrow (1997), x.

¹³² Compare: European Council in Copenhagen, Conclusions of the Presidency, 21-22 June 1993, SN 180/1/93, 7.A.3; Yildiz (2005), 23.

¹³³ European Council in Copenhagen, Conclusions of the Presidency, 21-22 June 1993, SN 180/1/93, 7.A.3

¹³⁴ Yildiz (2005), 23.

¹³⁵ Seufert/Kubasek (2006), 101.

expression and association were partly lifted, the prohibitions of the Kurdish language, broadcasting and teaching were theoretically abolished, and legal protection from torture was improved.¹³⁶ Some of these reforms will be discussed in detail in Chapter 4.

On October 6, 2004 the European Commission concluded on the basis of its reports that Turkey had sufficiently fulfilled the necessary criteria to open accession negotiations. But the Commission also stated that Turkey should implement another six packages of legislation before negotiations should begin. On December 17, 2004 the European Council followed the Commission's recommendation and declared that Turkey had fulfilled the political elements of the Copenhagen Criteria, which meant that accession negotiations could begin. In its decision the Council stated that the EU would monitor Turkey's political reforms, and in an unprecedented provision, it declared that talks could be suspended in the event of a serious and persistent breach of liberty, democracy, respect for human rights and fundamental freedoms.¹³⁷ On October 3, 2005 accession negotiations between Turkey and the EU commenced.¹³⁸

The reforms introduced by the AKP government have been a step in the right direction and the protection of human rights and the status of Turkey's minorities have been improved. Nevertheless doubts remain whether Turkey has completely fulfilled the political Copenhagen Criteria and has achieved the required "European standards" in the protection of human rights and minority rights. Particular concerns remain in respect of the status and the rights of the Kurds which do not yet seem to have been sufficiently acknowledged in Turkish legislation, and the fact that the Turkish authorities do not apply new laws in an appropriate manner.

Another problem is the resurgence of violence in the south-east. The PKK stopped its attacks after the capture of Abdullah Öcalan in 1999 and, after changing its name to Kongra-Gel, seemed to have abandoned the armed struggle. However, after the organisation once again adopted the name PKK in 2004 and returned to its policy of violent attacks which continue to this day. But support among the Kurdish population for the PKK is diminishing and more and more Kurds have become critical of its violent actions, arguing in particular that these methods only strengthen the position of the nationalist "hardliners" in Ankara. In June 2005 Turkish and Kurdish intellectuals publicly called upon the PKK to abstain from any form of violence.¹³⁹ Unfortunately,

¹³⁶ Yildiz (2005), 23.

¹³⁷ Yildiz (2005), 24.

¹³⁸ Seufert/Kubasek (2006), 174.

¹³⁹ Seufert/Kubasek (2006), 156.

there have been violent attacks even in the most recent past, and the conflict seems to have re-escalated.¹⁴⁰

In the wake of the AKP's pro-EU reforms and a more liberal position of the government in respect of minorities, the Kurds are once again trying to take part in Turkish politics and have founded political organisations. In October 2005 the "Democratic Society Party" (DTP) was established by Leyla Zana and other Kurdish politicians.¹⁴¹

A major breakthrough for the Kurdish population and the Turkish State, and another chance to find a peaceful and democratic solution to the "Kurdish question", occurred in 2007, when about 20 Kurdish deputies were elected to parliament in the national elections in which the AKP once again gained the majority.¹⁴² No matter how positive a step one may consider this opportunity for political representation to have been, it has to be noted that in order to circumvent the 10% national threshold the pro-Kurdish deputies were only able to enter parliament as independent candidates, and not as members of the pro-Kurdish DTP party.¹⁴³ Furthermore, instead of trying to take this historical opportunity to find a peaceful, political solution to the "Kurdish Question", the Turkish State and the authorities tried to adopt whatever measures they deemed appropriate to impede the work of the Kurdish deputies or even to have their immunities lifted, in particular by using (or abusing) criminal law.¹⁴⁴

Unfortunately, the fate of the DTP did not differ from that of previous Kurdish political parties. In December 2009, the Turkish Constitutional Court decided to dissolve the pro-Kurdish DTP. 37 of its members were banned from party politics, including two members of parliament who thereby lost their parliamentary seats.¹⁴⁵ The decision was mainly based on the argument that the party's leading officials did not clearly and unequivocally distance themselves from the PKK. In reaction to the dissolution, many Kurds in the Turkish South-East demonstrated on the streets, some demonstrations resulting in violent clashes with the security forces. Once again the Turkish State

¹⁴⁰ Compare, for example: Hürriyet-Turkish Daily News: "3 soldiers killed in PKK attack", 26.12.2008, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=10644955>, 28.01.2009; Commission of the European Communities: *Turkey 2010 Progress Report*, SEC(2010) 1327, 09.11.2010, http://ec.europa.eu/enlargement/press_corner/key-documents/reports_nov_2010_en.htm, 04.10.2011, 34.

¹⁴¹ Seufert/Kubasek (2006), 156.

¹⁴² Hürriyet-Turkish Daily News: "Final Results: AKP wins 340 seats", 24.07.2007, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=-610705>, 28.01.2009.

¹⁴³ Hürriyet-Turkish Daily News: "DTP withdraws from the elections", 23.05.2007, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=-606461>, 28.01.2009; Hürriyet-Turkish Daily News: "Independents circumvent the threshold", 23.07.2007, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=-610639>, 28.01.2009.

¹⁴⁴ Hürriyet-Turkish Daily News: "Deputies of DTP face barrage on immunities", 23.05.2007, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=-10763887>, 28.01.2009.

¹⁴⁵ European Commission: *Turkey 2010 Progress Report*, 7.

missed a chance to get Kurdish representatives involved in Turkish politics in order to find a peaceful solution to the situation of the Kurds in Turkey.

On the positive side, one should mention the beginning of broadcasting in Kurdish on TRT 6, a channel of the Turkish Radio and Television Corporation (the Turkish public broadcasting company), on January 1, 2009. On the occasion of the first broadcast, Prime Minister Erdogan even spoke some words in the Kurdish language.¹⁴⁶ The launch of the public Kurdish television programme was criticised by some as only being part of political propaganda by the AKP which hoped to win as many Kurdish votes as possible in the local elections of 2009, and others have argued that this measure will not be sufficient to resolve the existing problems between Turks and Kurds.¹⁴⁷ But even if this criticism may be justified, the possibility of receiving public broadcasts in Kurdish should nevertheless be seen as a step in the right direction.

2010 saw another positive reform with respect to cultural rights as the Regulation on the Radio and Television Supreme Council (RTÜK) was amended, removing all restrictions on broadcasting in Kurdish and other languages by private and public channels at local level. Fourteen radio stations and TV channels have been given permission to broadcast in Kurdish and Arabic.¹⁴⁸

Unfortunately, there have been violent clashes between Kurdish demonstrators and Turkish security forces in the course of demonstrations on the 10th anniversary of the capture of the PKK founder and leader Abdullah Öcalan,¹⁴⁹ and terrorist attacks committed by the PKK have again intensified during the last two years, resulting in the Turkish security forces even conducting air strikes against PKK hideouts in Northern Iraq.¹⁵⁰ These events particularly show that Turks and Kurds still have a long way to go to find a peaceful solution to the “Kurdish Question”.

Finally, there have recently been grounds for hope when the Turkish government announced that it was willing to find a political solution to the “Kurdish Question”, in particular by introducing a package of legislative reforms intended to provide more (cultural) rights for the Kurdish population.¹⁵¹ These announcements were even

¹⁴⁶ Der Standard: “Premier Erdogan redet kurdisch”, 01.01.2009, <http://derstandard.at>, 08.01.2009; Der Standard: „*Ein richtig gelungener Satz*“, 01.01.2009, <http://derstandard.at>, 08.01.2009.

¹⁴⁷ Hürriyet-Turkish Daily News: “*State television begins Kurdish test broadcasts*”, 27.12.2008, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=-10650965>, 28.01.2009; Hürriyet-Turkish Daily News: “*Playing Kurdish card*”, 23.05.2007, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=-10683003>, 28.01.2009.

¹⁴⁸ European Commission: *Turkey 2010 Progress Report*, 32.

¹⁴⁹ „*Batman: Kurdendemo aufgelöst*“, Der Standard, 15.02.2009, <http://derstandard.at/druck/?id=1234507085495>, 20.02.2009; „*Proteste von PKK-Anhängern*“, Der Standard, 16.02.2009, <http://derstandard.at/druck/?id=1234507159921>, 20.02.2009.

¹⁵⁰ European Commission: *Turkey 2010 Progress Report*, 34.

¹⁵¹ Der Standard, „*15-Punkte-Plan soll Kurden-Konflikt lösen*“, 12.11.2009, <http://derstandard.at>, 30.11.2009.

followed by some limited reforms and improvements, and it appears that an increasingly open debate on the Kurdish issue has begun. However, the desirable fundamental change in Turkish policies, encompassing far-reaching legislative reforms and appropriate implementation, has not yet happened. In 2010, the European Commission concluded that *“Overall, despite public statements of commitment, the democratic opening announced by the government in August 2009 to address notably the Kurdish issue, was only partly followed through.”*¹⁵²

¹⁵² European Commission: *Turkey 2010 Progress Report*, 34-35; the reforms that have been introduced will be described in detail in the relevant thematic context in Chapter 3.

2.2 The Kurds in Turkey

Today, the majority of the Kurds live in the territory of Turkey, Iran, Iraq and Syria, but there are also Kurdish populations in other Middle East states, for example in Armenia and Azerbaijan. Due to oppression, persecution and economic difficulties, thousands of Kurds have fled their traditional homelands and many of them now live in Western and Central Europe, with large groups in Germany, France, Sweden and Italy.¹⁵³

Turkey, Iran, Iraq and Syria are relatively young nation states with an authoritarian tradition, where governments place great emphasis on nationalism and any reference to a different ethnic identity within the population is perceived as a threat to the territorial integrity of the State.¹⁵⁴ The authorities therefore avoid collecting any data on the ethnical background or the mother-tongue of the population, and they tend to understate the numbers of Kurds living within their territory, which makes it difficult to assess the size of the Kurdish population in these countries.¹⁵⁵ In Turkey, there have been no questions about language in national censuses since 1965.¹⁵⁶ However, even if such questions were asked one would probably not discover the exact number of people with Kurdish ethnic origin. Some Kurds would consider themselves to be Turks and deny their Kurdish identity, and others would not admit that their mother-tongue was Kurdish for fear of negative consequences or even punishment.¹⁵⁷

As all the figures on the size of the Kurdish population are the result of estimates and approximate calculations, it is not surprising that they vary enormously. This discrepancy between the figures is probably also connected to the fact that there are different definitions of who is a Kurd. As KIRISCI/WINROW point out, for some scientists, a Kurd is somebody who speaks Kurdish, but there are also people within Turkey who have a Kurdish ethnic background, but don't speak any Kurdish. Additionally, some Kurds may define themselves only as Turks, although they have an ethnic and linguistic Kurdish background.¹⁵⁸

The estimated number of Kurds living in Turkey is considered to lie between 8 and 15 Million, which means that the Kurds form about 10 - 20% of Turkey's total population.¹⁵⁹

¹⁵³ Compare: Yildiz/Muller (2008), 5; Siegwart/Brentjes (2001), 58.

¹⁵⁴ Yildiz (2005), 4.

¹⁵⁵ Yildiz/Muller (2008), 6.

¹⁵⁶ Kirisci/Winrow (1997), 119-120.

¹⁵⁷ Gunter (1990), 6.

¹⁵⁸ Kirisci/Winrow (1997), 120.

¹⁵⁹ According to Litvinoff, Miles: *Minority Rights Group: The World Directory of Human Rights*, London: Minority Rights Group International 1997, 381, in 1993, there were 13 million Kurds in Turkey constituting 22% of a total population of 59.8 Mio.; Gunter (1990), 6, writes about 8 to 12 million Kurds in Turkey in 1990; Pan, Christoph/Pfeil, Beate-Sibylle: *National Minorities in Europe, Handbook, Ethnos Vol. 63*, Wien: Braumüller 2003, 169: The authors put the number of Kurds at 6,198,000 of a total

There are about 6 million Kurds in Iran, about 4 million in Iraq, and about 1 million Kurds in Syria¹⁶⁰

There has not been any extensive research into the history of the Kurds. It is assumed that they have shared a common ethnic identity for more than 2,000 years, stemming from various Indo-European tribes who migrated to the region of the Zagros Mountains some 4,000 years ago.¹⁶¹ The first references to a people called “Kur-da” or “Kardu” in the region where the majority of Kurds live today date back about 3,000 years.¹⁶² The term “Kurdistan” first appeared in the reign of the Seljuks during the 11th or 12th century.¹⁶³

The region referred to as “Kurdistan” covers the territories along the borders between Turkey and the neighbouring states of Iran, Iraq and Syria.¹⁶⁴ In Turkey, the Kurds traditionally inhabit the south-eastern provinces of Mardin, Siirt, Bitlis, Van, Mus, Hakkari, Diyarbakir, Agri, Tunceli, Bingol and Kars.¹⁶⁵ In some of these provinces the Kurds constitute the majority of the population, but, especially during the 1980s and 1990s, many Kurds left the region and moved to western Turkey, in particular to cities like Istanbul. Although some Kurds may have left the regions for economic reasons, many of them were evacuated or forced to leave after their villages had been burned by the security forces in the fight against the PKK.¹⁶⁶

Unlike Turkish, the Kurdish language belongs to the Indo-European language family.¹⁶⁷ There has been no development of a uniform Kurdish language because the Kurds have traditionally lived in mountainous regions in tribes that were relatively isolated from each other, and there was never a Kurdish national state or a uniform Kurdish school system.¹⁶⁸ Consequently, the Kurdish language consists of three major dialects, Kurmanji, Sorani, and Zaza (Zazaki), and of many regional dialects. Most Turkish

population of 62,866,000 (based on the 1997 census). According to this figure, the Kurds constitute 9.8% of the total population. However, the authors admit that the number of Kurds could be projected at 13,000,000; According to Yildiz (2005), 4, there are about 15 million Kurds in Turkey (23% of the total population). The figures of 15 million and 23% of the population are also quoted in Yildiz/Muller (2008), 6.

¹⁶⁰ Compare: Yildiz/Muller (2008), 6; Mc Dowell (1997), 381.

¹⁶¹ Yildiz/Muller (2008), 4.

¹⁶² Siegwart/Brentjes (2001), 8.

¹⁶³ Compare: Yildiz/Muller (2008), 5; Pöllinger, Siegrid: *Minderheitenprobleme und Minderheitenschutz – Das Engagement internationaler Organisationen*, Wien: NWV, Neuer Wissenschaftlicher Verlag 2001, 94.

¹⁶⁴ Yildiz (2005), 4.

¹⁶⁵ Compare: Yildiz/Muller (2008), 6; Gunter (1990), 6.

¹⁶⁶ Kirisci/Winrow (1997), 134-135

¹⁶⁷ See for example: Yildiz/Muller (2008), 4; Pan/Pfeil (2003), Table 4, p. 15; Remzi Tanriverdi, *Die Türkei und die Kurdenfrage – Probleme und Lösungsaspekte* (1998), 18-19;

¹⁶⁸ Siegwart/Brentjes (2001), 23.

Kurds speak Kurmanji, but in the north-west of the Kurdish dominated area in Turkey, Zaza is spoken.¹⁶⁹

The majority of the Kurds are Sunni Muslims¹⁷⁰, but it is worth noting that parts of the Kurdish population are Alevi.¹⁷¹

2.3 Turkey, the Kurds and the PKK

2.3.1 Introduction

According to the traditional arguments of the nationalist hardliners and certain political actors in Turkey in respect of the “Kurdish Question”, Turkey does not have a problem with minorities or, more specifically, with a Kurdish minority, but a problem with terrorism. The “Kurdish Question” is thereby reduced to a question of national security, and it is argued that the solution can only be a successful fight against terrorism.

Considering that the fight against terrorism in Turkey has lasted for decades without resulting in a solution, it is evident that this approach is wrong.¹⁷² Besides the failure of the Turkish authorities to find a solution to the “Kurdish Question” through military operations, the fight against terrorism has also led to numerous human rights violations. As the Turkish security forces have often not distinguished between armed fighters and the civilian Kurdish population in their fight against the PKK guerrillas, many of the victims of these human rights violations have been civilians.

It is not the purpose of this thesis to give a detailed analysis of the emergence of the PKK, the conflict in the south-east, or the related human rights violations. However, as this conflict and the problems resulting from it are among the most decisive factors in the development of the “Kurdish Question” and thus have to be taken into account in the attempt to find a possible solution to the situation of the Kurds, the Turkish fight against terrorism and the related human rights violations cannot be completely excluded from the analysis.

The main aspects of the historical development of this conflict, which has mainly taken place in Turkey’s south-eastern provinces between armed PKK fighters and the Turkish security forces but has also impacted on other Turkish regions and affected Turkey’s foreign policy, have already been described in Chapter 2.1 above. The following pages will now give a short overview of the related human rights issues.

¹⁶⁹ Yildiz/Muller (2008), 6.

¹⁷⁰ Compare: Pöllinger (2001), 94; Yildiz (2005), 4.

¹⁷¹ Compare: Yildiz/Muller (2008), 6; Yildiz (2005), 4.

¹⁷² See Chapter 2.1 on the historical development of the “Kurdish Question”.

2.3.2 The PKK – A Terrorist Organisation

The Turkish authorities have described the military campaign of the security forces against the PKK guerrillas as a “fight against terrorism”. Although there have been numerous attempts by international organisations to define the term “terrorism”, and both the term and the topic have been the subject of numerous studies by scholars¹⁷³, the definition of the word itself still remains ambiguous.

In terms of international law, the definitions elaborated by the organs of international organisations mainly contain the same important elements. Since this study tries to view the “Kurdish Question” from a European point of view, the most appropriate definition seems to be the one put forward by the Council of the European Union in Council Common Position of December 27, 2001, on the application of specific measures to combat terrorism:¹⁷⁴

“For the purpose of this common position, ‘terrorist act’ shall mean one of the following intentional acts, which, given its nature and its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of:

- (i) seriously intimidating a population, or*
- (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or*
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:*
 - (a) attacks upon a person’s life which may cause death;*
 - (b) attacks upon the physical integrity of a person;*
 - (c) kidnapping or hostage taking;*
 - (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;*
 - (e) ...¹⁷⁵*

¹⁷³ See for example: Ben Saul, *Defining Terrorism in International Law*, Oxford: Oxford University Press 2006.

¹⁷⁴ Council of the European Union: Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, (2001/931/CFSP).

¹⁷⁵ In the context of acts elaborated by the organs of the UN, a similar definition applies: “*Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and defined in the*

Art 2 (3) of Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism provides for the establishment, review and amendment of a list of persons, groups and entities to which this regulation applies. In accordance with this decision, the PKK has been put on this list of terrorist persons, groups and entities.¹⁷⁶

The European Council has thus designated the PKK as a terrorist organisation.

It is not the aim of this thesis to give a detailed analysis of the PKK and its activities in light of the above-mentioned definitions. In view of the violent conflict in the south-east and the violent actions committed by the PKK, which have often had the civilian population as their victims, it seems appropriate to designate the PKK as a terrorist organisation.

On the one hand, it may be understandable that parts of the Kurdish population resorted to violence because of the history of the treatment of the Kurdish population in Turkey, which was characterised by the denial and violent oppression of the Kurdish identity and did not provide the Kurds with a peaceful means of political participation. On the other hand, it is clear that unlawful acts of terrorism, in particular if they cause serious harm to other human beings, may never be justified under international law: *“Criminal acts intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”*¹⁷⁷

Criminal acts perpetrated by parts of the Kurdish population, either as members of the PKK or of another group or entity, or even without being members of a group, are unlawful under national as well as international law, and they will not provide a solution to the Kurdish problems in Turkey. However, the Turkish State must not adopt whatever measures it deems appropriate in reaction to these criminal acts, because, under the European regime for the protection of human rights, security concerns do not exempt the State from its obligation to respect human rights and fundamental freedoms and the principle of the rule of law. The fight against terrorism must not be used as an overriding justification for the restriction and violation of human rights.

international conventions and protocols relating to terrorism...”, UN Security Council Resolution 1566 (2004), 8 October 2004, Para 3.

¹⁷⁶ The list is frequently updated; see for example: Council of the European Union, Council Common Position 2007/871/CFSP of 20 December 2007 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2007/448/CFSP.

¹⁷⁷ UN General Assembly Resolution 49/60 (A/RES/49/60), 17 February 1995, I.3..

2.3.3 The Fight against Kurdish Terrorism and Human Rights

It is generally agreed, and follows from the jurisdiction of the ECtHR, that, at least under the European regime of human rights, a state is not only obliged to refrain from unjustified interference in the rights protected by international human rights law, but it also has a degree of duty to actively protect these rights. Thus, a state is not only entitled to protect its citizens against acts of terrorism but is actually required to do so, in particular under the regime of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In relation to issues of terrorism, in particular the protection of the right to life under Art 2, the ECHR requires the state to take actions to protect its citizens from terrorist attacks.¹⁷⁸

Terrorist attacks result in an ambiguous situation for the state: On the one hand, the authorities are required to protect the state's citizens and to re-establish security to safeguard such protection, on the other hand, their attempts to achieve these goals may result in reactions and measures which in themselves constitute a threat to the freedom and security of the citizens and a substantial burden on, or even a threat to the principle of the rule of law and the protection of human rights and fundamental freedoms.

In its decisions, the European Court of Human Rights tends to respect a state's security concerns and the particularities of the threat that is caused by terrorist attacks. But the fight against terrorism can not be used to justify every restriction on the protection of human rights and fundamental freedoms. The ECtHR clearly stated in this respect that: *"The Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate."*¹⁷⁹

Once the PKK had started to launch attacks against the Turkish State, the Turkish authorities reacted with a large military campaign and declared a state of emergency for several south-eastern provinces. It also enacted special state of emergency legislation which extended powers to the local authorities and reduced the procedural safeguards provided for the individual. The following fight against terrorism and the measures adopted by the military, security forces, police and other administrative authorities resulted in numerous applications and complaints being submitted to the ECtHR, and in many cases the Court found violations of one or several rights guaranteed by the ECHR. These human rights violations frequently took place in the

¹⁷⁸ Klugmann, Marcel: *Europäische Menschenrechtskonvention und antiterroristische Maßnahmen – Eine Untersuchung der Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte am Beispiel des Nordirland und des Kurdenkonflikts*, Peter Lang, Europäischer Verlag der Wissenschaften 2002.

¹⁷⁹ *Klass und andere v. Bundesrepublik Deutschland*, 06.09.1978, Appl. 5029/71, Para 49.

course of security operations where the security forces even burned down whole villages. The human rights that were frequently violated included the right to life under Art 2 ECHR¹⁸⁰, the prohibition of torture or other inhuman or degrading treatment under Art 3 ECHR¹⁸¹, the right to freedom under Art 5 ECHR, the right to private and family life under Art 8 ECHR¹⁸², the right to an effective remedy under Art 13 ECHR¹⁸³, and the right to property under Art 1 of Protocol 1 to the ECHR¹⁸⁴.

Some of the complainants also claimed a violation of the prohibition of discrimination in the enjoyment of the mentioned rights under Art 14 ECHR, based on the argument that the victims of these human rights violations were of Kurdish origin and had been specifically targeted by the security forces due to their affiliation with the Kurdish minority. However, in the cases where the Court found violations of the above-mentioned substantive rights guaranteed by the ECHR, it regularly judged it unnecessary to additionally consider these complaints in conjunction with Art 14 of the Convention.¹⁸⁵

In most of these cases the Court generally did not oppose the Turkish State's assessment that there was a state of emergency in the south-east, and it also admitted that the investigation of terrorist offences undoubtedly presented the authorities with special problems. However, the Court considered the necessity of the measures adopted and found that some of them were not justified even under a state of emergency.

Besides the human rights violations directly related to the security operations, the restrictions on the discussion of the "Kurdish Question" which qualify as violations of the freedom of expression, and the prohibition of pro-Kurdish parties, which constitute a restriction on the right to set up political parties under the rights to freedom of association, must also be cited as consequences of the Turkish fight against terrorism.

¹⁸⁰ *Kaya v. Turkey*, App. 22729/93, Judgement of 18 February 1998;

¹⁸¹ *Bilgin v. Turkey*, App. 23819/94, Judgement of 16 November 2000; *Selcuk and Asker v. Turkey*, App. 12/1997/796/998-999, Judgement of 24 April 1998.

¹⁸² *Dogan and others v. Turkey*, Apps. 8803-8811/02, 8813/02, 8815-8819/02, Judgement of 29 June 2004; *Orhan v. Turkey*, App. 2565//94, Judgement of 18 June 2002; *Bilgin v. Turkey*, App. 23819/94, Judgement of 16 November 2000; *Selcuk and Asker v. Turkey*, App. 12/1997/796/998-999, Judgement of 24 April 1998.

¹⁸³ *Dogan and others v. Turkey*, Apps. 8803-8811/02, 8813/02, 8815-8819/02, Judgement of 29 June 2004; *Orhan v. Turkey*, App. 2565//94, Judgement of 18 June 2002; *Bilgin v. Turkey*, App. 23819/94, Judgement of 16 November 2000; *Selcuk and Asker v. Turkey*, App. 12/1997/796/998-999, Judgement of 24 April 1998.

¹⁸⁴ *Dogan and others v. Turkey*, Apps. 8803-8811/02, 8813/02, 8815-8819/02, Judgement of 29 June 2004; *Orhan v. Turkey*, App. 2565//94, Judgement of 18 June 2002; *Bilgin v. Turkey*, App. 23819/94, Judgement of 16 November 2000; *Selcuk and Asker v. Turkey*, App. 12/1997/796/998-999, Judgement of 24 April 1998.

¹⁸⁵ Compare: *Orhan v. Turkey*, App. 2565//94, Judgement of 18 June 2002.

Since these rights are of particular importance for effective minority protection, they will be discussed in detail in Chapter 4.

2.3.4 Conclusions

Terrorist acts are illegal under international law and the Turkish State has a right and a degree of duty to defend itself and its citizens against violent terrorist attacks. However, the measures taken in the fight against terrorism do not exempt the state from observing and guaranteeing fundamental rights and freedoms as protected under international instruments for the protection of human rights such as the ECHR.

The resurgence of the PKK is not solely a security problem but mainly the consequence of a general political problem. Consequently, a military solution to the problem will prove impossible. If the Turkish State continues to oppress its Kurdish population, to systematically neglect or even abuse human rights, and to ban any form of expression of a distinct Kurdish identity and culture, there will always be Kurdish people who will be attracted to the PKK and the option to fight against the State.¹⁸⁶

A peaceful solution to the “Kurdish Question” can only be achieved through the adoption of political and legal measures. This does not rule out the fact that there will nevertheless still be people who will try to attack the Turkish State or other Turkish citizens and attempt to achieve their political goals through acts of violence. However, such people and their criminal acts, whether they qualify as terrorism or not, should be confronted with the usual means and measures provided by criminal law, with due respect for the principles of the rule of law and internationally acknowledged human rights. It is doubtful whether the PKK or other violent organisations would have widespread support from the Kurdish population if the Turkish State were to stop oppressing expressions of Kurdish identity and instead fully guaranteed the Kurds their human rights and granted additional minority rights. Were this the case, Turkish actions against these violent elements within society could be more easily justified and would probably have better results.

¹⁸⁶ Kirisci/Winrow (1997), 131: Security operations and the practice of burning villages were fuelling Kurdish nationalism and motivated young people in particular to join the PKK.

2.4 Excursus: The Kurds and the Right to Self-Determination

2.4.1 Introduction

The peoples' right to self-determination is one of the most controversial and most sensitive topics in international law. Most states fear that the principle is a threat to their territorial integrity because it is often linked to calls for secession and independent statehood, and national authorities therefore attempt to limit the scope of its application.

There is a controversial debate among scholars about various aspects of self-determination. Who is entitled to claim the right? What is the definition of a people? What are the possible ways of exercising the right? Does self-determination also comprise a right to secession?

It is not the purpose of this thesis, and it would go beyond its scope, to provide a detailed analysis of the right to self-determination.¹⁸⁷ However, the people's right to self-determination and the protection of minorities are issues that are strongly interconnected and interdependent, and a discussion of one of these topics therefore necessarily raises questions in respect of the other. In particular, minority groups living in independent states, like the Kurds in Turkey, regularly invoke the right to self-determination and use it as justification for claims for independence, autonomy or additional rights. We will therefore try to briefly analyse those aspects of the right to self-determination that seem most relevant for the situation of the Kurds in Turkey, with a particular emphasis on the European context and the interdependence with the European instruments for minority protection.

2.4.2 The Kurds in Turkey and the Concept of Self-Determination in the Context of the United Nations Charter

The question of whether minorities in independent, sovereign states are entitled to claim the right to self-determination has traditionally been the subject of a heated debate and is not easily answered. With regard to the Kurds in Turkey, the question

¹⁸⁷ For comprehensive studies on self-determination see for example: Cassese, Antonio: *Self-Determination of Peoples – A Legal Reappraisal*, Cambridge: Cambridge University Press 1995; Crawford, James: *The Creation of States in International Law*, 2nd Edition, Oxford: Clarendon Press 2006; Musgrave, Thomas D.: *Self Determination and National Minorities*, Oxford: Oxford University Press 1997 (Paperback 2000).

may be put as follows: Does the Kurdish (minority) population in Turkey constitute a “people” which is entitled to self-determination?¹⁸⁸

In the 20th century the principle of self-determination of peoples became important when it was adopted by US President Wilson in his speech before the United States intervened in the First World War. During the course of the war and the subsequent peace negotiations, Wilson promoted a concept of self-determination which was based on the idea that Europe should be restructured in accordance with national desires to reduce the risk of renewed global conflict.¹⁸⁹ Accordingly, identifiable peoples or nations that had constituted minorities in the Austro-Hungarian Empire and the Ottoman Empire should be given the means to govern themselves.¹⁹⁰ It has been noted above that an independent Kurdish State had been provided for in the Treaty of Sèvres, and a brief explanation has been given as to how the Kurdish people missed their opportunity to gain for independence for political and geo-strategic reasons and a lack of Kurdish national self-consciousness.¹⁹¹

The Kurds were thus seen as a distinct people entitled to claim self-determination after World War I, but like other distinguishable ethnic or national groups, they were unable to establish their own independent state. As such, the Kurds are a perfect example of how the applicability of Wilson’s concept of self-determination did not lead to the creation of ideal nation states and did not prevent renewed ethnic and national tensions. Rather, it led to the creation of states comprising multiple nationalities with further potential for internal violence and conflict, which finally led to the establishment of the system of minority protection under the League of Nations.

After the Second World War the principle of self-determination was introduced in Art 1 (2) and Art 55 of the United Nations Charter. Art 1 (2) declares the development of “...friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...” as one of the purposes of the United Nations, and Art 55 proclaimed certain goals that should be promoted by the United Nations with regard to “...the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...”. There were additional implicit

¹⁸⁸ The question of whether the Kurds in Turkey qualify as a (national) minority under international as well as under Turkish law will be discussed in detail below.

¹⁸⁹ Cassese (1995), 19.

¹⁹⁰ Castellino, Joshua: *International Law and Self-Determination*, The Hague/Boston/London: Martinus Nijhoff Publishers 2000, 15.

¹⁹¹ See chapter 2.1 above.

references to self-determination in the Charter, but its definition and the scope of its application remained unclear.¹⁹²

During the years following the Second World War and the establishment of the United Nations, self-determination became strongly linked to decolonisation. In this context, developing countries and socialist states favoured an external concept of self-determination, which meant that territories under colonial administration, so-called non-self-governing territories, should become independent. In this period, General Assembly Resolutions dealing with the right to self-determination therefore focused on decolonisation and insisted on the need to promote self-determination in non-self-governing territories.¹⁹³

This idea of limited applicability of the principle of self-determination to peoples under colonial power is most evident in Resolution 1514(XV) of 14 December 1960, which mainly provided that these peoples should be granted independence. According to Paragraph 6 of the Resolution, “*any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations*”. It is the written manifestation of the principle that colonial borders should remain the borders of the newly emerging independent states. In the light of these formulations, minorities do not seem entitled to claim rights under the principle of self-determination, and the emphasis on territorial integrity clearly denies the existence of a right to secede under international law.¹⁹⁴

However, there are also implications that minority groups in independent states might be entitled to self-determination under the UN Charter. General Assembly Resolution 2625(XXV) of 24 October 1970, the “*Friendly Relations Declaration*”, deals with the most important principles of the UN Charter and in particular with the right to self-determination.¹⁹⁵ It appears that the approach to self-determination in the “*Friendly Relations Declaration*” differs from the approaches of previous UN Resolutions in several aspects.

Although decolonisation was reaffirmed as a very important aspect of self-determination, the principle of self-determination was extended beyond the colonial context. The Resolution emphasizes that all peoples have the right to freely determine their political status, and it also enumerates different ways in which the right to self-

¹⁹² Musgrave (1997), 130; The protection of minorities is not mentioned at all in the Charter. In the years following the Second World War most states held that individuals could best be protected by granting universal human rights and that no special rights were needed for particular groups.

¹⁹³ Compare: Musgrave (1997), 96-97; Thornberry, Patrick: “*Self-Determination, Minorities, Human Rights: A Review of International Law*” in: *International and Comparative Law Quarterly* (Vol. 38, 1989), 873.

¹⁹⁴ Thornberry (1989), 874.

¹⁹⁵ Compare: Thornberry (1989), 875; Musgrave (1997), 75.

determination may be exercised. The use of the phrase “*all peoples*” in connection with the reference to “*all States*” and the description of a goal which was not necessarily linked to colonial situations were expressions of the Western view that self-determination was a universal principle and thus also applicable to peoples in sovereign states.¹⁹⁶

With regard to minorities, and thus the Kurdish minority in Turkey, one paragraph of Resolution 2625(XXV) seems to be of particular interest. It provides that:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

The provision reflects the Western concept of internal self-determination with its emphasis on the need for representative government. This concept can be defined as the right of the people to choose its own political and economic regime based on the principles of popular sovereignty and representative government within the borders of a sovereign state.¹⁹⁷ It originated from the Western democratic theory that governments must be based on the consent of the governed.

On the basis of the paragraph of the “Friendly Relations Declaration” quoted above which refers to “*the whole people belonging to the territory*”, one might argue that national minorities like the Kurds are also entitled to internal self-determination and thus have to be represented in government. Furthermore, the text implies that the sacred principle of territorial integrity is dependent on the existence of a government representing all parts of the population. It follows from this argument, that if peoples within existing states are treated in a discriminatory fashion by their government, they may claim the right to self-determination and do not have to respect the territorial integrity of the state. If one considers the way the Kurds have been treated by the Turkish government since the foundation of the Republic, one might conclude that Resolution 2625(XXV) would even justify Kurdish attempts to secede from Turkey. Although such an interpretation might seem convincing at first look, it has to be noted that there has been considerable and controversial debate about the scope of this paragraph.

¹⁹⁶ Musgrave (1997), 75.

¹⁹⁷ Compare: Musgrave (1997), 12 & 24; McCorquodale, Robert: “*Self-Determination: A Human Rights Approach*” in: McCorquodale, Robert: *Self-Determination in International Law*, Aldershot: Ashgate/Dartmouth 2000, 484.

CASSESE has elaborated a fairly narrow interpretation of the impact of the “*Friendly Relations Declaration*” on national minorities. Analysing the text and its preparatory work, he concludes that the right to internal self-determination as it is embodied in the declaration is only conferred on racial or religious groups living in sovereign states, but not on national or linguistic groups. He argues that self-determination is not considered a right of the entire population in authoritarian states, and even those groups that are entitled to it under the declaration can only claim equal access to government, but not equal rights. Only in cases where racial or religious groups are completely excluded from any participation in the government and are therefore denied their right to internal self-determination, such as in an openly racist regime, can they call for external self-determination by way of secession.¹⁹⁸ It follows from CASSESE’s interpretation that there is no general right to internal self-determination requiring a government which is representative of the whole people including ethnic, linguistic or religious minorities. Following his argumentation, the Kurds in Turkey do not seem entitled to any form of self-determination.

There are also broader interpretations of the right to self-determination under Resolution 2625(XXV). MUSGRAVE adopts a wider interpretation of the terms “*race, creed or colour*” and points out that territorial integrity is based on representative government, implying that self-determination is an ongoing process. If a government is not representative of the “*whole people belonging to that territory, that portion of the people not represented in the government would not be obliged to respect the territorial integrity of the state*”¹⁹⁹. According to MUSGRAVE, secession would even be permissible in such circumstances because the ban on “*...any action aimed at the total or partial disruption of the national unity and territorial integrity of any other state or country...*” as proscribed in one of the paragraphs of the Resolution applies only to states, and not to peoples excluded from government.²⁰⁰ According to this interpretation the phrase “*the whole people*” seems to also cover national and linguistic minorities which are therefore entitled to internal self-determination. In cases where political participation is denied, Resolution 2625(XXV) might even be invoked as justification for secession.

There is another aspect that seems relevant in respect of self-determination in terms of Resolution 2625(XXV). HANNUM asserts that “*A state that has a democratic, non-discriminatory voting system that does not formally exclude a particular group from*

¹⁹⁸ Cassese (1995), 108.

¹⁹⁹ Musgrave (1997), 76.

²⁰⁰ Musgrave (1997), 76.

*political participation can be considered to have a representative government.*²⁰¹ It follows from an interpretation such as this that a government does not need to recognize and favour minorities in order for it to be representative. One might argue that the Kurds in Turkey who are Turkish citizens are not formally excluded from political participation because they have the right to vote like other Turkish citizens. However, HANNUM points out that “...*participation in the political life of the country should not be merely a formal exercise. There must be effective and meaningful participation in the formulation of national and local policy choices...*”²⁰²

The Kurds have long been refused effective participation in Turkish politics because Kurdish political parties have been prohibited and some of those that were established were closed down. Furthermore, political pressure, acts by the security forces and the military, and the 10 per-cent threshold to enter parliament have been used as means to prevent effective political participation by the Kurdish population in Turkey.²⁰³ The right to vote may thus not be sufficient to guarantee a representative government which is required by the “*Friendly Relations Declaration*”.

In the light of these considerations one might conclude that the Kurds are excluded from political participation and deprived of their right to representative government. On the other hand, given the controversial debate about the scope of the “*Friendly Relations Declaration*” and the general reluctance to admit that minorities are entitled to self-determination, one cannot clearly state that the Kurdish minority in Turkey is entitled to claim rights in the name of self-determination on the basis of the United Nations Charter and corresponding UN General Assembly Resolutions.

2.4.3 Self-Determination as a Universal Human Right

The right to self-determination was also embodied in the International Covenant on Civil and Political Rights and in the Covenant on Economic, Social and Cultural Rights. Article 1 Paragraph 1, identical in both covenants, provides that:

“All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

It can therefore be concluded that with the adoption of Art 1 of the two international human rights covenants, the United Nations has established self-determination as a

²⁰¹ Hannum, Hurst: “*Rethinking Self-Determination*” in: McCorquodale (Ed.), *Self-Determination in International Law* (2000), 211.

²⁰² Hannum (2000), 245.

²⁰³ See Chapter 4.9 for a detailed analysis.

fundamental part of human rights.²⁰⁴ The straightforward language used in Art 1, in particular the simple reference to “*all peoples*”, and the fact that it is embodied in a human rights treaty, can be interpreted as evidence of the universal applicability of self-determination.²⁰⁵

NOWAK has pointed out that the right to self-determination does not only apply to peoples under colonial rule, but also to those in independent multinational states.²⁰⁶ Furthermore, the right to self-determination is not a right which may only be exercised once, but has a permanent character.²⁰⁷ However, he also stresses that an interpretation of the historical background indicates that minorities should not be accorded the right to self-determination. One of the arguments for such an interpretation is that the rights of members of minorities are included in Art 27 ICCPR.²⁰⁸ NOWAK also quotes different attempts to define the term “*people*” in the context of the ICCPR. Accordingly, a people can be defined as a social entity possessing a clear identity and its own characteristics, which implies a relationship with a territory, and which should not be confused with ethnic, religious or linguistic minorities in the sense of Art 27 ICCPR. However, NOWAK admits that when attempting to distinguish the term “*people*” from the term “*minority*”, “*...difficulties are promptly encountered, in that these terms overlap with one another, at least in sociological and ethnological usage*”.²⁰⁹

The distinction between “*people*” and “*minority*” (which can be defined in similar ways)²¹⁰ has been further defined by CASSESE who described a “*people*” as a national or ethnic group constitutionally recognized as a component part of a multinational state. According to his definition, the right to self-determination is only applicable to national groups of comparable size, while smaller groups constitute minorities. However, there are two weaknesses in such an approach: First, constitutional recognition is a dangerous limitation, enabling a state to deny a people the right to self-determination by denial of constitutional recognition. Second, the restriction to groups of comparable size raises the question as to what constitutes the relevant proportion of the total population. What is the difference between a group of comparable size and a large minority?²¹¹

²⁰⁴ de Zayas, Alfred: “*Selbstbestimmungsrecht und Vereinte Nationen*” in: Heintze, Hans-Joachim: *Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt*, Bonn: Dietz 1997, 161.

²⁰⁵ Hannum (2000), 212.

²⁰⁶ Nowak, Manfred: *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd Edition, Kehl: Engel 2005, Article 1, Recital 31.

²⁰⁷ Nowak (2005), Article 1, Recital 18.

²⁰⁸ Nowak (2005), Article 1, Recital 28.

²⁰⁹ Nowak (2005), Article 27, Recital 12.

²¹⁰ See Chapter 3 below.

²¹¹ Compare: Nowak (2005), Article 1, Recitals 29-30.

Other authors have adopted a more liberal approach regarding the applicability of self-determination as a human right, which can support the argument that national minorities are also entitled to claim this right.

Self-determination may be considered as a basic human right which is “...of *particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and the promotion and strengthening of those rights*”.²¹² International law is increasingly concerned with promoting the rights of human beings as individuals as well as on a collective level. On the basis of the principles of human freedom and equality which have been embodied in a number of human rights instruments, one can argue that “...the *international norm of self-determination is properly understood to benefit human beings as human beings and not sovereign entities as such*”.²¹³ It has likewise been argued that “...the *only appropriate legal framework to consider the right to self-determination is one based on the legal rules developed in international human rights law*”.²¹⁴ One of the principal arguments of such an approach is that most states are parties to international human rights treaties, and that human rights mainly provide efficient and coherent rules in international law. Thus, a general legal framework of human rights exists, and self-determination is an important part of this legal framework. Similarly, HANNUM argues that since human rights are widely accepted, they may be an effective tool for responding to concerns underlying self-determination.²¹⁵

In the light of such arguments, attempts to define a “*people*” as the whole population of a territory or an ethnic group with certain characteristics appear only to artificially limit the scope of application of the principle of self-determination.²¹⁶

Thus, it appears appropriate to regard self-determination in the same way as the protection of minority rights, i.e. as part of the protection of human rights, benefiting the individual human being or groups of human beings with regard to the governmental institutions under which they live. As human rights law is based on the principles of equality and non-discrimination, a democratic government must respect the principle of self-determination in relation to all of its citizens without unjustified distinction.²¹⁷ Or, as

²¹² Comment by the Human Rights Committee, HRC General Comments 12 (21), Para 1 (G.A. Official Records Doc. A/39/40, pp.142-143, quoted in McCorquodale, Robert: “*Self-Determination: A Human Rights Approach*” in McCorquodale (Ed): *Self-Determination in International Law* (2000), 492; similarly: Thornberry (1989), 883.

²¹³ Anaya, James: “*A Contemporary Definition of the International Norm of Self-Determination*” in: *Transnational Law & Contemporary Problems* (Vol. 3:131, Spring 1993), 136.

²¹⁴ McCorquodale (2000), 492.

²¹⁵ Hannum (2000), 238.

²¹⁶ Anaya (1993), 138.

²¹⁷ Hannum (2000), 211.

ANAYA states: *“In essence, self-determination entails a standard of governmental legitimacy based upon core precepts of human freedom and equality”*.²¹⁸

2.4.4 Internal Self-Determination in a European Context – Self-Determination and Democracy

When considering questions of national minorities and self-determination from a European perspective, one should also take into account the documents elaborated in the framework of the CSCE/OSCE.

Principle VIII of the Helsinki Final Act declares that:

“By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.”

What is innovative about this passage is that the text explicitly mentions the internal aspect of self-determination. In addition, self determination can be interpreted as a continuous process, because people *“always”* have the right to self-determination, and the right is extended to groups identifying themselves with sovereign states.²¹⁹

CASSESE has argued that the words *“in full freedom”* must be interpreted to mean *“...that self-determination cannot be implemented if basic human rights and fundamental freedoms are not ensured to all people”*.²²⁰ The Helsinki Final Act nevertheless retains the dichotomy between minority rights and self-determination, as Principle VII includes obligations for states in relation to minorities. Once again one could conclude that minorities should be granted specific rights, but that they are not entitled to self-determination like a people.²²¹

In the light of subsequent CSCE/OSCE-documents, such an interpretation seems to have been reconsidered. Based on the Copenhagen Document, which contains a list of fundamental democratic principles, the Charter of Paris contains specific obligations which its member states must fulfil in order to be considered to have established democratic statehood. One can assume that the acknowledgement of popular sovereignty and democracy as the basic principles and values of a state also has an impact on the right to self-determination. As democracy seems to become a normative

²¹⁸ Anaya (1993), 143.

²¹⁹ Compare: Musgrave (1997), 99-100; Thornberry (1989), 886 (with further references).

²²⁰ Cassese (1995), 284.

²²¹ Compare: Musgrave (1997), 99-100; Thornberry (1989), 886.

rule in international law on a European level, internal self-determination must be considered as a legal principle.²²²

European states have made considerable efforts to promote the protection of human rights and minority rights. This has been done within the framework of the CSCE/OSCE, and in particular at the level of the European Council with the elaboration of the European Convention on Human Rights and the Framework Convention on the Rights of National Minorities. Hence, it has been argued that the principle of democracy and the protection of human rights and minority rights have to be taken into account when interpreting the principle of self-determination in a European context.²²³

This approach is also manifested in the Declaration on the “*Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*” of 16 December 1991, which was elaborated by the European Community to formulate the requirements to be fulfilled by the former member states of the Soviet Union and the Federal Republic of Yugoslavia in order to be recognized as independent states. These requirements explicitly included “*respect for provisions of the Charter of the United Nations and the commitments subscribed to the Final act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights*” as well as “*guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE*”.²²⁴

It seems evident that, in a European context, the principle of the rule of law and the respect for human rights and minority rights are of some relevance in international law with regard to the right to self-determination.²²⁵ Consequently, one can conclude that, at least on a European level, respect for the right to self-determination requires a government to do more than be not openly racist or not systematically oppress parts of its population. A European government must represent the whole people on a democratic basis, including minorities like the Kurds in Turkey. If this is not the case, the principle of self-determination is violated.

It has been argued that the reluctance to grant minorities the right to self-determination is in part based on the idea that self-determination leads to the disintegration of states.

²²² Heintze, Hans-Joachim: *Selbstbestimmungsrecht und Minderheitenrechte im Völkerrecht: Herausforderungen an den globalen und regionalen Menschenrechtsschutz* (1994), 153.

²²³ Compare: Maraun, Thilo: „Anspruch auf Sezession?“ in: Heintze (Ed.): *Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt* (1997), 110; Maraun speaks of a „*new ordre public européen*“ which might even lead to a right to secession in cases of severe human rights violations;

²²⁴ Quoted in: Musgrave (1997), 112; The relevance of the declaration for the developments of international law in relation to secession and its theoretical implications for a recognition of an independent Kurdish State will be discussed below.

²²⁵ Pazartzis, Photini: “*Secession and International Law: The European Dimension*” in: Dugard, John/Raic, David: “*The Role of Recognition in the Law and Practice of Secession*” in: Kohen, Marcelo G. (Ed.), *Secession – International Law Perspectives*, Cambridge: Cambridge University Press 2006, 372

However, self-determination does not necessarily involve changing international borders; rather, it is an aspect of internal change within a state. This internal aspect of self-determination, which is briefly defined as the right of a people to freely determine their political status is widely recognized in international law. It is based on a democratic element and can be achieved by providing broad autonomy within a given state and by granting the relevant people corresponding participation in the state's political decision-making process.²²⁶

If self-determination, or at least the internal aspect of self-determination, is based on the concepts of democracy and the protection of human rights, then it appears artificial to draw a distinction between peoples and minorities, and it seems unjustified for minorities not to be covered by the right to self-determination. The fact that the rights of persons belonging to minorities differ from the right of peoples to self-determination does not necessarily exclude persons belonging to an ethnic or national group from legitimately making claims based on minority rights in some contexts and, in different contexts, when acting as a group, making claims based on the right of a people to self-determination.²²⁷ In the light of the various arguments of internationally acknowledged scholars briefly presented so far, it is in fact arguable that the Kurds in Turkey are entitled to claim the right to self-determination²²⁸ As the right to self-determination, when viewed from a European perspective, implies democracy and popular sovereignty, the Turkish government must thus be representative of the whole population of Turkey including the Kurds in order to fulfil its obligations under the right to self-determination.

Such an approach is also based on the consideration that self-determination is a fundamental human right, based in turn on the principles of freedom and equality. Since the Turkish authorities continue to restrict Kurdish attempts to participate in the political process and still oppress expressions of a Kurdish identity, the Turkish government is violating these principles. The Kurdish right to self-determination can only be granted if Turkish policies are based on the sovereignty and the free expression of the will of the whole population, including the Kurds. It is therefore not enough for Kurds to simply be able to take part in parliamentary elections; the Turkish authorities must acknowledge the existence of the Kurds, adopt policies that do not violate Kurdish rights or suppress their identity, and allow effective Kurdish political

²²⁶ Nowak (2005), Article 1, Recital 34.

²²⁷ Eide, Asbjorn: *Final Text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2001/2, 2. April 2001, Para 15.

²²⁸ Kartal (2002), 186-190 (with further references): According to Kartal, the Kurds in Turkey are entitled to self-determination.

participation. As HANNUM points out: *“If a minority is prohibited from publishing newspapers in its own language, or if a regional party is forbidden from advocating devolution of power from the central to the regional government, formal democracy becomes a sham”*.²²⁹

In the specific case of the Kurds in Turkey, one possible way to realise the right of internal self-determination would be to grant the Kurds a degree of autonomy. As different concepts of autonomy can be realized depending on the individual situation, it can provide an adequate means for protecting the identity of the Kurdish minority in Turkey and allowing Kurdish political participation without threatening the legitimate interest of the state to protect its territorial integrity.²³⁰ Different concepts of state autonomy or state federal structures could allow national minorities to participate in the political process, which is a requirement of international instruments for the protection of minorities. It is in this area that the overlap and corresponding aims of self-determination and minority protection are most evident, as in fact both are intended to enable a group of people, united by common characteristics and a collective will to preserve these characteristics, to participate in democratic decision-making processes to enable them to define their political status and to enjoy their human rights in full freedom.

As this thesis approaches the situation of the Kurds in Turkey from the perspective of minority rights protection, adequate models of autonomy which could be introduced for the Kurds in Turkey will thus not be discussed in relation to the issue of self-determination, but as part of the political participation of national minorities in Chapter 4.

2.4.5 The Kurds in Turkey and External Self-Determination by Way of Secession

Considering that the Kurdish right to internal self-determination has been constantly ignored by the Turkish State, the question arises as to whether the Kurds in Turkey are also entitled to claim the right of external self-determination by way of secession.²³¹

²²⁹ Hannum (2000), 255

²³⁰ Heintze, Hans-Joachim: *“Wege zur Verwirklichung des Selbstbestimmungsrechts der Völker innerhalb bestehender Staaten”* in Heintze (Ed): *Selbstbestimmungsrecht der Völker – Herausforderung der Staatenwelt* (1997), 24-25 and 36.

²³¹ External self-determination means the right of every people to determine its political status and socio-economic development free from external interference. The classical types of exercise of (external) self-determination include a declaration of national independence, the consolidation of various peoples into a unified federal state, dismemberment, secession of a territory with the simultaneous creation of a separate state, annexation by another state or express confirmation of allegiance to a particular state; Nowak (2005), Art 1, Recital 32.

States have traditionally been opposed to attempts at secession and seek to maintain their territorial integrity, but there have always been efforts by various (minority) groups living within existing states to establish their own independent state.²³² The question whether such secessionist tendencies are covered by international law is not easily answered, as there are various aspects that have to be taken into account.

The “*Friendly Relations Declaration*” seems to provide a justification for secession in the case of a sovereign and independent state if parts of the population are not represented in the government, thus linking territorial integrity to the existence of a representative government. It has been noted that one cannot clearly say whether minorities like the Kurds in Turkey are entitled to claim rights on the basis of this Resolution. With regard to this pre-condition, there is at the same time a controversial debate on whether the Resolution provides a basis for secession.

If one argues that the requirement for “*representative government*” as set forth in the Resolution is fulfilled so long as the government is non-discriminatory on the grounds of “*race creed or colour*”, then only openly racist regimes would qualify as unrepresentative. In such cases, violation of the state’s territorial integrity by an act of secession would probably not be a violation of international law. If the lack of representation of other groups, such as ethnic minorities, does not fall within the scope of the Resolution, these groups would not be justified in attempting secession if they are not represented in government.²³³ It follows from a narrow interpretation such as this that the Kurds would certainly not have any right to secession.

Scholars who have interpreted the Helsinki Final Act of the CSCE have concluded that a minority does not have a right to secession in the case of oppression, because the right to self-determination is limited by the principles of the inviolability of frontiers (Principle III) and territorial integrity (Principle IV).²³⁴

It has been noted that the relevant paragraph of the “*Friendly Relations Declaration*” can also be interpreted in a more liberal way. A more liberal interpretation sees this provision as part of a more extensive theory that legitimizes secession in the case of oppression. If a group or a people within an existing state are systematically and permanently oppressed by the government, secession would be legitimate if it is necessary for the people to safeguard its collective identity and the fundamental rights of its members.²³⁵ Secession could thus be justified on the argument that it is “...a variant of the right to self-defence if a minority’s existence is threatened or if there is

²³² Musgrave (1997), 108.

²³³ Musgrave (1997), 188.

²³⁴ Compare: Hannum (2000), 223; Cassese (1995), 284.

²³⁵ Dugard/Raic (2006), 98.

significant discrimination".²³⁶ For example, this "*oppression theory*" has been used to justify the secession of Bangladesh from Pakistan.²³⁷

With regard to the situation of Kosovo in the 1990s, it has also been argued that the Albanians of Kosovo might be entitled to secede from Serbia under the right to self-determination. MARKO/TRETTER/BORIC have concluded that the systematic oppression and discrimination of the Albanian population (and reports that certain measures carried out by the Serbian State have even resulted in a threat to the existence of the Albanian population) could qualify as the necessary preconditions for the Albanian population to claim the right to self-determination and a corresponding right to secede from Serbia. The authors have argued that under the given circumstances, the principles of national unity and territorial integrity could not be cited by Serbia as reasons for opposing calls for an independent Kosovo even if the Kosovo-Albanians did not qualify as a people, but as an ethnic minority.²³⁸

The view that systematic oppression and discrimination may result in a right to secede can also be based on the concept of self-determination as a fundamental human right, proceeding from the notions of human freedom and equality that are essential for the protection of other human rights. In the case of systematic and severe violations of human rights of members of a particular group, this group has a right to secession. The internal aspect of self-determination might therefore result in a right to external self-determination.²³⁹ If one takes this human rights approach, the external aspect of self-determination that can be derived from the "*Friendly Relations Declaration*" may be open to a liberal interpretation. Whenever an ethnic group is suffering systematic human rights abuses, one could argue that it is entitled to a right to secession.²⁴⁰ In general terms, it can be said that "*...territorial integrity as a limitation to self-determination can only apply in those states in which the government represents the whole population in accordance with the exercise of internal self-determination.*"²⁴¹

Considering that the Kurds have been consistently oppressed by the Turkish government, which has sought to eliminate any expression of a Kurdish identity and

²³⁶ Hannum (2000), 211.

²³⁷ Musgrave (1997), 189; According to Crawford (2006), 142, "...Genocide is the clearest abuse of sovereignty, and this factor, together with the territorial and ethnic coherence of East Bengal in 1971 qualified East Bengal as a self-determination unit..." But he points out that the exceptional circumstances of East Bengal were "...important factors in the decision of other states to recognize the secession..."

²³⁸ Marko, Joseph/Tretter, Hannes/Boric Tomislav: "*Perspektiven des zukünftigen politischen und rechtlichen Status Kosovos*", in: Journal für Rechtspolitik 1, 20-40 (1993), Wien New York: Springer-Verlag 1993, 34-35.

²³⁹ Maraun (1997), 110.

²⁴⁰ Maraun (1997), 111.

²⁴¹ Compare: McCorquodale (2000), 492; Blumenwitz, Dieter: *Volksgruppen und Minderheiten: Politische Vertretung und Kulturautonomie*, Berlin: Gebr. Mann Verlag 1995, 71.

has systematically violated Kurdish human rights in its fight against the PKK, one could argue that Kurdish attempts to secede from Turkey might be legitimate.

There has been no consistent practice of states regarding the acceptance of secession within the framework of the United Nations. In some cases, the United Nations has been rather reluctant to accept a right to secession or to recognize states after an act of secession.²⁴² For example, it refused to recognize the Turkish Republic of Northern Cyprus after its secession from Cyprus or the State of Biafra after its secession from Nigeria. In the more recent past, the international community of states has recognized a number of new states by allowing them to become members of the United Nations, as in the case of Bangladesh, the former member states of the Soviet Union or the former member states of the Federal Republic of Yugoslavia. In these instances the United Nations has obviously accepted the constitution of states by way of secession.²⁴³

Based on the consideration that recognition of new states only has a declaratory function in international law, one might argue that there is no significance in a State that has been created by an act of secession being recognized by other states. However, one must take into account that in recognizing a new state the international community demonstrates the extent to which it considers acts of secession to be legitimate and in accordance with international law. Furthermore, if a state is not recognized, it is unlikely that other states will enter into political and economic contact with it and it will consequently be unable to prevail.²⁴⁴

The practice of the European Community and its member states regarding the recognition of new states following the disintegration of Yugoslavia might have some implications for the situation of the Kurds in Turkey. When Slovenia and Croatia declared their independence from the Federal Republic of Yugoslavia in 1991 and hostilities broke out between Slovenian armed forces and the Yugoslav Federal army as well as between Croatia and the (mainly Serbian) Yugoslav army, Western States, in particular the United States and the member states of the European Community, at first responded by refusing to recognize the disintegration and tried to preserve the territorial integrity of Yugoslavia. As the fighting in Croatia worsened and violence escalated, it became obvious that Yugoslavia would not remain a unified state and the European Community changed its position. After attempts to get all the parties involved in the conflict to agree to the dissolution of the country had failed, the member states adopted a common position on the requirements for the recognition of emerging

²⁴² Maraun (1997), 107.

²⁴³ de Zayas (1997), 161.

²⁴⁴ Compare: Dugard/ Raic (2006), 98; Crawford (2006), 28: “...the status of an entity as a state is independent of recognition...”.

independent states.²⁴⁵ These conditions were laid down in the Declaration of the “*Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*” of 16 December 1991, mentioned above.²⁴⁶ Besides the fulfilment of the normal standards for recognition in international law, the requirements for the recognition of new states included respect for the principles of the rule of law, democracy and human rights, and guarantees for the rights of ethnic and national groups and minorities, but also respect for the inviolability of all frontiers “*which can only be changed by peaceful means and by common agreement*”.²⁴⁷

An independent Arbitration Commission was set up to investigate whether the new states fulfilled the conditions for recognition. On the basis of the Commission’s consideration the European Community recognized Slovenia and Croatia as independent states. In Bosnia-Herzegovina the civil war continued and it was not recognised by the EC until 1995.²⁴⁸

It might seem as if the EC’s recognition of the former member states of the Federal Republic of Yugoslavia as independent states implies that the EC generally accepts secession in cases where different nationalities are no longer willing to remain within one single state. Consequently one could argue that Kurdish attempts to secede from Turkey might be justified and an independent Kurdish State would be recognized by the European community of states, at least so long as it satisfies the criteria set out in the Declaration mentioned above. At a closer look, such an approach certainly needs to be reconsidered for a variety of reasons.

It is important to note that the Arbitration Commission argued that the disintegration of Yugoslavia should qualify as dissolution rather than secession, with the consequence that the Socialist Federal Republic of Yugoslavia no longer existed and no state could claim to continue its international personality. This qualification has been criticized in legal literature as it was simply based on the argument that the organs of the Federal Republic did not function any longer after some of the Republics that constituted the Federal Republic had withdrawn their representatives. However, qualifying the disintegration as dissolution certainly helped the European Community in its attempts to solve the conflict because there was no successor state of the former Republic of Yugoslavia which could have accused the EC of intervention in its internal affairs and

²⁴⁵ Musgrave (1997), 116.

²⁴⁶ Musgrave (1997), 112; The secession of thirteen Union Republics from the Soviet Union was less problematic as it took place with the consent of all the parties involved including the central government of the Soviet Union.

²⁴⁷ Musgrave (1997), 112.

²⁴⁸ For an overview of the developments in Yugoslavia see: Musgrave (1997), 114-122.

because the EC was able to recognize the emerging States without appearing to endorse secession.²⁴⁹

There is another aspect that shows that European states would be unlikely to acknowledge a Kurdish secession from Turkey. The Declaration clearly states that existing frontiers have to be respected and can only be changed by peaceful means and common agreement. Similarly, the Arbitration Commission declared that the right to self-determination must not involve changes to existing frontiers at the time of independence except where states agree otherwise. Applying the principle of "*uti possidetis*" the EC was only willing to recognize independent states if their borders were identical to the frontiers of the Federal Republics within the Federal Republic of Yugoslavia. A Kurdish secession from Turkey would inevitably lead to a change of frontiers because there are no internal borders within Turkey that might serve as frontiers of an independent Kurdistan.

The European approach to the disintegration of Yugoslavia must be seen as an individual approach to a specific situation and it is doubtful that the policy adopted by the EC has contributed to the development of new implications for the right to self-determination by way of secession.²⁵⁰ As the situation of the Kurds in Turkey is different from the situation in Yugoslavia, the EC would probably not take a similar approach to calls for secession by the Kurdish population.

However, the recognition of the independence of Kosovo by the member-States of the EU nevertheless indicates that at least in Europe states tend to prefer the creation of new states rather than ongoing internal conflicts.

It is difficult to ascertain whether the Kurds in Turkey are entitled to external self-determination by way of secession. The considerations above show that it is probably right to say that international law neither allows nor prohibits secession as such.²⁵¹ As the practice of states varies depending on the individual circumstances, it is difficult to deduce international norms regarding secession. Although one might argue that cases where secession takes place without intervention by another state are not subject to international law but only to the domestic law of the state concerned, the establishment

²⁴⁹ Compare: Musgrave (1997), 203.

²⁵⁰ Compare: Hannum (2000), 249; Crawford (2006), 401; Crawford states that "...the way in which the Yugoslavian situation was handled provides no precedent for the extension of any international legal right to secede in the case of the constituent units of a federal state." As Turkey is not a federal but a unitary state, it is even more unlikely that the approach to the disintegration of Yugoslavia taken by the EC can be seen as a legal basis for a Kurdish secession from Turkey; see also: Pazartzis (2006), 372: Pazartzis argues that the refusal of a right to external self-determination "...has been counterbalanced by a shifting focus on the internal aspect of self-determination."

²⁵¹ Compare: Dugard/Raic (2006), 98; Hannum (2000), 236

of an independent state is always dependent on international recognition and support.²⁵²

There can be little doubt that Turkey would never agree to the establishment of an independent Kurdish State on its territory, and the violent conflict in the south-east of Turkey can be seen as Turkey's suppression of an attempt to secede and establish such a state, which was the original aim of the PKK. Furthermore, it is very unlikely that any other state would support the Kurds, because the intervention by a state into the internal affairs of another state is prohibited in international law. Even if the Kurds were able to secede from Turkey, an independent Kurdish State would not prevail without the recognition and support of the international community. Most states are generally reluctant to acknowledge that minorities have a right to secede, and the establishment of a Kurdish State in particular would most likely not be recognized because of fear of its destabilizing effect in the region as well as in other parts of Europe. Secession by the Kurds in Turkey would most likely lead to similar attempts by the Kurds living in the neighbouring countries, which would cause further problems in a region that already faces severe political problems. In addition, recognition by the European Community of States might also motivate minority groups in European states to claim independent statehood.

Historical developments in Europe in the twentieth century show that the creation of new states also creates new minorities. Secession and independent statehood alone are not adequate solutions for resolving ethnic tensions and conflicts or the question of minority protection as such. Adequate minority protection can only be achieved through adequate protection of human rights, respect for the principles of democracy and the rule of law, support of the various minority groups living within states to maintain and develop their identity, and through the promotion of intercultural dialogue and respect with the aim of creating of a pluralist society.²⁵³

There is another aspect of enormous importance that has not yet been mentioned. It is not clear whether the majority of Kurds in Turkey actually desire to secede from Turkey.²⁵⁴ There are no reliable data to answer this question, but there is good reason to assume that most Kurds would probably desire to remain within the Turkish State, provided that Turkey would stop the suppression of the Kurds, guarantee their human rights and grant additional minority rights. The only Kurdish political movement that has

²⁵² Musgrave (1997)

²⁵³ Compare: Pan, Christoph: *Minderheitenschutz in Europa*, in: Blumenwitz, Dieter: *Minderheitenschutz und Menschenrechte*, Berlin: Duncker & Humblot 2006, 19.

²⁵⁴ Kartal (2002), 186-190: Kartal also argues that an assessment needs to be made as to whether the Kurds in fact want to secede from Turkey, or whether they want to realise their right to self-determination within Turkish territory.

openly promoted the idea of an independent Kurdish State was the PKK. Other Kurdish parties have sought instead to change the legal framework within Turkey to improve the situation of the Kurds, mostly with the ultimate aim of establishing some sort of autonomy or a federal structure, and even the PKK now seems to have abandoned the idea of Kurdish independence.

As the majority of the Kurds would probably not want to secede from Turkey the discussion about the legal framework of secession and to the difficulties of its realisation remains academic. One should think instead about a solution to the “Kurdish Question” which includes the introduction of some sort of autonomous regime for the Kurdish population. The establishment of an autonomous regime would not only be an adequate means under the Kurdish right to self-determination, but also allow Turkey to fulfil its obligation to grant the Kurdish minority political participation as required by the European instruments for the protection of national minorities.

2.4.6 Conclusions

From a “European Perspective” there are good reasons to argue that the Kurds in Turkey are entitled to claim the right to self-determination. This right requires the Turkish government, established in a democratic way, not only to represent the Turkish population, but also the Kurdish minority. It is therefore simply not enough to allow Kurds to vote on an equal basis with the Turks, the government must also represent Kurdish interests in its policies. Furthermore, self-determination is considered a basic human right established on the principles of the dignity and equality of every individual. Kurdish self-determination is therefore only possible if the Turkish government protects Kurdish human rights on a non-discriminatory basis.

The requirement for representative government as an essential part of the right to self-determination can even be used to justify Kurdish claims for local or functional autonomy or some sort of federal structure within Turkey, if Kurdish interests are not sufficiently protected by the Turkish authorities at national level.

Equal representation and the protection of human rights might nevertheless prove insufficient to protect a distinct Kurdish identity and Kurdish culture.²⁵⁵ The Turkish authorities should therefore recognise the existence of a Kurdish minority and protect it on a collective basis by granting additional minority rights. As self-determination and the protection of minority rights are both part of the protection of human rights, based

²⁵⁵ Hannum (2000), 255.

on the principles of human freedom and equality, they should not be seen as independent concepts with different goals.

If the Turkish government continues to suppress and discriminate against its Kurdish population instead of representing it and protecting its fundamental rights, and denies the Kurds the right to self-determination, Kurdish claims for the right to secession might be justified. However, one cannot say that the Kurds actually have a right to secede under present international law. Kurdish attempts to secede would most likely result in continued violent suppression by the Turkish authorities, resulting in a further escalation of existing tension and violence. The International community would most probably hesitate to recognize an independent Kurdish State for various political and strategic reasons and it is doubtful whether an independent state would be able to prevail without international recognition and support. Another important aspect is that the majority of the Kurds in Turkey might not want to secede from Turkey, preferring a solution to the Kurdish question within the existing borders of the Turkish state.

One can therefore conclude that Kurdish self-determination should be realised within the existing geographic borders and the political institutions of the Turkish state by way of political representation, respect for human rights and the protection of minority rights.

3 The Kurds in Turkey – A Minority

3.1 The International Approach

3.1.1 The Definition of the Term “Minority”

There is no definition of the legal term “*minority*” in any of the international instruments for the protection of minorities. Many states still fear that an explicit definition of a minority in combination with legal obligations might lead to restrictions on state sovereignty or even claims for the right to secession.²⁵⁶ However, an autonomous definition of the term “*minority*” has to be found in international law. Otherwise, states would be free to avoid applying of the provisions relevant to minorities by adopting a narrow interpretation of the term.²⁵⁷

There have been various efforts by scholars and different bodies of international organisations to define the term “*minority*” and it can be asserted that there is widespread agreement as to the main elements of such a definition. A widely accepted and frequently cited definition of the term “*minority*” is the one suggested by Francesco CAPOTORTI in a study he elaborated for the United Nations with regard to Art 27 of the ICCPR.²⁵⁸ He defined a minority as follows:

*“A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.”*²⁵⁹

Since this definition has been elaborated within the framework of the United Nations and has been approved of by many scholars, it is of certain normative relevance.²⁶⁰

There have also been attempts to define the term “*minority*” within the framework of the Council of Europe. In Recommendation 1201 on an additional protocol on the rights of national minorities to the European Convention on Human Rights of 01.02.1993, the

²⁵⁶ Heintze (1994), 125.

²⁵⁷ Compare: Nowak (2005), Article 27, Recital 13, in relation to Art 27 CCPR.

²⁵⁸ For example: Heintze (1994), 125; Lerner, Natan: „*The Evolution of Minority Rights in International Law*“, in: Brölmann/Lefebvre/Zieck (Eds.), *Peoples and Minorities in International Law* (1993), 79; Mohr, Manfred: „*Die Vereinten Nationen und der Minderheitenschutz. Versuch einer Bestandsaufnahme*“ in: Mohr, Manfred (Ed.): *Friedenssichernde Aspekte des Minderheitenschutzes in der Ära des Völkerbundes und der Vereinten Nationen in Europa*, Frankfurt: Springer 1996, 89; Musgrave (1997), 138; Pan, Franz: *Der Minderheitenschutz im neuen Europa und seine historische Entwicklung*, Ethnos Vol. 53, Wien: Braumüller 1999, 17-18; Pöllinger (2001), 26-27; Nowak (2005), Article 27, Recital 14.

²⁵⁹ 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, S. 9f., available under: <http://daccessdds.un.org/doc/UNDOC/GEN/NL7/903/66/PDF/NL790.366.pdf?OpenElement>, 11.03.2008

²⁶⁰ Heintze (1994), 125.

Parliamentary Assembly of the Council of Europe defined the term “*national minority*” as follows:²⁶¹

“...the expression “*national minority*” refers to a group of persons in a state who: a.) reside on the territory of that state and are citizens thereof; b.) maintain longstanding, firm and lasting ties with the state; c.) display distinctive ethnic, cultural, religious or linguistic characteristics; d.) are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state; e.) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their tradition, their religion or their language.”

Unlike CAPOTORTI's definition, the definition of the Parliamentary Assembly uses the term “*national minority*”. There has been a lot of discussion concerning the difference of the terms “*minority*”, “*ethnic minority*” and “*national minority*”.²⁶² However, at international level it seems that the term “*national minority*” is used today to cover ethnic, religious, linguistic and racial groups.²⁶³ The title “*Framework Convention for the Protection of National Minorities*” is a good example of this and Chapter 3.1.2 will deal with the definition of the term “*national minority*” in the context of the Framework Convention. For the purpose of this study, the terms “*minority*” and “*national minority*” are used with identical meaning, covering groups of people with common ethnic, religious, linguistic and/or racial characteristics.

The main elements of a “*minority*” or “*national minority*” may be summarized as follows:

1. A minority is a group that is numerically inferior to the rest of the population. According to the Parliamentary Assembly's definition, the group has to be “*sufficiently representative*”. This requirement has met with some criticism, as the existence of a minority should not be dependent on a certain number of members.²⁶⁴ A group's need for protection might be even more urgent if the group is very small.
2. This group has to be in a non-dominant position, meaning that it does not have political power within the state.²⁶⁵ To constitute a minority, the group must not

²⁶¹ PACE Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights, adopted on 01.02.1993, quoted in: Pfeil, Beate-Sybille: „Minderheitenschutz im Rahmen des Europarates und der KSZE/OSZE“ in: Pan, Christoph/Pfeil, Beate-Sybille (Eds.): *Zur Entstehung des modernen Minderheitenschutzes in Europa, Handbuch der Europäischen Volksgruppen*, Vol. 3, (2006), 463.

²⁶² Compare: Heintze (1994), 135; Mohr (1996), 91, with further references.

²⁶³ Pan (1999), 15.

²⁶⁴ Pan (1999), 20.

²⁶⁵ It is possible that a numerically inferior group exercises political power (and even suppresses the majority of the population). This was the case in the apartheid regime in South Africa. In such a case, the numerically inferior group does not qualify as a minority in the legal sense of the word. See: Heintze (1994), 126;

simply be inferior in absolute numbers, it must also need specific human rights protection against the power of the majority.²⁶⁶

3. The members of the group have ethnic, religious or linguistic characteristics in common that are distinct from those of the majority; the Parliamentary Assembly's definition also includes cultural characteristics. In many cases, or even typically, a minority will be different from the majority in respect of more than one of those characteristics.²⁶⁷
4. The members of the group are citizens of the state they live in;²⁶⁸ the Parliamentary Assembly's definition additionally requires that the members of the group "...reside on the territory of that state..." and that they "...maintain longstanding, firm and lasting ties with the state..." The minimum duration of residence and the exact meaning of these elements are not clear.²⁶⁹
5. The members of the group show solidarity with the group and a desire to preserve the group's culture, religion, tradition or language.²⁷⁰

It is worth pointing out that both CAPOTORTI's definition and the Parliamentary Assembly's (like most international attempts to define the term "*minority*") combine objective and subjective elements. A person's affiliation to a minority is therefore not only dependent on objective criteria, but also, and possibly primarily, on the person's wish to belong to the group in question.²⁷¹

An important question with regard to the minority status of a particular group is whether the existence of a minority (in the legal sense of the word) is dependent on its recognition by the state. This issue has already been addressed with regard to Art 27 ICCPR. The opening phrase of the article reads: "*In those States in which ethnic, religious or linguistic minorities exist...*". Some states have interpreted this to mean that the states themselves may determine whether or not minorities exist within their

²⁶⁶ Mohr (1996), 90.

²⁶⁷ Mohr (1996), 90.

²⁶⁸ This element has been met with some disapproval. The purpose of its introduction was to make foreigners such as refugees or migrant workers (so-called "new minorities") ineligible for minority rights. Compare: Heintze (1994), 126; Mohr (1996), 91; Nowak (2005), Article 27, Note 17.

²⁶⁹ See for example: Pan (1999), 20.

²⁷⁰ In 1985, in the course of the preparations for the UN Declaration on National Minorities, Jules Deschènes elaborated another definition of the term minority which is based on Capotorti's definition and, although it puts a little more emphasis on the subjective element, it mainly contains the same elements: "*A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.*"; UN-Doc. E/CN.4/Sub.2/1985/31, S. 30, quoted in: Heintze (1994), 131.

²⁷¹ Heintze (1994), 127.

borders, an interpretation which has been met with some criticism.²⁷² Since the article emphasizes the factual existence of a minority group, the existence of a minority must be determined on the basis of objective criteria rather than on the basis of legal recognition by the state. The state does not have discriminatory power in the matter.²⁷³ With regard to the application of Art 27 ICCPR, CAPOTORTI concludes that “...if the existence of a minority group within a State is objectively demonstrated, non-recognition of the minority does not dispense the State from the duty to comply with the principles in Art 27.... even in the absence of general recognition at the constitutional level.”²⁷⁴

If recognition of a minority by the state were a necessary pre-condition for the protection of the minority, any provision and obligation for the protection of minorities would be almost meaningless.²⁷⁵ The state could ignore its obligations simply by denying the existence of minorities on its territory or by arguing that a specific group does not qualify as a minority under national law.

The idea that the existence of a minority is independent of the state’s recognition is also consistent with the principle that the “...*protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.*”²⁷⁶ As the protection of national minorities “...*does not fall within the reserved domain of States...*”²⁷⁷ a state is not allowed to invoke the principle of non-interference in internal affairs in this field of international law. If a state were able to circumvent its obligations in the area of minority-protection as part of human rights law just by denying the existence of minorities on its territory, the exemption from the principle of non-interference in the reserved domain of states would be useless. In particular, the case of Turkey and the Kurds is a perfect example of the denial of minority protection based on the argument that national or ethnic minorities do not exist within the state, which demonstrates the necessity of an objective assessment of minorities’ existence and of international control in the field of minority protection.

²⁷² Compare: Capotorti: *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN-Doc. E/CN.4/Sub.2/384/Rev.1, Para 12; Musgrave (1997), 138, with further references.

²⁷³ Musgrave (1997), 138, with further references.

²⁷⁴ Capotorti: *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN-Doc. E/CN.4/Sub.2/384/Add.5, para.12.

²⁷⁵ Heintze (1994), 129.

²⁷⁶ Art 1 FCNM; minority rights can be qualified as special mechanisms within the general system of human rights with the aim of preserving the minorities’ identities; compare: Ahmed (2011), 27.

²⁷⁷ Explanatory Report, Para 30.

3.1.2 The Definition of a National Minority under the Framework Convention for the Protection of National Minorities

In respect of the attempt to define the decisive elements of a minority in a legal sense, some additional considerations are necessary with regard to the meaning of the term “*national minority*” in the text of the FCNM. Like other legal documents dealing with the protection of national minorities, the Framework Convention does not contain a definition of the term “*minority*”. This lack of definition, the vague formulations of its provisions and a rather weak control mechanism have given rise to much criticism. However, no consensus was reached with regard to the definition of the term “*national minority*” during the drafting of the text.

It is up to the member states to examine and define the personal scope of application of the Convention’s provisions for their country. However, this definition must be made on the basis of objective criteria and no group should be excluded from the scope of application on the basis of an arbitrary or unjustified decision. The Advisory Committee on the Framework Convention for the Protection of National Minorities notes in its opinions in relation to the personal scope of application that, on the one hand, “...*Parties have a margin of appreciation in this respect in order to take the specific circumstances prevailing in their country into account, it notes on the other hand, that this must be exercised in accordance with general principles of international law and the principles set up in Article 3. In particular, it stresses that the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions.*”²⁷⁸

According to one of the principles of international law, which is expressly cited in Art 2 of the Framework Convention, treaties have to be applied in good faith. This explicit reference to this principle may be interpreted as a reminder to the parties to the Convention that even in the absence of strong implementation mechanisms, and irrespective of the fear of secession, utmost treaty fidelity is required. Besides the principles of interpretation which usually apply (ordinary meaning of the text, object and purpose of the treaty), the express reference to the principle of good faith also allows for an evolutionary interpretation.²⁷⁹ An interpretation in good faith also means that despite the somewhat restrictive language of the FCNM with its multiple “claw-back clauses”, the Convention has to be interpreted in compliance with its aims: the

²⁷⁸ Compare for example: Advisory Committee Opinion on Albania, adopted on 12.09.2002, ACFC/INF/OP/I(2003)004, Para 17-18; Advisory Committee Opinion on Armenia, adopted on 16.05.2002, ACFC/INF/OP/I(2003)001, Para 14-15; Advisory Committee Opinion on Austria, adopted on 16.05.2002, ACFC/INF/OP/I(2002)009, Para 13-14; Advisory Committee Opinion on Croatia, adopted on 06.04.2001, ACFC/INF/OP/I(2002)003, Para 14-15.

²⁷⁹ Hilpold, Peter: „Article 2“, in: Weller, Marc (Ed); *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 101.

protection of minorities, which is also in the interest of and for the benefit of the state as a whole.²⁸⁰ A narrow interpretation of the term “*national minority*” with arbitrary exclusion of particular groups by the state is without doubt incompatible with the principle of good faith.

Elements of an appropriate definition of the term “*minority*” can be drawn from the text of the Framework Convention, including the preamble, which usually serves to declare the aim and the subject of the treaty. Paragraph 7 of the preamble declares that “...*a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity*” and in Art 5 FCNM the essential elements of the identity of members of national minorities are defined as “*religion, language, traditions and cultural heritage*”, elements that also appear in other provisions of the Framework Convention. One can therefore conclude that these are understood to be the essential characteristics of a national minority as dealt with as the subject of the Framework Convention.²⁸¹

The Explanatory Report also provides assistance in interpreting of the term “*national minority*”. Art 3 Para 1 FCNM guarantees to every person belonging to a national minority the freedom to “...*decide whether or not he or she wishes to come under the protection flowing from the principles of the framework Convention.*” According to the Explanatory Report, in the context of the Convention, this freedom “...*does not imply a right of an individual to choose arbitrarily to belong to any national minority*”, but “...*the individual’s subjective choice is inseparably linked to objective criteria relevant to the person’s identity*”.²⁸² Thus, the term national minority as understood in the field of application of the Framework Convention requires the existence of objective as well as subjective criteria.

The common definitions of international law that have been described above have been elaborated within the framework of international organisations such as the United Nations or the Council of Europe. Due to their widespread acceptance, they have a degree of normative quality and may at least be considered as “*soft law*”.²⁸³ Accordingly, they have to be taken into account in any interpretation of international documents and treaties for the protection of national minorities. An analysis of the

²⁸⁰ Hilpold (2006), 104.

²⁸¹ Klebes, Heinrich: “Rahmenübereinkommen des Europarats zum Schutz nationaler Minderheiten” in: Europäische Grundrechte Zeitschrift (EuGRZ), Kehl/Strasbourg: N.P. Engel Verlag 1995, 262-285, 263.

²⁸² Explanatory Report, Para 35.

²⁸³ As to the term and the normative relevance of soft law, compare: Tretter, Hannes: “*Der Schutz ethnischer Minderheiten durch kollektive und individuelle Rechte*” in: Ermacora, Felix/Tretter, Hannes/Pelzl, Alexander (Eds.): *Volksgruppen im Spannungsfeld von Recht und Souveränität in Mittel- und Osteuropa*, Ethnos Vol. 40, Wien: Braumüller 1993, 177

Framework Convention indicates that the term “*national minority*” in the field of application of the Convention mainly contains the same elements as these common international definitions. Where there is no definition of the term “*national minority*” in an international convention or covenant, these definitions should be and will be applied to the term “*minority*” and to the scope of application of treaties such as the Framework Convention.²⁸⁴

State parties to the FCNM have adopted different approaches regarding the definition of the scope of application within their territories. Some of them have made provisos and declarations intended to precisely define the groups they consider to be a national minority, either through enumerating those groups, or enumerating the criteria which they consider essential for a group qualify as a national minority under the FCNM. Other states have adopted a more inclusive approach.²⁸⁵

Austria has made a declaration regarding the scope of application, defining it in terms of applicable national law:

*“The Republic of Austria declares that, for itself, the term “national minorities” within the meaning of the Framework Convention for the Protection of National Minorities is understood to designate those groups which come within the scope of application of the Law on Ethnic Groups (Volksgruppengesetz, Federal Law Gazette No. 396/1976) and which live and traditionally have had their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic cultures.”*²⁸⁶

Denmark, Germany, the Netherlands and Sweden have explicitly enumerated those groups which they consider covered by the provisions of the FCNM.

3.1.3 The Individual as a Member of the National Minority

One of the fundamental principles of the protection of national minorities is the right of a person belonging to a national minority to choose to be treated or not to be treated as such. This principle is based on the idea that an individual may possess several identities and may identify himself/herself in different ways in different situations and for different purposes. It is an important aspect of the general principle of the autonomy of

²⁸⁴ Compare: Hofmann (1996), 132

²⁸⁵ Compare: List of declarations made with respect to treaty No. 157 (of the Council of Europe), <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=&DF=&CL=ENG&VL=1>, 24.02.2010.

²⁸⁶ See: List of Declarations with respect to Treaty No. 157 (of the Council of Europe), <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=8&DF=08/02/05&CL=ENG&VL=1>, 26.03.2008

the individual and is embodied in the basic European instruments for the protection of national minorities.²⁸⁷

Art 3 Para 1 FCNM stipulates: *“Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice.”* Although the provisions of the Framework Convention are in general understood to only contain the obligations of the member states, the formulation of Art 3 Para 1 implies that the individual is granted a specific right by this very provision. It is not clear and may seem doubtful whether this was the intention of the drafters, but the text indicates such an understanding.²⁸⁸

In a declaration similar to that of Art 3 Para 1 FCNM, the first sentence of Paragraph 32 of the Copenhagen Document states that *“To belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice.”*

According to the Explanatory Report, Art 3 Para 1 of the Framework Convention guarantees to every person belonging to a national minority the freedom to *“...decide whether or not he or she wishes to come under the protection flowing from the principles of the framework Convention”*²⁸⁹. In general terms it is thus up to the individual whether he or she wants to be protected and granted specific rights as a member of a minority. The aim of the phrase *“...no disadvantage shall arise from the free choice it guarantees, or from the exercise of the rights which are connected to that choice...”* in Art 3 is *“...to secure that the enjoyment of the freedom to choose shall not be impaired indirectly.”*²⁹⁰ The phrase clarifies that it is not sufficient simply to provide a theoretical choice which may not be exercised because of possible negative consequences, but that states are under an obligation to guarantee the freedom of choice in an effective manner.

The practice of most European states which are parties to the FCNM shows that they seem to respect the freedom of choice accorded to persons belonging to a national minority. In Austria, for instance, freedom of choice is explicitly mentioned in legislation, as for example under Section 1, Para 3 of the Minorities Act, *“...everyone is free to declare his or her affiliation with a national minority. No person belonging to a minority shall be put at a disadvantage as a result of exercising or not exercising the rights to*

²⁸⁷ Heintze, Hans-Joachim: „Article 3“, in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 118-119.

²⁸⁸ Hofmann (1996), 134.

²⁸⁹ Explanatory Report on the Framework Convention for the Protection of National Minorities, Para 34, <http://conventions.coe.int/Treaty/EN/Reports/Html/157.htm>, 25.03.2008

²⁹⁰ Explanatory Report, Para 36;

*which he/she is entitled as a member of such a minority. No one is under an obligation to show his or her affiliation to a national minority.*²⁹¹

Despite the general acceptance of the freedom to choose, the collection of data in respect of the actual minority population may, in particular, be problematic. There does not seem to be an obligation under the international instruments to collect data on the number of persons considering themselves as belonging to a national minority.²⁹² However, a lack of such data may lead to problems if the number of such persons is consequently only estimated. Since certain provisions of the Framework Convention contain elements such as “*areas inhabited by persons belonging to a national minority...in substantial numbers*” or “*sufficient demand*”, a lack of reliable data might lead to negative consequences in the field of minority protection.

On the other hand, individuals must not be forced to give information on whether they belong to a national minority or not. States should thus not oblige people to give information about their mother tongue, ethnic origin, religious belief or other data regarding an individual’s affiliation with a particular national minority, and such information should not be collected in other ways without the consent of the person concerned and under protection of appropriate legal safeguards.²⁹³

3.1.4 The Individual or the Group as the Subject of Minority Rights

Another important aspect of the protection of minorities is the question of who the holder is of minority rights: the minority as a group or the individual belonging to the minority? The international instruments for the protection of minorities adopt an individualistic approach.

Art 3 Para 2 of the Framework Convention stipulates:

“Persons belonging to national minorities may exercise the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention individually as well as in community with others.”

Almost the same wording is to be found in the final Sub-Paragraph of Paragraph 32 of the Copenhagen Document which declares: “*Persons belonging to national minorities*

²⁹¹ Report by the Republic of Austria pursuant to Art 25 paragraph 1 of the Framework Convention for the Protection of National Minorities of 30 June 2000, ACFC_SR(2000)003, (Austria State Report)

²⁹² Compare: Heintze (2006), 126.

²⁹³ Compare: Heintze (2006), 130.

can exercise and enjoy their rights individually as well as in community with other members of their group.”²⁹⁴

Although these provisions contain a collective element, there can be little doubt that the rights and freedoms contained in the FCNM as well as in the Copenhagen Document are designed as individual rights, and not as group rights.²⁹⁵ The Explanatory Report declares that what is recognized is “...the possibility of joint exercise of those rights and freedoms, which is distinct from the notion of collective rights.”²⁹⁶ The holder of minority rights is not the minority as a whole, but the individual belonging to the minority.²⁹⁷

The importance of the collective element in the exercise of minority rights should nevertheless not be underestimated. The term “others” should be understood in the widest possible sense covering other persons belonging to the same minority and persons belonging to another minority, as well as persons belonging to the majority population of the state.²⁹⁸ Certain minority rights have essential collective elements, such as the right to freedom of assembly and association, or education rights. The provisions guaranteeing these rights presuppose the existence of a group and the collective exercise of these rights. One can even go so far as to argue that the collective element contained in the international instruments for the protection of minorities protects the existence of the minority as a whole: “Phrased in this way, the individualistic approach adopted by the Framework Convention inevitably protects the minority as such as a group as well, since without the protection of the group the individual cannot enjoy the freedoms together with other persons belonging to the same group. Without this implication, the right of a person belonging to the group would be meaningless.”²⁹⁹

Most European states have rejected the idea of collective rights and their legal systems only contain individual rights and freedoms. According to HEINTZE, implementation practice, in particular the fact that few state reports to the FCNM have contained

²⁹⁴ Compare: Art 3 of UN General Assembly Resolution 47/135, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, A/RES/47/135, 18 December 1992:

“Persons belonging to national minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.”

²⁹⁵ Group rights are granted to the group as such, which means that the group is the holder of these rights; compare: Lerner (1993), 90 and 100.

²⁹⁶ Explanatory Report, Para 37.

²⁹⁷ Compare: Hofmann (1996), 132 and 134.

²⁹⁸ Explanatory Report, Para 37.

²⁹⁹ Heintze (2006), 134; compare: Eide, Asbjorn: *Final Text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2001/2, 2. April 2001: “While only individuals can claim the rights, the State cannot fully implement them without ensuring adequate conditions for the existence and identity of the group as a whole.”

information on Art 3 (2) FCNM, indicates that States do not consider the traditional individualistic approach or the collective dimension of minority rights to be problematic.³⁰⁰

3.1.5 The Kurds in Turkey – A Minority under International Law

In the light of the common international definitions, the Kurds in Turkey do constitute a minority which is entitled to claim specific rights and protection under international law. As described in Chapter 2.2, the estimated number of Kurds in Turkey varies considerably, but one can conclude that they constitute between 10% and 23% of the overall Turkish population and are numerically inferior to the majority of ethnic Turks. In view of the historical developments and the current political situation in Turkey, there can be little doubt that the Kurds are in a non-dominant position within the Turkish State. Since the beginning of the Republic, the Kurds have had no influence or political power within the Turkish government and have constantly been subjected to oppression and forced assimilation by the government which has championed Turkish nationalism and denied any existence of a Kurdish minority. It has always been the Turkish majority population, i.e. those who consider themselves to be Turks, united by the idea of the Turkish nation, which has had political power and been responsible for Turkish policies. The Kurds have always been, and still are, in a non-dominant position and are consequently in need of special protection.

Very often, or even typically, a minority not only distinguishes itself from the majority solely by its ethnic, or religious, or linguistic characteristics, but two or even all of these elements will apply together.³⁰¹ The Kurds in Turkey are a good example of such a case. They are different from the Turkish majority with regard to ethnic characteristics, as they have their own historical background, ancestry and culture, but they are also a linguistic minority.³⁰² Although Kurdish consists of different dialects that are mutually understandable to a limited extent, the Kurdish language as a member of the Indo-European language family is a different language from Turkish. Parts of the Kurdish minority even constitute a religious minority, because there are Kurds who are not Sunni Muslims, but Alevi. Obviously therefore, the Kurds have ethnic, linguistic (and some of them, even, religious) characteristics, that are different from those of the Turkish majority.

³⁰⁰ Heintze (2006), 134.

³⁰¹ Mohr (1996), 90.

³⁰² Compare: Rumpf, Christian: „*Die rechtliche Stellung der Minderheiten in der Türkei*“ in: Frowein, Jochen Abraham/Hofmann, Rainer/Oeter Stefan (Eds.): *Das Minderheitenrecht europäischer Staaten*, Teil 1, Berlin/Heidelberg/New York: Springer Verlag 1993, 456.

Most Kurds living in Turkey are citizens of the Republic of Turkey. Although there has not been much historical research into it, one can be sure that the Kurds have been living on the territory of modern day Turkey at least for centuries, and although there are thousands of Kurdish refugees who have fled from Iraq, the majority of Kurds have been citizens of the Republic of Turkey since the time of its proclamation. Consequently, one can say that the Kurds “...*maintain longstanding, firm and lasting ties...*” with the Turkish State.

A group fulfilling all the objective requirements also has to “...*show a sense of solidarity, directed towards preserving their culture, tradition, religion or language...*”³⁰³ in order to qualify as a minority. It has already been noted that, before the foundation of the Turkish Republic, the tribe and the community of Islam were the traditional source of group identification for the Kurds. For most of their history, the Kurds did not regard themselves as a distinct people or nation, and accordingly, for a long period of time, they do not seem to have shown any sense of solidarity with each other aimed at the preservation of a common culture and tradition. However, this changed considerably during the course of the 20th century. Kurdish nationalism, calls for an independent Kurdish State and Kurdish autonomy, the demand for Kurdish cultural rights, the existence of Kurdish media and broadcasting agencies, and the formation of Kurdish political parties can all be seen as manifestations of the solidarity required to qualify as a minority. Although the Turkish State is not interested in obtaining such data, one can assume that most Kurds nowadays regard themselves as Kurds, as members of a distinct Kurdish people. It should be emphasized that this does not necessarily mean that they do not see themselves as Turks or Turkish citizens at the same time, because an individual may have several identities, overlapping and complementing each other depending on the particular situation.

The Kurds in Turkey are a minority according to widely acknowledged definitions in international law. Consequently, they are covered by the provisions of international treaties and other instruments dealing with the protection of national minorities.

The Kurds have characteristics such as language, traditions, cultural heritage and, in some cases, religion, which are distinct from those of the Turkish majority population. These elements are also crucial for the definition of the term “*national minority*” in the context of the Framework Convention for the Protection of National Minorities. If Turkey were to sign and ratify the Framework Convention, any exclusion of the Kurds from the scope of application of the Convention could without doubt be deemed as arbitrary and in violation of the principles of international law, since the exclusion of the largest

³⁰³ See relevant definitions in Chapter 3.1 above.

minority group from the application of a convention for the protection of national minorities would be contrary to the object and purpose of the treaty and not in accordance with the principle of good faith.

3.2 The Turkish Minority-Concept

3.2.1 Introduction

As the Kurds qualify as a minority in international law, it is necessary to analyse whether they are recognized as a minority under Turkish national law. It has to be noted at this stage that neither European minority rights instruments nor the political criteria of Copenhagen require a state to confer any kind of formal minority status on a minority. International standards only require effective protection of minorities and not formal legal status. It is thus not necessary for Turkey to formally recognize the existence of a Kurdish minority or any other ethnic, linguistic or religious minority on its territory, or to accord them with special status.³⁰⁴ What is necessary is the effective protection of the Kurdish population, as it clearly qualifies as a minority under international law. However, implicit recognition of a minority by the legal system and the authorities is obviously a minimum necessary pre-condition for effective minority protection. Thus, the following pages will contain an analysis of whether the Kurds qualify as a minority under Turkish law.

3.2.2 The Treaty of Lausanne

Questions of legal minority status, specific protection and additional minority rights in Turkey are inextricably linked to the ideology of the Turkish constitutional and legal system. The ideological function of the Turkish Constitution is the main reason why the present Turkish legal and political concept of national minorities is still based on the Treaty of Lausanne of 1923.³⁰⁵

Articles 37 to 44 of the Treaty of Lausanne contain provisions for the protection of minorities in Turkey. Art 38 prohibits discrimination and grants the right to freedom of religion, confession and belief, Art 39 grants the right to equal treatment, and Art 40 the right to factual equal treatment. Also included are the right to use the minority language in public and in private (Art 39), the right to cultural and social institutions (Art 40), the

³⁰⁴ Compare: Rumpf, Christian: „*Die türkische Verfassungsentwicklung auf dem Weg zur EU-Mitgliedschaft*“ in: Zippel, Wulfdieter (Ed.): *Spezifika einer Südost-Erweiterung der EU: Die Türkei und die EU-Türkei-Beziehungen*, Baden-Baden: Nomos Verlagsgesellschaft 2003, 115.

³⁰⁵ Rumpf (1993), 448.

right to education in the minority language under certain circumstances (Art 41) and the requirement for state regulations that respect the values and traditions of non-Muslim minorities.³⁰⁶

According to the official Turkish view, all the articles in the Treaty of Lausanne regarding the protection of minorities apply only to religious minorities in Turkey.³⁰⁷ Muslim groups with different ethnic or linguistic characteristics are not covered by the treaty and are consequently not granted any specific rights on the basis of its provisions. The minority concept which the Turks were able to introduce into the Treaty of Lausanne (against the initial intention of the Western powers) is based on the principles governing the Millet system of the Ottoman Empire.

To this day, the Treaty of Lausanne is the basis of Turkey's policies in respect of minorities. Accordingly, Turkey only recognizes three non-Muslim minorities: Greeks, Armenians and Jews. As most of the Kurds are Sunni Muslims, they are not covered by the provisions of the Treaty of Lausanne.³⁰⁸

3.2.3 The Turkish Constitution and the Turkish Concept of Nationalism

The restrictive minority concept of the Treaty of Lausanne and its traditional interpretation as only covering non-Muslim minorities has been passed down to subsequent Turkish constitutions, including the current constitution of 1982, which does not provide for specific protection or additional rights of minorities.

One of the basic principles of the present as well as past Turkish constitutions is nationalism, which is understood as the specific form of nationalism created and established as a political principle by Mustafa Kemal in the course of the foundation of the Republic of Turkey.³⁰⁹ There is a reference to the “*value*” of the nationalism of Atatürk and multiple references to the “*Turkish nation*” in the Preamble of the current Turkish Constitution.

Under the heading “*Characteristics of the Republic*”, Art 2 of the Turkish Constitution declares:

³⁰⁶ An English version of the Treaty of Lausanne can be found on the website of the Turkish Ministry of Foreign Affairs, <http://www.mfa.gov.tr/lausanne-peace-treaty.en.mfa>, 24.02.2010; For a German translation of Art 37-44 of the Treaty see: Kartal (2002), 92-94; For a summary of the content see: Pan, Christoph: „*Minderheitenrechte in der Türkei*“ in: Pan, Christoph/Pfeil, Beate-Sibylle (Eds.): *Minderheitenrechte in Europa*, 2nd Edition, Wien: Springer Wien New York 2006, 555.

³⁰⁷ With reference to particular Articles of the Treaty, this interpretation is covered by the text of the Treaty, which explicitly refers to “non-Muslim minorities”.

³⁰⁸ Compare: Kartal (2002), 91-96; Pan (2006), 554; Strohmaier, Barbara, *Ethnische und religiöse Pluralität in der Türkei – Auswirkungen der EU-Beitrittsbestrebungen am Beispiel der Situation von Aleviten und Kurden* (2001), 52-53.

³⁰⁹ On the importance of nationalism in the present constitution see: Rumpf (1996), 100-105.

*“The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.”*³¹⁰

The importance of the concept of nationalism is not only evident from its predominant position in the Turkish Constitution, but also in the fact that it is embodied in numerous laws and encompasses the whole Turkish legal system.³¹¹

Turkish nationalism, as defined by Atatürk, is based on the concept of the nation state.³¹² The human element of the Turkish nation state is the Turkish nation, which is defined in a “subjective” way. Based mainly on the fact that the Turkish population consisted of, and still consists of, different ethnic, linguistic and religious groups,³¹³ Atatürk’s nationalism presupposed that *“...a nation is based, not necessarily on such “objective” shared characteristics as race, ethnicity, religion and language, but on shared sentiments and commitments of their members and particularly on their will to live together under a common government.”*³¹⁴ The Preamble of the constitution includes an implicit definition of nationalism according to which *“...all Turkish citizens are united in national honour and pride, in national joy and grief, in their rights and duties regarding the national existence, in blessings and in burdens, and in every manifestation of national life...”*. In accordance with this concept, the term “*Türk*” in its constitutional sense is not defined in ethnic terms.³¹⁵ Art 66 of the Turkish Constitution stipulates: *“Everyone bound to the Turkish state through the bond of citizenship is a Turk.”* With regard to the question of the constitutional recognition of minorities, this provision gets its specific meaning when read in conjunction with the principle of nationalism. Understood in this way, Art 66 of the Turkish Constitution stipulates that the Turkish nation consists of all the people with Turkish citizenship.³¹⁶ Since members of ethnic or linguistic minorities living in Turkey usually have Turkish citizenship, they are necessarily Turks in the constitutional context and as such are part of the Turkish nation. Thus, one may conclude that even if minorities in Turkey exist as a matter of fact, legally they are non-existent under the Turkish Constitution, which only

³¹⁰ Art 2 of the Turkish Constitution. The text of the Turkish Constitution is available on the website of the Office of the Turkish Prime Minister: <http://www.byegm.gov.tr/mevzuat/anayasa/anayasa-ing.htm>, 18.03.2008.

³¹¹ Rumpf, Christian: *Das türkische Verfassungssystem: Einführung mit vollständigem Verfassungstext*, Wiesbaden: Harrassowitz Verlag 1996, 102-103; these legal provisions and their impact on the situation of the Kurdish minority in Turkey will be discussed in Chapter 4.

³¹² Kartal (2002), 119.

³¹³ Rumpf (1993), 455.

³¹⁴ Özbudun, Ergun: *“Constitutional Law”* in: Ansay, Tugrul/Wallace Jr., Don: *Introduction to Turkish Law*, Kluwer Law International, 5th Edition, The Hague 2005, 29.

³¹⁵ Kartal (2002), 120.

³¹⁶ Compare: Kartal (2002), 124; Rumpf (1993), 468.

acknowledges the Turkish nation as an identifiable group of citizens and neglects criteria such as different language or ethnic background.³¹⁷

With regard to questions of nationalism and the Turkish minority-concept, Art 10 of the Turkish Constitution is of particular importance: *“All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such consideration...”* and *“...no privilege shall be granted to any individual, family, group or class...”*

The principle of equality and the prohibition of discrimination can be found in most constitutions of democratic societies, but in the context of the Turkish constitution their purpose and interpretation are understood in a very specific way. Even though the Turkish principle of equality is interpreted in such a way that different legal treatment (restrictions or privileges) is justified if the underlying facts are different, privileges are not allowed on the basis of criteria such as different ethnic identity, different religion or different language.³¹⁸ If minority rights are considered to be privileges, and different ethnicity, language or religion are categorically not considered to be different facts justifying different treatment, the principle of equality under Art 10 of the Turkish Constitution may be seen as a constitutional prohibition of minority rights. As will be shown in Chapter 4, the principle of equality, as it is usually interpreted in the European context, does not constitute an impediment to the effective protection of a national minority through the guarantee of additional rights.

However, the principle of equality under Art 10 of the Turkish Constitution is not only understood as a guarantee of equal treatment and a prohibition of discrimination, it is instead also understood by the Turkish authorities as a requirement of the state to reduce ethnic, religious or cultural differences among the population and to assimilate members of groups with characteristics which are different to those of the “Turkish” majority.³¹⁹ Accordingly, this principle not only prohibits the granting of specific rights to members of particular groups like the Kurds, but also prohibits the “creation” of a Kurdish minority through legal recognition. Understood in such a way, the principle of equality loses its protective function in respect of the protection of human rights and fundamental freedoms.³²⁰

An important element of Turkish nationalism is “national culture”, which is mentioned in the preamble of the Turkish constitution and constitutes a source of restriction of human rights in Turkey.³²¹ “National culture” is not defined in the constitution. Since the

³¹⁷ Compare: Pan (2006), 556-557; Rumpf (1993), 468.

³¹⁸ Rumpf (1996), 241.

³¹⁹ Compare: Rumpf (1996), 241; Kartal (2002), 161; Pan (2006), 558, Strohmeier (2001), 55.

³²⁰ Rumpf (1993), 483.

³²¹ Compare: Kartal (2002), 141; Pan (2006), 557-558.

multicultural, multilingual and multi-ethnic structure of the population on Turkish territory was inconsistent with the idea of a unified Turkish nation, it was also necessary in the course of the foundation of the Republic to artificially create a cultural basis for the Turkish nation.³²² According to Art 134 of the Turkish Constitution, the Atatürk High Institution of Culture, Language and History was to be established “...*in order to conduct scientific research, to produce publications and to disseminate information on the thought, principles and reforms of Atatürk, Turkish culture, Turkish history and the Turkish language...*”. The achievements of this institution have included the “*sun language theory*” and the Turkish “*history thesis*”, which were mentioned in Chapter 2.1. Research on the history of the Kurds or any other ethnic, linguistic or religious group has been diligently avoided.³²³

Although it is not explicitly stipulated in the Turkish Constitution, a systematic interpretation shows that, in order to conform to Atatürk’s concept of nationalism, “national culture” can only mean, and is understood as, “Turkish culture”. Furthermore, the concept of a public institution responsible for Turkish culture implies that culture is not something to be created by the individual or the population of a State, but created by the elite in order to serve the interests of the State.³²⁴ Art 3 of the Turkish Constitution, which stipulates that the language of the Turkish State is Turkish, and Art 42 Para 9 of the Turkish Constitution, which provides that no other language “...*than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education...*” have to be considered as part of such a systematic approach. From this perspective, the constitutional term “*national culture*” seems to exclude the possibility of any legal protection for a minority culture and is used as a tool for cultural and ethnic assimilation.³²⁵

Thus, whilst the concept of Turkish nationalism, which is based on the idea of the nation-state and primarily defines the nation as the collective of Turkish citizens, may initially appear to be indifferent to ethnic background and identity, in fact, it is not neutral, but hostile with regard to expressions of different ethnic and cultural identities among Turkish citizens.³²⁶

³²² Rumpf (1993), 455.

³²³ Rumpf (1993), 455.

³²⁴ Rumpf (1996), 272.

³²⁵ Compare: Kartal (2002), 146; Rumpf (1993), 479.

³²⁶ Compare: Rumpf (1996), 101-102.

3.2.4 The Indivisible Integrity of the Turkish State with its Territory and Nation and Restrictions on Human Rights and Fundamental Freedoms

Based on the perception that ethnic and national minorities do not exist, Turkish nationalism is also understood as the safeguard of national unity and the unity of the Turkish people.³²⁷ Accordingly, an important aspect of this specific understanding of nationalism is the principle of the “*indivisibility of the Turkish State with its territory and nation*”, which is incorporated in the Preamble, Art 3 and numerous other provisions of the Turkish Constitution.³²⁸

Art 3 Para 1 of the Turkish Constitution declares: “*The Turkish state, with its territory and nation, is an indivisible entity.*”

The “*indivisibility of the state with its territory and nation*” is embodied in numerous legal provisions and serves as a guideline for the interpretation of the constitution and other legal provisions. It is one of the basic principles of the Turkish legal order.³²⁹

Although the territorial integrity of a state is a common principle in international law, Turkey’s interpretation of the principle as set forth in the Turkish Constitution does not comply with European standards, because, in contrast to other states, the Turkish model of territorial integrity also includes the necessity for a unified Turkish nation.³³⁰

As any reference to a national or ethnic minority is seen as a violation of the principle of a unified nation, which might even lead to calls for the right to secession, it is perceived as a threat to Turkey’s territorial integrity. Accordingly, the principle of the “*indivisibility of the state and the nation*” constitutes one of the main impediments to the recognition of an ethnic or linguistic minority such as the Kurdish one.

As this principle is understood as a ban on separatist tendencies or movements,³³¹ it has been further exploited by the Turkish Constitution as a basic restriction on the exercise of fundamental rights and freedoms. The original version of Art 13 of the Turkish Constitution of 1982 provided that fundamental rights and freedoms could be restricted for the protection of public interests such as the indivisible entity of the state with its territory and nation, national sovereignty, the republic, national security, public order or security. In general terms the Article stipulated that in the event of a conflict between one of these public interests and an individual’s interest in the exercise of a fundamental right or freedom, the former would prevail. The general terminology has

³²⁷ Kartal (2002), 122.

³²⁸ Rumpf (1996), 103.

³²⁹ Kartal (2002), 123.

³³⁰ Pan (2006), 558-559.

³³¹ Ozbudun (2005), 29.

allowed for a very broad interpretation by the constitutional court which in turn has led to a very restrictive human rights regime.³³²

In particular minorities such as the Kurds have suffered under these restrictions because any exercise of fundamental rights which has resulted in an expression of Kurdish identity has been perceived as a threat to one of the above-mentioned public interests, in particular to the territorial integrity of the Turkish state and the integrity of the Turkish nation, and has consequently been prohibited.³³³

In the course of the legal reforms undertaken by the Turkish authorities with the aim of bringing the Turkish legal system in line with European Union standards, Art 13 of the Turkish Constitution was amended on 03.10.2001. The current version stipulates:

“Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the constitution without infringing upon their essence. These restrictions shall not be in conflict with the letter and spirit of the constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality.”

The new version of Art 13 of the Turkish Constitution does not include the general precedence of public interests over fundamental rights and freedoms and its text appears to be in line with the requirements for restrictions of human rights and fundamental freedoms set forth in the ECHR. Art 13 stipulates that restrictions can only be imposed by formal law (enacted by parliament), and not by administrative act, and it protects the “essence” of every fundamental right and freedom.³³⁴ Another positive aspect is the introduction of the principle of proportionality as a basic principle for the interpretation and specification of individual fundamental rights and freedoms. It is worth noting that this principle has already been used in the jurisdiction of the Turkish Constitutional Court in some cases.³³⁵ Although the provision that “...restrictions shall not be in conflict with...the requirements of the democratic order of the society...” resembles the identical phrases in the second paragraphs of Articles 8 to 11 ECHR, there is an important difference in the wording. Whereas the Turkish Constitution only requires that “restrictions shall not be in conflict with...the democratic order”, the European Convention contains the additional element that the restrictions also have to be necessary in a democratic society. However, the Turkish Constitutional Court also

³³² For a comprehensive analysis of Art 13 of the Turkish Constitution (old version) see: Rumpf (1996), 219-224.

³³³ Specific examples of such prohibitions will be given in Chapter 3.

³³⁴ Rumpf (2003), 98.

³³⁵ Rumpf (2003), 98; Rumpf (1996), 232-233.

seems to apply the element of “necessity” in its jurisprudence, basically bringing this jurisprudence in line with that of the European Court of Human Rights in this regard.³³⁶

While it appears as if the amendment of Art 13 of the Turkish Constitution has introduced a much more liberal system for the protection of fundamental rights and freedoms into the Turkish Constitution, there are nevertheless still reasons for concern, because far-reaching restrictions are still possible, especially with regard to the exercise of such rights by members of minorities.

Under the heading “*Prohibition of Abuse of Fundamental Rights and Freedoms*”, Art 14 of the Turkish Constitution, which was also amended in 2001, contains a general restriction on the exercise of human rights:

“None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights.

No provision of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution.

The sanctions to be applied against those who perpetrate these activities in conflict with these provisions shall be determined by law.”

The text of the previous version of Art 14 was more restrictive and could be interpreted as a mandate for the Turkish authorities to further limit fundamental rights and freedoms, in particular the freedom of thought and expression of thought, and the freedom of the press. According to the Turkish Constitutional Court, Art 14, interpreted in the light of the preamble of the Constitution, implied that no opinion or expression of thought should be protected if it ran counter to Turkish national interests, the principle of the indivisible entity of the Turkish State with its territory and nation, the historic and moral values of Turkism, nationalism, and the principles and reforms of Atatürk.³³⁷

The aim of Art 14 in its amended form, as well as in its previous wording, with its broadly formulated possibilities for restrictions, is to provide a basis for those Turkish penal laws that prohibit and sanction activities that are perceived as a threat to the Turkish state. However, such broad provision is not necessary, because the protection of the state and its democratic order is inherent in the Constitution. If fundamental rights and freedoms are granted in a well-elaborated system such as the ECHR, they

³³⁶ Rumpf (2003), 99.

³³⁷ For a comprehensive analysis of Art 14 of the Turkish Constitution (old version) see: Rumpf (1996), 224-225.

can certainly be restricted when exercised in a way that threatens the state, its democratic order or the exercise of fundamental rights and freedoms by other individuals, and no additional catch-all provision is therefore necessary.³³⁸

Like the old version, the amended text of Art 14 (1) of the Turkish Constitution with its vague and general formulation can be easily used, and has been used, to arbitrarily restrict fundamental rights and freedoms. In particular, the element of the protection of the indivisible integrity of the state still provides a constitutional basis for restricting the fundamental rights and freedoms of members of an ethnic, religious or linguistic group in order to prevent expressions of their distinct identity and culture. Such an arbitrary denial of human rights is incompatible with the principle of the rule of law, which is one of the characteristics of the Republic of Turkey pursuant to Art 2 of the Turkish Constitution, and contrary to the principle that human rights are inherent to every individual.³³⁹

Although many of the provisions of the Turkish Constitution have been amended in the framework of a large package of reforms intended to bring the Turkish legal system in line with the standards set by the European Union, the protection of fundamental rights and freedoms still does not fully meet European standards, and the rights of minorities are still not mentioned in the Turkish Constitution.

3.3 Conclusion

Turkish Nationalism, with its emphasis on the indivisibility of the Turkish State and the Turkish nation, which are among the fundamental and most important principles of the Turkish Constitution, constitute the main legal impediments to the recognition, effective protection and promotion of national minorities such as the Kurds. Since, pursuant to Art 4 of the Turkish Constitution, the provisions of Art 3 and Art 4 “...*shall not be amended, nor shall their amendment be proposed*”, they will most probably remain in the present as well as in any future Turkish Constitution, no matter what other reforms are introduced. Without a fundamental change of attitude in this ideological aspect and a major reform of the Constitution, it will be almost impossible for Turkey to meet European standards in the field of the protection of human rights and rights of minorities.³⁴⁰

³³⁸ Rumpf (2003), 100.

³³⁹ Pan (2006), 559.

³⁴⁰ According to the European Commission, even in Turkey there is a growing awareness that “*Turkey’s Constitution, drafted in the aftermath of the 1980 military coup, needs to be amended in order to allow further democratisation in a number of areas and give stronger guarantees of fundamental freedoms in line with EU standards*” (European Commission: *Turkey 2009 Progress Report*, 7).

The Kurds in Turkey constitute a linguistic, ethnic and national minority according to the standards of international law, but the Turkish legal system does not recognize the existence of ethnic, linguistic or national minorities in Turkey. All Turkish citizens, including the Kurds are part of the Turkish nation without regard to their ethnic or linguistic background, and according to the traditional Turkish line of argument, all Turks have the same rights and duties.

The principle of equality is without doubt one of the basic principles of a modern democratic society which guarantees human rights and fundamental freedoms, but its specific interpretation by the Turkish authorities is not compatible with that required by international instruments in Europe. As the principle of equality requires different situations to be treated differently, it is consequently one of the basic principles of any form of minority protection, because the specific situation of the minority in a state justifies and even requires it to be treated differently and granted additional rights. The “Turkish” principle of equality is regarded as deviating from this interpretation, because it is seen as a prohibition of any form of unequal treatment on grounds of unequal ethnic or linguistic characteristics.³⁴¹ Consequently, the only minorities which are recognized by Turkey to this day are the three non-Muslim minorities covered by the Treaty of Lausanne for historical reasons.

Since only particular religious minorities are recognized, an individual's choice to be treated as a Kurd will therefore not result in special protection or the benefit of additional rights. Instead, historical developments in Turkey show that such a choice regularly had, and still has, negative consequences for the individual, including the denial of his/her human rights and punishment.

In respect of the question of which groups constitute a minority and have to be recognized and treated as such, the Turkish legal system and corresponding Turkish policies obviously do not comply with the standards of international law. Although it is argued that formal constitutional recognition of a minority (a formal minority status) is desirable, but not mandatory, under international law, the present constitutional framework and the restrictive approach to the recognition of minorities under the Treaty of Lausanne result in unfavourable preconditions for the effective protection and adequate promotion of minorities such as the Kurds, as required by European instruments for the protection of national minorities. The assessment of the consequences of these preconditions for the Kurds in Turkey will form part of the analysis of the following chapter.

³⁴¹ The principle of equality/the prohibition of discrimination will be discussed in detail in Chapter 4.2.

4 The European Legal Framework of the Protection of Minorities and the Rights of the Kurds in Turkey

4.1 Introduction

The Kurds in Turkey qualify as a minority under international law, in particular in relation to European instruments for the protection of national minorities. The Turkish constitutional system, with its emphasis on nationalism and a minority concept based on the Treaty of Lausanne, does not recognize the existence of ethnic or linguistic minority groups. Accordingly, the Kurds are not endowed with any form of minority status under Turkish constitutional law.

Since formal legal recognition of a minority is only desirable, but not mandatory, it is nevertheless possible for the Turkish legal system and Turkish policies to provide an adequate level of protection and promotion for the Kurds in Turkey, at least in respect of certain minority rights acknowledged and protected by international instruments for the protection of national minorities. Thus, it is necessary to examine whether the Kurds are granted specific protection and additional rights under the Turkish legal system as required by European instruments for the protection of national minorities.

In order to assess this, the relevant Turkish legal provisions, their implementation by the Turkish authorities in relation to the Kurdish population, and the overall factual situation of the Kurds in Turkey have to be scrutinized with regard to the application of the rights and obligations set forth in the European instruments for the protection of minorities. Chapter 4 will therefore analyse the most important rights of minorities and the corresponding obligations of states within the European Framework of the protection of national minorities. In this analysis, emphasis will be placed on the interpretation of these rights and obligations by the competent international authorities, monitoring bodies and scholars. Also, the implementation of the applicable provisions in various European countries will be briefly examined to give a more detailed and more practical picture of the measures required for an adequate level of minority protection.

Once particular standards for specific rights and obligations in one of the areas of minority protection have been identified, the European standards will be compared to the applicable Turkish legal framework and the factual situation of the Kurds in Turkey. The aim will be to identify possible deficiencies in respect of the relevant rights and obligations. Where such deficiencies and requirements for improvement are identified, possible measures will be indicated which appear appropriate for improving the situation.

4.2 The Principle of Equality and Protection from Discrimination

4.2.1 The European Standards

4.2.1.1 The Prohibition of Discrimination – A Human Right

The principles of equality and non-discrimination are fundamental concepts in the protection of human rights and they have been embodied in all of the relevant international instruments for the protection of human rights and fundamental freedoms in the framework of the United Nations, the Council of Europe and the CSCE/OSCE.³⁴²

Since the prohibition of discrimination based on membership of a national minority is an important variant in respect of the rights of equality before the law and equal protection by the law, most human rights instruments explicitly prohibit discrimination on grounds such as minority characteristics or membership of a minority. Art 14 ECHR prohibits “...*discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status...*” in relation to the enjoyment of the rights and freedoms set forth in the Convention. Because it is especially important in European human rights law and is enforced by a unique, dynamic mechanism via the jurisdiction of the ECtHR, the prohibition of discrimination under Art 14 ECHR shall be discussed in more detail.

According to the ECtHR, Art 14 ECHR does not exist independently of the other substantive provisions of the Convention, it only complements them. The provision can therefore only be applied if the facts at issue fall within the ambit of one or more of the other provisions.³⁴³ If this is the case, the facts at issue may qualify as discrimination in violation of Art 14 ECHR even if the substantive provision of the Convention as such is not violated.³⁴⁴

Despite the restrictive scope of its application, Art 14 ECHR has been used to preserve the rights of minority groups in certain cases and the jurisdiction of the ECtHR provides useful guidance as to the interpretation of what constitutes discrimination.

In the Belgian Linguistic case, the ECtHR stated that “...*Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized...*” Pointing out that it is necessary to look for criteria to determine whether or not a

³⁴² Compare: Art 2 (1) and Art 26 ICCPR; Art 2 of the Universal Declaration of Human Rights; Art 14 ECHR; Paragraph 31 of the Copenhagen Document.

³⁴³ Ovey, Clare/White, Robin: Jacobs and White, *The European Convention on Human Rights*, 4th Edition, Oxford: Oxford University Press 2006, 413.

³⁴⁴ Frowein, Jochen Abr./Peukert Wolfgang: *Europäische Menschenrechtskonvention – EMRK-Kommentar*, 2nd Edition, Kehl: Engel 1996, Art 14, Recitals 2 and 9.

difference in treatment contravenes Art 14, the court held that “...*the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies...*” However, there can still be a violation of Art 14 if the means employed and the aim sought to be realised are in “...*no reasonable relationship of proportionality*”.³⁴⁵ This definition already indicates that the prohibition of discrimination under Art 14 ECHR is not understood as a general ban on unequal treatment, but rather as only prohibiting arbitrary distinctions in the guarantee of the Convention’s rights and freedoms.³⁴⁶ Also, it is possible to view the grounds explicitly mentioned in Art 14 ECHR as enjoying special protection, whereas distinctions based on other forms of “*status*” are easier to justify.³⁴⁷ Consequently, differences in treatment on the basis of language or association with a national minority are hard to justify under the ECHR.

It follows from the above-mentioned criteria, and it has also been explicitly stated by the ECtHR, that Art 14 does not prohibit any difference in treatment.³⁴⁸ “*To argue that Art 14 prohibits all inequalities in treatment based on the grounds stated would lead to manifestly unreasonable results, since the inequality might actually be designed to benefit the less privileged class.*”³⁴⁹ The idea that Art 14 ECHR prohibits any form of difference in treatment may be based on the French version of the text of the provision, which prohibits every distinction (“*sans aucune distinction*”), whereas the English version uses the words “*without discrimination*”. However, the Court has held that “...*one would reach absurd results were one to give Art 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognized. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to*

³⁴⁵ *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, App. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgement of 23 July 1968, Series A, Vol. 6, n. 34; These requirements are repeatedly used in and form a constant element of the courts case law in relation to Art 14 ECHR: Ovey/White (2006), 413 and 417.

³⁴⁶ Hillgruber, Christian: „*Minderheitenschutz im Rahmen der Europäischen Menschenrechtskonvention: Stand und Entwicklung*“ in: Blumenwitz, Dieter/Gornig, Gilbert (Eds.): *Minderheiten- und Volksgruppenrechte in Theorie und Praxis*, Staats- und völkerrechtliche Abhandlungen der Studiengruppe für Politik und Völkerrecht Vol. 12, Bonn: Verlag Wissenschaft und Politik 1993, 39.

³⁴⁷ Ovey/White (2006), 413.

³⁴⁸ Compare: Frowein/Peukert (1996), Artikel 14, Recital 17.

³⁴⁹ Ovey/White (2006), 416.

*correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.*³⁵⁰

Making different legal and administrative provisions for persons belonging to a linguistic or ethnic minority, as long as this difference in treatment is objectively and reasonably justified in relation to the aim and effects of the measure under consideration, and as long as the principle of proportionality is observed, is thus compatible with Art 14 ECHR.

Finally, it seems important to consider whether obligations for positive action by states may be derived from Art 14 ECHR. According to OVEY/WHITE, the “...ECtHR has indicated that, whether the discrimination arises by positive action or by a failure to ensure non-discrimination, the justification for the differential treatment must meet a legitimate aim and there must be a reasonable relationship of proportionality between the aim and its realisation. It is also inherent in the scheme of Art 14 that states are obliged to take steps to prevent discrimination falling within the ambit of the article. This obligation manifests itself in the Court’s conclusion that the right not to be discriminated against in the enjoyment of the rights falling within the scope of the Convention will be violated where states fail to treat persons in different situations differently without any objective and reasonable justification.”³⁵¹

This obligation to adopt positive measures is complemented by the idea that under certain circumstances, the state may also be obliged to prevent discrimination among private parties in order to ensure that such discrimination does not affect the enjoyment of the rights guaranteed by the European Convention.³⁵²

Based on these considerations and the jurisdiction of the ECtHR, one can conclude that, where the facts at issue fall within the ambit of one of the substantial articles of the ECHR, as for example the right to freedom of expression or freedom of assembly and association, a state may even be obliged to provide different treatment or additional rights to persons belonging to a national minority in order to guarantee the right in question without discrimination.

While Art 14 ECHR only prohibits discrimination in relation to the rights granted by other provisions of the ECHR, Art 1 of Protocol 12 to the ECHR contains a general prohibition of discrimination:

³⁵⁰ *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, App. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgement of 23 July 1968, Series A, Vol. 6, n. 34; Compare: Ovey/White (2006), 416.

³⁵¹ Ovey/White (2006), 414 referring to the case of *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV.

³⁵² Frowein/Peukert (1996), Art 14, Recital 18.

“(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

*“The emphasis under Protocol 12 moves from a prohibition of discrimination to a recognition of right to equality.”*³⁵³ This is also evident from the text of the preamble in which reference is made to all persons being equal before the law and being entitled to equal protection of the law, and which expresses a commitment to the promotion of equality of all persons through the collective prohibition of discrimination.³⁵⁴

The additional scope of Art 1 of Protocol 12, when compared to Art 14 ECHR, contains instances where a person is discriminated against:

- i. “in the enjoyment of any right specifically granted to an individual under national law;*
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;*
- iii. by a public authority in the exercise of discretionary power;*
- iv. by any other act or omission by a public authority.”*³⁵⁵

Whereas Art 14 ECHR requires difference in treatment to fall within the ambit of one of the other fundamental rights guaranteed by the ECHR, Art 1 of Protocol 12 to the ECHR is applicable in the case of differential treatment in the enjoyment of any right set forth in international law. The two provisions may consequently be interpreted as harmonious, completing each other. Since the latter provision has not yet been ratified by many states, its importance for the right to equal treatment on a European level will probably remain fairly limited in the near future.³⁵⁶ The free-standing application of Art 1 of Protocol 1 to the ECHR, however, provides increased possibilities for the ECtHR to address discriminatory treatment faced by groups and it is argued that it *“represents*

³⁵³ Ovey/White (2006), 430.

³⁵⁴ Ovey/White (2006), 430.

³⁵⁵ Explanatory Report on Protocol 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>, 01.04.2009

³⁵⁶ Ovey/White (2006), 431; Turkey signed Protocol 12 to the ECHR on 18.04.2001 but has not yet ratified it.

one of the most significant moves towards the protection of minorities under the ECHR”.³⁵⁷

4.2.1.2 The Right to Equality and the Prohibition of Discrimination in the European Legal Framework for the Protection of National Minorities

Based on the idea that the right to equality and the prohibition of discrimination are among the most essential rights for persons belonging to minority groups, they have also been embodied in the European instruments for the protection of minorities.

Art 4 of the Framework Convention for the Protection of National Minorities, the first provision of the operative part of the Convention, stipulates:

“(1) The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

(2) The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

(3) The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.”

Similarly, Paragraph 31 of the Copenhagen Document provides that:

“Persons belonging to national minorities have the right to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law. The participating States will adopt, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms.”³⁵⁸

Article 4 FCNM contains three essential elements for the protection of minority rights:

(1) the rights of equality before the law and equal protection by the law; (2) the prohibition of discrimination against a person for belonging to a minority; (3) the

³⁵⁷ Ahmed (2011), 31.

³⁵⁸ Compare: Art 4 Para 1 of UN General Assembly Resolution 47/135: *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, A/RES/47/135, 18 December 1992: “States shall take measures where required to ensure that persons belonging to national minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.”

introduction of adequate measures for the promotion of full and effective equal rights for minority and majority persons.³⁵⁹

In line with international instruments for the protection of human rights, Art 4 (1) FCNM requires states to guarantee the right to equality before the law and equal protection by the law. In addition to equal treatment in law and by the public authorities, these rights are usually also meant to imply equal opportunities in the enjoyment of rights.³⁶⁰ According to the Explanatory Report to the FCNM, an explicit provision on “*equal opportunities*” was “...*considered unnecessary as the principle is already implied in paragraph 2 of this Article...*”³⁶¹, which provides for special measures to promote full and effective equality.

Whereas under Art 14 ECHR, discrimination of persons belonging to national minorities is only protected in relation to the fundamental rights and freedoms protected by the Convention, the European instruments for the protection of national minorities explicitly prohibit their discrimination in relation to the general principles of equality before the law and equal protection by the law. Any distinction in law or in the treatment by public authorities on the grounds of a person’s membership of a national minority that can not be reasonably and objectively justified is thus prohibited by international law in the European framework.

The legislative body of the European Union also contains instruments which address the issue of discrimination on grounds such as ethnic origin. In particular, Council Directive 2000/43/EC³⁶² on implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin (“*Anti-Racism Directive*”) is an important legal document with regard to the equal treatment of persons of different racial or ethnic origin. The directive mainly prohibits direct or indirect discrimination on grounds of, among others, affiliation with an ethnic group in connection with an employment relationship and in other areas such as social protection, including social security, and access to and supply of goods and services that are generally available to the public.³⁶³ Since the directive is part of the *acquis communautaire*, it has to be appropriately incorporated into the Turkish legal system if Turkey is to become a member state of the European Union. As such, these norms are of specific importance, because unlike

³⁵⁹ Alfredsson, Gudmundur: “Article 4” in: Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 141.

³⁶⁰ Alfredsson (2006), 146

³⁶¹ Explanatory Report, Para 40.

³⁶² Council Directive 2000/43/EC of 29. January 2000.

³⁶³ For a more detailed analysis of Council Directive 2000/43/EC and its potential impact on minority protection see: Ahmed (2011), 89.

international treaties, it is not up to the state to decide whether it is willing to sign or ratify the directive.

The principle of equality and the prohibition of discrimination is also part of the (constitutional) law of most European states. In Austria, the right to equality is guaranteed by the general principle of equality of Art 7 Para 1 of the Constitutional Law (*Bundesverfassungsgesetz*), which is one of the pillars of the Austrian Constitution and equally binding upon all state organs (at federal, regional and local level). According to this provision, all federal nationals are equal before the law. Furthermore, Art 66 Para 1 of the Treaty of St. Germain-en-Laye, which is of constitutional standing, provides that all Austrian nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language and religion, and Art 67 of the Treaty stipulates that Austrian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as other Austrian nationals. In addition, the prohibition of discrimination pursuant to Art 14 ECHR is, as is the ECHR as such, part of the Austrian Federal Constitution.³⁶⁴ The relevant Council Directive 2000/43/EC has been transferred into Austrian law mainly by amending the existing Austrian Equal Treatment Act (Federal Law Gazette I No. 66/2004), the Federal Law on the Equal Treatment Commission and the Equal Treatment Ombudsman (Federal Law Gazette No. 108/1979).³⁶⁵

The Italian Constitution is based on the principles of freedom and equality. While Art 3 (2) of the Constitution guarantees formal equality, Paragraph 2 of the Article also guarantees factual equality by way of special measures.³⁶⁶ In Spain, the right to equality and non-discrimination is guaranteed by Art 14 of the Constitution.³⁶⁷ In Croatia, the right to equality and the prohibition of discrimination are guaranteed by Arts 14-15 of the Constitution as well as by a specific "Constitutional Law for Nationalities".³⁶⁸

To give some further examples: the principle of equality and the corresponding prohibition of discrimination can also be found in the constitutions of Germany³⁶⁹, France³⁷⁰, Finland³⁷¹, Hungary³⁷² and Romania³⁷³.

³⁶⁴ Austria State Report, 16.

³⁶⁵ Second Report submitted by Austria pursuant to Art 25 paragraph 1 of the Framework Convention for the Protection of National Minorities of 1 December 2006, ACFC/SR/II(2006)008, (Austria Second State Report).

³⁶⁶ Pan, Christoph: „Minderheitenrechte in Italien“, in: Pan, Christoph/Pfeil, Beate-Sibylle (Eds.): *Minderheitenrechte in Europa, Handbuch der Europäischen Volksgruppen Vol. 2*, 2nd Edition, Wien: Springer Wien New York 2006, 219.

³⁶⁷ Pfeil, Beate-Sibylle: „Minderheitenrechte in Spanien“, in: Pan/Pfeil (2006), 523

³⁶⁸ Pan, Christoph: „Minderheitenrechte in Kroatien“, in: Pan/Pfeil (2006), 243-244

³⁶⁹ Pfeil, Beate-Sibylle: „Minderheitenrechte in Deutschland“, in: Pan/Pfeil (2006), 114

³⁷⁰ Pan, Christoph: „Minderheitenrechte in Frankreich“, in: Pan/Pfeil (2006), 173

Despite the clear international obligations of states and corresponding provisions in national law, discrimination in law and in fact still seems to be a very common phenomenon in Europe and the Advisory Committee has emphasized the issue in its assessment of state reports to the FCNM.³⁷⁴ The Advisory Committee's criticism mainly focuses on the lack of specific anti-discrimination legislation in important societal settings such as education and housing, and on the lack of adequate implementation of existing anti-discrimination legislation in practice, resulting in cases of so-called "*de-facto discrimination*".³⁷⁵ In addition, socio-economic differences between the majority population and certain minority groups seem to be a cause for concern in various countries.³⁷⁶

4.2.1.3 Positive Discrimination

The European instruments for the protection of minorities not only promote formal equality (equality in law), but full and effective equality (equal rights in fact). Art 4 (2) FCNM, as well as Paragraph 31 of the Copenhagen Document, both require states to adopt special measures in order to achieve full and effective equality between persons belonging to a national minority and those belonging to the majority.

One might argue that it would appear to be adequate in a democracy if all individuals were granted the same universal cultural rights, and no group (whether it constituted a national minority or not) were granted additional rights. However, such an approach requires the same political, economic and social pre-conditions to exist for the minority and the majority, and a political system that is based on the principles of democracy, human rights and the rule of law. If this is not the case, and in particular in situations where the minority may be subject to discrimination, displacement and forced assimilation, specific rights for the protection and promotion of the minority are necessary to establish effective, and not only formal equality. In such a situation,

³⁷¹ Pan, Christoph: „*Minderheitenrechte in Finnland*“, in: Pan/Pfeil (2006), 152

³⁷² Pan, Christoph: „*Minderheitenrechte in Ungarn*“, in: Pan/Pfeil (2006), 591

³⁷³ Pan, Christoph: „*Minderheitenrechte in Rumänien*“, in: Pan/Pfeil (2006), 404

³⁷⁴ Compare: Alfredsson (2006), 146-147

³⁷⁵ Compare: Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 24-26; Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 23-24; Advisory Committee Opinion on Norway, ACFC/INF/OP/I(2003)003, Para 22-23.

³⁷⁶ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 30; Para Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 20;

granting specific rights is not a privilege, but a form of equal treatment necessary due to specific circumstances.³⁷⁷

In general terms one can say that strict application of formal equality without distinction does not lead to factual/effective equality. The idea of effective equality not only allows, but requires the application of the same (legal) consequences to the same facts and of different (legal) consequences to different facts. Especially in the field of the protection of minorities formal legal equality is not sufficient, but “reverse” or “positive” discrimination is necessary to achieve effective equality with the majority.³⁷⁸

Even if one were to argue that “reverse discrimination” violates the principle of equality before the law, or that it might lead to opposition on the part of the majority, one has to acknowledge that at least in certain spheres – as for example the use of one’s mother-tongue before the courts – affirmative actions are necessary in order to achieve equality between the majority and a national minority.³⁷⁹ Granting members of minorities the right to use their language before the court – to continue with this example – is necessary for the achievement of formal equality, which results in effective equality.

Minorities need an appropriate legal framework to preserve and develop their identity, in particular with regard to the use of their language and the exercise of their culture. In order to provide such a legal basis, it is necessary to grant specific rights to minorities and to the persons belonging to a minority.³⁸⁰

Thus, it is not surprising that, on a European level, international instruments for the protection of minorities include provisions allowing limited “positive” (“reverse”) discrimination. Art 4 (2) FCNM and Para 31 of the Copenhagen Document both stress that the promotion of full and effective equality between persons belonging to a national minority and those belonging to the majority may require a states to adopt special measures that take into account the specific conditions of the persons concerned. The Explanatory Report to the FCNM points out that such measures need to be “adequate”, meaning that they have to be “...in conformity with the proportionality principle, in order to avoid violation of the rights of others as well as discrimination against others...”, and requires them to “...not extend, in time or in scope, beyond what is necessary in order to achieve the aim of full and effective equality.”³⁸¹ Thus, special measures are

³⁷⁷ Compare: Tretter (1993), 166; Marko/Tretter/Boric (1993), 25; according to Alfredsson, “Questions concerning special measures arise when the basic rules of the equal enjoyment and the equal exercise of human rights and of non-discrimination are insufficient for minority protection”, Alfredsson (2006), 148.

³⁷⁸ Blumenwitz, Dieter: *Volksgruppen und Minderheiten: Politische Vertretung und Kulturautonomie*, Berlin: Gebr. Mann Verlag 1995, 83.

³⁷⁹ Compare: Hillgruber (1993), 46-47.

³⁸⁰ Tretter (1993), 167.

³⁸¹ Explanatory Report, Para 39.

intended to be temporary and should only serve until discriminatory patterns have been eliminated. In nation states which champion the cause of nationalism and where there are tendencies to systematically discriminate against minority groups, such measures will probably have to be in place for extended periods in order to achieve their objective.³⁸²

By stipulating that “...*measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination*”, Para 3 of Art 4 FCNM clarifies that special measures for the promotion of national minorities are not to be regarded as contravening the principles of equality and non-discrimination. The Explanatory Report emphasizes that the aim of this provision is to ensure “*effective equality*”.³⁸³

Similarly, Para 33 of the Copenhagen Document declares that measures creating conditions for the promotion of the identity of national minorities are “*in conformity with the principles of equality and non-discrimination with respect to the other citizens of the participating State concerned*”.

Special measures for the benefit of national minorities should consequently not be seen as constituting privileges or an act of discrimination. Instead, these measures should be understood as tools intended to help persons belonging to national minorities to attain a position where they can enjoy and exercise their human rights equally to persons belonging to the majority. Interpreted in this way, such measures “...*are thus firmly rooted in the rule of equal rights as is non-discrimination*”.³⁸⁴

With reference to the provision of Art 4 Para 3 of the Framework Convention, the Advisory Committee has stressed that the non-discrimination principle may not be invoked by a state as an argument against the introduction of special measures for the benefit of persons belonging to national minorities aimed at promoting full and effective equality. Furthermore, the Advisory Committee has pointed out that “*it is also important that the possibility of introducing such measures is clearly stipulated in the envisaged law on the protection of national minorities*”.³⁸⁵

It has already been noted above that even within the scope of application of the ECHR, a state may be permitted to favour a minority, because difference in treatment does not constitute a violation of Art 14 if it is justified, i.e. reasonable in relation to the aim and effects of the measure under consideration, and proportionate.³⁸⁶ The ECtHR has even held that treating two different groups in the same way can discriminate against one of

³⁸² Alfredsson (2006), 149.

³⁸³ Explanatory Report, Para 39.

³⁸⁴ Alfredsson (2006), 150.

³⁸⁵ Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 28.

³⁸⁶ Compare: Gilbert, Geoff: “*Minority Rights under the Council of Europe*” in: Cumper, Peter/Wheatley, Steven (Eds.): *Minority Rights in the “New” Europe*, The Hague/London/Boston: Martinus Nijhoff Publishers 1999, 57.

those groups,³⁸⁷ and that a general practice applied to everyone without distinction might have negative effects on specific groups within a state.³⁸⁸

Positive discrimination by way of special legal provisions for the promotion of national minorities is possible under the national legal system of many states within the European Union.³⁸⁹ The Italian Constitution, for example, explicitly provides for positive protective measures for national minorities in Art 3 Para 2.³⁹⁰ The general principle of equality in the Austrian Constitution does not prevent the Austrian legislator from giving preference to members of a national minority over members of the majority population. According to the case law of the Austrian Constitutional Court, the principle of equality requires the legislator to apply the same legal consequences to the same facts, and different legal consequences to different facts. In relation to the protection of national minorities in particular, the legislator is bound to evaluate the situation before adopting rules and regulations. Depending on the issue, the protection of national minorities may justify a more favourable treatment of the minority members. This is also the aim of the basic policy clause of Art 8 Para 2 of the Austrian Constitution, which serves as a tool for any legal interpretation and requires State organs to act accordingly: *“The Republic (federal, regional and local authorities) is committed to its linguistic and cultural diversity, which has evolved in the course of time and finds its expression in the autochthonous ethnic groups. The language and culture, the continued existence and protection of these ethnic groups are to be respected, safeguarded and promoted.”*³⁹¹

The prohibition of discrimination and the right to equal treatment are thus firmly rooted in the European legal framework for the protection of minorities and are understood in a specific way as not only requiring formal legal equality, but full and effective equality. These principles are of fundamental importance for minority protection and provide useful guidance in the interpretation of other minority rights guaranteed in the Framework Convention and other international instruments for the protection of national minorities.³⁹² The principle of equality and the prohibition of discrimination will consequently also be dealt with in the analysis of other minority rights in the following chapters.

³⁸⁷ *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV;

³⁸⁸ *Shanaghan v. The United Kingdom*, 37715/97, EHRR 326 (4 May 2001); compare: Gilbert, Geoff, “Article 5” in: Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 156.

³⁸⁹ For an overview of the principle of equality including possibilities of positive discriminations in various European States see: Pan, Christoph/Pfeil, Beate-Sibylle, (Eds.): *Minderheitenrechte in Europa, Handbuch der Europäischen Volksgruppen* Vol. 2, 2nd Edition, Wien: Springer Wien New York 2006.

³⁹⁰ Pan, Christoph: „Minderheitenrechte in Italien“, in: Pan/Pfeil (2006), 224.

³⁹¹ Austria State Report (2006), 17.

³⁹² Compare: Alfredsson (2006), 145 and 151.

4.2.2 The Turkish Principle of Equality and the Kurds

It has already been noted in Chapter 3.2 that the Turkish Constitution acknowledges the principle of equal treatment and a general prohibition of discrimination in Art 10, which provides:

“All individuals are equal without any discrimination before the law, irrespective of language, race colour, sex, political opinion, philosophical belief, religion and sect, or any such consideration.”

The Treaty of Lausanne also guarantees equality before the law, but only to persons belonging to non-Muslim minorities, and not to those belonging to ethnic or linguistic minority groups.

As a member of the Council of Europe and party to the ECHR, Turkey is obliged to respect Art 14 of the ECHR in relation to the protection of the human rights of persons belonging to the Kurdish minority. Many complaints by persons of Kurdish origin before the ECtHR in fact also allege a violation of Art 14, because the applicants argue that their human rights have been violated in a discriminatory way because of their Kurdish origin. In many of these cases, the ECtHR has not considered it necessary to examine these complaints separately under Art 14 ECHR, since it had already found violations of the substantive articles of the Convention.³⁹³ Accordingly, it is difficult to assess, on the basis of these judgements, whether the Turkish authorities basically comply with Art 14 ECHR in relation to the Kurdish population. Given that numerous cases before the ECtHR which involve people of Kurdish origin, are based on similar facts, thus implying systematic abuse of Kurdish human rights, Turkey's general compliance with Art 14 ECHR remains doubtful.³⁹⁴

With regard to its international obligations, it has to be noted that Turkey has signed but not yet ratified Protocol 12 to the ECHR, which contains a general prohibition of discrimination in Article 1.³⁹⁵

Art 10 of the Turkish Constitution comes under the section of the Turkish Constitution entitled “General Principles”, and not in the section dealing with fundamental rights and freedoms. Thus, the principle of equality is considered to be a basic principle of the Turkish constitutional system which is generally applicable in the interpretation of laws by the public authorities, but, in other European countries, the principle of equality

³⁹³ For example: *Selim Yildirim and Others v. Turkey*, Appl.no. 56154/00, judgement of 19 October 2006, Para 86-88.

³⁹⁴ Compare Chapter 2.3.

³⁹⁵ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8&DF=8/13/2008&CL=ENG>, 13.08.2008.

should also be an important parameter in the interpretation of human rights and the examination of the adequacy of the restriction of human rights in Turkey.³⁹⁶

There is, however, an important difference between the principle of equality and the prohibition of discrimination under Art 10 of the Turkish Constitution, as interpreted and implemented by the Turkish authorities, in comparison to the interpretation of these principles under the European instruments for the protection of minorities as well as in other European countries. Although Art 10 of the Turkish Constitution allows for different legal treatment of different facts³⁹⁷, different treatment of a person or group is not allowed on the basis of certain criteria enumerated in Art 10 of the Turkish Constitution. These criteria include different ethnic identity, religion or language – the elements that are required for a group to qualify as a minority under international law. Art 10 Para 3 explicitly sets forth that “*no privilege shall be granted to any individual group or class*”. The Turkish version of the principle of equality thus seems inspired by the idea of formal equality (equality before the law), and not by the principle of effective equality.

The Turkish authorities do not interpret the principle of equality as requiring measures for the promotion of full and effective equality, but as authorising the prohibition of the “creation” of ethnic, religious or linguistic minorities.³⁹⁸ Understood in this way, the principle of equality has an assimilating function: in the interest of the indivisible integrity of the Turkish territory and nation, different treatment on the basis of natural differences such as ethnic identity, different religion or different mother tongue are not justified,³⁹⁹ and such natural and objective differences may be eliminated by way of assimilation.⁴⁰⁰ In order to prevent the “creation” of minorities, the Turkish principle of equality under Art 10 of the Turkish Constitution is used as the legal basis for a general assimilation policy directed at minority groups such as the Kurds. The principle of equality thereby loses its protective function in respect of the rights of the individual and is used by the state as weapon against the individual.⁴⁰¹

The idea of the formal equality of all individuals and the non-recognition of the Kurds as a minority in need of special protection and special rights leads to considerable discrimination in practice. Although there are hardly any specific data available, discrimination against members of ethnic, religious, and linguistic minorities still seems

³⁹⁶ Rumpf (1996), 240-241; Rumpf (2004), recital 157.

³⁹⁷ Rumpf (1996), 241; Rumpf (2004), recital 157.

³⁹⁸ Compare: Rumpf (1993), 483, Kartal (2002), 161; Art 5 of the Turkish Associations Act prohibits associations whose purpose is to “*create forms of discrimination on the grounds of race, religion, sect or regions or create minorities on these grounds, and destroy the unitary structure of the Republic of Turkey*”; ECRI, *Third report on Turkey*, adopted on 25 June 2004, Para 17.

³⁹⁹ Rumpf (1996), 241. Rumpf (2004), recital 158.

⁴⁰⁰ Rumpf (1993), 483.

⁴⁰¹ Rumpf (1993), 483.

to be a widespread phenomenon in Turkey. It can be assumed that the Kurds in particular are very often discriminated against, not only in their exercise of basic human rights, but also in their everyday lives.⁴⁰²

Certain positions of employment and posts in public administration can rarely be obtained by people belonging to an ethnic group such as the Kurds. If people of Kurdish origin want a career in the public services, they can only do so if they completely deny their ethnic origin and avow themselves to be Turkish.⁴⁰³

It has also been argued that the principle of equality and the prohibition of discrimination have not been adequately embodied in legislation and are not applied appropriately in practice. There is no general legislation prohibiting discrimination, but only individual provisions in specific laws dealing with discrimination in specific contexts. But even these laws do not always prohibit discrimination on the grounds of ethnic origin, but only refer to language, race and religion.⁴⁰⁴

The Turkish Penal Code explicitly stipulates in Art 3 Para 2 that where the Code is applied, no distinctions may be made on the basis of race, language, religion, confession, nationality, colour, sex, political or other opinion and thought, philosophical belief, national or social origin, birth, economic or other social status, and that privileges may not be extended to anyone.⁴⁰⁵ Art 216 Para 1 of the Turkish Penal Code prohibits incitement to enmity or hatred between parts of the population on the basis of social class, race, religion, sect or region. While in theory this provision might be an effective tool against hate speech and incitement to hatred against minorities such as the Kurds, in practice it is used by Turkish prosecutors to bring charges against individuals who express peaceful opinions about the situation of the Kurdish minority.⁴⁰⁶ On the other hand, violence and hate speech directed against the Kurdish minority and other minorities still seems to be a widespread phenomenon in Turkey, and the Turkish authorities are sometimes unable or unwilling to protect minority groups appropriately. However, recent convictions of persons for such acts against minorities have raised hopes for a general tendency to protect minorities using criminal law provisions.⁴⁰⁷

The assertion that, as Turkish citizens, Kurds enjoy the same rights and opportunities as other Turks is not convincing and is even easy to disprove as a theory. While the obligation to learn the Turkish language in school gives students of Turkish ethnic and

⁴⁰² Compare: ECRI: *Third report on Turkey* (2004), Para 80.

⁴⁰³ Compare: Kartal (2002), 145 and 162 (with further references).

⁴⁰⁴ Compare: MRG-Report (2007), 29; ECRI, *Third report on Turkey* (2004), Para 24, referring to an amendment of the Turkish labour law.

⁴⁰⁵ Art 3 (2) of the Turkish Penal Code, law. No. 5237 of 26.09.2004; A German translation of the Code can be found in: Tellenbach, Silvia, *Das türkische Strafgesetzbuch – Türk Ceza Kanunu*, 2nd edition, Ettenheim: Stückle Druck und Verlag 2008.

⁴⁰⁶ MRG-Report (2007), 29; compare Chapter on freedom of expression below.

⁴⁰⁷ MRG-Submission (2004), 40.

linguistic origin adequate opportunities for learning their mother tongue, the same opportunities are not provided those Kurdish students whose mother tongue is one of the Kurdish dialects. A similar logic applies concerning the prohibition of giving children Kurdish names.⁴⁰⁸

When considering the principle of equality in relation to the Kurdish minority in Turkey, reference has to be made to the socio-economic conditions in the south-east of the country, where the Kurdish population has traditionally lived.⁴⁰⁹ Since the socio-economic situation is much worse there than in other regions of Turkey, in particular in respect of average income, education and living-conditions, preferential treatment for these regions seems to be much needed in order to allow the Kurdish population in these areas, in particular, to enjoy the same opportunities as the rest of the Turkish population.

4.2.3 Conclusion

Turkey's formal approach to the principle of equality does not comply with the standards set by the European instruments for the protection of minorities. While these instruments promote the idea of effective equality, stipulating different treatment for persons belonging to national minorities if their specific situation requires it, the Turkish understanding of formal equality before the law results in discrimination of the Kurds in various areas of life. Understood as a prohibition of the "creation" of minorities, the principle of equality in Turkey is not used for the protection of minorities, but as a tool to justify their assimilation. In order to comply with the European standards set by international instruments for the protection of minorities, Turkey must adopt a different approach with regard to the principle of equality, and allow differential treatment on the basis of a person's membership of a specific ethnic and/or linguistic group.

Furthermore, Turkey must adopt a comprehensive policy prohibiting discrimination against Kurdish people in the exercise of their human rights and in their exercise of other rights provided by national law. General anti-discrimination legislation seems to be required, prohibiting discrimination by public authorities as well as by private actors. In order to comply with the *acquis communautaire* (in particular the relevant EC-Regulation), such legislation must prohibit direct as well as indirect discrimination. However, new legislation alone will not be sufficient if it is not adequately implemented by the competent authorities.⁴¹⁰ In addition to the enactment of laws and the promotion

⁴⁰⁸ Kartal (2002), 160.

⁴⁰⁹ Compare: Kartal (2002), 160.

⁴¹⁰ Compare: MRG-Report (2007), 29.

of their application, existing legal provisions prohibiting discrimination should be used consistently to penalize perpetrators of acts of discrimination and hatred against the Kurdish minority.

Unfortunately, such reforms will not guarantee adequate protection for minorities such as the Kurds if the prevalent mentality in Turkey does not change. As long as the many Turkish people in the country's administration, as well as private actors in everyday life, do not adopt a more tolerant approach with regard to the various minority groups living in Turkey, discrimination will continue to be a widespread phenomenon. The promotion of tolerance and multi-cultural dialogue, in particular in the education system, is thus a very important factor in the fight against discrimination and the struggle for the realisation of full and effective equality of all persons living in Turkey, irrespective of their ethnic or linguistic origin or their religious belief.⁴¹¹

4.3 The Right of a Person to Express, Preserve, and Develop his/her Identity and Protection from Assimilation

4.3.1 The Promotion of Minorities' Identities in a Climate of Mutual Understanding and Tolerance

4.3.1.1 The Obligation of States to Promote the Conditions Necessary for the Protection of Minorities' Cultures and Identities

One of the basic ideas in the promotion of specific rights for minorities is respect for the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority and the creation of appropriate conditions to enable such persons to express, preserve and develop this identity.⁴¹² The relevant European legal documents for the protection of minorities contain explicit obligations for positive action by states in this respect.

Article 5 (1) FCNM stipulates:

"The parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage."

The Explanatory Report states unambiguously that Art 5 "...essentially aims at ensuring that persons belonging to national minorities can maintain and develop their culture and preserve their identity" and that Para 1 of the "...provision contains an

⁴¹¹ Compare: Alfredsson (2006), 151; According to Alfredsson, education in general, and human rights education in particular, are likely to be the most significant measures to overcome discrimination.

⁴¹² Compare: Paragraph 7 of the Preamble of the Framework Convention for the Protection of National Minorities.

obligation to promote the necessary conditions in this respect”.⁴¹³ The essential elements of a national minority’s identity are defined as religion, language, traditions and cultural heritage.⁴¹⁴

The Copenhagen Document contains a similar provision on culture and identity:

*“Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will....”*⁴¹⁵

Under this provision, the right to identity includes certain, more specific rights such as the right of members of national minorities

- to use freely their mother tongue in private as well as in public (32.1)
- to establish and maintain their own educational, cultural and religious institutions, organizations or associations (32.2)
- to profess and practise their religion (32.3)
- to establish and maintain unimpeded contacts among themselves within their country and across frontiers with citizens of other states with whom they share a common ethnic or national origin, cultural heritage or religious belief (32.4)
- to disseminate, have access to, and exchange information in their mother tongue (32.5)
- to establish and maintain organizations or associations within their country and to participate in international non-governmental organizations (32.6).

Para 33 of the Copenhagen Document requires participating states not only to protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory, but also to “...*create conditions necessary for the promotion of that identity...*” and to “*take the necessary measures to that effect...*”⁴¹⁶

Thus, the standards set by the Framework Convention as well by the Copenhagen Document not only require states to tolerate expressions of identity by national minorities and to protect that identity, but also to take positive actions to promote such identities. States are under an obligation to provide an appropriate environment that allows persons belonging to a national minority the opportunity to develop their culture

⁴¹³ Explanatory Report, Para 42-43.

⁴¹⁴ Regarding the meaning of these elements for the definition of the term “national minority” in the context of the Framework Convention, see Chapter 3.1.2 above.

⁴¹⁵ Para 32 of the Copenhagen Document.

⁴¹⁶ Compare: UN General Assembly Resolution 47/135, “*Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*”, A/RES/47/135, 18 December 1992, Art 1: “1. States shall protect the existence and the national or ethnic, cultural, and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.
2. States shall adopt appropriate legislative and other measures to achieve those ends.”

and identity as far as possible. The mere preservation of the status quo, without specifically addressing the present situation, the needs, the desires and the problems of persons belonging to minorities, is not sufficient.⁴¹⁷

Although Art 5 (1) FCNM and the relevant provisions of the Copenhagen Document are very programmatic in nature and use very vague formulations, they nevertheless make it unequivocally clear that on a European level, minority protection requires positive action on the part of the state.⁴¹⁸ In this sense, Art 5 (1) FCNM in particular can be seen as a complement to the provisions that accord rights to individual persons who belong to a national minority.⁴¹⁹

The provision consequently gets its specific meaning when read in conjunction with the other Articles of the Framework Convention. Two particular aspects of Art 5 (1) FCNM shall nevertheless be highlighted at this stage.

First, states should ensure that the minority groups are involved in the process of determining how to promote the necessary conditions for them to flourish, for example by way of consultation.⁴²⁰ Effective participation in the sense of Art 15 FCNM (see Chapter 4.9 on effective participation) is without doubt important to appropriately establish the conditions mentioned in Art 5, because the minority group itself will probably know best about the needs of its members.

The second important issue in relation to the obligation of states to promote the necessary conditions for national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, is the allocation of finance to minority groups.⁴²¹ The Advisory Committee has commented on financial support as being an essential tool for the adequate promotion of national minorities.⁴²² What is important in this regard is that the distribution of financial resources has to be based on transparent criteria, and that national minorities have to be adequately involved in the allocation process.⁴²³

⁴¹⁷ Compare: Gilbert, Geoff, "Article 5" in: Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 157-158.

⁴¹⁸ The question of whether states were under an obligation of positive action under Art 27 ICCPR remained controversial because of the passive formulation of the text of this provision. Art 5 FCNM (and its Explanatory Report) leaves no doubt about the obligations for positive action by states in the field of application of the Framework Convention.

⁴¹⁹ Gilbert (2006), 154.

⁴²⁰ Compare: Gilbert (2006), 159.

⁴²¹ Compare: Gilbert (2006), 160.

⁴²² Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 34; Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 34-35; Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 23.

⁴²³ Compare: Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 30. Criticism of the proceedings of the national authorities in this respect: Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 25; In Advisory Committee Opinion on Finland, ACFC/INF/OP/I

Art 5 FCNM is of general importance for the interpretation of all the other substantive provisions of the Framework Convention, but there is a particular overlap between Art 5 and Art 4, because, when read in conjunction with each other, they provide an extensive legal basis for equal treatment by way of special measures for persons belonging to a minority. Another overlap which deserves special mention is the overlap with Art 12 FCNM, which contains obligations of states in the field of education: In order to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, states should provide education about the traditions and cultures of the minorities on their territory to all students, and not only to those belonging to the minority.⁴²⁴

4.3.1.2 The Promotion of Mutual Understanding and Tolerance

Article 5 FCNM has to be read together with Article 6 FCNM.⁴²⁵ Art 6 (1) FCNM provides that:

“The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.”

The provision is similar to Paragraph 36 of the Copenhagen Document:

“Every participating State will promote a climate of mutual respect, understanding, co-operation and solidarity among all persons living on its territory, without distinction as to ethnic or national origin or religion, and will encourage the solution of problems through dialogue based on the principles of the rule of law.”

The relationship between Art 5 and Art 6 FCNM may be best described as follows: While Art 5 FCNM is “about states creating the conditions in which persons belonging to the minority group can develop their culture, Art 6 focuses on how a minority group can relate to other state mechanisms and form part of the overall culture of the majority society.”⁴²⁶

Art 6 reflects the idea that tolerance and intercultural dialogue are essential in order to balance the needs of persons belonging to a national minority to preserve their culture

(2001) 992, 2000, Para 23, the Advisory Committee comments positively on the devolution of the allocation of finance to the Sami Parliament.

⁴²⁴ Gilbert (2006), 156.

⁴²⁵ Gilbert (2006), 154.

⁴²⁶ Gilbert, Geoff: “Article 6” in: Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 179.

and to be fully integrated into the state and its society.⁴²⁷ Like Art 5, Art 6 FCNM is of a programmatic nature and does not engender enforceable rights, but it nevertheless uses compelling terms and can be seen as a general obligation of states to promote pluralist societies in which minority groups not only exist, but are part of the identity of the state.⁴²⁸ Furthermore, some of the elements of this general obligation can be derived from other, more substantive provisions of the FCNM, such as Art 4 which prohibits discrimination, Art 11 Para 3 which provides for dual language signs, such signs being a symbol for mutual respect and tolerance, and Art 12, dealing with education.

Regarding the scope of Art 6 (1) FCNM, it has to be noted that the provision refers to “*all persons living on their territory*”, and not only to persons belonging to a national minority. The Advisory Committee seems to apply the provision additionally to groups of persons who do not fall under traditional definitions of the term “national minority”, or who do not qualify as a minority in the relevant declarations and reservations of states regarding the personal scope of application of the Framework Convention.⁴²⁹

State Reports and corresponding Advisory Committee Opinions to the FCNM indicate that cases of prejudice or intolerance towards national minorities often involve the police.⁴³⁰ In this context, Art 6 (1) implies that it is a state duty to ensure that the police are not guilty of such patterns of behaviour and to follow up on complaints in each and every case.

Another aspect which the Advisory Committee has constantly stressed in relation to Art 6 is the duty of states to try to prevent the media from stereotyping minority groups.⁴³¹ The media play an important role in the promotion of intercultural dialogue which is explicitly addressed in Art 6 (1) FCNM, and the importance of co-operation between the state and the press and other media cannot be underestimated. While the power of the media may have positive effects if it is used for the promotion of mutual understanding and tolerance, it also contains an enormous risk for minority groups if the media use stereotypes and raise unjustified fears when reporting on minority groups. Where this is

⁴²⁷ Gilbert (2006), 178.

⁴²⁸ Gilbert (2006), 178-179.

⁴²⁹ For example: Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 32.

⁴³⁰ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 37, 40; Advisory Committee Opinion on Armenia, ACFC/INF/OP/I (2003) 001, 2002, Para 41; Advisory Committee Opinion on Croatia, ACFC/INF/OP/I (2001) 001, 2001, Para 36; Advisory Committee Opinion on Italy, ACFC/INF/OP/I (2002) 007, 2001, Para 38; Advisory Committee Opinion on Spain, ACFC/INF/OP/I (2004) 004, 2003, Para 56.

⁴³¹ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 37; Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 32; Advisory Committee Opinion on Croatia, ACFC/INF/OP/I (2001) 001, 2001, Para 33; Advisory Committee Opinion on Italy (2002), Para 35-37; Advisory Committee Opinion on Spain, ACFC/INF/OP/I (2004) 004, 2003, Para 50.

the case, states are encouraged to adopt measures to counter such trends without interfering with the independence of the press.⁴³²

Where prejudiced behaviour occurs in the population, it should be counteracted by the state.⁴³³ In as far these patterns involve private parties Art 6 implies horizontal responsibilities on the part of the state.

Finally, it should be emphasized that while integration as such is very difficult to promote, appropriate educational measures may produce positive effects in this regard, helping to realise the aims of Art 6 FCNM.⁴³⁴

European instruments for the protection of national minorities not only require states to promote mutual understanding and tolerance, but also to adopt measures to protect persons belonging to a minority group against acts of hatred and discrimination.

Art 6 (2) FCNM provides that the *“Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”*

Similarly, Paragraph 40 of the Copenhagen Document provides for the commitment of the participating states to *“...clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-Semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds.*

They declare their firm intention to intensify the efforts to combat these phenomena in all their forms and therefore will

(40.1) take effective measures, including the adoption, in conformity with their constitutional systems and their international obligations, of such laws as may be necessary, to provide protection against any acts that constitute incitement to violence against persons or groups based on national, racial, ethnic or religious discrimination, hostility or hatred, including anti-Semitism;

(40.2) commit themselves to take appropriate and proportionate measures to protect persons or groups who may be subject to threats or acts of discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity, and to protect their property...”

Further measures to combat the phenomena mentioned in Paragraph 40 include; effective measures to promote understanding and tolerance, particularly in the fields of education, culture and information (40.3), recognition of the right of the individual to

⁴³² Compare Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 32; Advisory Committee Opinion on Italy, ACFC/INF/OP/I(2002)007, Para 35.

⁴³³ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I (2003) 004, 2002, Para 39-40

⁴³⁴ Compare: Gilbert (2006), 184-185; Advisory Committee Opinion on Spain, ACFC/INF/OP/I (2004) 004, 2003, Para 52; the obligations of states in the area of education will be dealt with in Chapter 4.7 below.

effective remedies (40.5), and adherence to the international instruments which address these phenomena (40.6 and 40.7).

The guarantees of Art 6 (2) FCNM and the corresponding provisions of the Copenhagen Document overlap considerably with the guarantees of equality and non-discrimination under Art 4 FCNM and Para 31 of the Copenhagen Document, but they also contain additional obligations for states. The principal areas that have to be addressed under Art 6 (2) FCNM seem to be the press and other media, the behaviour of the police, and discrimination by other private and public actors.⁴³⁵

The minimum requirement of states under this provision is to have laws in place prohibiting discrimination and criminal legislation against hate crimes based on racist motives. Where such legislation is in place it needs to be put into practice appropriately by the police and other authorities, meaning that relevant incidents, in particular claims made by members of a minority group, have to be investigated and the suspected perpetrators have to be prosecuted.⁴³⁶ Failure by the police to treat persons belonging to minority groups equally before the law in comparison to the rest of the population has to be seen as a particularly serious problem, and states have to react appropriately to such misconduct.⁴³⁷

Regarding the press and other media, it has to be reiterated that stereotyping and the promotion of unjustified fears in relation to minority groups present a serious threat to the promotion of a tolerant society where minorities are able to maintain and develop the features of their identity. States need to have laws in place to prohibit unjustified, pejorative reporting on minorities, and these laws have to be put into practice appropriately. Furthermore, states should also address indirect discrimination, for example where minorities are systematically ignored by the media not reporting on events relevant to their members.⁴³⁸

4.3.1.3 Turkey and the Kurdish Identity

Although it is difficult to deduce specific obligations of states from Articles 5 and 6 FCNM and the corresponding provisions of the Copenhagen Document, it does seem appropriate to highlight some problematic aspects in relation to the situation of the Kurds in Turkey.

⁴³⁵ Gilbert (2006), 187

⁴³⁶ Compare: Advisory Committee Opinion on Romania, ACFC/INF/OP/I(2002)001, Para 40-42.

⁴³⁷ Compare: Gilbert (2006), 190; Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 27.

⁴³⁸ Gilbert (2006), 190; Compare: Advisory Committee Opinion on Armenia, ACFC/INF/OP/I (2003) 001, 2002, Para 39, where the Advisory Committee commented positively on Armenia for successful efforts in this field.

While the provisions on equality and the prohibition of discrimination within the European instruments for the protection of minorities leave no doubt about the admissibility of special measures for minority groups, Art 5 FCNM and Para 33 of the Copenhagen Document go so far as to require states to adopt special measures in order to promote the minority groups within their territory. The principle of equality as understood by the Turkish authorities in relation to Art 10 of the Turkish Constitution is consequently incompatible with European minority rights standards.

Since the promotion of different identities is required, Turkish legal provisions and the administrative and political measures of the Turkish authorities aimed at the suppression of Kurdish identity constitute a violation of the FCNM as well as the Copenhagen Document.

However, amending the legal provisions which prevent the expression and promotion of minorities' identities such as that of the Kurds may not be sufficient in order to comply with the standards set by the European instruments for the protection of minorities. As indicated by the interpretation of the Advisory Committee, states not only have to provide the legal framework for minority protection and promotion, but additional measures including financial support are usually also necessary for the aims of the FCNM to be achieved. Consequently, the Turkish authorities would need to provide special funds for the promotion of the minorities residing on Turkish territory, and representatives of the minority group would have to be given the opportunity to participate in the decision-making process for the distribution of these funds.

In view of the long-lasting conflict between the Turkish security forces and the PKK, the Turkish authorities should encourage the media not to report on issues relating to the Kurds and the south-east in a way which fosters negative stereotypes and prejudices. In addition, the authorities should ensure that the police and the military do not discriminate against persons belonging to the Kurdish minority on the grounds that there is a conflict. Where the security forces have acted in a discriminatory way and violated the human rights of persons belonging to the Kurdish minority in the fight against the PKK, the persons responsible should be brought to justice before the competent authorities. In order to foster mutual trust and respect between the security forces and the Kurdish civilian population, particular efforts should be made to recruit persons belonging to the Kurdish minority to serve as police officers and in the military.⁴³⁹

A prerequisite for the appropriate support of the various minority groups in Turkey is the existence of reliable information and data about the various minorities living on

⁴³⁹ Compare: Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 27.

Turkish territory, including their social and economic situation. So far, Turkey has not collected any such data and information to monitor the situation of minorities.⁴⁴⁰

European instruments for the protection of national minorities contain an unambiguous requirement for the promotion of tolerance and a multi-cultural society which is based on mutual respect and understanding. While it has already been acknowledged that tolerance or respect within the population is unlikely to be achieved solely by means of legislation, the importance of the adoption of specific laws and, possibly more importantly, their application by the authorities, in practice should nevertheless not be underestimated.

Turkish criminal law contains – at least in theory – appropriate provisions for targeting crimes resulting from intolerance or racist motives which are committed against persons belonging to a minority group. Art 216 of the Turkish Penal Code prohibits the incitement of the population to enmity or hatred towards members of another group for reasons of social class, race, religion, confession or region.⁴⁴¹ In practice, however, these legal provisions seem to be used by prosecutors more as a means to prosecute members of minority groups who have expressed non-violent opinions on minority issues, while perpetrators of crimes against minority groups or those who incite to hatred and intolerance against minorities usually go unpunished.⁴⁴²

The problems of intolerance and discrimination among private actors should be dealt with not just under criminal law, but also under civil and administrative law. A recent amendment to the Turkish Labour Law, which introduced the prohibition of discrimination on grounds including language, race and religion in labour relations including recruitment, appears to be a step in the right direction. National or ethnic origin is not among the grounds listed, but the list is not exhaustive, and they are therefore also covered by it.⁴⁴³ Also, Art 122 of the Turkish Penal Code provides that discrimination on grounds such as language, race, colour, sex, disability, political opinion, philosophic convictions, religion or confession in relation to the sale and transfer of goods and services, employment, the provision of food, access to public services or the exercise of common economic activity is a criminal offence. The introduction of such legal provisions prohibiting direct or indirect discrimination is important for the implementation of Directive 2000/43/EC, which – as part of the *Acquis*

⁴⁴⁰ Compare: European Commission against Racism and Intolerance, *Third Report on Turkey*, CRI (2005) 5, adopted on 25 June 2004, Para 110.

⁴⁴¹ Art 216 of the Turkish Penal Code (*Türk Ceza Kanunu*), Law no. 5237 of 26 September 2009, in the version of 15.11.2008, printed in: Tellenbach (2008), 139.

⁴⁴² Compare: ECRI, *Third Report on Turkey* (2004), Para 13-14; Minority Rights Group Report: “A Quest for Equality: Minorities in Turkey”, 10 December 2007:

<http://www.minorityrights.org/download.php?id=425>, 28.04.2008.

⁴⁴³ ECRI, *Third Report on Turkey* (2004), Para 24; MRG-Report (2007), 29.

Communautaire – has to be appropriately implemented into Turkish law as the Turkish legal system is prepared for EU membership.⁴⁴⁴ Once again it has to be emphasized that such legal provisions can only be of practical use and will only conform with international legal obligations if they are appropriately implemented in practice.

The promotion of tolerance towards minority groups is dependent on the good will of the various political actors, in particular the different political parties. The highest central authorities should adopt an appropriate attitude in respect of minorities and emphasize the need for tolerance and inter-cultural dialogue in public. Furthermore, the authorities encourage the adoption of such an attitude by authorities at lower levels, in particular at local level.⁴⁴⁵

Unfortunately, some political parties in Turkey continue to promote the cause of Turkish nationalism and to make intolerant remarks against minorities in order to gain political influence and popularity among certain groups within the population.⁴⁴⁶ In doing so, these politicians and political parties encourage the public to view the identity of minorities as posing a serious threat to the unity, the security and the well-being of the Turkish State and nation. Attempts such as these to gain political influence through the promotion of xenophobia and fears of people with a different identity can be observed in many European countries including Austria, where the resistance of the regional government of Carinthia to putting up additional signs indicating village and town names also in the minority language gave rise to much public discussion and was used by one political party as a means of political activism. Political propaganda of this kind used against minority groups is a cause for serious concern, in particular when it unquestionably constitutes a violation of constitutional law and contravenes the rulings of the constitutional court.⁴⁴⁷

In view of the serious consequences that have already resulted from the conflict between the Turkish “nationalist” identity and Kurdish identity, political statements which fuel this conflict should not be tolerated by any other political actors nor by the international community which should explicitly condemn such behaviour. However, nationalist slogans and propaganda against the Kurdish and other minority identities seem to be justified or even required under the Turkish constitutional system with its emphasis on the Turkish nation. Given, therefore, that the ideological framework of its

⁴⁴⁴ Compare: Chapter 4.2 above.

⁴⁴⁵ Compare: Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 31; Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 35: In the case of the Ukraine, the Advisory Committee criticized the fact that statements by certain politicians in a dispute on language issues did not reflect the principles contained in Art 6 of the Framework Convention, and the Committee expressed its opinion “...that the authorities’ attitudes, statements and measures vis-à-vis the language issues can be instrumental in promoting a measured approach to the questions at issue.”

⁴⁴⁶ Compare: ECRI, *Third Report on Turkey* (2004), Para 103

⁴⁴⁷ Compare: Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 29-30.

constitution appears incompatible with the values of tolerance and multiculturalism underlying the European system of human rights and minority protection, Turkish will need to effect systematic change in respect of these archaic ideologies if it is to succeed on its path to further European integration, even though it is evident that such a development will take some time.

Values such as tolerance and acceptance of different identities and the conviction that different cultures, languages and identities are not a threat to but an enrichment for the society of a state cannot be instilled simply by legal reforms and constitutional amendments. Additional efforts by means of special measures will therefore be necessary. One of the best ways to promote such values and ideas is through education. Young people in particular have open minds which are usually resistant to indoctrination by the prevalent opinions of the society in which they live. Consequently, they will not usually be as sceptical and reluctant to accept new ideas, opinions and values as their elders.

Education is fundamental for the promotion of tolerance towards minorities and their identities, but it can also have the opposite effect if used as means for the indoctrination in archaic ideologies. The existence of Turkish school textbooks and curricula which promote negative stereotypes of minorities⁴⁴⁸ and the emphasis on the Turkish language and Turkish national culture in school are cause for concern in this regard.

Minority protection not only requires tolerance and acceptance, but a positive attitude towards cultural pluralism on the part of the state and society in general, as well as respect for distinct characteristics and the contribution of the minority to the national society as a whole.⁴⁴⁹ The obligation of states to promote the necessary conditions for national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, should be seen as an essential tool for the achievement of these ideals. If Turkey wishes to be further integrated into the European Community of States by way of EU membership, it should be obliged to show its clear and unconditional commitment to tolerance and cultural pluralism which are essential elements of a pluralist democracy. One important aspect of such a commitment would be the legal and political acceptance of the various minority groups living in Turkey, including the Kurds, and the adoption of legal and political measures in order to promote the key features of the identity of these minority groups. So far, Turkey seems to have failed in this regard. In surprisingly clear and unambiguous language, the 2008

⁴⁴⁸ ECRI, *Third Report on Turkey* (2004), Para 34

⁴⁴⁹ Eide, Asbjorn: *Final Text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2001/2, Para 28.

Progress Report on Turkey points out that “overall, Turkey has made no progress on ensuring cultural diversity and promoting respect for and protection of minorities in accordance with European standards.”⁴⁵⁰

In 2009 the European Commission’s assessment was more positive, as it noted that “a debate on minority-related issues has developed in the country”, but still stated that overall, “full respect for and protection of language, culture and fundamental rights, in accordance with European standards have yet to be fully achieved. Turkey has made limited efforts to enhance tolerance or promote inclusiveness vis-à-vis minorities.”⁴⁵¹

4.3.2 The Prohibition of Assimilation

4.3.2.1 The Prohibition of Assimilating Policies

European instruments for the protection of minorities explicitly prohibit states from adopting measures which aim at the assimilation of persons belonging to national minorities.

Art 5 (2) FCNM provides:

“Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.”

Similarly, Para 32 of the Copenhagen Document provides that “...persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will.”

Both provisions refer to assimilation “against the will” of the persons concerned. Voluntary assimilation of persons belonging to national minorities is not prohibited.⁴⁵²

Under Art 5 (2) FCNM states are allowed to take measures in pursuance of their general integration policy. This approach “...acknowledges the importance of social cohesion and reflects the desire expressed in the preamble that cultural diversity be a source and a factor, not of division, but of enrichment to each society.”⁴⁵³ For example, such measures may consist of the obligation to learn the official language of the state in school (compare Art 14 (3) FCNM).

⁴⁵⁰ European Commission: *Turkey 2008 Progress Report*, 26.

⁴⁵¹ European Commission: *Turkey 2009 Progress Report*, 28.

⁴⁵² Explanatory Report, Para 45.

⁴⁵³ Explanatory Report, Para 46.

Although it has to be acknowledged that a certain degree of integration is necessary and that an integration policy may have positive effects for the minority as well as society as a whole, it has to be noted that the difference between assimilation and integration is often very small. There is the constant danger that measures aimed at integration may ultimately lead to unwanted assimilation.⁴⁵⁴ Furthermore, the allowance for integration measures must not be used by states to justify measures which are in fact aimed at assimilation. Any such policies and actions claim to be furthering integration have to be scrutinized very carefully. If their aim is in fact to eradicate cultural or linguistic particularities of a minority rather than to facilitate their participation in society as a whole, such policies and actions are incompatible with the FCNM.

Cases of assimilation seem to be very rare in the member states of the EU which are parties to the FCNM, but integration policies need to be constantly monitored to ensure that they do not have the effect of unwanted assimilation.⁴⁵⁵

4.3.2.2 The Prohibition to Alter the Proportions of the Population

The prohibition of assimilation needs to be read together with Art 16 FCNM:⁴⁵⁶

“The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention.”

Minorities with a traditional link to a specific territory have often been considered by states as a particular threat to their territorial integrity, because such a relationship between a territory and a people may lead to calls for self-determination by way of secession. Policies aimed at altering the demographic structure in such traditional minority territories may be used by states as a means to prevent such developments and to undermine minority protection. In particular, the exercise of minority rights which contain some kind of territorial link as a prerequisite for their application or as a key element for the required scope of protection (for example Articles 10 and 14 FCNM) will be severely impeded or even precluded by measures which change the proportion of the minority population in relation to the overall population of an area.⁴⁵⁷

⁴⁵⁴ Gilbert (2006), 173.

⁴⁵⁵ Compare: Gilbert (2006), 174.

⁴⁵⁶ Gilbert (2006), 172.

⁴⁵⁷ Compare: Jackson-Preece, Jennifer: “Article 16” in Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 463-465.

Art 16 FCNM clearly stipulates that measures which change the proportion of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms which flow from the Framework Convention, are prohibited. Measures which only have the effect of restricting such rights and freedoms, but which do not have the aim of restriction, are not prohibited under Art 16 FCNM, since such measures may be justified and legitimate. One example might be the resettlement of the inhabitants of a village in order to build a dam.⁴⁵⁸ But even if such measures only have the effect of altering the proportions of the population, it follows from Articles 16 FCNM, in conjunction with Articles 4 and 5, that policies involving demographic change must neither discriminate nor deliberately target persons belonging to minority groups.⁴⁵⁹

The Explanatory Report contains a non-exhaustive list of four possible measures that are prohibited under Art 16: expropriation, evictions, expulsions and redrawing administrative borders with a view to restricting the enjoyment of rights and freedoms (gerrymandering).⁴⁶⁰

In Europe, the right to property is guaranteed under Art 1 of Protocol 1 to the ECHR. This right is not absolute, and a person may be deprived of his/her possessions “...*in the public interest and subject to the conditions provided for by law and be the general principles of international law*”.⁴⁶¹ Expropriation, which is the taking of private property by the state, can consequently be legitimate if it serves a public interest (for example economic development) and the state pays prompt, adequate and effective compensation.⁴⁶²

In the case of expropriation of persons belonging to a national minority, it is the purpose of the expropriation that is of specific importance: National Minorities must not be specifically targeted by expropriation for the purpose of encouraging their movement and dispersion by depriving them of their resources (home, livestock, business). Expropriation for a legitimate purpose (an overriding public interest), which only affects persons belonging to a national minority, is permissible, even if it affects them in a disproportionate manner. But even in such a situation, expropriation must not be exercised in a discriminatory way, only targeting the property of persons belonging to national minorities.⁴⁶³

⁴⁵⁸ Explanatory Report, Para 82.

⁴⁵⁹ Jackson-Preece (2006), 466.

⁴⁶⁰ Explanatory Report, Para 81.

⁴⁶¹ Article 1 of Protocol 1 to the ECHR.

⁴⁶² Jackson-Preece (2006), 468.

⁴⁶³ Jackson-Preece (2006), 469-470.

Currently there do not seem to be relevant cases among the European state parties to the FCNM. In the case of Croatia, however, the Advisory Committee has held that the state must resolve property and housing issues relating to national minorities which are the results of past expropriations and resettlements. The obligations of states under Art 16 are obviously not limited to current expropriations or other measures taken in relation to changing the composition of the population, but also involve measures in relation to policies in the past.⁴⁶⁴

Forced eviction can be defined as “*the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.*”⁴⁶⁵ Such practices may violate a number of universal human rights, including the right to home, private and family life under Art 8 ECHR, and the right to freedom of movement under Art 2 of Protocol 4 to the ECHR.⁴⁶⁶ While these rights may be restricted under certain conditions, evictions are illegal if they do not serve a legitimate purpose and are not executed in compliance with the requirements of the concept of due process.

Quite often, such illegal (forced) evictions are the prelude to other illegitimate policies such as forced relocation, forced resettlement, forced expulsion or population transfer or exchange, and they are regularly accompanied by the disproportionate use of force (on the part of state officials) leading to the destruction of homes and property. The victims usually do not have (effective) legal remedies against such measures.⁴⁶⁷

The ECtHR has repeatedly held that the forced eviction of persons from their homes, the refusal to let them return, and the separation of families were violations of the right to respect for private life, family life and home. The ECtHR has ruled that while Art 8 (2) ECHR allows for the restriction of the rights guaranteed by Art 8 under certain circumstances, it could not justify the forced displacement of civilians.⁴⁶⁸

The vulnerability of national minorities to forced eviction has also been acknowledged in the context of the OSCE. The 1992 Helsinki Document commits states to “... *refrain from resettling and condemn all attempts, by the threat and use of force, to resettle persons with the aim of changing the ethnic composition of areas within their territories*”.⁴⁶⁹ Art 16 FCNM, insofar as it applies to forced evictions, can thus be seen

⁴⁶⁴ Advisory Committee Opinion on Croatia, ACFC/INF/OP/I (2001) 001, 2001, Para 66.

⁴⁶⁵ Jackson-Preece (2006), 470, with further references.

⁴⁶⁶ Compare: Arts 12 and 17 ICCPR.

⁴⁶⁷ Jackson-Preece (2006), 471-472.

⁴⁶⁸ Compare: *Selcuk and Asker v. Turkey*, App. 12/1997/796/998-999, Judgement of 24 April 1998; *Mentes and Others v. Turkey*, APP. 23186/94, 1997.

⁴⁶⁹ Conference for Security and Co-Operation in Europe: CSCE Helsinki Document, 9.-10.July 1992, VI, Para 27, <http://www.osce.org/item/15842.html>, 25.02.2010.

as “...a continuation of this prior trend in minority rights protection; their effect is to render *prima facie* unlawful forced eviction specifically directed against persons belonging to minorities.”⁴⁷⁰

State practice in Europe does not seem to give rise to particular concern with regard to forced evictions, but there is a case which illustrates the importance of the distinction between the aims and effects of an eviction: In Germany, a community which mainly consisted of persons belonging to the Sorbian minority was dissolved and resettled by the government in order to facilitate lignite mining in the region concerned. This measure was justified by the German government on the grounds of the economic importance of lignite mining in the region. The measure was in accordance with national law, and effective redress against the measure had been provided.⁴⁷¹ The Advisory Committee did not judge the resettlement of the Sorbian population to be incompatible with the FCNM, but the Committee stated that it was a matter of deep concern and encouraged the German authorities to continue to ensure that the Sorbian inhabitants were able to continue to enjoy their rights in the cultural and linguistic field. In addition, the Advisory Committee stressed that it was necessary to pay due attention to the requirements established by the Framework Convention when weighing any public interest against the legitimate aspirations of the Sorbian people to maintain their culture and preserve their identity.⁴⁷²

Expulsion can be defined as an act, or failure to act, by an authority of a state with the intention and with the effect of securing the removal of a person or persons against their will from the territory of a state, while deportation may be described as the factual execution of the expulsion order.⁴⁷³ In international law expulsion per se is not prohibited, nor is it allowed for if it is carried out deliberately, however the pre-conditions for legal expulsion can be found in international human rights law. Protocol 4 to the ECHR contains an explicit prohibition of expulsion in two different forms: Art 3 of the Protocol prohibits the individual or collective expulsion of a person from the territory of a state in which he/she is a national, and Art 4 of Protocol 4 prohibits the collective expulsion of aliens from the territory of state.

Art 1 of Protocol 7 to the ECHR provides greater detail, stipulating that an alien lawfully resident in the territory of a state shall not be expelled except in pursuance of decisions reached in accordance with the law and shall be allowed to submit reasons against his expulsion; to have his case reviewed; and to be represented for these purposes before the competent authority. The emphasis on procedural requirements for an expulsion in

⁴⁷⁰ Jackson-Preece (2006), 474

⁴⁷¹ Germany State Report, ACFC/SR(2000)001, 101.

⁴⁷² Advisory Committee Opinion on Germany, ACFC/INF/OP/I(2002)008, 2002, Para 29-32, Para 96.

⁴⁷³ Jackson-Preece (2006), 476, with further references.

accordance with the ECHR reflects the interpretation of Articles 3 and 4 of Protocol 4 by the ECtHR, according to which a legitimate expulsion has to be decided on the basis of an objective and reasonable case-by-case review.⁴⁷⁴

Since, in most cases, persons belonging to a national minority are nationals of the state they live in (citizenship is usually seen as a requirement for the qualification as a national minority), their expulsion is not permissible under European human rights law (Art 3 of Prot 4 ECHR). In cases where they are not nationals but are covered by the FCNM, Art 16 may be interpreted to imply that any expulsion of a person belonging to a national minority is *prima facie* illegal. The state would thus be obliged to show that the individual case of expulsion is objectively and reasonably justified and not contrary to the rights and principles enshrined in the FCNM (in particular the prohibition of discrimination).⁴⁷⁵

At present, there seem to be no cases of expulsions of persons belonging to national minorities in the European states which are parties to the FCNM.

Gerrymandering, which can be described as the redrawing of administrative borders with a view to restricting the enjoyment of the rights and freedoms of minorities does not seem to be prohibited *per se* under international human rights law. However, certain provisions in international human rights and minority rights instruments, as well as the Explanatory Report to the FCNM, show that such a redrawing of the administrative map does not comply with international minority rights standards.⁴⁷⁶

Since human rights instruments usually recognize the right of an individual to be represented by the government and/or actively participate in the conduct of public affairs, they already provide for a (limited) restriction on gerrymandering because its purpose is to create inequalities between different individuals or groups in relation to the participation in public affairs. This restriction is reinforced by international instruments for the protection of minorities.

Art 15 FCNM stipulates that “*Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them*”. Art 9 of The Lund Recommendations on the effective participation of National Minorities in Public Life provides that the electoral system should facilitate minority representation and

⁴⁷⁴ Jackson-Preece (2006), 474; The requirement of a fair and objective review of each individual case has also been included in Art 13 ICCPR, which restricts the legal expulsion of aliens, providing that expulsion of an individual is only permitted “...in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by and be represented for the purpose before, the competent authority or a person especially designated by the competent authority”.

⁴⁷⁵ Compare: Jackson-Preece (2006), 480.

⁴⁷⁶ Compare: Jackson-Preece (2006), 481.

influence and Art 10 stipulates that the geographical boundaries of electoral districts should facilitate the equitable representation of national minorities.⁴⁷⁷

Any measure aimed at diminishing the political influence of a minority group by way of altering the proportions of the population would be a breach of the obligations resulting from Art 15 FCNM as well as from other minority rights instruments such as the Lund Recommendations.⁴⁷⁸

Gerrymandering, like other measures aimed at altering the proportion of the minority population in relation to the overall population in a territory does not seem to be a problem in the European state parties to the FCNM.

4.3.2.3 The Assimilation of the Kurds in Turkey

Since the foundation of the Republic of Turkey the nationalistic concept of the Turkish constitutional system, the emphasis on the indivisibility of the Turkish State and the Turkish nation, the specific interpretation of the principle of equality as contained in Art 10 of the Turkish Constitution, and the promotion of the Turkish language and a particular concept of Turkish national culture, have all been used by the Turkish authorities as the legal foundation for a general policy of assimilation aimed particularly at the Kurds who constitute the largest minority group with distinct ethnic, linguistic and cultural features in Turkey.⁴⁷⁹

In the past Turkey has attempted to assimilate the Kurds in a variety of ways. As language is one of the key features of a person's identity, the suppression of the Kurdish language was one of the main tools of assimilation. The constitutional prohibition of the use in public, and particularly in the press, of any language prohibited by law was basically aimed at the Kurdish language, which has been prohibited since the introduction of the Constitution of 1982.⁴⁸⁰ The prohibition of giving children Kurdish names and the changing of names of places, towns and villages had a similar purpose. The prohibition of Kurdish political parties because they "create" minorities, and the prohibition of Kurdish associations or associations promoting languages and cultures other than Turkish were intended to prevent the formation of a Kurdish collective and political will in favour of a Turkish identity. While some of the laws providing the basis

⁴⁷⁷ Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note; the text is available at: http://www.osce.org/publications/hcnm/1999/09/31545_1151_en.pdf, 23.06.08

⁴⁷⁸ The rights of minorities and the obligations of states resulting from Art 15 FCNM will be discussed in Chapter 4.9 below.

⁴⁷⁹ See Chapter 2.1.

⁴⁸⁰ Compare: Yildiz/Muller (2008), 16; Gunter (1997), 10; the Kurdish language was prohibited by Law no. 2932.

for these assimilating measures have been amended, some of them are still in place. Also, the amended laws are not always appropriately implemented in practice.

In order to meet European standards in the area of minority rights and human rights, Turkish authorities will have to refrain from any policies which aim at the (forced) assimilation of minority groups such as the Kurds. The prohibition of assimilation is one of the fundamental principles of minority protection. In order to comply with this principle, the Turkish authorities will need to demonstrate an appropriate and unconditional political commitment and introduce additional reforms of the legal system. Considering the extent of past assimilation policies, it would be desirable if the Turkish State endeavoured to provide redress for the victims of assimilation that occurred in the past.

In view of the prohibition on altering the proportions of the minority population in relation to the overall majority, there appear to be two issues which merit attention. In their attempt to create the Turkish nation, the Turkish authorities adopted law Nr. 2510 on the amendment of the population in 1934. The aim of the law was to alter the population structure in order to foster Turkish nationalism and culture. Groups of persons with a cultural background distinct from the Turkish national culture were resettled in areas where Turkish national culture was widespread. As such, the law was used as an instrument of assimilation against the Kurdish population by way of forced displacement and resettlement.⁴⁸¹

The Advisory Committee has argued in its Opinion on Croatia that the prohibition of Art 16 FCNM also includes an obligation to attempt to remedy the consequences of past displacements. While it has to be admitted that it is very difficult to recover damages caused by legal and political measures implemented some time ago in the past, the Turkish authorities should nevertheless try to provide an appropriate legal framework and resources in order to recompense those Kurds or their descendants who were forcefully displaced. It would also appear desirable for the Turkish government to adopt an appropriate official point of view which demonstrates that such policies in the past were not justified and will not be continued in the future.

The second problematic aspect is the forced eviction and factual expropriation of Kurdish people in the course of the violent conflict between the Turkish security forces and the PKK in the Turkish south-east. While it is probably true that the PKK has itself committed violent acts against those parts of the Kurdish population which did not support the organisation, the main responsibility for the displacements and the

⁴⁸¹ Compare: Yildiz/Muller (2008), 16; Kirisci/Winrow (1997), 98; Gunter (1997), 5; Kartal (2002, 160.

destruction of houses and whole villages seems to lie with the Turkish security forces and the Turkish authorities.

There are numerous cases of Kurdish villagers being forcefully evacuated by the security forces who then burned down the houses and other properties. Some of these cases have been brought before the ECtHR, which in most cases has assessed similar facts and found violations of the right to home, private and family life under Art 8 ECHR and the protection of property pursuant to Art 1 Protocol 1 ECHR.⁴⁸² In some of these cases, the court has also held that Turkey violated the right to effective remedy, and that the burning down of the applicant's whole property amounted to inhumane or degrading treatment pursuant to Art 3 ECHR. It is estimated that until 1999, about 3,500 villages had been evacuated and up to 3 million people, mainly Kurds, had been displaced⁴⁸³

Turkey has launched two government programmes to provide assistance and compensation to the people who were displaced in the course of the military campaign. The programmes are intended to assist people to return to their villages and rebuild their houses, and they provide funds as compensation for the loss of property. While the establishment of these programmes has to be seen as a positive step in relation to the Kurdish question, it has to be noted that the government's initiatives have been criticized for various reasons. The criticism mainly focuses on the following points: the lack of public information (campaigns), which has left many displaced people unaware of the programmes; inadequate implementation because of a slow evaluation process and inconsistent compensation amounts; lack of independence and impartiality of the commissions responsible for the decision-making; insufficient funds.⁴⁸⁴

The prohibitions of forceful population transfers in the various forms established by the FCNM as well as the relevant documents of the OSCE should be interpreted in such a way that they oblige states to provide redress for measures that have been carried out in the past. Since the forced evictions and expropriation in the Turkish south-east were partly the result of accusations that the Kurdish minority as a whole was responsible for the violence, assistance and compensation for those who suffered from the measures carried out by the security forces seem justified on the grounds of effective minority protection.

The Turkish government should be encouraged to continue its programmes for internally displaced persons, and to provide full and effective remedies for those Kurds

⁴⁸² Compare: *Selcuk and Asker v. Turkey*, App. 12/1997/796/998-999, Judgement of 24 April 1998; *Mentes and Others v. Turkey*, APP. 23186/94, 1997.

⁴⁸³ Compare: Yildiz/Muller (2008)

⁴⁸⁴ Compare: MRG-Report (2007), 27.

who suffered from the excessive violence which seems to have been particularly directed against them.

4.4 The Right to Freedom of Expression

4.4.1 The Right to Freedom of Expression and its Particular Relevance for Persons belonging to National Minorities

The right to freedom of expression is a basic human right guaranteed by a number of human rights instruments including the ECHR, the ICCPR and the Copenhagen Document. As a basic human right which is universal in nature, freedom of expression applies to all persons whether they belong to a national minority or not, but taken together with certain other human rights and fundamental freedoms, the right to freedom of expression has an important democratic function and is of particular relevance to the preservation of the identity of a minority group.⁴⁸⁵ The importance of the right to freedom of expression for a society as a whole and the individual member of a minority group in particular can be derived from the leading case heard by the ECtHR, *Handyside v. the United Kingdom*, where the ECtHR held unequivocally that Art 10 “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man”.⁴⁸⁶

The importance of freedom of expression of persons belonging to a national minority is also evident from the text of the FCNM. Article 7 FCNM provides that:

“The Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.”

The rights enumerated in Art 7 FCNM are also guaranteed under the ECHR and should be interpreted in conformity with the latter (Art 23 FCNM).⁴⁸⁷ However, the standards set by the ECHR concerning the rights enumerated in Art 7 of the Framework Convention have to be taken as minimum standards, because the ECHR does not specifically deal with national minorities.⁴⁸⁸ Since the aim of the drafters of the Framework Convention was to ensure comprehensive protection for persons belonging

⁴⁸⁵ Compare: Explanatory Report, Para 51; Machnyikova, Zdenka: “Article 7” in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 194-195

⁴⁸⁶ *Handyside v. United Kingdom*, Judgement of 7 December 1976, Series A no. 24, Para 48.

⁴⁸⁷ Art 23 FCNM provides: „The rights and freedoms flowing from the principles enshrined in the present framework Convention, in so far as they are subject of a corresponding provision in the Convention for the Protection of Human Rights and Fundamental Freedoms or in the Protocols thereto, shall be understood so as to conform to the latter Provisions.“

⁴⁸⁸ Machnyikova (2006), 198-199

to national minorities, they explicitly guaranteed the right to freedom of expression in general in Art 7 and provided for protection for particular aspects of this right in Art 9.⁴⁸⁹ The latter article further specifies the right to freedom of expression and contains detailed provisions concerning the access to, the use of, and the creation of media by persons belonging to national minorities. These aspects will be discussed in Chapter 4.5.

The first sentence of Art 9 Para 1 FCNM further specifies the right to freedom of expression of members of national minorities:

“The Parties undertake to recognize that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference and regardless of frontiers.”

The text of this phrase is modelled on the second sentence of Art 10 Para 1 of the ECHR and basically contains the same elements, but unlike Art 10 ECHR this provision refers specifically to the freedom to receive and impart information and ideas in the minority language. According to the Explanatory Report, Art 9 implies the freedom to use the minority language, the majority language or any other language to exercise this right.⁴⁹⁰ There can thus be no doubt that on a European level, the free choice of language, including each and every minority language, is part of the right to freedom of expression.⁴⁹¹

It is not necessary in this context, and would go beyond the scope of this Chapter, to analyse the various aspects and details of the right to freedom of expression and its interpretation by the ECtHR. Consequently, the following pages will only contain a description of those aspects of the Turkish legal system and of the application of those Turkish laws which are of concern in relation to freedom of expression as guaranteed by the European instruments for the protection of human rights and minority rights.

⁴⁸⁹ Machnyikova (2006), 196

⁴⁹⁰ Explanatory Report, Para 56

⁴⁹¹ Compare: Machnyikova (2006), 216; Packer; John/Holt, Sally: “Article 9” in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 265; The different aspects of the right of persons belonging to national minorities to use the minority language and their implications for the Kurds in Turkey are described in Chapter 4.6.

4.4.2 Restrictions on the Kurdish Right to Freedom of Expression under the Turkish Constitution and Turkish Criminal Law

The Turkish Constitution contains extensive provisions on various aspects of the right to freedom of expression, including, in Articles 25 to 31, the freedom of the press and the right to use other media.

Art 25 of the Turkish Constitution stipulates that: *“Everyone has the right to freedom of thought and opinion. No one shall be compelled to reveal his thoughts and opinion for any reason or purpose, nor shall anyone be blamed or accused on account of his thoughts and opinions.”*

Art 26 of the Turkish Constitution provides that: *“Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. This right includes the freedom to receive and impart information and ideas without interference from official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing.*

The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation and rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.”

The current version of Art 26 of the Turkish Constitution, which was amended on 17 October, 2001, seems to provide an adequate constitutional basis for the protection of the right to freedom of expression in accordance with European standards because it guarantees the freedom to express and disseminate thoughts and opinions and to receive and impart information and ideas in various forms without interference by public authorities. The original version of the article contained an explicit restriction with regard to languages prohibited by law and other clauses that allowed for a very limited interpretation of the right to freedom of expression, in particular in relation to the exercise of this right by the Kurds or other minorities.

Although the possibilities for restricting the exercise of the right to freedom of expression have been limited in the amended version of Art 26 (2) of the Turkish Constitution, their remains reason for concern. In particular, the elements *“national security”, “public order and public safety”, and “safeguarding the indivisible integrity of*

the State with its territory and nation”, when interpreted in light of the traditional Turkish concept of nationalism, still provide a legal basis for the restriction of the exercise of the right to freedom of expression by members of the Kurdish minority. These elements have also been included in Art 3 of the Turkish Press Law, where they are enumerated as legitimate aims for restrictions imposed on the freedom of the press.⁴⁹²

The Turkish authorities have traditionally prohibited the use of the Kurdish language and have prosecuted Kurds for the use of the Kurdish language basically on the argument that the use of this language constitutes a threat to the integrity of the Turkish State and Nation. The implications of these restrictions for the right of the Kurdish minority to use their language will be discussed in the Chapter on language rights. It has to be reiterated at this point that the use of a language - per se – must not be used as a reason to restrict the right to freedom of expression.⁴⁹³

Even if the Turkish language is used, the conditions mentioned above may be used to restrict the expression of thoughts and opinions regarding the Kurds in Turkey. References to a Kurdish people, a Kurdish minority or a distinct Kurdish culture, the call for Kurdish cultural and minority rights, opinions about possible models of autonomy as well as criticism of the government’s policies on the Kurdish question may all still be prohibited, based on the argument that they constitute a threat to “*the integrity of the Turkish territory and nation*”, to “*national security*” or “*public order and safety*”.⁴⁹⁴ Journalists and Kurdish politicians in particular have faced severe restrictions on the right to freedom of expression that have regularly included criminal prosecution and conviction for “pro-Kurdish” statements.⁴⁹⁵ And the situation does not seem to have improved in recent years. In 2010, for instance, the European Commission observed that “*Pressure on newspapers discussing the Kurdish question or publishing in Kurdish increased*”.⁴⁹⁶

The constitutional reforms mentioned above have been bolstered by other legislative reforms, in particular through amendments to certain provisions of the Turkish Penal Code. Although some of the new legal provisions represent considerable progress, some changes have been rather cosmetic or rendered completely ineffective as a result of the re-enactment of certain restrictive provisions in other articles.⁴⁹⁷ This is particularly regrettable because Turkish Penal Law has always been applied extensively by Turkish prosecutors to limit free expression on politically sensitive

⁴⁹² Compare: Yildiz/Muller (2008), 60, referring to the Turkish Press Law, no. 5187.

⁴⁹³ Packer/Holt (2006), 268.

⁴⁹⁴ Compare: Yildiz/Muller (2008), 50-51.

⁴⁹⁵ Compare: MRG-Report (2007), 22.

⁴⁹⁶ European Commission: 2010 Progress Report on Turkey, 20.

⁴⁹⁷ Compare: Yildiz/Muller (2008), 53.

topics, and Turkish criminal law has served, and still serves, as the principal means of restricting any form of expression relating to minority rights or to the situation of the Kurds in Turkey. There have been numerous cases before the ECtHR in which the court found that criminal convictions for the expression of opinions and view-points on the situation of the Kurds in Turkey constituted violations of Art 10 ECHR.⁴⁹⁸

The old Art 159 of the Turkish Penal Code, which was politically controversial as it prohibited the “*denigration of Turkishness*”, was replaced by Art 301 of the Turkish Penal Code. In its actual version of 12.10.2004 Art 301 (1) of the Turkish Penal Code provides that any person who publicly denigrates the Turkish Nation, the Turkish Republic, the Grand National Assembly, the government of the Turkish Republic or the organs of the judiciary, should be punished by imprisonment of between six months and two years. Similarly, Para 2 of the provision prohibits the public denigration of the military and the security forces.⁴⁹⁹ Like its predecessor, the provision served as the basis for criminal charges against intellectuals, writers, publishers, journalists or human rights advocates who expressed opinions on minority rights. One famous example of such a prosecution and conviction was the Armenian writer Hrant Dink, who had written critically about the situation and the treatment of Armenians and Kurds in Turkey.⁵⁰⁰

Although Art 301 Para 4 of the Turkish Penal Code states that expressions of thought intended to criticise should not constitute a crime, the extensive interpretation adopted by prosecutors and judges in respect of the Article resulted in numerous prosecutions of persons who had expressed opinions on the Kurdish minority and the Kurdish question. In view of the fact that the distinction between “*denigrating*” the State and its institutions on the one hand, and the expression of thoughts intended to “*criticise*” on the other, seems to be imprecise, leaving the courts with a very wide measure of discretion, the provision raised concerns in respect of the principle of the rule of law, which requires that legislation, and in particular criminal laws, has to be sufficiently precise in order to be able to foresee how it is implemented, i.e. which behaviour shall be prohibited.⁵⁰¹ It is thus not surprising that Art 301 of the Turkish Penal Code was particularly criticised by international organisations and scholars as well as by the

⁴⁹⁸ To give some examples: *Sürek and Özdemir v. Turkey*, Apps. 23927/94 and 24277/94, Judgement of 8 July 1999; *Arsalan v. Turkey*, App. 23462/94, Judgement of 8 July 1999; *Gümüş and others v. Turkey*, App. 40303/98, Judgement of 15 March 2005; *Koc and Tambas v. Turkey*, App. 50934/99, Judgement of 21 March 2006.

⁴⁹⁹ Art 301 of the Turkish Penal Code (*Türk Ceza Kanunu*), Law no. 5237 of 26 September 2004, in its version of 15.11.2008, printed in: Tellenbach (2008), 190.

⁵⁰⁰ Compare: MRG-Report (2007), 22; for further examples see: Amnesty International: “*Turkey: Article 301 is a threat to freedom of expression and must be repealed now!*”, 1 December 2005, <http://www.amnesty.org/en/library/info/EUR44/035/2005>, 01.03.2010; Amnesty International: “*Turkey: Article 301: How the law on “denigrating Turkishness” is an insult to free expression*”, 01.03.2006, <http://www.amnesty.org/en/library/info/EUR44/003/2006>, 01.03.2010; Yildiz/Muller (2008), 54.

⁵⁰¹ Compare: Yildiz/Muller (2008), 54.

European Commission.⁵⁰² The European Commission repeatedly called for its provisions to be amended in order to safeguard freedom of expression in Turkey.⁵⁰³ According to the Commission, the Article was a cause for serious concern because it probably contributed to a climate of self-censorship in Turkey.⁵⁰⁴

Art 301 of the Turkish Penal Code was once again slightly amended in 2008. The amendments introduced, amongst others, a permission requirement by the Minister of Justice in order to launch a criminal investigation on the basis of the Article. After the amendments had come into force, the Minister reviewed numerous pending cases as well as newly initiated investigations and only granted permission to a very small percentage of them. In 2009 the European Commission concluded that Art 301 of the Turkish Penal Code was no longer used systematically to restrict freedom of expression, and that the revision of the Art had led to a significant reduction in the number of prosecutions compared with previous years.⁵⁰⁵ Similarly, the European Commission stated in 2010 that there were few cases initiated on the basis of Article 301 of the Turkish Criminal Code after it had been amended in 2008.⁵⁰⁶ One can thus hope that there is a corresponding trend which will continue in the future.

However, there are also other provisions of the Turkish Criminal Code, the Anti-Terror Law and the Press Law which are used to restrict freedom of expression in Turkey.⁵⁰⁷ One of these provisions which are particularly used to punish those who claim minority rights or publicly express proposals for a solution to the Kurdish question is Art 216 of the Turkish Penal Code. Para 1 of the Article, which prohibits the incitement of hatred or enmity on the basis of difference in class, race, conscience or religion, may be used to punish those who write articles on or otherwise publicly discuss the Kurdish question.⁵⁰⁸ It has been reported that Turkish prosecutors have recently seemed to resort rather readily to the provisions of Art 216 of the Turkish Penal Code to curtail the peaceful advocacy of minority rights.⁵⁰⁹

Art 220 (8) of the Turkish Penal Code has traditionally served as the legal basis for the restriction and criminalization of comments on the situation of the Kurds and the conflict

⁵⁰² Compare: Amnesty International: *"Turkey: Article 301 is a threat to freedom of expression and must be repealed now!"*, 1 December 2005; Amnesty International: *"Turkey: Article 301: How the law on 'denigrating Turkishness' is an insult to free expression"*, 01.03.2006; MRG-Report (2007), 22; Yildiz/Muller (2008), 54-55.

⁵⁰³ European Commission: *Turkey 2005 Progress Report*, 26.

⁵⁰⁴ European Commission: *Turkey 2006 Progress Report*, 14.

⁵⁰⁵ European Commission: *Turkey 2009 Progress Report*, 17.

⁵⁰⁶ European Commission: *Turkey 2010 Progress Report*, 20.

⁵⁰⁷ European Commission: *Turkey 2010 Progress Report*, 20.

⁵⁰⁸ Art 216 of the Turkish Penal Code (*Türk Ceza Kanunu*), Law no. 5237 of 26 September 2004, in its version of 15.11.2008, printed in: Tellenbach (2008), 139; Before the reform of the penal code, the provision was found in Art 312.

⁵⁰⁹ MRG-Report (2007), 22.

in the Turkish south-east. Art 220 prohibits the foundation of any association which has the aim of committing criminal offences, and Para 8 prohibits propaganda for such an organisation or its goals.⁵¹⁰ Because of the very broad interpretation of Art 220 Para 8 used by Turkish prosecutors, people who have claimed minority rights or expressed opinions similar to the demands issued by members of the PKK can be prosecuted for making prohibited propaganda for a terrorist organisation.⁵¹¹

One of the main tools for the prosecution of Kurds who claim minority rights or call for a solution to the Kurdish question has traditionally been the Turkish “Prevention of Terrorism Act”.⁵¹² Because of its over-inclusive definition of terrorism and the far-reaching and unclear formulation of its provisions it has served not only for the prosecution and conviction of violent PKK terrorists, but for the restriction of any expression or activity associated with a separate Kurdish identity, specific rights for the Kurds or the Kurdish question in general. In particular, Section 8 of the Prevention of Terrorism Act, which banned separatist propaganda and also included criminal liability for editors and publishers, was frequently used as the basis for charges brought against people who publicly expressed opinions or views on the Kurdish question.⁵¹³

The original version of Section 8 Paragraph 1 (before amendment by Law no. 4126 of 27 October 1995), provided as follows:

*“Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years’ imprisonment and a fine of from fifty million to one hundred million Turkish liras.”*⁵¹⁴

In particular, as a result of the formulation “*irrespective of the methods used and the intention*” and the correspondingly wide interpretation of it used by the Turkish authorities, Section 8 prohibited the simple existence or expression of convictions or attitudes without requiring any form of criminal action, which made the provision incompatible with the right to freedom of expression as guaranteed by Art 10 ECHR.

Section 8 of the Prevention of Terrorism Act was finally amended by Law no. 4126 of 27 October 1995, which removed the phrase “*irrespective of the methods used and the*

⁵¹⁰ Art 220 of the Turkish Penal Code (*Türk Ceza Kanunu*), Law no. 5237 of 26 September 2004, in its version of 15.11.2008, printed in: Tellenbach (2008), 141.

⁵¹¹ MRG-Report (2007), 22.

⁵¹² Law no. 3713 of 12 April 1991.

⁵¹³ Compare: Gunter (1997), 10; numerous cases resulted in proceedings before the ECtHR, e.g. *Arslan v. Turkey*, App. 23462/94, Judgement of 8 July 1999.

⁵¹⁴ The English text of Section 8 of the Prevention of Terrorism Act in its original and amended versions can be found in the following judgement of the ECtHR: *Sürek and Özdemir v. Turkey*, Apps. 23927/94 and 24277/94, Judgement of 8 July 1999.

intention” and slightly lightened the sentences to be imposed. Finally, Section 8 was completely withdrawn in 2003. However, the broad and imprecise definition of the term “terrorism” was not amended, leaving prosecutors and judges able to classify legitimate criticism as terrorist propaganda.⁵¹⁵ The Anti Terror Law was amended again in 2006, introducing new restrictions on free speech by reducing procedural safeguards for those suspected of terrorist offences and providing for severe sanctions for the press and the media engaged in “terrorist propaganda”.⁵¹⁶ The amendments are seen as a considerable setback in Turkey’s progress towards compliance with European human rights standards.⁵¹⁷

The European Commission also criticized Turkish anti-terrorism legislation, stating that “*the wide definition of terrorism under the Anti-Terror Law remains a cause for concern*”.⁵¹⁸ And in the case of *Ürper and others v. Turkey*, the ECtHR stated that Turkey should revise Art 6 (5) of the Anti-Terror Law no. 3713, as the present version allowed for a practise of long-lasting suspension of the future publication and distribution of entire periodicals for past violations which amounted to censorship in a form which is incompatible with the right to freedom of expression under Art 10 ECHR.⁵¹⁹

It has been observed that with regard to freedom of expression, an increasingly open and free debate continued on a wide scale in the media and public on topics perceived as sensitive, such as the Kurdish issue and minority rights. However, at a close look, there are still considerable short-comings and frequent violations of freedom of expression incompatible with Art 10 ECHR, with a high number of cases brought before the ECtHR.⁵²⁰

4.4.3 Restrictions on the Kurdish Right to Freedom of Expression under Article 10 ECHR

The rights of persons belonging to national minorities enumerated in Art 7 FCNM, including freedom of expression, have to be interpreted so as to comply with the respective provisions of the ECHR. It is therefore legitimate for states to restrict the exercise of these rights in accordance with the conditions enumerated in the ECHR.⁵²¹

⁵¹⁵ Yildiz/Muller (2008), 56.

⁵¹⁶ Yildiz/Muller (2008), 57.

⁵¹⁷ MRG-Report (2007), 23.

⁵¹⁸ European Commission: *Turkey 2010 Progress Report*, 20.

⁵¹⁹ *Ürper and Others v. Turkey*, Apps. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 504371/07, 50372/07 and 54637/07, Judgement of 20 October 2009, Para 51-52.

⁵²⁰ Compare: European Commission: *Turkey 2010 Progress Report*, 20.

⁵²¹ Machnyikova (2006), 201.

The right to freedom of expression under Art 10 ECHR may be restricted by a state only if the conditions of Para 2 of the Article are met.⁵²²

Art 10 ECHR provides:

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Any constitutional or legal provision which enables the authorities to restrict the exercise of the right to freedom of expression by national minorities on the basis of criteria that are not mentioned in the ECHR does not comply with the European standards for the protection of human rights and the rights of national minorities.

The provisions of Art 26 of the Turkish Constitution that are usually used by the Turkish authorities to justify restrictions on the right to freedom of expression of members of the Kurdish population or any other person advocating minority rights are the protection of *“the integrity of the Turkish territory and nation”*, of *“national security”* or of *“public order and safety”*. At first glance one might conclude that these justifications are covered by the provision of Art 10 (2) ECHR, and that the Turkish Constitution and other legal provisions which refer to these elements, or are interpreted on their basis, comply with the standards set by the ECHR.

However, the provisions of the ECHR have to be interpreted in accordance with the jurisdiction of the ECtHR, which has given a very specific meaning to the elements contained in the Articles of the Convention and has thereby contributed considerably to the establishment of European standards in the protection of human rights and fundamental freedoms. In order to meet these standards, the Turkish authorities have to interpret their national legislation and the possible limitations of fundamental rights contained within them in accordance with the jurisdiction of the ECtHR.

Because the right to freedom of expression is especially important in an effectively functioning democracy, and because the guarantee of the right is the norm whereas its

⁵²² Compare: Ovey/White (2006), 220.

limitation is the exception, the ECtHR takes a very narrow view of any possible restrictions on the exercise of the right.⁵²³ In assessing whether a given limitation of the right to freedom of expression is justified, the ECtHR adopts the following “three-part questioning”:

First, the Court determines whether the interference is in accordance with, or prescribed by law; second, the Court looks to see whether the aim of the limitation is legitimate in that it corresponds to one of the aims enumerated in Para 2; third, the Court asks whether the limitation is, in all the circumstances, necessary in a democratic society. In the course of this assessment, the court considers whether the states base their decisions on an acceptable assessment of the relevant facts. This includes the qualification of the proportionality of the interference in securing the legitimate aim.⁵²⁴

The key point is that any limitation of the right to freedom of expression has to be necessary in a democratic society, which means that it is made in response to “a *pressing social need*”. In view of the importance accorded to the requirement that the restriction has to be proportionate to its legitimate aim, one can say that the “*essence of each of the restrictions is that the interests of society as a whole override the interests of the individual*”.⁵²⁵ States are accorded a certain margin of appreciation in assessing the necessity of limitations in order to allow them to take the individual circumstances within the state into account. While this margin of appreciation may be burdensome in certain cases, it is evident that the state must pay due attention not to interfere with the principles which characterize a “*democratic society*”, including qualities such as pluralism, tolerance, broad-mindedness, equality, liberty, and the encouragement of self-fulfilment.⁵²⁶

Some of the possible factors that have to be considered when balancing the interests of freedom of expression against the public interest in its restriction are the nature and severity of the restriction, its duration, the nature of the specific public interest and the validity of the reason for the restriction under changing circumstances.⁵²⁷

The following overview of the jurisdiction of the ECtHR in respect of Art 10 ECHR is intended to highlight cases which have specific implications for the situation of the Kurds in Turkey. The restrictions which the Turkish authorities impose on freedom of expression in respect of Kurdish minority rights and a solution to the conflict in the

⁵²³ Compare: Frowein/Peukert (1996), 400; Logemann, Anika: *Grenzen der Menschenrechte in demokratischen Gesellschaften: Die „demokratische Gesellschaft als Determinante der Grundrechtsschranken in der Europäischen Menschenrechtskonvention*, Baden-Baden: Nomos Verlagsgesellschaft 2004, 190.

⁵²⁴ Ovey/White (2006), 222

⁵²⁵ Ovey/White (2006), 222 and 232

⁵²⁶ Ovey/White (2006), 233

⁵²⁷ Reid (1998), 232

south-east, as described in Chapter 4.4.2 above, should therefore be kept in mind when reading the following pages.

Cases concerning the right to freedom of expression very often involve the media which, as public manifestations of the communication of ideas and information, are very likely to feel the consequences of limitations of this right. The ECtHR has frequently recognized the important role of the media in the free flow of information and ideas in a democratic society and its function as a “*watchdog*” monitoring the functioning of democracy itself.⁵²⁸ Measures banning publications of the press thus have to be closely scrutinized, and if the matter to be reported is of public interest, contributing towards social and political debate, criticism and information, it is fairly difficult to find an appropriate justification for the restriction (unless severe damage has to be prevented).⁵²⁹

Cases of journalists, publishers or editors being pursued by way of criminal proceedings seem to be of particular interest in relation to the Kurdish question. The ECtHR has held that such criminal sanctions constitute interference with the right to freedom of expression which requires convincing justification under Art 10 Para 2.⁵³⁰ It has to be mentioned, however, that the media are a very powerful tool, capable of influencing a great number of people. In the exercise of their freedom of expression, members of the media consequently bear a certain degree of responsibility.⁵³¹ Particularly in situations of conflict and tension, as in the case of the conflict in the Turkish south-east, journalists bear a special responsibility not to become “*a vehicle for the dissemination of hate speech and violence*”. Under such circumstances, criticism in the media is by no means prohibited, but it must not amount to an unjustified overreaction, stirring up emotions, hardening already existing prejudices or even calling for violent revenge.⁵³² However, even in situations of conflict and tension the state is not justified in prohibiting and criminalizing the simple reference to the existence of a linguistic or ethnic minority such as the Kurds or peaceful calls for Kurdish linguistic, cultural and political rights in political debate, as such expressions cannot qualify as hate speech or incitement to violence.

Turkey has a long tradition of restricting the right to freedom of expression of members of political parties, in particular those representing the Kurdish population. The regime of the ECHR recognizes that freedom of expression is particularly important for those

⁵²⁸ Compare: Frowein/Peukert (1996), 393; Ovey/White (2006), 223.

⁵²⁹ Compare: Ovey/White (2006), 320; Reid (1998), 232-233.

⁵³⁰ Compare: *Oberschlick v. Austria* (Nr. 2), 1 July 1997, Reports of Judgements and Decisions 1997-IV.

⁵³¹ Compare: Ovey/White (2006), 318.

⁵³² Compare: Ovey/White (2006), 321-322; *Sürek v. Turkey (No.1)*, App. 26682/95, Judgement of 8 July 1999; *Sürek and Özdemir v. Turkey*, Apps. 23927/94 and 24277/94, Judgement of 8 July 1999.

participating in the democratic process. Elected representatives have to be able to participate in political debate in order to represent their electorate and defend their ideas. Interference with the right to freedom of expression inside and outside the legislature consequently calls for the closest scrutiny.⁵³³

In respect of political participation, the right to freedom of expression may be relevant wherever restrictions are placed on a candidate's or other people's ability to debate or express their views.⁵³⁴ Restrictions such as criminal prosecutions which are imposed on members of Kurdish political parties who express their views about the situation of the Kurds, either in parliament, in the course of public events before the elections, or elsewhere, are thus very likely to constitute violations of the right to freedom of expression. Constraints on the right to freedom of expression of members of political parties or candidates may also violate the electoral rights of human beings, in particular where minorities are affected.⁵³⁵

Art 10 ECHR not only protects the freedom of expression of political actors, it also guarantees the freedom to criticise these actors, in particular the government. The ECtHR has held that penalties imposed for criticising the government require extremely strong justification. As actions and omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of the press and public opinion, the limits of permissible criticism are wider with regard to the government than in relation to private citizens. Furthermore, since the government holds a dominant position in society, it should not readily resort to criminal proceedings, in particular where other means of responding to unjustified attacks and criticism are available.⁵³⁶ In view of these arguments, criticism of Turkish policies or the approach adopted or the measures taken by the Turkish government in relation to the situation of the Kurds, the conflict in the Turkish south-east, or in relation to the acknowledgement of minorities and the protection of minority rights, should not be prohibited and punished by means of criminal law as is currently the case in Turkey. The Turkish government should be able to defend itself against criticism by other means, such as public statements, if it considers such criticism to be incorrect or harmful.

Cases involving issues of national security and terrorism raise difficult and sensitive questions in respect of the lengths to which a state should be able to go in order to prevent or punish the communication of ideas and information that seem to directly or

⁵³³ Compare: Reid (1998), 241; *Castells v. Spain*, 23 April 1992, Series A no. 236; (1992) 14 EHRR 455.

⁵³⁴ Reid (1998), 210.

⁵³⁵ Reid (1998), 209.

⁵³⁶ Ovey/White (2006), 324; *Castells v. Spain*, 23 April 1992, Series A, no. 236; (1992) 14 EHRR 455, Para 45; *Sürek v. Turkey (No.1)*, App. 26682/95, Judgement of 8 July 1999; *Sürek and Özdemir v. Turkey*, Apps. 23927/94 and 24277/94, Judgement of 8 July 1999.

indirectly support a terrorist group engaged in a violent conflict. Should, for example, the promotion of the idea of an independent Kurdistan be allowed? The institutions in Strasbourg have adopted the view that it is necessary to assess whether the statements and publications in question can be interpreted as inciting or encouraging violence.⁵³⁷ The use of words that only deny the territorial integrity of a state is not in itself sufficient to justify restrictions of the right to freedom of expression.⁵³⁸

Restrictions on the right to freedom of expression may be justified, however, in order to prevent support for an illegal terrorist organisation. In the case of *Zana v. Turkey*⁵³⁹, the court held that Turkey was justified in prosecuting and convicting persons for statements they made in support of the PKK, which constitutes an illegal terrorist organisation. The court argued that the statements were dangerous when seen against the background of the existing violence in the south-east as they were likely to worsen the situation.

The case of *Zana v. Turkey* shows that when a state considers limiting the right to freedom of expression it is justified in taking into consideration the violence and the sensitivity linked to a given problem within its territory. However, such a consideration must not lead to a ban on all political comment critical of the official view of a specific security problem. Only expressions inciting violence or explicit support of a violent organisation and its means of action are legitimate grounds for restrictions on the right to freedom of expression.

With regard to the above-mentioned judgements and considerations, it seems particularly problematic that the Turkish authorities have traditionally established a link between every pro-Kurdish political party and the PKK, the latter being classified as an illegal terrorist organisation. It seems evident that the existence of such a connection has to be assessed on the basis of objective arguments and facts, and not in an arbitrary manner. Not every Kurdish party must be supportive of the PKK just because the PKK is a Kurdish organisation. Kurdish parties must be allowed to express their political views on solutions to the Kurdish question without interference in their right to freedom of expression, as long as their views and opinions do not in themselves expressly incite hatred and violence.

The Turkish authorities frequently try to justify limitations of human rights and fundamental freedoms with the argument that the specific action which is prohibited poses a threat to the integrity of the Turkish nation. It must therefore be noted in this context that the ECtHR seems to have implicitly rejected the Turkish government's idea

⁵³⁷ Compare: Ovey/White (2006), 321-322; *Sürek v. Turkey (No.1)*, App. 26682/95, Judgement of 8 July 1999.

⁵³⁸ Reid (1998), 242.

⁵³⁹ *Zana v. Turkey*, App. 18954/91, Judgement of 25 November 1997.

that the protection of the territorial integrity of state, which is a legitimate aim for the limitation of the right to freedom of expression, includes the protection of any form of “*national unity*”.⁵⁴⁰ Restrictions on the right to freedom of expression which are justified by the Turkish authorities as being necessary for the protection of the “*Turkish Nation*” do not comply with the requirements of Art 10 ECHR if the action in question does not additionally constitute a real threat to Turkey’s territorial integrity.

As the Turkish authorities traditionally resort to criminal sanctions when trying to restrict pro-Kurdish expressions, it is worth noting that the sanctions in question have to be necessary and proportionate to their aim. In particular, sentences of imprisonment are usually hard to justify as sanctions for the dissemination of opinions and ideas, because there may be other, less severe measures for preventing the expression of opinions and ideas which cannot be tolerated in a democratic society.⁵⁴¹

4.4.4 The Additional Value of Article 7 of the Framework Convention for the Protection of National Minorities

The right to freedom of expression is vital for national minorities to be able to assert their identity, and European states have to endeavour to meet the standards set by the relevant legal instruments for the protection of national minorities. Since the basic human rights embodied in Art 7 FCNM are closely interrelated with other provisions of the Framework Convention, and because the scope of protection of these rights may be interpreted as being wider under the Framework Convention than it is under the ECHR, the implementation of the Convention’s obligations in this field requires considerable diligence on the part of the states.

Art 7 FCNM implies obligations for positive action to protect the freedoms mentioned in it against violations which do not emanate from the state.⁵⁴² States consequently have to provide horizontal protection for the expression of opinions by persons belonging to national minorities, which includes effective judicial remedies.⁵⁴³ Cases of threats and violent acts by private persons against prominent Kurds, in particular Kurdish journalists who have made “pro-Kurdish” statements, are manifestations of the need for special protection of the Kurdish right to freedom of expression. Turkish legislation should contain provisions that protect the right to freedom of expression of members of the Kurdish or any other minority from threats emanating from other individuals by granting enforceable rights.

⁵⁴⁰ Ovey/White (2006), 227; e.g. *Arslan v. Turkey*, App. 23462/94, Judgement of 8 July 1999, Para 38-40.

⁵⁴¹ Ovey/White (2006), 328.

⁵⁴² Explanatory Report, Para 52.

⁵⁴³ Machnyikova (2006), 201, 222.

Furthermore, it is worth noting that the direct or indirect discrimination of national minorities is prohibited in relation to the exercise of the right to freedom of expression. It is therefore possible that specific measures are necessary to ensure full and effective equality in the enjoyment of this right.⁵⁴⁴

4.4.5 Résumé

The right to freedom of expression under the ECHR does not only protect “...*information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic’ society.*”⁵⁴⁵

It is evident that peaceful expressions of opinions and viewpoints on the situation of the Kurds in Turkey, even if they are critical of official Turkish policies on the issue, must not lead to criminal sanctions or other forms of restriction imposed by the Turkish authorities on the right to freedom of expression. The right to freedom of expression as interpreted at a European level covers claims for cultural and political rights for the Kurdish minority, calls and proposals for a peaceful solution to the conflict in the south-east, and even peaceful approaches to solutions including constitutional changes which lead to some sort of autonomy. The right to use the Kurdish language is also part of the right to freedom of expression.

Restrictions on comments on the Kurdish question are only justified if they can qualify as incitement to hatred or violence or are supportive of violent acts committed by the PKK. However, such qualifications have to be made on the basis of objective criteria, taking into account the individual circumstances, and keeping in mind that the pre-conditions for legitimate restrictions of free expression have to be narrowly defined. Criminal sanctions should only be used as *ultima ratio* in extreme cases of abuse of the right to freedom of expression, and provisions of criminal law should not be used under any circumstances as an instrument for unjustified limitations of the free expression of thoughts and opinions, even if the latter are critical of official policies or touch sensitive issues such as the conflict in the Turkish south-east. The principal aim of criminal law should always be the protection of the individual against serious harm, not the protection of the state against critical individuals.

Since the Kurds are a minority under the Framework Convention for the Protection of National Minorities, the standards set by Art 10 ECHR and its interpretation by the

⁵⁴⁴ Machnyikova (2006), 203.

⁵⁴⁵ *Handyside v. the United Kingdom*, Judgement of 7 December 1976, Series A no. 24, Para 49.

ECtHR have to be regarded as absolute minimum standards. Given its importance for the functioning of a democracy and the self-fulfilment of each and every individual, the right of freedom of expression is of particular importance to persons belonging to a minority. The Turkish authorities should abstain from attempts to limit the expressions of opinions of pro-Kurdish politicians or journalists, and they should provide an effective legal basis for the protection of expressions of “pro-Kurdish” views and opinions from interference by public as well as private actors.

Although the European Commission stated in 2009 that there was an increasingly open and free debate in Turkish society, including debate on issues traditionally perceived as sensitive such as the Kurdish issue or minority rights in general, it concluded that the Turkish legal framework still failed to provide sufficient guarantees for exercising freedom of expression in line with the ECHR and ECtHR case law.⁵⁴⁶ This observation was repeated in the European Commission’s Progress Report on Turkey in 2010.⁵⁴⁷

Overall, Turkey should be encouraged to increase its efforts to effectively guarantee the right to freedom of expression to the members of the Kurdish minority to enable them to enjoy their cultural and political rights and to assert their identity.

4.5 Access to the Media

4.5.1 The Standards set by the Framework Convention

The media are very important as means of communication and a carrier of culture. As such they may contribute considerably to pluralism in a democratic society.⁵⁴⁸ Consequently, access to and the free use of the media is of particular relevance for persons belonging to a national minority to assert their identity. The European legal framework for the protection of national minorities contains specific provisions to facilitate and promote the access of national minorities to the media which go beyond the scope of guarantees protected by the right to freedom of expression under Art 10 ECHR.

Art 9 FCNM provides:

“(1) The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the

⁵⁴⁶ European Commission: *Turkey 2009 Progress Report*, 18-19.

⁵⁴⁷ Commission of the European Communities: *Turkey 2010 Progress Report*, 21.

⁵⁴⁸ Packer, John/Holt, Sally: “Article 9” in: Weller, Marc (Ed.): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2005, Paperback 2006, 265.

framework of their legal systems that persons belonging to a national minority are not discriminated against in their access to the media.

(2) Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.

(3) The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media.

(4) 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 and in order to promote tolerance and permit cultural pluralism.”

Para 1 of Art 9 specifies the right to freedom of expression, in that it refers to the right “...to receive and impart information and ideas in the minority language”, which also implies the freedom to receive and impart information and ideas in the majority or other languages.⁵⁴⁹ Furthermore, the second sentence of Para 1 contains an explicit prohibition of discrimination of members of national minorities in their access to the media. The use of a minority language, like one of the Kurdish dialects, or affiliation to a national minority must not be used as the basis for restrictions in people’s access to the media. In this respect, Art 9 (1) FCNM covers access to public media as well as the right of the minority to have its own (private) media.⁵⁵⁰

Pursuant to Art 23 FCNM, the meaning and scope of the right to freedom of expression under Art 9 (1) FCNM is the same as that guaranteed by Art 10 ECHR, and “*in accordance with Article 19 of the Framework Convention, this right is only subject to those limitations, restrictions, or derogations provided in equivalent provisions of other international legal instruments, particularly the ECHR*”.⁵⁵¹ Consequently, limitations of Art 9 (1) FCNM (and its additional value to the right to freedom of expression of persons belonging to national minorities) are subject to the conditions set forth in Art 10 (2) ECHR and its interpretation by the ECtHR.⁵⁵²

Like Art 10 ECHR, Para 2 of Art 9 FCNM permits the regulation of the broadcasting media and cinemas through licensing, acknowledging that regulation in this field may be necessary due to limited available frequencies. It is explicitly stipulated that the distribution of licensing has to be effected on the basis of objective criteria and without

⁵⁴⁹ Explanatory Report, Para 56.

⁵⁵⁰ Compare: Packer/Holt (2006), 267.

⁵⁵¹ Packer/Holt (2006), 268.

⁵⁵² See chapter 4.4 above.

any form of discrimination. The inclusion of these requirements into the text of Para 2 was considered important for an instrument designed to protect persons belonging to a national minority.⁵⁵³

Based on the idea that the right to freedom of expression is inextricably linked to the possibility to create and use one's own, private media, Art 9 (3) FCNM contains a twofold obligation for states.⁵⁵⁴ First, states are obliged not to hinder the creation of printed media by persons belonging to national minorities. Second, they have to ensure possibilities for the creation of broadcast media for national minorities, as far as this is possible. While the allowance of private printed media of the first sentence of Para 3 contains an essentially negative undertaking, the more flexible worded second sentence implies a positive obligation in the field of sound radio and television. This difference reflects the problem of relative scarcity of available frequencies and the need for regulation in the latter field.⁵⁵⁵

Finally, Art 9 (4) FCNM “...*emphasises the need for special measures with the dual aim of facilitating access to the media for persons belonging to national minorities and promoting tolerance and cultural pluralism.*”⁵⁵⁶ This paragraph implies that the state has to facilitate the access of minorities not only to private media, but also to public media.⁵⁵⁷ The word “access” contains a passive receptive as well as an active element. Understood actively, “access” means that persons belonging to national minorities have the possibility to participate in the decision-making process and the production of programmes for national minorities, whereas the passive element implies that the members of national minorities have the possibility to receive programmes intended for them, even if they are transmitted from other countries.⁵⁵⁸

In its comments on Art 9 (2) FCNM, the Explanatory Report refers to Art 4 (2) FCNM, indicating that the expression “*adequate measures*” was used to clarify that special measures may be necessary to promote full and effective equality, and that such

⁵⁵³ Explanatory Report, Para 59.

⁵⁵⁴ Compare: Paragraph 8 of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Report: “*Persons belonging to national minorities have the right to establish and maintain their own minority language media. State regulation of the broadcast media shall be based on objective and non-discriminatory criteria and shall not be used to restrict enjoyment of minority rights.*”

⁵⁵⁵ Explanatory Report, Para 61.

⁵⁵⁶ Explanatory Report, Para 62.

⁵⁵⁷ Compare: Paragraph 9 of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Report: “*Persons belonging to national minorities should have access to broadcast time in their own language on publicly funded media...*”

⁵⁵⁸ Compare: Packer/Holt (2006), 292; In relation to the active element, participation of representatives of national minorities in Councils or other similar authorities competent in matters of broadcasting may have positive effects in ensuring participation in the decision-making process: Advisory Committee Opinion on Albania, ACFC/INF/OP/I (2003) 004, 2002, Para 49; Advisory Committee Opinion on Croatia, ACFC/INF/OP/I (2001) 001, 2001, Para 40.

measures are justified as long as they are proportionate. The Explanatory Report provides some examples for the measures envisaged by this paragraph: funding for minority broadcasting or for programme productions dealing with minority issues; offering a dialogue between groups; encouraging of editors and broadcasters to allow national minorities access to their media, but without disrespecting editorial independence.⁵⁵⁹

It has been asserted that in most European states, freedom of expression as provided under Art 9 (1) FCNM is generally guaranteed on a constitutional level in a way covering all sorts of media and not excluding national minorities.⁵⁶⁰ The Advisory Committee Opinions nevertheless indicate that there are certain problems which occur rather frequently in relation to the obligations of states under Art 9 FCNM. In addition, the Advisory Committee has contributed considerably to the specification of the requirements of this Article. It seems appropriate to provide a short overview over those aspects discussed by the Advisory Committee Opinions which seem to be of particular relevance for the situation of the Kurds in Turkey.

In order to ensure that the distribution of licenses is based on objective criteria, it should be regulated by clear and precise legislation which does not accord too much discretion to the competent authorities. Decisions should be made by a politically independent regulatory body.⁵⁶¹

Although the promotion of the official language is not incompatible with Art 9 FCNM, this must not lead to an exclusion of the languages of national minorities from private and public broadcasting.⁵⁶² Promotional measures for the official language should be proportional to the aim and must not lead to excessive quotas which limit the broadcasting time allocated to minorities.⁵⁶³ When considering the adequacy of the time allocated to minority programmes and the content of these programmes, in particular the size of the minority population has to be taken into account.⁵⁶⁴

Besides the question of overall time of broadcasting in minority languages and/or broadcasting of contents specifically intended for national minorities, states should also

⁵⁵⁹ Explanatory Report, Para 62.

⁵⁶⁰ Packer/Holt (2006), 268-269, with further references.

⁵⁶¹ Compare: Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 45-47.

⁵⁶² Compare: Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 50; Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 43.

⁵⁶³ Compare: Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 46.

⁵⁶⁴ Compare: Advisory Committee Opinion on Croatia, ACFC/INF/OP/I (2001) 001, Para 41; Advisory Committee Opinion on Estonia, ACFC/INF/OP/I(2002)005, Para 37; Similarly, Para 9 of the Oslo Recommendations provides: *"Persons belonging to national minorities should have access to broadcast time in their own language on publicly funded media. At national, regional and local levels the amount and quality of time allocated to broadcasting in the language of a given minority should be commensurate with the numerical size and concentration of the national minority and appropriate to its situation and needs."*

take due care to the ration of these programmes, as well as that these programmes are sent at reasonable times of the day, in order to guarantee appropriate coverage of the respective national minorities.⁵⁶⁵

The requirement of translation of programmes sent in minority languages is another problematic issue in relation to Art 9 FCNM, because it may cause severe difficulties for national minorities in their efforts to create their own media.⁵⁶⁶ If this is the case, the translation requirements have to be lightened or accompanied by financial assistance by the state.

One of the major impediments for the creation of printed and broadcasting media is usually a lack of resources on the part of the minority groups.⁵⁶⁷ While it is inherent to Art 9 FCNM that national minorities have the right to seek funds for the establishment of their own media,⁵⁶⁸ the question arises of whether the state has to provide financial assistance for the establishment of media for national minorities. Considering other provisions of the Framework Convention, like Art 5, one has to assert that the state himself has to promote the creation of the necessary conditions for national minorities to have their own media. It is evident that where the state provides funds to broadcasters in general, national minorities must not be excluded from the benefit of such public funds in a discriminatory way. However, one might even suggest that in cases where national minorities cannot raise the necessary financial resources on their own the state might even be obliged to support the creation of minority media by financial means.

Besides short-comings in respect of funding, the lack of qualified personnel may in some cases also constitute an obstacle to the creation of private media by national minorities. Such problems could be countered by providing special training opportunities and the promotion of minority media professionals.⁵⁶⁹

The important function of the media for the preservation and development of minority languages is also evident in the European Language Charter. Acknowledging that *“today no language can keep its influence unless it has access to the new forms of mass communications”*⁵⁷⁰, Art 11 of the European Language Charter contains obligations of states in the field of the media. The various undertakings envisaged by Art 11 of the Charter *“...for the users of the regional or minority languages within the territories in which those languages are spoken...”* may vary depending on *“...the*

⁵⁶⁵ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 49.

⁵⁶⁶ Advisory Committee Opinion on Estonia, ACFC/INF/OP/I(2002)005, Para 38.

⁵⁶⁷ Compare: Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 52; Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 42.

⁵⁶⁸ Explanatory Report, Para 61.

⁵⁶⁹ Advisory Committee Opinion on Armenia, ACFC/INF/OP/I (2003)001, Para 50.

⁵⁷⁰ Explanatory Report to the European Charter for Regional or Minority Languages, Para 107.

situation of each language”, and on “...the extent that the public authorities, directly or indirectly, are competent, have power or play a role in this field, respecting the principle of the independence and autonomy of the media”.⁵⁷¹ It is thus recognized that the public authorities in the different states have varying degrees of control over the media.⁵⁷²

The measures provided for in Art 11 (1) of the European Language Charter cover the following issues: ensuring, encouraging or making adequate provision for the creation of radio stations and TV channels (in particular where radio and television carry out a public service mission) (lit. a, b and c); encouraging and/or facilitating the creation and maintenance of at least one newspaper in the regional or minority language or at least of newspaper articles on a regular basis (lit. e); to cover the additional costs of those media using minority languages or by applying financial assistance to audiovisual productions in the regional or minority language (lit. f); support of the training of journalists and other staff for media using regional or minority languages (lit. g). Where relevant, the undertaking given by the parties includes the allocation of the necessary frequencies to those broadcasting in regional or minority languages.⁵⁷³

Art 11 (2) of the European Language Charter specifies the right to freedom of expression, obliging the state parties to guarantee freedom of direct reception and retransmission of radio and television broadcasts from neighbouring countries in languages identical or similar to the regional or minority language. Furthermore, states have to ensure that no restrictions are placed on the freedom of expression and free circulation of information in the written press in languages identical or similar to the regional or minority language. Finally, Art 11 (2) clarifies that restrictions of these freedoms are only allowed in accordance with the conditions set by Art 10 (2) ECHR.

In addition, Art 11 (3) of the European Language Charter obliges the states to undertake that “...the interests of the users of regional or minority languages are represented or taken into account within such bodies as may be established in accordance with the law with responsibility for guaranteeing the freedom and pluralism of the media”.

4.5.2 Media access of the Kurds in Turkey

The Treaty of Lausanne seems to provide a basis for the use of minority languages in the media in Art 39, which provides:

⁵⁷¹ Art 11 (1) European Language Charter.

⁵⁷² Explanatory Report to the European Charter for Regional or Minority Languages, Para 109.

⁵⁷³ Explanatory Report to the European Charter for Regional or Minority Languages, Para 110.

“No restrictions shall be imposed on the free use by any Turkish national of any language in private intercourse, in commerce, religion, in the press, or in publications of any kind or in public meetings.”

Since Art 39 of the Treaty of Lausanne refers to “any Turkish National”, one might suggest that it also protects the right to use the Kurdish language in the press or other publications. Such an interpretation has also been suggested by other scholars, but according to the official interpretation of the Turkish state, all the provisions for the protection of national minorities included in the Treaty of Lausanne only apply to non-Muslim minorities.⁵⁷⁴ Consequently, Art 39 of the Treaty of Lausanne does not guarantee a right to use the Kurdish language in the press or other publications.

In Turkey, freedom of the press is guaranteed by Art 28 of the Turkish Constitution. Until its amendment in 2001, Art 28 of the Turkish Constitution contained a restriction of the use of “...any language prohibited by law in publications of any kind”. This constitutional restriction mainly targeted the Kurdish minority, because the use of the Kurdish language was prohibited by law.

While it is a positive step that the explicit ban of certain languages in the press and other publications was removed, it has to be emphasized that far-reaching possibilities for the restriction of the exercise of freedom of the press remained in Art 28 of the Turkish Constitution.⁵⁷⁵ The protection of the indivisible integrity of the Turkish state

⁵⁷⁴ Compare chapter 3.2.2 above.

⁵⁷⁵ Art 28 of the Turkish Constitution, as amended on October 17, 2001, provides:

“The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee.

The state shall take the necessary measures to ensure freedom of the press and freedom of information. In the limitation of freedom of the press, Articles 26 and 27 of the Constitution are applicable.

Anyone who writes or prints any news or articles which threaten the internal or external security of the state or the indivisible integrity of the state with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets and anyone who prints or transmits such news or articles to others for the above purposes, shall be held responsible under the law relevant to these offences. Distribution may be suspended as a preventive measure by the decision of a judge, or in the event delay is deemed prejudicial, by the competent authority designated by law. The authority suspending distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order suspending distribution shall become null and void unless upheld by a competent judge within forty-eight hours at the latest.

No ban shall be placed on the reporting of events, except by the decision of judge issued to ensure proper functioning of the judiciary, within the limits specified by law.

Periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of offences prescribed by law, and, in situations where delay could endanger the indivisible integrity of the state with its territory and nation, national security, public order or public morals and for the prevention of offence by order of the competent authority designated by law. The authority issuing the order to confiscate shall notify a competent judge of its decision within twenty-four hours at the latest. The order to confiscate shall become null and void unless upheld by the competent court within forty-eight hours at the latest.

The general common provisions shall apply when seizure and confiscation of periodicals and non-periodicals for reasons of criminal investigation and prosecution takes place.

Periodicals published in Turkey may be temporarily suspended by court sentence if found to contain material which contravenes the indivisible integrity of the state with its territory and nation, the

with its territory and nation provides a legal justification for the suspension or seizure of publications and the prosecution of writers, editors and publishers. Although such measures are dependent on the decision of a judge and consequently seem to be subject to independent decisions, the traditional interpretation of these legal terms in accordance with the Turkish concept of nationalism and emphasis on national unity is a reason for concern.

In 2003 and 2004, a series of laws was enacted in order to allow broadcasting in minority languages. However, these laws were specified by an executive regulation, which established a restrictive regime of rules for minority broadcasting, including: prohibition of children's programmes; prohibition of the teaching of minority languages; time restrictions to a few hours per week; requirement of simultaneous or subsequent translation into Turkish for TV and radio-programmes; direct state control.⁵⁷⁶

In 2004, the Turkish Radio-Television Corporation started to launch broadcasts in five minority languages, including Zaza and Kurmanci. These programmes were restricted to TV programmes of 45 minutes, five days a week, and radio programmes of 30 minutes, five days week. While this was considered a positive step, it was also criticized for the fact that the authorities selected the languages and programmes without consultation of the minority groups, for the content and time restrictions, and for the outdated nature of the news programmes.⁵⁷⁷

Despite the removal of the prohibition to use certain languages in publications from Art 28 of the Turkish Constitution, the provision still contains extensive clauses allowing for far-reaching restrictions in publications and broadcasting. These possibilities for restrictions have also been introduced into simple law provisions, like the Supreme Board of Radio and Television Law, which also prohibits broadcasting that incites violence or hatred. Repeated violations of the law may result in the suspension or permanent cancellation of the broadcasting licence. While the prohibition of programmes directed at the incitement of violence or hatred in itself is fully understandable, once again the extensive interpretation of the legal terms proved to be problematic. In 2007, for instance, the authorities used the provision to first suspend

fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being a continuation of a suspended periodical is prohibited; and shall be seized following a decision by a competent judge."

Art 3 of the Turkish Press Law, Law no. 5187 of 09.06.2004: *"The press is free. This freedom includes the right to acquire and disseminate information, and to criticize, interpret and create works.*

The exercise of this freedom may be restricted in accordance with the requirements of a democratic society to protect the reputation and rights of others as well as public health and public morality, national security, and public order and public safety; to safeguard the indivisible integrity of its territory; to prevent crime; to withhold information duly classified as state secrets; and to ensure the authority and impartial functioning of the judiciary."

⁵⁷⁶ Compare: MRG-Report (2007), 17; Yildiz/Muller (2008), 82.

⁵⁷⁷ MRG-Report (2007), 17.

and the cancel the licence of a radio station in 2007 for playing a song on the situation of the Kurdish population in Turkey. Similarly, the broadcasting of GÜN TV and CAN TV in Diyarbakir and Hakkari FM radio station was suspended for duration of 90 days in 2004.⁵⁷⁸

Due to another legal amendment in June 2008, the Turkish public service broadcaster “TRT” is allowed to broadcast nation-wide in languages other than Turkish all day long, which until then was only possible to a maximum of half a day. However, an appeal against the law was already pending before the Turkish Constitutional Court short after its introduction.⁵⁷⁹ A new local radio channel, Mus FM, received authorisation to broadcast in Kurdish in 2008. On the other hand, two of the four local TV and radio channels which had started broadcasting in languages traditionally used by Turkish citizens closed down.⁵⁸⁰

In 2008, broadcasting in minority languages was still subject to extensive restrictions under Turkish Law.⁵⁸¹ Except for films and music programmes, time restrictions were still in place. Educational programmes teaching the Kurdish language remained prohibited. Except for songs, all broadcasts must be subtitled or translated into Turkish. In particular broadcasts in Kurdish were strictly monitored by the police and the Radio and Televisions Supreme Council, and there have been several investigations held and cases brought before the courts against the only TV channel broadcasting in Kurdish, GÜN TV. These cases focused on the wording of Kurdish songs the channel has aired. The European Commission’s 2008 Progress Report on Turkey concluded that the restrictions on broadcasting in minority languages “...*make broadcasting in languages other than Turkish cumbersome and non-viable commercially*”.⁵⁸²

However, there have recently been remarkable reforms that seem to have considerably improved the situation of the Kurdish minority and other minorities with respect to broadcasting. Beginning on 1 January 2009 broadcasting in Kurdish was launched on TRT 6, a channel of Turkish Radio and Television Corporation (the Turkish public broadcasting company). On the occasion of the first Kurdish broadcasting in Kurdish by the channel, Prime Minister Erdogan even spoke some words in the Kurdish language.⁵⁸³ The start-up of the public Kurdish programme was criticised by some as only being part of the political propaganda by the AKP, hoping to win as many Kurdish votes as possible in the local elections of 2009, and others have argued that this

⁵⁷⁸ MRG-Report (2007), 17.

⁵⁷⁹ European Commission: *Turkey 2008 Progress Report*, 26.

⁵⁸⁰ European Commission: *Turkey 2008 Progress Report*, 26.

⁵⁸¹ Compare: Yildiz/Muller (2008), 84; Turkey 2008 Progress Report (2008), 26;

⁵⁸² European Commission: *Turkey 2008 Progress Report*, 26.

⁵⁸³ European Commission: *Turkey 2009 Progress Report*, 28; Der Standard: “Premier Erdogan redet kurdisch”, 01.01.2009; Der Standard: „Ein richtig gelungener Satz“, 01.01.2009.

measure will not be sufficient to resolve the existing problems between Turks and Kurds.⁵⁸⁴ But it should nevertheless be seen as a step in the right direction, in particular as it was followed by additional reforms in the field of broadcasting.

In November 2009, the Radio and Television Supreme Council (RTÜK) adopted a regulation that lifted basically all restrictions on broadcasting in Kurdish and other languages by private and public channels at local level.⁵⁸⁵ There are no more time restrictions for private broadcasters, allowing 24-hour broadcasting in languages other than Turkish. The Regulation also removed the requirement of subtitles and consecutive translation which results in a permission for live broadcasts. Limitations regarding children's' and language teaching programmes have also been lifted. Consequently, the number of regional radio stations and TV channels broadcasting in other languages than Turkish has increased to 15 by the end of 2010.⁵⁸⁶

The European Commission also observed that (at least irregular) consultation with broadcasters continued, and that RTÜK has reinforced its monitoring capacity by recruiting new staff who speak Kurmanci and Zaza. *“For the moment however, the monitoring of all local TV and radio broadcasts are carried out with contributions of the monitoring units of the local police...”*⁵⁸⁷ In this respect, the Turkish authorities should be encouraged to continue their liberal approach towards broadcasting in minority language, and to pay due attention that the new legislation is adequately implemented without any interference by the police or other actors.

4.5.3 Conclusions

The importance of access to the press and broadcast media for human beings in general, and persons belonging to minority groups in particular, is acknowledged in European instruments for the protection of human rights and minority rights. Thus, it has to be recognized and welcomed that there has been considerable progress in Turkey regarding the use of the Kurdish language and other minority languages in the media. This can be seen as a positive outcome resulting from the open debate on sensitive issues such as minorities and a new political approach towards these issues that is reported to slowly emerge in Turkey.

While past developments with respect to broadcasting in Kurdish and other minority languages appeared to be rather cosmetic, as the restrictive legal regime for

⁵⁸⁴ Hürriyet-Turkish Daily News: “State television begins Kurdish test broadcasts”, 27.12.2008; Hürriyet-Turkish Daily News: “Playing Kurdish card”, 23.12.2008

⁵⁸⁵ European Commission: *Turkey 2010 Progress Report*, 32.

⁵⁸⁶ European Commission: *Turkey 2010 Progress Report*, 57.

⁵⁸⁷ European Commission: *Turkey 2010 Progress Report*, 57.

broadcasting in minority languages was too restrictive and impeded most sorts of broadcasting in minority languages, the new legal framework seems to have opened the way for more extensive and diverse broadcasting in minority languages. It should be closely monitored, however, that this legal framework is also adequately implemented in practice.

Considering the developments in recent years, Turkey appears to be on its way to ensure adequate possibilities for the use of Kurdish language in the media. While this development is a rather slow process, it is nevertheless slowly continuing in the right direction. Turkey has to be encouraged to maintain and increase its efforts in the field of minorities and the media, in particular by trying to extend private and public broadcasting also at national level, as well as by introducing promotional measures such as funding.

4.6 The Right to Use the Minority Language

4.6.1 The Use of the Minority Language in Private and in Public

4.6.1.1 Art 10 (1) FCNM

The right of persons belonging to national minorities to use their minority language in the private as well as in the public sphere is a widely accepted minority right which has been introduced in many international documents for the protection of minorities. It is of outstanding importance because the use of the minority language is one of the principal means by which persons belonging to a minority can assert and preserve their identity.⁵⁸⁸

The right to use the minority language is closely linked to the right of freedom of expression and the Explanatory Report points out that the right to use the minority language is a precondition for persons belonging to a national minority to exercise the right to freedom of expression.⁵⁸⁹

The right to use one's language, including minority languages, can be seen as well established in international law and has been expressly acknowledged in Art 27

⁵⁸⁸ Compare: Explanatory Report, Para 63; Ahmed (2011), 37; Eide (2001), Para 59: "*Language is among the most important carriers of group identity.*"; The Explanatory Note to the Oslo Recommendations Regarding the Linguistic Rights of National Minorities, states in its first Paragraph: "*Equality in dignity and rights presupposes respect for the individuals identity as a human being. Language is one of the most fundamental components of human identity. Hence, respect for a person's dignity is intimately connected with respect for the person's identity and consequently for the person's language.*"

⁵⁸⁹ Explanatory Report, Para 63; The protection of languages including minority languages can also be derived from Art 10 ECHR when read in conjunction with Art 14 ECHR, because the right to freedom of expression under Art 10 ECHR has to be guaranteed without "*discrimination on any ground such as...language...*" under Art 14 ECHR.

ICCPR, as well as in Paragraph 32.1 of the Copenhagen Document.⁵⁹⁰ This acknowledgement is strengthened by Art 10 (1) FCNM, which explicitly refers to the right to use the minority language in private and in public.

*“The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.”*⁵⁹¹

The provision of Art 10 (1) FCNM covers the use of a minority language in private and public places (both in the presence or absence of other persons), but not in dealing with public authorities, which is the subject of Para 2 of this Article.⁵⁹² The formulation of Para 1 of Art 10 FCNM is similar to the formulations used in other international documents and does not appear to provide specific standards for the protection of minorities on a European level. Interpreted as a whole, however, the legal relevance and importance of the paragraphs of Art 10 FCNM should not be underestimated.

Since Art 10 Para 1 deals only with linguistic freedom and not with the use of a minority language in dealings with public authorities, it seems that specific legislation which explicitly provides for the use of the minority language might be highly desirable, but not absolutely necessary as long as there are no restrictions on the private use of language.⁵⁹³

States should nevertheless take care that existing legislation, in particular if it is intended to promote the official language of the State, is not formulated or interpreted in a way which leads to restrictions on the right to use the minority language in private or in public, for example by extending the requirement to use the official language to

⁵⁹⁰ Art 27 ICCPR guarantees that “persons belonging to...minorities shall not be denied the right, in community with other members of their group, to...use their own language”. Paragraph 32 of the Copenhagen Document provides: “To belong to a national minority is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice. Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. In particular, they have the right to use freely their mother tongue in private as well as in public;...”; Frowein/Peukert (1996), 342; In the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, the ECtHR has implicitly recognized that the right to use a minority language is covered by Art 8 ECHR.

⁵⁹¹ Art 10 (1) FCNM; compare: Art 2 of UN General Assembly Resolution 47/135: *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, A/RES/47/135, 18 December 1992: “1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own language, in private and in public, freely and without interference or any form of discrimination.”

⁵⁹² Compare: De Varennes, Fernand: “Article 10” in: in Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 305; Explanatory Report, Para 63.

⁵⁹³ De Varennes (2006), 307.

private organisations.⁵⁹⁴ While interest in promoting the official language is considered legitimate by the Advisory Committee, the actual promotion must be “...*carried out in a manner that fully protects the rights contained in Articles 10, 11 and other pertinent provisions of the Framework Convention.*”⁵⁹⁵

Considering that, so far, the Advisory Committee has issued hardly any comments specifically concerning Art 10 (1) FCNM, one can assume that the content of the rights and obligations covered by this provision is rather clear and, in general, is respected by the European States which are Parties to the FCNM.

4.6.1.2 The European Language Charter and its Implications for the Kurds in Turkey

The European Language Charter is not intended to provide individual rights to persons belonging to minorities. However, the Charter is intended to protect the existence and promote the continued use of minority languages in Europe. Hence one can deduce additional criteria which European States have to observe in the protection and promotion of minority languages, which are ultimately to the benefit of those minority groups for whom a specific minority language is one of the decisive elements of their identity.

Article 1 of the European Language Charter provides a definition of the term “regional or minority language”:

“For the Purpose of this Charter:

a) ‘regional or minority languages’ means languages that are:

- traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State’s population; and*
- different from the official language(s) of that State;*

it does not include either dialects of the official language(s) of the State or the languages of migrants;”

⁵⁹⁴ Compare: Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 53; Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 50; Advisory Committee Opinion on the Russian Federation, ACFC/INF/OP/I (2003) 005, Para 80; Advisory Committee Opinion on Lithuania, ACFC/INF/OP/I (2003) 008, Para 55: The scope of application of legal provisions on the mandatory use of the State language in the public administration must not be extended beyond the public sphere.

⁵⁹⁵ Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 53-54: In particular the text of legislation on State language should not be formulated in a way which could be interpreted as requiring that private records and communications such as records of non-governmental organisations should be kept in the State language.

Considering the description of the Kurds and the Kurdish language (the different Kurdish dialects) in Chapter 2.2, there can be little doubt that the Kurdish language falls under this definition. The various Kurdish dialects have been spoken in the Kurdish regions for centuries and have been passed on for numerous generations. The Kurds living in the South-East of Turkey are usually Turkish citizens (not including the Kurdish refugees who have fled from Iraq), and the Kurds constitute a group which is numerically smaller than the rest of the Turkish population. As already described, the Kurdish language is different from the Turkish language, and despite historical efforts by the Turkish authorities to qualify Kurdish as a Turkish dialect, scientific opinions show that Kurdish is an independent language which does not even belong to the same language family as Turkish.⁵⁹⁶ Just as the existence of a minority within a State is independent of the State's recognition, the same is also true of the existence of a regional or minority language. The language Charter is applicable to those languages which fulfil the requirements set by the Charter's definition of a regional or minority language, independent of its recognition by the State.⁵⁹⁷

Accordingly, the Kurdish language, or rather the different Kurdish dialects, undoubtedly qualifies as a minority language under the European Language Charter.⁵⁹⁸

Already in the preamble of the European Language Charter, it is explicitly stated *“that the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights, and according to the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms”*.⁵⁹⁹

Art 7 of the European Language Charter contains objectives and principles, which have to be observed by the Parties in relation to all languages qualified as regional or minority languages. Among these objectives and principles is *“the need for resolute action to promote regional or minority languages in order to safeguard them”* (Art 7 (1) c)) and *“the facilitation and/or encouragement of the use of regional or minority languages, in speech and in writing, in public and in private life”* (Art 7 (1) d)).

While one may make the criticism that the text of the charter does not explicitly contain such a *“right”* as that mentioned in the preamble, and that the references to the two international covenants seem rather imprecise (in particular in respect of a definition of

⁵⁹⁶ Compare Chapter 2.2.

⁵⁹⁷ Tichy, Heinz: *Die europäische Charter der Regional oder Minderheitensprachen und das österreichische Recht*, Klagenfurt, Wien, Ljubljana: Verlag Hermagoras/Mohorjeva 2000, 14.

⁵⁹⁸ Tichy (2000), 31: The term “regional or minority language” also covers forms and dialects of such regional or minority languages.

⁵⁹⁹ European Charter for Regional or Minority Languages, Para 4 of the preamble.

“*public life*”),⁶⁰⁰ it is still evident that European States are urged not only to respect such a right, but to adopt positive measures in order to ensure that the use of the regional minority language is possible in private as well as in public in as many areas of life as possible.⁶⁰¹

4.6.1.3 The Use of the Kurdish Language in Turkey

Turkish is not only the official language of the Turkish State, but it is also an ideological cornerstone of the traditional conception of Turkish nationalism. Since the foundation of the Republic, the Turkish State has tried to promote the idea of the Turkish nation in particular through policies promoting the Turkish language and through denial of the existence of a separate Kurdish language, which was seen as a particular threat to the unity of the new Republic.⁶⁰² Although recent legal reforms and changes in official policies have obviously had positive effects, the use of the Kurdish language remains problematic in certain areas of life.

As already described above, the constitutional provisions guaranteeing freedom of expression (Art 26 of the Turkish Constitution), and freedom of the press (Art 28 of the Turkish Constitution), originally stipulated that no language prohibited by law should be used in the expression and dissemination of thought or in publications of any kind. From 22 October 1983 to 12 April 1991, the law for the prohibition of languages banned the dissemination of thoughts and opinions in any language that was not the official language of a State recognized by Turkey. Only those languages that were protected by the Treaty of Lausanne were excluded from this prohibition.⁶⁰³ Thus, the Kurdish language was expressly prohibited by Turkish law for almost a decade. This legislation promoted the forced assimilation of the Kurdish population and for those Kurds who, due to a lack of education, were unable to speak any language other than Kurdish it more or less resulted in a prohibition on speaking.⁶⁰⁴

Besides the law on the prohibition of languages, there were other legal provisions that served as a restriction on the use of the Kurdish language. Until the enactment of the Turkish Anti Terror Law, the use of the Kurdish language could be punished as “*racist propaganda*” or “*propaganda violating national feelings*” under Art 142 Para 3 of the Turkish Penal Code, which was interpreted in a broad manner by the Turkish criminal courts. The Anti Terror law which served as a successor to this provision redefined this

⁶⁰⁰ Tichy (2000), 22.

⁶⁰¹ Tichy (2000), 14.

⁶⁰² See chapter 2.1 above.

⁶⁰³ Compare: Yildiz/Muller (2008), 16; Gunter (1997), 10; Rumpf (1993), 489-490.

⁶⁰⁴ Kartal (2002), 155.

crime as “*propaganda against the indivisible entity of the State and the Nation*”. This law was interpreted less strictly and provided less severe punishments, but it was also used to restrict and criminalize the use of the Kurdish language in public.⁶⁰⁵

Despite the abrogation of the law for the restriction of languages and the introduction of less severe penal provisions, there are still some restrictions on the use of the Kurdish language. Even under the amended version of Art 26 of the Turkish Constitution the exercise of freedom of expression and the dissemination of thought “...*may be restricted for the purpose of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation, preventing crime...*”. “*The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law.*” These formulations may provide a basis for the restriction of the use of the Kurdish language in private and in public at least in certain domains, and there are still corresponding legal provisions which restrict the use of minority languages. The Turkish Political Parties Act, for instance, still prohibits the use of languages other than Turkish at public political meetings.⁶⁰⁶

On the positive side, however, one must note that Art 6 of the Turkish Associations Act, which prohibited associations from using any language other than Turkish, both orally and in writing, including at private meetings of members of an association, was finally amended. The requirement that the Turkish language be used is now confined to written communications between the association and the authorities.⁶⁰⁷

Although there have been important reforms and one can see an improvement in the legal framework for the use of minority languages, in particular in relation to the media and private language courses, Turkish legislation still does not fully comply with European standards regarding the right to use the minority language in private and in public. According to the FCNM, which should be seen as the most important standard-setting legal instrument for European States, the authorities cannot simply interfere with the use of a national minority language for reasons of policy or the protection and promotion of an official or State language, even if the constitution allows for such measures.⁶⁰⁸ Furthermore, one must consider the fact that the Advisory Committee has expressed its concerns about national legislation including language provisions which

⁶⁰⁵ Rumpf (1993), 489-490.

⁶⁰⁶ ECRI: *Third report on Turkey* (2004), Para 18.

⁶⁰⁷ ECRI: *Third report on Turkey* (2004), Para 18.

⁶⁰⁸ De Varennes (2006), 308.

have been interpreted in such a way as to restrict and prohibit the free use of a national minority language in private context.⁶⁰⁹

Turkish law still contains prohibitions on the use of minority languages in the private or public sphere. In addition, the emphasis on the Turkish language as a fundamental element of the Turkish nation may result in interpretations which allow for restrictions on the use of the Kurdish language without convincing justification. It is of particular concern that these restrictions also include the risk of prosecution and sanctions under Turkish penal law. For instance, it is reported that until quite recently members of political parties were sentenced to prison terms for using the Kurdish language during election campaigns, as Art 81c of Law no. 2820 on political parties still prohibits the use of minority languages in public political activities.⁶¹⁰

Languages are among the principal means by which persons belonging to a national minority may assert their identity. Considering that equality in dignity and rights presupposes respect for the individual's identity as a human being, "...respect for a person's dignity is intimately connected with respect for the person's identity and consequently for the person's language."⁶¹¹ If Turkey is willing to fully and unconditionally respect the dignity and guarantee the equality of its Kurdish citizens, it has to fully and unconditionally respect, protect and promote the Kurdish language.

Consequently, the Turkish State should be encouraged to introduce further reforms in order to ensure that minority languages, and in particular the Kurdish language may be used without interference in every domain of private and public life. Remaining restrictions on the right to use minority languages in the private or public sphere such as the prohibition on using any language other than Turkish in public political meetings must be removed. In addition, the Turkish authorities should be made fully aware that the prohibition or far-reaching restriction of the use of the Kurdish language as such is not permitted. What is permitted is the prescription of the (additional) use of the official language in cases where this is necessary for the sake of clearly defined public interests.⁶¹²

⁶⁰⁹ Compare: Advisory Committee Opinion on Lithuania, ACFC/INF/OP/I (2003)008, 2003, Para 55; Advisory Committee Opinion on the Russian Federation, ACFC/INF/OP/I (2003)005, Para 80.

⁶¹⁰ Please refer to Chapter 9 on political participation.

⁶¹¹ Explanatory Note to the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998), Para 1.

⁶¹² Compare: The Explanatory Note to the Oslo Recommendations regarding the linguistic rights of persons belonging to national minorities: "However, protection of the rights and freedoms of others and the limited requirements of public administration may well justify specific prescriptions for the additional use of the official language or languages of the State...In sum, the State could never prohibit the use of a language, but it could, on the basis of a legitimate public interest, prescribe the additional use of the official language or languages of the State. In keeping with the logic of legitimate public interest, any requirement(s) for the use of language which may be prescribed by the State must be proportional to the public interest to be served."

Europe is characterized by its multi-ethnic and multilingual population, and this cultural and linguistic pluralism is seen as a source of enrichment for the whole European population. Hence it is not surprising that there have been considerable efforts made within the framework of international organisations to protect and promote those languages whose existence is under threat. Against this background, it seems particularly strange that the Turkish State, which is seeking further European integration, still seems to be eager to suppress or at least restrict expression in regional and minority languages.

In addition to legislative reforms for the removal of any restrictions on the use of the Kurdish language in private and in public, further international efforts will be required to convince the Turkish political actors and the population that linguistic pluralism is not a threat to the State, but a source of enrichment for the society.

4.6.2 The Use of the Minority Language in Relations with the Administrative Authorities

4.6.2.1 The Obligation of States to Ensure the Conditions for the Use of the Minority Language in Dealings with Administrative Authorities

While the freedom to use a minority language in private as well as in public can be considered as a well established right in international minority rights law, certain European instruments for the protection of national minorities have raised the standards of minority protection by requiring that, under certain circumstances, States provide for the use of the minority language in dealings between persons belonging to a national minority and the administrative authorities.

Para 34 of the Copenhagen Document contains the political commitment that the participating States will endeavour to ensure that persons belonging to national minorities have adequate opportunities to use their mother tongue before public authorities wherever this is possible and necessary.

In a more detailed fashion, the Oslo Recommendations (Para 13 and 14) also recommend the use of the minority language in dealings between persons belonging to the national minority and the administrative authorities when certain pre-conditions are met:

“13) In regions and localities where persons belonging to a national minority are present in significant numbers and where the desire for it has been expressed, persons belonging to this national minority shall have the right to acquire civil documents and certificates both in the official language or languages of the State and in the language of the national minority in question from regional and/or local public institutions.

Similarly, regional and/or local public institutions shall keep the appropriate civil registers also in the language of the national minority.

14) Persons belonging to national minorities shall have adequate possibilities to use their language in communications with administrative authorities especially in regions and localities where they have expressed a desire for it and where they are present in significant numbers. Similarly, administrative authorities shall, wherever possible, ensure that public services are provided also in the language of the national minority. To this end, they shall adopt appropriate recruitment and/or training policies and programmes.”

The idea that provision should be made for the use of the minority language in dealings between members of a minority and the administrative authorities was finally also introduced into Art 10 (2) FCNM:

“In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relation between those persons and the administrative authorities.”

According to DE VARENNES, Art 10 (2) FCNM *“...is, perhaps, the one section of the Framework Convention which is not only the most challenging, but also contributes the most in both theory and practice for European states. It sets out the conditions under which a state’s administrative authorities have an obligation to use a national minority language in contact with members of the public. That individuals may claim such a right is novel from the point of view of international and European law, since it is not explicitly recognized in either the ECHR or the ICCPR.”*⁶¹³

However, one must be aware that this provision contains certain deficiencies. It must be reiterated that the Framework Convention does not provide rights for individuals, but sets forth obligations and duties for the member states in respect of certain minority rights. Leaving the member states with a very wide measure of discretion and allowing for almost unlimited possibilities with regard to restrictions on the use of the rights in question, the text of Para 2 of Art 10 is a perfect example of the rather weak formulations used in the Framework Convention.⁶¹⁴

The difficulties inherent in defining the exact conditions under which the use of the national minority language has to be allowed in dealing with the administrative authorities are also evident from the drafting process. Some States were very hesitant to include such an obligation in the Framework Convention and the use of softening

⁶¹³ De Varennes (2006), 304.

⁶¹⁴ Compare the criticism of: Hofmann (1996), 138; Klebes (1995), 266.

terms and vague formulations was the price for their agreement to the incorporation of Para 2 into Art 10 FCNM.⁶¹⁵

According to the Explanatory Report, the provision has been worded very flexibly because of the possible financial, administrative and technical problems associated with the use of minority languages in dealing with administrative authorities. Furthermore, the Explanatory report clarifies that the term “*administrative authorities*” must be interpreted broadly.⁶¹⁶

The existence of “*a real need*” has to be assessed by the State on the basis of objective criteria. Although the wording “*as far as possible*” indicates that States may take various factors into consideration, in particular their financial resources, they should make every effort to apply the principle of Para 2 in practice.⁶¹⁷ DE VARENNES points out that the requirement “*as far as possible*” seems to indicate “*...that States must act to the maximum of their abilities and resources to enable the use of a minority language, consistent with the overall object and intent to protect national minorities as expressed in the Preamble.*”⁶¹⁸

The Explanatory Report also stresses that Art 10 (2) FCNM does not in any way affect the official language or languages in the respective State.⁶¹⁹ The provision does not diminish the status of the official language, but simply indicates situations where the official language cannot be the exclusive language of the administrative authorities.⁶²⁰

The competence to define the “*...areas inhabited by persons belonging to national minorities traditionally or in substantial numbers...*” where a minority language may be used in dealing with the authorities lies with the State, allowing a flexible application.⁶²¹

The wording of the provision seems to refer to areas that have a high geographical concentration of an ethnic minority, without this concentration necessarily being a historical one.⁶²²

In view of the flexible and vague formulations of Art 10 (2) FCNM, it is useful to look at its implementation in the various States which are parties to the Framework Convention in order to assess the extent to which European States tend to provide for the use of minority languages in dealing with administrative authorities.

In Austria, the use of minority languages is not confined to dealings with the administrative authorities but this right also exists before Austrian courts. Art 8 of the

⁶¹⁵ For an overview of the drafting history see: De Varennes (2006), 311-312.

⁶¹⁶ Explanatory Report, Para 64.

⁶¹⁷ Explanatory Report, Para 65.

⁶¹⁸ De Varennes (2006), 311.

⁶¹⁹ Explanatory Report, Para 66.

⁶²⁰ De Varennes (2006), 313.

⁶²¹ Explanatory Report, Para 66.

⁶²² De Varennes (2006), 313.

Federal Constitution Act stipulates that “*German is the official language of the Republic without prejudice to the rights granted by federal Law to the linguistic minorities*”. According to Art 7 (3) of the State Treaty regarding the establishment of an Independent and Democratic Austria which is of constitutional standing, the Slovene and Croat languages shall be admitted as official languages in administrative and court districts with a mixed population, in addition to German. The Austrian Constitutional Court has held that, in the absence of an appropriate implementing ordinance, this right shall be applied directly, and that a member of the Slovene or Croat minority may assert this right directly when dealing with an authority. According to § 2 (1) of the National Minorities Act, those public authorities and agencies before which the use of a minority language as an official language (in addition to German) is permitted have to be designated by ordinance. Before such public authorities persons belonging to national minorities have the right to use the national minority language orally and in writing. Such ordinances have been enacted for the Croat, the Slovene and the Hungarian minorities in certain districts with mixed populations.⁶²³

In Croatia, Croatian is the official language, but the use of minority languages in communications with the authorities at local and regional levels is possible in regions where the minority constitutes one third of the population. This is the case in 27 of the total 416 municipalities and mainly affects the Serbian language, but also Hungarian and Italian (two municipalities) and the Czech and the Slovak languages (one municipality).⁶²⁴

In Finland, Art 17 of the Constitution stipulates that Finnish and Swedish are both official languages of the State. In addition, the Sami are entitled to use their language in dealings with the authorities (including before the courts) in their traditional homelands. Specific legislation provides that certain officials within the administration in bilingual districts must not only be able to use the majority language, but also to express themselves orally and in writing in the “second” language. However, it must be recognized that there seem to be difficulties in implementing this legislation, as some officials have only very limited command of the Swedish language.⁶²⁵

In Italy there are numerous legal provisions governing the use of minority languages in the northern regions where these minorities traditionally live. In the region of Aosta, French is the second official language, in the province of Bolzano, the German language is the second official language. In the region “Friuli-Venezia-Giulia”, the

⁶²³ For a detailed description see: Austria State Report (2006), 75-79.

⁶²⁴ Compare: Croatia 2nd State Report, ACFS/SR/II(2004)002, 12-13; Pan, Christoph: „*Minderheitenrechte in Kroatien*“, in Pan/Pfeil (2006), 245.

⁶²⁵ Compare: Finland 2nd State Report, ACFS/SR/II(2004)012E, 64-67; Pan, Christoph: „*Die Minderheitenrechte in Finland*“, in Pan/Pfeil (2006), 154-156.

Slovene language may be used in dealing with the local administrative and judicial authorities, although some practical problems in the implementation of the applicable legislation seem to prevail.⁶²⁶

In Spain, where the constitutional system provides for the establishment of autonomous regions, the five existing autonomous regions have each introduced a second official language (besides Spanish). Thus the Catalan, the Basque and the Galician language are all official languages within the respective autonomous regions and the authorities within these regions must ensure that it is possible to use them.⁶²⁷

Unfortunately the Advisory Committee's comments on States' compliance with Art 10 (2) FCNM are not always consistent and lack clarity in relation to the interpretation of certain elements of the provision.⁶²⁸ Especially when one considers the vague formulation of the various elements, a precise and concrete interpretation is to be desired. However, various aspects of the provision have been addressed, at least in relation to specific State parties and these considerations may help to define the obligations set up by the Framework Convention.

It is clear that the obligations under Art 10 (2) FCNM require that States adopt the necessary legislation defining the conditions under which persons belonging to national minorities may use the minority language in dealing with the administrative authorities in all areas where the criteria established by Art 10 (2) FCNM are met. According to the Advisory Committee the possibility of using the minority language "*...should not be left to the discretion of the authorities concerned*".⁶²⁹ Furthermore, such legislation has to be sufficiently clear in defining the conditions under which the minority language can be used.⁶³⁰ Where an appropriate legislation is in place, the authorities must take due care that it is properly applied in practice, and that sufficient resources are available, including measures to recruit staff and provide language training.⁶³¹

Concerning With regard to the precondition that the demand for the right to use the minority language in dealing with the authorities has to emanate from an area which is inhabited by persons belonging to national minorities traditionally or in substantial numbers, it must be emphasized that meeting one of the criteria, either "*substantial numbers*" or an area "*traditionally*" inhabited by members of the minority, is

⁶²⁶ Compare: Italy State Report, ACFS/SR(1999)007, 45-46; Pan, Christoph: „*Die Minderheitenrechte in Italien*“, in Pan/Pfeil (2006), 226-229.

⁶²⁷ Compare: Pfeil, Beate Sibylle: „*Die Minderheitenrechte in Spanien*“, in: Pan/Pfeil (2006), 525-526.

⁶²⁸ For examples of the inconsistent interpretation and possible explanations see: De Varennes (2005), 315-319.

⁶²⁹ Compare: Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 57; Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 59.

⁶³⁰ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 52-53.

⁶³¹ Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 34.

sufficient.⁶³² Where persons belonging to a national minority traditionally inhabit a certain area, their number should not be the decisive element.⁶³³

It is not clear what constitutes an adequate numerical threshold in considering the element of “*substantial numbers*”. The requirement that the minority constitutes the majority in the area in question has been qualified as insufficient,⁶³⁴ and the requirement that the minority constitutes at least one third does not seem to fully satisfy the Advisory Committee either.⁶³⁵ A 10%-threshold seems to be adequate.⁶³⁶

Despite the difficulties in assessing the exact obligations under Art 10 (2) FCNM, it must be emphasized that this provision of the Framework Convention in particular clearly indicates that the designation of a language as “official” or “national” does not mean that this language has to be exclusive in the respective State. Art 10 FCNM as a whole is a clear rejection of the idea that a State must be united by a common and exclusive language. National legislation and those practices on the part of the authorities which are aimed at suppressing or maintaining ignorance of the languages of national minorities are a violation of the European legal standards for the protection of minorities.⁶³⁷

The European Charter for Regional or Minority Languages also provides for the use of minority languages in dealings between the users of these languages and the administrative authorities. Subject to the condition that the number of residents who are users of the regional or minority languages in the respective administrative territory justifies such measures, and according to the situation of each language, States shall undertake to adopt measures enabling the use of regional or minority languages in dealings with the administrative authorities as far as this is possible.

Art 10 of the charter thereby distinguishes three categories:

- *“action by administrative authorities of the State: that is to say traditional acts of the public authorities, especially in the form of the exercise of public prerogatives or powers under ordinary law (paragraph 1);*
- *action by local and regional authorities, that is general sub-national territorial authorities with powers of self-government (paragraph 2):*

⁶³² De Varennes (2006), 316.

⁶³³ Compare: Advisory Committee Opinion on Germany, ACFC/INF/OP/I(2002)009, Para 48.

⁶³⁴ Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 44

⁶³⁵ Advisory Committee, Second Opinion on Croatia, ACFC/INF/OP/II(2004)002, Para 111-112.

⁶³⁶ Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)003, 45.

⁶³⁷ De Varennes (2006), 302.

- *action by bodies providing public services, whether under public or private law, where they remain under public control: postal services, hospitals, electricity, transport, and so on (paragraph 3).*⁶³⁸

In these fields, States should choose from among the following measures: ensuring that the administrative authorities use the regional or minority languages (compare: Art 10 (1) lit a.i. and a.ii., Art 10 (2) lit a, Art 10 (3) lit a); making it possible for the users of regional or minority languages to submit oral or written applications in these languages (compare: Art 10 (1) lit a.iii. and a.iv., Art 10 (2) lit b, Art 10 (3) lit b); the supplementary publication of official documents by the authorities in the regional or minority language (compare: Art 10 (1) lit b. and c, Art 10 (2) lit c and d), the additional use of the regional or minority language in debates in assemblies of regional and local authorities (Art 10 (2) lit e and f).

Considering the variety of measures envisaged by Art 10 of the European Language Charter, this provision as well as Para 13-14 of the Oslo Recommendations may provide useful guidance as to the scope of the possible measures a State should introduce in order to enable persons belonging to a national minority to use their minority language in dealing with the administrative authorities.

4.6.2.2 The Kurdish language and the Turkish administrative authorities

Although it is difficult to define exact standards to determine the right of members of minorities to use the minority language in dealing with the administrative authorities, there are various aspects that indicate that, at least in certain areas of Turkey, the use of the Kurdish language (one of the Kurdish dialects) should be allowed in dealings between individuals and the Turkish administrative authorities.

The Kurds in Turkey traditionally inhabit large areas in the South-East of Turkey, and despite the fact that many Kurds have been forced to leave due to the violence in the region or because of economic difficulties, the Kurds still occupy the south-eastern provinces in substantial numbers. While the formulation “...*areas inhabited by persons belonging to national minorities traditionally or in substantial numbers*...” leaves the States with a margin of appreciation, this does not mean that it can be interpreted in a completely arbitrary manner. In addition, the Kurds have inhabited the South-East of Turkey for centuries. Accordingly, they “*traditionally*” inhabit this region in the sense of the words of Art 10 (2) FCNM. Since minorities have to be provided with the opportunity to use the minority language in dealing with the administrative authorities in

⁶³⁸ Explanatory Report to the European Language Charter, Para 102.

areas which are either traditionally inhabited by persons belonging to a minority, or inhabited by such persons in “*substantive numbers*”, use of the Kurdish language in dealing with public authorities should be possible in many of Turkey’s south-eastern provinces. The substantive –numbers requirement would, perhaps, also be met in other areas, in particular certain Turkish cities, to which many Kurds have moved after leaving the South-East.

The existence of “*a real need*” for conditions enabling the Kurds to use the Kurdish language has to be assessed on the basis of objective criteria. It is reported that, due to deficiencies in the general infrastructure and a lack of educational facilities and schools in the South-East, many Kurds who live there have only a limited knowledge of the Turkish language. In the rural areas of Turkey women, in particular, are poorly represented in the schools, with the consequence that most are illiterate and do not speak Turkish.⁶³⁹ As a result, many Kurdish language speakers, in particular women, have difficulty communicating when it comes to accessing public services, especially health care.⁶⁴⁰ In order to enable these people to exercise their rights before the public authorities, it appears absolutely necessary to make it possible for the Kurdish population to be able to use the Kurdish language/dialects in dealing with the authorities. The conditions for the use of the Kurdish language in communications between the administrative authorities and the population should be governed by national legislation, and the national authorities should take due care that they are appropriately applied in practice at the local level.

Financial, administrative and technical concerns may be considered by the States when transforming the rights enshrined in Art 10 (2) FCNM into national legislation and practice. Even if Turkey was bound by the FCNM, the Turkish authorities might, therefore, argue that problems of a financial, administrative or technical kind would prevent them from introducing the option to use the Kurdish language in communications between public authorities and individuals. While such arguments are not illegitimate, it must be emphasized once more that States must make every effort and act to maximum of their abilities and resources to apply the provision of the FCNM into practice. The above-mentioned concerns are no excuse for denying the Kurds the opportunity to use their mother tongue in dealing with the Turkish administration. The employment of members of the Kurdish minority, in particular of individuals with a profound knowledge of the Kurdish as well as the Turkish language, in the administration would certainly help to reduce difficulties in the application of the principles set forth by Art 10 (2) FCNM. Their employment would not only help to

⁶³⁹ MRG-Report (2007), 20.

⁶⁴⁰ ECRI: *Third report on Turkey* (2004), Para 58.

reduce costs (e.g. for language courses and interpreters), but would probably help to foster the confidence of the local Kurdish population into the State and the public authorities.⁶⁴¹

So far, Turkish legislation does not provide for the use of minority languages in the administration, and in practice there is no option to use any language other than Turkish in dealing with the authorities, even in areas predominantly inhabited by minorities, where many individuals do not have adequate knowledge of the official language. There have been attempts by Turkish local authorities to provide for public services in a minority language outside the legal framework, but these measures have been banned by the national authorities. When the municipal council of Sur district in south-eastern Turkey decided to provide “multilingual municipal services” in the Kurmanci and Zaza dialects, Armenian and other locally spoken languages because of the multilingual population in the area, this resulted in criminal investigations and the dissolution of the municipal council by the Council of State.⁶⁴² The decision to prohibit such administrative services in minority languages was based on the argument that, since Turkish was the exclusive language of education in Turkey according to Art 42 of the Turkish Constitution, every person that can read and write is able to speak and write Turkish, making services in any other language unjustified. This decision does not seem to correspond to the reality in south-eastern Turkey,⁶⁴³ and it has also been reported that governorships in several cities in the South-East have started offering public services in Kurdish.⁶⁴⁴

Evidently, the reason behind the legal requirement for the exclusive use of the Turkish language in the administration is its important function as a tool for the promotion of Turkish nationalism. However, Turkish concerns about the Turkish language losing its status as the official language are not justified. The Explanatory Report explicitly states that the status of the official language is not affected by the provision of Art 10 (2) FCNM. However, the status of a language which has been designated as the official language must not lead to an exclusion of other languages if the use of these languages is necessary to provide all necessary services to the population without discrimination. Considering the principle of equality, it is thus not the official language, spoken by the majority population of the State in question, which is in need of specific promotion – notwithstanding the fact that the State should provide the necessary

⁶⁴¹ Compare: Explanatory Note to The Oslo Recommendations Regarding the Linguistic Rights of National Minorities, Para 13/14/15: “*The ethnic representativity of administrative institutions and agencies designed to serve the population is usually reflective of a pluralistic, open and non-discriminatory society.*”

⁶⁴² Compare: MRG-Report (2007), 19; Yildiz/Muller (2008), 89.

⁶⁴³ MRG-Report (2007), 19.

⁶⁴⁴ European Commission: *Turkey 2009 Progress Report*, 28.

educational facilities to enable the whole population to learn the official language – but the use of languages used by only parts of the population should be facilitated by special measures.

In contrast to the freedom to use the minority language in private and in public, the right to use the minority language in dealing with the administrative authorities requires the elaboration of specific legal obligations. Without effective entitlement of the individual by specific laws, the opportunity to use a minority language is dependent on the goodwill of the authorities, who could easily ignore any such request.⁶⁴⁵ To comply with the standards set by the Framework Convention, the Oslo Recommendations, the Copenhagen Document and the European Language Charter, Turkey should be encouraged to enact specific legislation enabling the Kurds (and other minorities) to use their mother tongue in dealing with the Turkish administrative authorities in those areas which meet the requirements as described above. Since there is a direct link between a minority's ability to communicate with the administrative authorities and the access of its members to health, justice, education and other services,⁶⁴⁶ the importance of such legal measures cannot be underestimated.

4.6.3 Language Rights in Criminal Proceedings

4.6.3.1 European Standards

“The parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter.”⁶⁴⁷

Art 10 (3) FCNM, which reflects widely acknowledged rights, is based on similar provisions within Articles 5 and 6 of the ECHR, and its content does not go beyond the safeguards contained in the latter.⁶⁴⁸

The guarantees contained in Art 10 (3) FCNM correspond to Art 5 (2) ECHR which provides that everyone who is arrested shall be informed promptly, in a language which he/she understands, of the reasons for his/her arrest and of any charge against him/her, and to Art 6 (3) lit a and e ECHR, which guarantee the following minimum rights to everyone charged with a criminal offence: *“to be informed promptly, in a*

⁶⁴⁵ De Varennes (2006), 314.

⁶⁴⁶ MRG-Report (2007), 19.

⁶⁴⁷ Art 10 (3) FCNM.

⁶⁴⁸ Explanatory Report, Para 67; De Varennes (2006), 323.

language which he understands and in detail, of the nature and cause of the accusation against him” (lit a); and “to have the free assistance of an interpreter if he cannot understand or speak the language used in court” (lit e).

Art 10 (3) FCNM only stipulates that a member of a national minority has to be informed in any language he or she understands. It does not refer a specific right to use a minority language in judicial proceedings and does not contain an obligation for judicial authorities to use a minority language.⁶⁴⁹

It seems that the rights enshrined in Articles 5 and 6 ECHR and Art 10 (3) FCNM are generally well implemented into the national legislation of most European States. However, some practical problems may be observed. These problems basically involve a general lack of interpreters for certain languages, or a lack of financial resources to enable the State to comply with the international obligations in this field.⁶⁵⁰

Under the Framework Convention, the obligations of States in respect of linguistic rights in judicial proceedings do not go beyond the standards set out by international human rights instruments. As these are absolute minimum standards, States should think about additional measures for the promotion of linguistic rights of persons belonging to national minorities in judicial proceedings.

The Oslo Recommendations Regarding the Linguistic Rights of National Minorities provide for such additional rights in Paragraphs 17 to 19:

“17) All persons, including persons belonging to a national minority, have the right to be informed promptly, in a language they understand, of the reasons for their arrest and/or detention and of the nature and cause of any accusation against them, and to defend themselves in this language, if necessary with the free assistance of an interpreter, before trial, during trial, and on appeal.

18) In regions and localities where persons belonging to a national minority are present in significant numbers and where the desire for it has been expressed, persons belonging to this minority should have the right to express themselves in their own language in judicial proceedings, if necessary with the free assistance of an interpreter and/or translator.

19) In those regions and localities in which persons belonging to a national minority live in significant numbers and where the desire for it has been expressed, States should give due consideration to the feasibility of conducting all judicial proceedings affecting such persons in the language of the minority.”

While the linguistic rights of persons, including persons belonging to national minorities, under the Framework Convention and the ECHR are limited to certain aspects and

⁶⁴⁹ De Varennes (2006), 324.

⁶⁵⁰ De Varennes (2006), 325.

stages of criminal proceedings, the Oslo Recommendations imply that such linguistic rights should be applicable in all sorts of judicial proceedings. The Explanatory Note to the Oslo Recommendations stresses the importance of such rights by stating that *“...taking into consideration the importance, in democratic societies, of effective access to justice, it is reasonable to expect that States should, so far as possible, ensure the right of persons belonging to national minorities to express themselves in their language in all stages of judicial proceedings (whether criminal, civil or administrative) while respecting the rights of others and maintaining the integrity of the processes, including through instances of appeal.”*⁶⁵¹

Art 9 of the European Language Charter also provides for the implementation of measures in respect of the use of regional or minority languages in criminal, civil and administrative proceedings. The Article obliges States to provide for such measures in the case of those judicial districts in which the number of residents using the regional or minority language justifies them, based upon the situation of each of these languages and on condition that the use of the facilities afforded by Art 9 is not considered by the judge to hamper the proper administration of justice.

The following measures are envisaged by Art 9 of the European Language Charter:

“a. in criminal proceedings:

- (i) to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages; and/or*
- (ii) to guarantee the accused the right to use his/her regional or minority language; and/or*
- (iii) to provide that requests and evidence, whether written or oral, shall not be considered inadmissible solely because they are formulated in a regional or minority language; and/or*
- (iv) to produce, on request, documents connected with legal proceedings in the relevant regional or minority language,*

if necessary by the use of interpreters and translations involving no extra expense for the persons concerned;

b. in civil proceedings:

- (i) to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages; and/or*
- (ii) to allow, whenever a litigant has to appear in person before a court, that he or she may use his or her regional or minority language without thereby incurring additional expense; and/or*

⁶⁵¹ Explanatory Note to the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998), Para 17-18.

- (iii) *to allow documents and evidence to be produced in the regional or minority languages*

if necessary by the use of interpreters and translations;

c. in proceedings before courts concerning administrative matters:

- (i) *to provide that the courts, at the request of one of the parties, shall conduct the proceedings in the regional or minority languages; and/or*
- (ii) *to allow, whenever a litigant has to appear in person before a court, that he or she may use his or her regional or minority language without thereby incurring additional expense; and/or*
- (iii) *to allow documents and evidence to be produced in the regional or minority languages*

if necessary by the use of interpreters and translations;”

States should take steps to ensure that the application of these measures and the necessary use of interpreters and translations do not involve extra costs for the persons concerned.⁶⁵² Furthermore, Art 9 of the European Language Charter stipulates that States should ensure that the validity of legal documents is not denied solely because they are drafted in a regional or minority language.⁶⁵³

While States are not obligated to adopt all the measures enumerated in Art 9 of the European Language Charter, the catalogue of measures still provides useful guidance as to which measures a State could and should adopt in order to allow for the use of regional or minority languages in judicial proceedings.

4.6.3.2 The Situation of the Kurds in Turkey

Turkish legislation does not provide the Kurdish minority with a right to use its minority language in the course of criminal proceedings. While Articles 36 to 40 of the Turkish constitution, which deal with the rights in court proceedings, do not grant any right in relation to the use of or information in a specific language, Article 39 of the Treaty of Lausanne provides that “...adequate facilities shall be given to Turkish nationals of non-Turkish speech for the oral use of their own language before the Courts.” According to the official Turkish interpretation, however, the Kurdish minority is not covered by the provisions on minority rights of the Treaty of Lausanne.

While the Turkish law on criminal proceedings grants the accused the right to be provided with an interpreter to follow the final pleadings of the prosecutor and his own lawyer if this is necessary, there are practical problems in the application of these

⁶⁵² European Charter for Regional or Minority Languages, Art 9 Para 1. d.

⁶⁵³ European Charter for Regional or Minority Languages, Art 9 Para 2. a.-c.

limited linguistic rights. It is reported that defendants belonging to a minority are often not provided with a competent interpreter. The necessary translation is sometimes only carried out by a court clerk or any other person present, although they are often not competent to translate legal proceedings. Older Kurds and Kurdish women in particular are affected by these deficiencies.⁶⁵⁴

The Turkish authorities should be encouraged to adopt appropriate legislation on translation requirements in criminal proceedings which fully conforms to the standards set by Articles 5 and 6 ECHR as well as Art 10 (3) FCNM. In addition, adequate measures should be taken to implement this legislation into practice, in particular through the provision of funds and the training of interpreters.

Considering that there are Kurds in Turkey who have only very limited knowledge of any language other than Kurdish, the standards set by Art 10 (3) FCNM and the relevant provisions of the ECHR may result in a right to be informed in Kurdish about relevant facts in Turkish criminal proceedings. Accordingly, the Turkish authorities are under obligation to ensure that such defendants are provided with an interpreter competent in the appropriate Kurdish dialect.

Furthermore, the Turkish authorities should be encouraged to grant additional linguistic rights in judicial proceedings (criminal, civil and administrative) to persons belonging to the Kurdish minority in regions where such persons live in significant numbers and have expressed a corresponding desire. While there is no legally binding obligation under international law to provide such additional rights, the specific situation of the Kurdish minority in Turkey might make the introduction of additional measures in this sphere desirable, not least because this may facilitate judicial proceedings involving persons who have limited knowledge of the Turkish language, and it may strengthen the confidence of the Kurdish population in the judicial authorities of the State.

4.6.4 The Right to Use Personal Names in the Minority Language

4.6.4.1 The Personal Name – a Human Right

European instruments for the protection of national minorities provide for the protection of additional linguistic rights for national minorities with considerable significance for the minority's identity. While the existence of such additional rights was partly recognised

⁶⁵⁴ Compare: MRG-Report (2007), 19; similarly, the European Commission observed in 2010: “No measures have been taken to facilitate access to public services for non-speakers of Turkish. While interpretation during the investigation phase and court hearing is possible under the current legislation for suspects, victims and witnesses, it is not consistently applied in practice” (European Commission: *Turkey 2010 Progress Report*, 33).

even before the drafting of the Framework Convention, Art 11 FCNM contains corresponding, legally binding obligations for States.

Art 11 FCNM provides:

“(1) The Parties undertake to recognize that every person belonging to a national minority has the right to use his or her surname (patronym) and first name in the minority language and the right to official recognition of them, according to the modalities provided for in their legal system.

(2) The Parties undertake to recognize that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public.

(3) In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is sufficient demand for such indications.”

In general terms, Art 11 FCNM aims to protect linguistic rights with considerable significance and a symbolic value, clearly stating that certain visible manifestations of the minority language may not be prohibited.⁶⁵⁵ Besides these common elements, there are various obligations resulting from this provision, which will be analysed separately.

It appears that the right to use a personal name in a minority language as provided for in Art 11 (1) FCNM was already protected under international human rights standards before the FCNM came into force. According to the jurisdiction of the ECtHR, the right to use one's name of choice falls within the scope of the right to private life guaranteed by Art 8 ECHR.⁶⁵⁶ A person's name is considered to be an important source of identity, but it is recognized that it also has a social function within a State and its society. In accordance with the conditions enumerated in Para 2 of Art 8 ECHR, the right to use one's name may therefore be regulated and restricted by the State under the legal regime of the ECHR. Accordingly, the right to use names in a minority language has to be balanced with the interest of the State in regulating a person's name and civil status. However, forcing a person belonging to a national minority to change their name in order to obscure their ethnic origin by means of linguistic assimilation is not permissible under Art 8 (2) ECHR, because the administrative registration of the population only

⁶⁵⁵ Compare: De Varennes, Fernand: “Article 11” in: in Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 329-330

⁶⁵⁶ Compare: *Burghartz v. Switzerland*, App. 16213/90, Judgement of 22 February 1994.

requires that every citizen bears a name that distinguishes him/her from others.⁶⁵⁷ Consequently, there is no general justification under Art 10 (2) ECHR for the imposition of a requirement that names be in the official language of the State.

The right of persons belonging to national minorities to use their personal names in their own language according to their own traditions and linguistic systems is also acknowledged by the Oslo Recommendations, which provide that these names shall be given official recognition and be used by the public authorities. According to the Recommendations, the right also extends to private entities such as cultural associations and business enterprises.⁶⁵⁸

The European Language Charter recognizes the right to use (family) names in minority languages in Art 10 (5), which provides that the Parties “...undertake to allow the use or adoption of family names in the regional or minority languages, at the request of those concerned”.

The fact that the right to use one's name in the language of choice has already been guaranteed by other international documents is probably one of the reasons why it is generally respected by most European States which are parties to the FCNM.⁶⁵⁹ But although the scope of Art 11 (1) FCNM seems to be uncontroversial and widely accepted, the Advisory Committee has identified certain problematic aspects in relation to the obligations resulting from this provision, which are relevant for the situation of the Kurds in Turkey.

One problem is the use of different alphabets or the use of certain characters which are not common to the official and the minority language. The Advisory Committee seems to have adopted the approach that, in order to comply with Art 11 (1) FCNM, a State is not obliged to use an alphabet which is different to the one of the official language when registering names in a minority language. However, the use of an alphabet different to the one of the minority language must not lead to a denial of the right to use personal names in the minority language.⁶⁶⁰ One possible solution that seems adequate in such a situation would be to register the name in the minority language according to its phonetic pronunciation when using the alphabet of the official

⁶⁵⁷ Hillgruber/Jestaedt (1994), 44.

⁶⁵⁸ The Oslo Recommendations 'Regarding the Linguistic Rights of National Minorities, Para 1 and 2.

⁶⁵⁹ For an overview of the national legislation and practice in various European States see: First and Second cycle State Reports pursuant to Art 25 paragraph 1 of the Framework Convention for the Protection of National minorities, available under http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp; a summary of the applicable national legislation of every European State can be found in: Pan, Christoph/Pfeil, Beate-Sibylle (Eds.): *Minderheitenrechte in Europa, Handbuch der Europäischen Volksgruppen* Vol. 2, 2nd Edition, Wien: Springer Wien New York 2006.

⁶⁶⁰ Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 58.

language.⁶⁶¹ This solution was also envisaged by the drafters of the Oslo Recommendations.⁶⁶²

In any case, the national authorities must take due care and adopt those measures necessary to ensure that the right to use names in the minority language is also respected by civil servants at the local level.⁶⁶³

While the Advisory Committee has not expressed the view that a State is obliged to use the alphabet of a minority language where this is different to the one of the official language, an obligation to use additional characters may arise where this does not cause too many difficulties. Considering that States should comply with the Framework Convention to the maximum of their abilities, the use of some additional characters does not cause too many difficulties if the keyboards of the computers used in the administration or easily accessible computer programmes enable the civil servants to reproduce these characters of the minority language.⁶⁶⁴

Another problematic aspect with regard to the right to use the name in the minority language is the forced changing of names of members of national minorities imposed by national authorities. It follows from the obligations under Art 11 (1) FCNM that persons belonging to national minorities have the right to change their names into the form of the minority language in cases where their actual names were forced upon them by the State. The right to change the name into the minority language under Art 11 (1) FCNM exists even in cases where the ancestors of the person in question were forced to change their names.⁶⁶⁵ This view is also expressed in the Explanatory Note to the Oslo Recommendations: *"In view of this very basic right relating closely to both the language and the identity of individuals, persons who have been forced by public authorities to give up their original or ancestral name(s) or whose name(s) have been changed against their will should be entitled to revert to them without having to incur any expenses."*⁶⁶⁶

⁶⁶¹ The Advisory Committee has not expressed any concerns or opposition to this approach adopted by the Albanian authorities: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, 54-55.

⁶⁶² The Explanatory Note to the Oslo Recommendations Regarding Linguistic Rights of National Minorities (1998) acknowledges that the particular circumstances in each State have to be considered, and that the *"...public authorities would be justified in using the script of the official language or languages of the State to record the names of persons belonging to national minorities in their phonetic form. However, this must be done in accordance with the language system and tradition of the national minority in question."*

⁶⁶³ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, 55.

⁶⁶⁴ Compare: De Varennes (2006), 334-335.

⁶⁶⁵ Advisory Committee Opinion on Norway, ACFC/INF/OP/I(2003)003, Para 48-49.

⁶⁶⁶ Explanatory Note to the Oslo Recommendations Regarding Linguistic Rights of National Minorities (1998), Para 1.

4.6.4.2 The Use of Kurdish Names in Turkey

An explicit prohibition to use names in a minority language or an obligation that a person's name has to be common in the official language is not in compliance with European standards of minority protection and constitutes a breach of the obligations imposed by the FCNM. Although the Turkish Constitution declares that Turkish is the language of the State, it does not make reference to personal or place names in foreign or minority languages. In other words, the Constitution neither provides for nor prohibits the use of personal or place names in minority languages.

Despite the fact that there is no constitutional prohibition of personal names in minority languages (or other languages), the use of Kurdish personal names has long been prohibited in Turkey. As part of a reform package in the years 2003 and 2004, the proscription on giving children names that were “*offensive to the national culture*” or not appropriate in respect of Turkish “*customs and tradition*” was removed from the Civil Registration Act. In practice these legal provisions had traditionally been used to ban Kurdish names from registration.⁶⁶⁷ According to the amended Law, it is only forbidden to give children names which contravene “*moral norms*” or which “*offend the public*”.⁶⁶⁸ Consequently, after its introduction, the administrative authorities began to register Kurdish names. However, a circular issued by the Ministry of Interior stated that only those names consistent with the Turkish alphabet could be registered, effectively banning names containing the letters q, w and x, which are not used in the Turkish alphabet, but common in the Kurdish language. Thus, Kurds are still precluded from giving their children names involving these three letters.⁶⁶⁹ The criticism has been made that in practice the circular seems to be applied quite inconsistently, and names in foreign languages other than the Kurdish language have been registered, even if they contained one of these letters.⁶⁷⁰

As described above, the use of a different alphabet or of different letters must not be used as justification for denying parents the right to give children names in a minority language. It is also hard to understand how three letters of a different alphabet could be offensive to the public or constitute a threat to moral values.

If Kurdish individuals want to use names using one of the letters that are inconsistent with the Turkish alphabet, one possible solution, in accordance with European standards, would be to write these names in their phonetic form. Where keyboards and typewriters in Turkey include these three letters, it would even be possible to write

⁶⁶⁷ Compare: MRG-Submission (2004), 24; Pan (2006), 560; MRG-Report (2007), 18.

⁶⁶⁸ Yildiz/Muller (2008), 87.

⁶⁶⁹ Compare: MRG-Submission (2004), 24; Pan (2006), 560; MRG-Report (2007), 18; Yildiz/Muller (2008), 87; ECRI, Third Report on Turkey (2004), Para 78.

⁶⁷⁰ MRG-Submission (2004), 24; Pan (2006), 560.

Kurdish names containing these letters in their correct form. Although one cannot go so far as to state that this is required by the European instruments for the protection of national minorities, such a practice would be advisable as a positive step in the protection of a minority and as a clear sign that the Kurdish identity and Kurdish language rights are being given due recognition.

Considering that many Kurds were deprived of their right to use Kurdish names and that in the past many Kurds were even forced to adopt Turkish names instead of their Kurdish ones, the Turkish authorities should consider implementing appropriate measures to allow Kurds who have suffered from such an imposition of Turkish names to change their names into Kurdish.

As in other States, the problems relating to the recognition of names in the minority language do not only result from unsatisfying legislation, but also from inconsistent and arbitrary application in practice, which is further motivated by the actions of the highest authorities, in this particular case through the passing of a decree by the Ministry of Interior.

On a European level, international instruments for the protection of human rights and minority rights, in particular Art 11 (1) FCNM, specifically guarantee that a person's name or surname as part of his or her identity includes the language in which it takes form.⁶⁷¹ In order to fully guarantee the right to use the name in the Kurdish language in accordance with acknowledged European standards, the Turkish national authorities should be encouraged to draw up an appropriate legal framework which leaves no room for deliberate (mis)interpretations or restrictions on the basis of the applicable alphabet, and to adopt the necessary measures to ensure that such legislation is appropriately implemented in practice by the authorities at regional and local levels.

4.6.5 Signs and Information of a Private Nature

Art 11 (2) FCNM explicitly recognizes the right of persons belonging to a minority to display signs, inscriptions and information of a private nature in the minority language. According to this provision, the State-parties “...undertake to recognize that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public.”

The rights mentioned in Art 11 (2) FCNM are not novel in international law. They are considered to be inherent to the right to freedom of expression as guaranteed by

⁶⁷¹ De Varennes (2006), 338.

international human rights instruments such as the ECHR or the ICCPR. Accordingly, these rights seem to be acknowledged by most European States and, in general, the State parties to the FCNM fulfil their obligations under Art 11 (2) FCNM.⁶⁷²

Despite the uncontroversial nature of the right to display signs, inscriptions and other information of a private nature in the minority language, two aspects deserve mentioning.

While the option to use the minority language in private information visible to the public should not be restricted, national minorities may also be required to display the respective inscriptions and information in the official language.⁶⁷³ However, where national legislation may be interpreted in a way preventing persons belonging to a national minority to enjoy the rights covered by Art 11 (2) FCNM, such legislation should be revised by the respective State.⁶⁷⁴

Persons belonging to the Kurdish minority in Turkey should be able to display signs, inscriptions and information of a private nature such as shop and restaurant signs or advertisements in the Kurdish language without restrictions and interference on the part of the authorities. Turkish legislation which may be interpreted in ways restricting this right should be revised. The additional use of the Turkish language may nevertheless be required.

4.6.6 Signs and Information of Public Nature

4.6.6.1 The Importance of Local Names, Street Names and other Topographical Indications under the FCNM

While Para 1 and 2 of Art 11 of the Framework Convention cover rights of persons belonging to national minorities that are widely accepted in international human rights law and minority rights law, Para 3 of Art 11 FCNM introduces obligations for States that are rather novel in international law and have so far only been addressed in Para 3 of the Oslo Recommendations.⁶⁷⁵

Art 11 (3) FCNM stipulates: *“In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and*

⁶⁷² Compare: De Varennes (2006), 340-341.

⁶⁷³ Explanatory Report, Para 69.

⁶⁷⁴ Compare: Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 59.

⁶⁷⁵ Paragraph 3 of the Oslo Recommendations Regarding the Linguistic Rights of Persons belonging to National Minorities provides: *„In areas 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, also in the minority language, of local name, street names and other topographical indications intended for the public.”*

taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is sufficient demand for such indications.”

The introduction of this provision met with strong reservations and disagreements on the part of some of the drafters, which may be explained by the fact that such an obligation is not only a novelty in international law, but also touches on a very sensitive issue. Due to the use of local names and topographic indications in a minority language, certain regions might seem to be “owned” by or strictly associated with the national group, which might resurrect historical claims for a territory or even foster separatist tendencies.⁶⁷⁶ The numerous “escape clauses” of Art 11 (3) FCNM are obviously the prize for the consensus that was finally reached on the inclusion of such an obligation.

Although the concerns of States in respect of territorial claims may be understandable, the non-recognition of local names and topographic indications in minority languages may have negative consequences for an effective minority protection. Refusal to recognize the validity of historic denominations of the kind described in Art 11 (3) FCNM “...can constitute an attempt to revise history and to assimilate minorities, thus constituting a serious threat to the identity of persons belonging to minorities.”⁶⁷⁷

Respect for the principles contained in Art 11 (3) FCNM and Para 3 of the Oslo Recommendations should thus be seen as an important aspect of the promotion and the necessary respect for the history and identity of persons belonging to minorities.

The Explanatory Report clarifies that Art 11 (3) FCNM does not involve any form of official “recognition” of local names in the minority language.⁶⁷⁸ Furthermore, it is evident from the wording of the paragraph (“...also in the minority language...”) that it does not contain an obligation for the exclusive use of the minority language.

In comparison to Art 10 (2) FCNM covering the use of minority languages in dealing with administrative authorities, Art 11 (3) FCNM is even more vaguely and restrictively formulated.⁶⁷⁹ The obligations of State parties to the FCNM regarding place names and topographic indications should, nevertheless, not be underestimated. Art 11 (3) FCNM requires specific national legislation to set out the conditions under which the minority language must be used. It is not enough to allow the authorities to implement/ continue to apply administrative practices with no clear legal basis.⁶⁸⁰ States must take due care

⁶⁷⁶ Compare: De Varennes (2005), 346-348

⁶⁷⁷ Explanatory Note to the Oslo Recommendations Regarding Linguistic Rights of National Minorities, Para 3.

⁶⁷⁸ Explanatory Report, Para 70.

⁶⁷⁹ De Varennes (2005), 348.

⁶⁸⁰ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 56.

that the respective legislation is sufficiently precise and ensure that it is effectively implemented in practice.⁶⁸¹ Legal provisions such as laws on the official language which are in conflict with national legislation implementing the rights enshrined in Art 11 (3) FCNM must be amended.⁶⁸²

The imprecise preconditions contained in Art 11 (3) FCNM have been partly specified by the Advisory Committee Opinions. According to Art 11 (3) FCNM, place names, street names and other topographic indications shall be displayed in the minority language in “...*areas traditionally inhabited by substantial numbers*...”.⁶⁸³ It is not clear what constitutes a substantial number and nothing suggests that it has to be defined by fixed thresholds, but in practice it is most likely that States will apply minimum percentages of the national minorities in relation to the total population of the region in question. The Advisory Committee is of the opinion that the provision of Art 11 (3) FCNM should be interpreted as generously as possible, but it does not give a clear guidance as to what minimum percentage is acceptable. In the case of Austria, a 10% threshold was welcomed and considered in accordance with the Framework Convention.⁶⁸⁴ The requirement that the national minority constitutes the majority in the area in question appears to be excessive and does not fulfil the standards set by Art 11 (3) FCNM.⁶⁸⁵

Unfortunately, the Advisory Committee Opinions do not provide clear guidelines in relation to the requirement of “*sufficient demand*”, because the Committee adopted a rather arbitrary approach in this respect.⁶⁸⁶ Considering that, as the guiding principle, States must provide national minorities with maximum possible protection, a rather liberal approach to the requirement of “*sufficient demand*” seems appropriate.

Similarly, there is not much to learn from the Advisory Committee Opinions on the meaning of “*traditionally*”. In the sense of a “minority-friendly” interpretation, the requirement will be fulfilled if there is some long-standing link between the minority group and a certain region.⁶⁸⁷

Where the preconditions for the additional display of signs and information of a public nature are met in accordance with the relevant legislation, States should take every

⁶⁸¹ Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 103.

⁶⁸² Compare: Advisory Committee Opinion on Lithuania, ACFC/INF/OP/I(2003)008, Para 58.

⁶⁸³ While the right protected by Art 10 (2) FCNM shall be guaranteed by the States in areas traditionally inhabited by persons belonging to national minorities **or** inhabited by such persons in substantial numbers, Art 11 (3) FCNM requires that the area in question is traditionally inhabited by substantial numbers of persons belonging to national minorities, thus linking the two requirements.

⁶⁸⁴ Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 50.

⁶⁸⁵ Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 57.

⁶⁸⁶ Compare: De Varennes (2005), 356-358.

⁶⁸⁷ De Varennes (2005), 358.

effort to put up the necessary bilingual signs immediately. Financial difficulties do not constitute an excuse for considerable delays in the implementation of this obligation.⁶⁸⁸

Since the content of criteria for the establishment of bilingual place names and topographic indications is not clear from the text and the Explanatory Report of the FCNM, the practice of various European States may provide useful guidance in the identification of European standards in this field.

In Austria, Art 7 (3) of the State Treaty of Vienna stipulates that topographical signs and inscriptions in the autochthonous settlement areas of the Croat and Slovene minorities must be displayed in the minority languages as well as in German. Pursuant to Sec 2 Para 1 (2) of the National Minorities Act which implements the Constitutional Provision of Art 7 (3) of the State Treaty of Vienna, the territories where topographical designations have to be bilingual are defined by ordinance. This applies also to all other national minorities in Austria. Such ordinances have been enacted for the Croat, Slovene and Hungarian minorities, listing the territories where such bilingual topographical designations and inscriptions have to be displayed and defining the designation of these territories in the respective minority language.⁶⁸⁹ In respect of the legal element of an “administrative district with a mixed population”, which is a prerequisite for the obligation to set up bilingual topographical designations and inscriptions, the Austrian Constitutional Court has ruled in a case relating to the Slovene minority that a mixed population exists where the minority population constitutes more than ten per cent of the overall population in the respective district over a longer period of time.⁶⁹⁰ Despite this clear legal framework, practical problems persist in the implementation of the applicable legislation and the Constitutional Court’s case law, as, in spite of lack of convincing justification, the regional government of Carinthia continues to refuse to set up the required bilingual signs. This behaviour gives rise to serious concern with regard to the principle of the rule of law and the commitment to fully and unconditionally protect and promote national minorities in compliance with the standards set by the FCNM.⁶⁹¹

In Croatia, municipalities and towns/cities in which the language and script of a national minority are accorded equal official status are to have bilingual or multilingual traffic

⁶⁸⁸ Advisory Committee Opinion on Germany, ACFC/INF/OP/I(2002)008, Para 52-53.

⁶⁸⁹ Austria State Report, ACFC_SR(2000)003, 42.

⁶⁹⁰ Austria 2nd State Report, ACFC/SR/II(2006)008, 81, referring to the decision of the Constitutional Court of 13 December 2001, file number G 213/01-18, V 62,63/01-18, “Municipal Signs Decision”.

⁶⁹¹ Compare: Advisory Committee, 2nd Opinion on Austria, ACFC/OP/II(2007)005, 24.

signs and other written notifications in road traffic, street and square names, as well as place and geographic site names in lettering of the same size.⁶⁹²

In Finland, public signs such as traffic and road signs and other public information must be displayed in Finnish and Swedish in every bilingual municipality. A municipality is designated bilingual if the population includes Finnish and Swedish speakers and the minority comprises at least eight per cent of the local residents or at least 3,000 persons. In the traditional homelands of the Sami, additional use of the Sami language is required. There are currently 44 bilingual municipalities in Finland.⁶⁹³

In France, where the constitutional system does not formally recognize national minorities, topographic indications and other public signs must principally be in the French language. However, due to public pressure, some bilingual public signs have been erected in Breton, Basque, Occitan, Alsatian and Corsican agglomerations.⁶⁹⁴

In Italy, the use of place names in minority languages is not regulated in a uniform way, since national legislation differentiates between regions with a special statute and others (which will be explained in chapter 4.9.6). Four of the five regions with special status (Valle d'Aosta, Friuli-Venezia Giulia, Sardinia and Trentino-Alto Adige) have been entitled to introduce regulations on the use of bilingual place names. In these regions the majority of village/town signs are also displayed in the majority languages. But even outside these regions with special status, the minorities in certain provinces are entitled to have place names displayed in their minority language too.⁶⁹⁵

4.6.6.2 Topographical Indications in Kurdish

Traditional names of regions, towns, villages and other topographical indications are of enormous importance for the identity of a national minority as well as of the majority. Since this importance was seen as a possible threat to the successful formation of the Turkish nation within a clearly defined territory, the names of many Kurdish towns and villages in the South-East of Turkey were changed into Turkish in the course of the twentieth century.⁶⁹⁶

⁶⁹² Compare: Croatia 2nd State Report, ACFS/SR/II(2004)002, 14; Pan, Christoph: „*Minderheitenrechte in Kroatien*“, in Pan/Pfeil (2006), 246.

⁶⁹³ Compare: Finland 2nd State Report, ACFS/SR/II(2004)012E, 70; Pan, Christoph: „*Die Minderheitenrechte in Finland*“, in Pan/Pfeil (2006), 157.

⁶⁹⁴ Pan, Christoph: „*Die Minderheitenrechte in Frankreich*“, in Pan/Pfeil (2006), 176.

⁶⁹⁵ Compare: Italy State Report, ACFS/SR(1999)007, 69; Pan, Christoph: „*Die Minderheitenrechte in Italien*“, in Pan/Pfeil (2006), 229-232.

⁶⁹⁶ Compare: Muller/Yildiz (2008), 14 and 16; MRG-Report (2007), 18; ; Pan (2006), 560; MRG-Submission (2004), 24: The Provincial Administrative Law of 1949 still allows the Ministry of Interior to change village names that are not Turkish and may give rise to confusion. In particular in the past

Due to the political sensitivity of the issue, the obligation on States to display signs and information of public nature such as topographical indications also in minority languages is relatively new even on a European level. Consequently, it is difficult to assess minimum standards in this field of minority rights, but State practice and the Opinions of the Advisory Committee provide sufficient guidance to argue that the Turkish State must also act on the issue of the display of village names and other topographical indications in the Kurdish language.

For centuries, the Kurds have been living in the regions which today constitute the south-eastern provinces of the Republic of Turkey. Despite considerable (mainly forced) migration during the past decades, members of the Kurdish minority still live in this area in considerable numbers and even constitute the majority of the population in some areas. The traditional Kurdish indications of these places probably still exist in the collective memory of the Kurdish population and it is not unlikely that questioning of the people would reveal the desire to be able to use and display the names of villages, towns and mountains in the Kurdish language as well as Turkish.

With this in mind, there can be little doubt that the criteria set forth by Art 11(3) FCNM are met in relation to certain Turkish regions. The Turkish government seems to have realized that topographic indications may be of significant importance to the identity of the Kurdish minority and of symbolic value with regard to the general attitude of a State towards minorities. It is reported that, in the course of the newly adopted programme on policies in favour of the Kurdish minority, among the first measures that were adopted by the Turkish AKP government was the setting up of bilingual signs for towns and villages in the Turkish South-East.⁶⁹⁷ These measures must be welcomed, as they appear to provide proof that the government is trying to adopt a new approach towards its Kurdish minority. Considering the political sensitivity of topographic indications and the nationalistic opposition on the part of certain political groups and parties, the immediate introduction of bilingual signs is, without doubt, a courageous step in the right direction.

The Turkish authorities should be encouraged to set up additional bilingual signs wherever this is appropriate. The conditions that have to be met as prerequisites for the introduction of such bilingual signs should be clearly defined by appropriate legislation. These laws should not provide overly restrictive clauses such as excessive numerical

decades, numerous Kurdish names of towns and villages have been changed into Turkish on the basis of this law.

⁶⁹⁷ Compare: Der Standard, “*Erste türkisch-kurdische Ortstafeln aufgestellt*”, 26.11.2009, <http://derstandard.at>, 01.12.2009; European Commission: *Turkey 2010 Progress Report*, 34: „In a number of cases original place names have been restored in response to public demand.“

thresholds, and the authorities should take due care that these legal provisions are appropriately implemented in practice.

4.7 Education

4.7.1 The European Standards

4.7.1.1 Introduction

The right to education is a widely acknowledged basic human right. In addition to its general importance for the development of the individual, education is of particular relevance for persons belonging to a national minority because it appears to be a vital safeguard for the continued existence of a national minority as a distinct community. Accordingly, international instruments for the protection of national minorities contain specific provisions on educational rights for minorities that go beyond the standards contained in human rights treaties.

In particular the FCNM introduces numerous obligations for States in the field of education in the Articles 12, 13 and 14. THORNBERRY has underlined the importance of these educational provisions by stating that the characterisation of education as “...*both a human right and an indispensable means realizing other human rights*” may also be applied to the normative scheme of the Framework Convention. “*In the particular context of minority rights, the possibilities to enjoy these rights are severely reduced in the absence of a coherent education strategy.*”⁶⁹⁸ In view of the fact that the different elements of the Framework Convention hang together, empowerment of minorities in the field of education leads to empowerment in other areas of minority protection, while a lack of opportunities in the field of education leads to disadvantage in other areas.⁶⁹⁹

On the one hand, education rights of national minorities must consequently be seen as important tools for the preservation and development of the minorities’ identity and as a prerequisite for the full and effective enjoyment of other minority rights. On the other hand, education should also contribute to the integration of persons belonging to the minority into society as a whole, without resulting in assimilation. Accordingly, the

⁶⁹⁸ Thornberry, Patrick: “Article 12” in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 372.

⁶⁹⁹ Thornberry (2006), 372; similarly, the “*Commentary on Education under the Framework Convention for the Protection of National Minorities*” of the Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFEC/25DOC(2006)002, adopted on 2 March 2006, highlights that “...*the right to education is a right in itself but is also instrumental as a precondition for the full enjoyment of many other rights...*” (Page 7 of the Commentary).

provisions for the education rights of persons belonging to national minorities must always be interpreted in the light of these two interrelated aims.

4.7.1.2 The Right to Education under Article 2 of Protocol 1 to the ECHR

On a European level, the right to education is a basic human right guaranteed by Art 2 of Protocol 1 to the ECHR:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

Since the ECHR does not specifically deal with the protection of minority rights, the ECtHR has interpreted the guarantees of Art 2 of Protocol 1 in a way which does not confer any specific rights to minorities. In the *Belgian Linguistics Case*⁷⁰⁰, the court basically held that Art 2 of Protocol 1 ECHR does not provide a right to a specific form of education or education in a specific language. States have a wide margin of appreciation with regard to the educational system they establish, and Art 2 of Protocol 1 ECHR only protects the right of access to the educational system established at a given time.⁷⁰¹ Consequently, the provision does not confer a right to persons belonging to a national minority to be taught the minority language or in the minority language in the public educational system.

There are, nevertheless, indications that Art 2 of Protocol 1 ECHR is of relevance for particular aspects of minority education. In the case of *Cyprus v. Turkey*⁷⁰², the ECtHR held that the provision of education in a specific language at primary level, which is not continued at secondary or higher level, may be a violation of this provision. *“This means that there may be a positive obligation to continue educational provision in, for example, the language of a minority once that has been provided even though there is no obligation to provide education in minority languages.”*⁷⁰³ It should be noted, however, that the decision was very much influenced by the very particular facts underlying the case.⁷⁰⁴

⁷⁰⁰ *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, App. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgement of 23 July 1968, Series A, Vol. 6., p. 32.

⁷⁰¹ Compare: Ovey/ White (2006), 378.

⁷⁰² *Cyprus v. Turkey*, App. 25781/94, Judgement (Grand Chamber) of 10 May 2001, Para 273-280.

⁷⁰³ Ovey/ White (2006), 378.

⁷⁰⁴ De Varennes, Fernand/Thornberry, Patrick: “Article 14” in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 412.

With regard to aspects of the education of national minorities, Art 2 of Protocol 1 ECHR may also be violated under certain circumstances when it is read in conjunction with Art 14 ECHR. For example, this could be the case where the public educational system allows certain minority languages to be taught, whereas others are excluded without objective and reasonable justification.

The second sentence of Art 2 of Protocol 1 ECHR aims “...at safeguarding the possibility of pluralism in education, which is essential for the preservation of a democratic society as conceived by the Convention.”⁷⁰⁵ Thus, States are forbidden to pursue the aim of indoctrination in the public educational system, and any information given which is of public interest has to be presented in an objective, critical and pluralistic manner. One of the effects of the second sentence might well be that it allows parents to withdraw their children from the public educational system and educate them privately, whether at a private school or at home.⁷⁰⁶ Accordingly, in the course of private education, there can be little doubt that under Art 2 of Protocol 1 ECHR, States must not interfere with the parents' rights to teach their children the minority language or educate them in the minority language.

According to Art 2 of Protocol 1 ECHR, “...the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. According to the court, “*philosophical conviction*” must relate to a weighty and substantial aspect of human life and behaviour. The term refers to serious coherent views that are worthy of respect in a democratic society and are not incompatible with human dignity. In light of such a definition, one might argue that the desire of parents belonging to a specific linguistic or cultural group to have their children educated in their mother tongue has to be recognized as such a conviction.⁷⁰⁷

The interpretation of Art 2 of Protocol 1 ECHR by the ECtHR has not yet produced very favourable effects for the educational rights of national minorities, but the interpretation of the ECHR as a “*living instrument*” might result in more extensive minority protection in the future. “*If the provision or non-provision of a language widely spoken in a State but which is not the official language of the state does not fall within the scope of Art 2 Prot 1, then few aspects of educational policy choice by a Contracting State are likely to violate the guarantee in the article.*”⁷⁰⁸ In order to give full effect to these guarantees, a more extensive interpretation of the content might seem adequate, even though it is

⁷⁰⁵ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, App. 5095/71; 5920/72; 5926/72, Judgement of 7 December 1976, Series A, No. 23; 1 EHRR 711, Para 50.

⁷⁰⁶ Ovey/ White (2006), 382.

⁷⁰⁷ Blum, quoted in: Hillgruber/Jestaedt (1994), 26 (note 64).

⁷⁰⁸ Ovey/ White (2006), 382.

understandable that the ECtHR is reluctant to impose overly extensive duties upon States in an area that is politically very sensitive.

4.7.1.3 The Right to Learn the Minority Language

The right to learn the minority language is essential for persons belonging to national minorities, since it is one of the principal means by which such individuals can assert their identity.⁷⁰⁹

Art 14 (1) FCNM stipulates: “*The Parties undertake to recognize that every person belonging to a national minority has the right to learn his or her minority language.*”

The Explanatory Report unmistakably stipulates that “*there can be no exception to this*”, but also clarifies that the acknowledgement of this right does not imply positive action, notably of a financial nature, on the part of the State.⁷¹⁰ An obligation for active support might nevertheless be derived from the fact that the various articles of the Framework Convention should be interpreted in light of each other. Based on the overall approach of the Convention to promote national minorities’ identities, active support might seem adequate in cases where persons belonging to national minorities might otherwise have undue difficulties in learning their minority language.

While the Advisory Committee has commented favourably on the express legal recognition of the right to learn the minority language, it does not seem to suggest that States are obliged to provide such recognition in national law in order to comply with the obligations under Art 14 (1) FCNM. Instead, the Advisory Committee has emphasised the question of whether the right to learn the minority language is sufficiently respected by the States in practice.⁷¹¹ Where minorities seem to encounter practical difficulties in learning the official language, States are encouraged to examine the needs of the national minorities and identify solutions in co-operation with representatives of the minorities in question.⁷¹²

In addition to a general acknowledgement of the right of persons belonging to a minority to learn the minority language, European instruments for the protection of national minorities also contain positive obligations for States regarding the teaching of or in the minority language.

⁷⁰⁹ Explanatory Report, Para 74.

⁷¹⁰ Explanatory Report, Para 74.

⁷¹¹ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 63-66; Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 71-76.

⁷¹² Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 66; Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 74

Para 34 of the Copenhagen Document provides that the “...*participating States will endeavour to ensure that persons belonging to national minorities, notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction of their mother tongue or in their mother tongue,...*”⁷¹³

In a flexible wording already known from other provisions of the Framework Convention, Article 14 (2) FCNM stipulates:

“In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their educational systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in that language.”

The flexible wording is explained by the recognition of the possible financial, administrative and technical difficulties associated with the implementation of the obligation, leaving parties a wide measure of discretion. States have a choice as to the means and arrangements by which they ensure such instruction of or in the minority language in accordance with their educational system.⁷¹⁴

Since a restrictive interpretation of the numerous qualifying phrases could considerably reduce the effectiveness of the paragraph, the Advisory Committee’s examination of the preconditions contained in Art 14 (2) is of particular importance.⁷¹⁵

In order to assess those areas which are “*traditionally*” inhabited or inhabited “*in substantial numbers*”, accurate statistical information is needed.⁷¹⁶ The requirement of “*sufficient demand*” has deliberately not been defined in the text to allow national authorities a country-specific approach.⁷¹⁷ However, national authorities should not apply restrictive criteria in the assessment of such a demand, which, quite often, will depend on the particular circumstances, such as community awareness, the existence of services, or the confidence that such services will be delivered if requested. Taking account of these circumstances, it may well be that there is widespread desire to receive instruction of and in the minority’s mother tongue, but that such collective

⁷¹³ Compare: Art 4 Para 3 of the UN Declaration on the Rights of Persons Belonging to National or, Ethnic, Religious and Linguistic Minorities: “*States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.*”

⁷¹⁴ Explanatory Report, Para 75-76.

⁷¹⁵ Compare: The Hague Recommendations, Para 3: As the relevant obligations and commitments in the field of education, as in other areas of minority protection, constitute international minimum standards, such a restrictive interpretation would be contrary their spirit and intent.

⁷¹⁶ Advisory Committee Opinion on Albania, ACFC/INF/OP/I (2003) 004, 2002, Para 65.

⁷¹⁷ Explanatory Report, Para 76.

desire is not adequately expressed, rendering it difficult to identify sufficient demand for such education.⁷¹⁸

In order to comply with their obligations under Art 14 (2) FCNM, States must adopt the necessary legislation defining the conditions under which education in minority languages is offered.⁷¹⁹ Such legislation must stipulate the numerical or other criteria necessary to trigger the introduction of instruction in or of the minority language. The establishment of administrative practice without legislative clarity is not sufficient.⁷²⁰

In respect of the determination of the legal preconditions for education of or in the minority language, it must be observed that numerical thresholds should not be the sole criteria for the provision of such education. Instead of a “mechanical” application of numerical minimum thresholds, other criteria must be taken into account in order to comply with the different demands and needs of national minorities which may depend on the individual circumstances of the case.⁷²¹ Where the law provides for minimum numbers of pupils per class in order to trigger minority language education, due care should be given that these numbers are not excessive.⁷²²

The qualifying clause “*as far as possible*” indicates that instruction of or in the minority language is dependent on the available resources of the State.⁷²³ Lack of financial resources should, nevertheless, not be used as an excuse for the complete or far-reaching denial of instruction in or of the mother tongue if the other preconditions for such education are fulfilled.

Shortage of textbooks in the minority language and the lack of qualified teachers constitute the most frequently encountered obstacles to minority language education.⁷²⁴

States should endeavour to remove these obstacles to the best of their abilities. Where problems are identified in connection with minority language education, solutions

⁷¹⁸ Compare: De Varennes/Thornberry (2006), 419.

⁷¹⁹ Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 71.

⁷²⁰ Compare: Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 51; Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 62.

⁷²¹ Compare: Advisory Committee Opinion on Germany, ACFC/INF/OP/I(2002)003, Para 59-60.

⁷²² In the case of Germany, a minimum requirement of 20 pupils per class in order to trigger minority language education was considered rather high by the Advisory Committee, Advisory Committee Opinion on Germany, ACFC/INF/OP/I(2002)003, Para 60; Provision for classes or groups with a minority language as a language of instruction upon a request by parents of at least 8-10 pupils in non-rural areas and of 5 pupils in rural areas were considered to represent a commendable interpretation of a “sufficient demand” under Art 14 FCNM (Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 63).

⁷²³ Explanatory Report, Para 75.

⁷²⁴ Compare: Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 74-75; Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004) 001, 2003, Para 62; Advisory Committee Opinion on Norway, ACFC/INF/OP/I(2003)003, Para 55; Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002) 010, Para 59 and 68.

should be examined in co-operation with the representatives of the various minority groups.⁷²⁵

The text of Art 14 (2) FCNM as well as of Para 34 of the Copenhagen Document suggests that individuals belonging to national minorities should either be taught the minority language as a separate curriculum subject (like other foreign languages) or that all or some curriculum subjects should be taught through the medium of the minority language. The Explanatory Report clarifies that these alternatives are not mutually exclusive and that States may implement both of them. According to the Report, bilingual instruction may be one of the means of achieving the objectives of Art 14 (2).⁷²⁶ Since Art 14 (2) FCNM is a very minimalist provision, the introduction of additional requirements by national legislation for education in the minority language such as lack of sufficient knowledge of the official language does not seem adequate in the context of the Framework Convention.⁷²⁷

In order to build a mature knowledge of the minority language in question, it is recommended that minority language education is not only catered for at primary level, but also in the post-primary phase of education as well as in the sphere of higher education.⁷²⁸

The international instruments for the protection of national minorities which provide a right to learn the minority language all emphasize that this right is “...*without prejudice to the learning of the official language or the teaching in this language.*”⁷²⁹ Such provisions underline that in matters of language education for national minorities, “...*a balance needs to be struck which respects a twin-track approach: equipping the members of minorities with sufficient language skills to succeed in the broader society, while facilitating the preservation and development of their own language(s).*”⁷³⁰

It can be considered as a widely acknowledged international standard that individuals, including persons belonging to national minorities, are entitled to learn the official language of the State they live in, and the State Reports and Advisory Committee Opinions indicate that there is no case of this being denied by any of the members

⁷²⁵ Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 74.

⁷²⁶ Explanatory Report, Para 77

⁷²⁷ Advisory Committee Opinion on Norway, ACFC/INF/OP/I(2003)003, Para 59: Norwegian regulations on bilingual basic education for minorities other than Sami and Kven-Finnish (in the designated regions) envisaged such education only until the persons in question have acquired a sufficiently good knowledge of Norwegian to be able to follow the ordinary teaching programme. The Advisory Committee stated that the guarantees of Article 14 were not conditioned upon lack of knowledge of the state language and considered that the Norwegian authorities should examine the extent of demand and improve the legal and practical situation if necessary.

⁷²⁸ AC Opinion on Austria, ACFC/INF/OP/I (2002) 009, 2002, Para 98; AC Opinion on Albania, ACFC/INF/OP/I (2003) 004, 2002, Para 61.

⁷²⁹ Art 14 (3) FCNM; compare: Para 34 of the Copenhagen Document.

⁷³⁰ De Varennes/Thornberry (2006), 408.

States to the FCNM. States may stipulate in their national legislation that the official language must be taught in school.⁷³¹ The promotion of the official language in education is legitimate as long as this is designed and implemented in a way which does not impede or prevent equal access of persons belonging to national minorities to education at all levels, and which guarantees to persons belonging to national minorities adequate opportunities for being taught the minority language or for receiving instruction in this language.⁷³² Where persons belonging to the national minority have to learn the official language in school, the curriculum should be organised in such a manner that it does not preclude these individuals from also being taught the minority language.⁷³³ Thus the provision of instruction in the official or the minority language must not result in situations where persons belonging to national minorities may only learn one of them. Particular concerns in this respect arise in cases where much emphasis is put on the learning of the official language in school in a way which may exclude the use of the minority language in education.⁷³⁴

Education of and in the minority language is also an important element of The Hague Recommendations Regarding the Education Rights of National Minorities, which provide additional guidance on ways in which such education for persons belonging to national minorities should be implemented.⁷³⁵ The Explanatory Note to the Recommendations points out that “...*the attainment of multilingualism by the national minorities of OSCE States can be seen as a most effective way of meeting the objectives of the international instruments relating to the protection of national minorities as well as to their integration.*”⁷³⁶

Referring to the results of educational research, The Hague Recommendations indicate that the medium of teaching in pre-school and kindergarten levels should ideally be the child’s language.⁷³⁷ Similarly, at primary level, the curriculum should ideally be taught in the minority language, and the minority language should also be taught as a subject on a regular basis. The official State language should be taught as a subject on a regular basis preferably by teachers who have good understanding of the children’s cultural

⁷³¹ De Varennes/Thornberry (2006), 423-424.

⁷³² Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I (2004) 001, 2003, Para 63 and 69.

⁷³³ Compare: Advisory Committee Opinion on Serbia and Montenegro, ACFC/INF/OP/I (2004) 002, 2004, Para 97.

⁷³⁴ Compare: Advisory Committee Opinion on Estonia, ACFC/INF/OP/I (2002) 005, 2001, Para 50; Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I (2002) 010, 2002, Para 65.

⁷³⁵ The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note (1996), http://www.osce.org/publications/hcnm/1996/10/31521_1148_en.pdf, 23.06.2008.

⁷³⁶ Explanatory Note to The Hague Recommendations Regarding the Education Rights of National Minorities (1996), 9.

⁷³⁷ The Hague Recommendations (1996), Para 11.

and linguistic background. States should create conditions enabling parents to avail themselves of these options wherever this is possible.⁷³⁸

While at secondary level, parts of the curriculum should still be taught in the minority language and the minority language and the official language should still be taught as separate subjects throughout this period, the number of subjects taught in the State language should gradually be increased.⁷³⁹ Furthermore, The Hague Recommendations also call upon States to make vocational training or tertiary education in the minority language available if certain conditions are met.⁷⁴⁰

According to the Explanatory Note, the approach adopted by The Hague Recommendations endeavours to create the space that is required for the weaker minority language to strive. Other approaches where the minority language is only taught in a minimalist way to facilitate an early transition to the exclusive teaching of the official State language or where minorities are exclusively taught in the minority language in separate schools without adequate opportunities to learn the official state language are thus rejected as not in line with international standards.⁷⁴¹

The Hague Recommendations also highlight the need for facilities for the appropriate training of teachers and for facilitating access to such training in order to be able to provide adequate opportunities for minority language education.⁷⁴²

Besides European instruments relating specifically to the protection of national minorities, education in and of minority languages is naturally envisaged by the European Language Charter. Art 7 of the Charter, defining the objectives and principles upon which States shall base their policies, legislation and practice in respect of regional or minority languages, expressly refers to *“the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages”*, as well as to *“the provision of facilities enabling non-speakers of a regional or minority language living in the area where it is used to learn it if they so desire”*⁷⁴³.

The obligations of State parties to the European Language Charter in the field of education are stipulated in Art 8, the first article of the normative catalogue of the Charter.⁷⁴⁴ Each of the Paragraphs of Art 8 of the European Language Charter

⁷³⁸ The Hague Recommendations (1996), Para 12.

⁷³⁹ The Hague Recommendations (1996), Para 13.

⁷⁴⁰ The Hague Recommendations (1996), Para 14-18.

⁷⁴¹ Explanatory Note to The Hague Recommendations Regarding the Education Rights of National Minorities (1996), 9.

⁷⁴² The Hague Recommendations (1996), Para 14.

⁷⁴³ Art 7 (1) lit. f. and g. of the European Language Charter.

⁷⁴⁴ According to Art 2 (2) of the European Language Charter, each Party undertakes to apply at least three paragraphs or sub-paragraphs of Art 8 in respect of each language specified as regional or minority language, indicating the prominent role of education in the protection and promotion of language

provides for education in the regional or minority language within the territory in which such languages are used at one of the various levels of the education system: pre-school education; primary education; secondary education; technical and vocational education; university and other higher education; adult and continuing education courses.⁷⁴⁵ At the various levels, States shall undertake to make all of the education⁷⁴⁶ or a substantial part of education available in the relevant regional or minority language⁷⁴⁷, or to provide for the teaching of the relevant language as an integral part of the curriculum⁷⁴⁸, or, at the very least, to implement one of the aforementioned provisions for pupils whose families so request and whose number is considered sufficient⁷⁴⁹. Where the public authorities are not competent to introduce one of these measures, it shall at least allow for and encourage the provision of education in the regional or minority language.⁷⁵⁰

Finally, Art 8 (2) contains the (optional) obligation that states allow, encourage or provide teaching in or of the minority language at all appropriate stages of education in those territories where such languages are not traditionally used but where the number of users of these languages justifies such undertakings.

While it must be reiterated that State-parties to the European Language Charter are entitled to select from amongst the obligations contained therein, the various aspects of language education addressed by Art 8 of the Charter provide useful guidance in defining the elements which are necessary to protect and promote the continued existence of minority languages. Accordingly, European States should at least use these obligations as guidelines for implementing policies, legislation and practice intended to protect and promote the minority languages used on their territory.

An overview of the national legislation in the member states of the European Union indicates that almost all of them provide for the education of and, in many instances, in the minority language in the public schooling system. While the extent to which such education is envisaged in the national legal systems varies from one State to another, and practical problems may be observed in certain instances, it appears that no member State of the European Union completely denies persons belonging to national

education, as States only have to choose at least one paragraph or sub-paragraph of the other Articles (except for Art 12) of the Charter.

⁷⁴⁵ Compare: Art 8 (1) lit. a.-f. of the European Language Charter.

⁷⁴⁶ Compare: Art 8 (1) lit. a.i, lit b.i., lit. c.i., lit. d.i. and lit. e.i. of the European Language Charter.

⁷⁴⁷ Compare: Art 8 (1) lit. a.ii, lit. b.ii., lit. c.ii., and lit. d.ii. of the European Language Charter.

⁷⁴⁸ Compare: Art 8 (1) lit. lit. b.iii., lit. c.iii., and lit. d.iii. of the European Language Charter.

⁷⁴⁹ Compare: Art 8 (1) lit. a.iii, lit. b.iv., lit. c.iv., and lit. d.iv. of the European Language Charter.

⁷⁵⁰ Compare: Art 8 (1) lit. e.iii and lit. f.iii. of the European Language Charter.

minorities the opportunity to learn their mother tongue in the public education system.⁷⁵¹

4.7.1.4 Access to Education and Contents of Education

The education rights of minorities are not restricted to aspects relating to the teaching of and in the minority language.

Art 12 FCNM stipulates:

(1) The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.

(2) In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.

(3) The Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.

The Copenhagen Document contains a similar provision in Para 34, where the participating States commit themselves to take account of the history and culture of national minorities in the context of the teaching of history and culture in educational establishments.

The aspects of education included in Art 12 (1) FCNM and Para 34 of the Copenhagen Document are also addressed by the Hague Recommendations: *“In view of the importance and value that international instruments attach to intercultural education and the highlighting of minority histories, cultures and traditions, State educational authorities should ensure that the general compulsory curriculum includes the teaching of the histories, cultures and traditions of their respective national minorities. Encouraging members of the majority to learn the languages of the national minorities living within the State would contribute to the strengthening of tolerance and multiculturalism within the State.”*⁷⁵²

In relation to the promotion of regional or minority languages, the European Language Charter also provides an (optional) obligation for States *“to make arrangements to*

⁷⁵¹ For an overview of the national legislation and practice in various European States see: First and Second cycle State Reports pursuant to Art 25 paragraph 1 of the Framework Convention for the Protection of National minorities, available under http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp; a summary of the applicable national legislation of every European State can be found in: Pan, Christoph/Pfeil, Beate-Sibylle (Eds.): *Minderheitenrechte in Europa, Handbuch der Europäischen Volksgruppen* Vol. 2, 2nd Edition, Wien: Springer Wien New York 2006.

⁷⁵² The Hague Recommendations (1996), Para 19.

ensure the teaching of the history and the culture which is reflected by the regional or minority language."⁷⁵³

It is important to note that the obligations enshrined in Art 12 FCNM should be read in light of other Articles of the Framework Convention. Art 6 FCNM obliges States to *"...encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory."* Art 12 FCNM provides important tools for the achievement of these objectives, because the provision *"...seeks to promote knowledge of the culture, history, language and religion of both national minorities and the majority population in an intercultural perspective..."* in order *"...to create a climate of tolerance and dialogue, as referred to in the preamble of the framework convention..."*.⁷⁵⁴ In addition, Articles 4 and 5 FCNM *"...make clear that an active and coherent educational policy is necessary in order to implement the provisions in the framework convention"*.⁷⁵⁵ Bearing in mind that the existence of basic data in the field of education is a precondition for any active educational policy, States need to collect data on the different minority groups within their territories and on the needs and aspirations of these groups in order to introduce an appropriate educational policy which aims to fulfil the objectives of Articles 6 and 12.⁷⁵⁶

Para 1 of Art 12 FCNM uses a modest but firm formulation and it is difficult to imagine situations in which it does not seem appropriate to foster the desired knowledge in the relevant areas as required by the provision. *"Knowledge"* implies that the information provided should be critical and fair-minded and presented in a way fully respecting human rights. Any form of ideological manipulation or propaganda or forms of racist or xenophobic ideas must be avoided.⁷⁵⁷

In general, the aim of intercultural education envisaged by Art 12 FCNM is that the general population should be aware of the presence, history and culture of minorities, and that persons belonging to a minority are not isolated in such a way that they do not take interest in the rest of the population.⁷⁵⁸ Thus, an increase in the efforts to foster the knowledge about minority cultures in the society will be *"...for the benefit of the*

⁷⁵³ Art 8 (1) lit. g. of the European Language Charter.

⁷⁵⁴ Explanatory Report, Para 71.

⁷⁵⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 10.

⁷⁵⁶ Compare: Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 10.

⁷⁵⁷ Compare: Thornberry (2006), 372 and 375; Ovey/White (2006), 384: the right to education under the ECHR requires that there must be no attempt at indoctrination, and that the information must be presented in an objective, critical and pluralistic manner.

⁷⁵⁸ Compare: Thornberry (2006), 372.

majority as well as the minorities".⁷⁵⁹ To achieve these aims the teaching of inter-communal tolerance in general curricula for the population as a whole, as well as specific education for national minorities, is desirable.⁷⁶⁰ Education on national minorities should be part of the general curriculum and not only be provided in special classes.⁷⁶¹ Furthermore, multicultural education should not only be provided in areas traditionally inhabited by persons belonging to national minorities, but also in other areas.⁷⁶²

While issues relating to the minority language are mainly addressed in the context of the Articles 10, 11 and 14 FCNM, the simple reference to language in Art 12 (1) FCNM may be interpreted in a way which implies that language education is not only an important element of the education of national minorities, but that knowledge of the minority language may also be beneficial for members of the majority population and the society as a whole.⁷⁶³

It is essential that the information provided in the course of the relevant intercultural curriculum is adequate and that the content of educational materials such as textbooks is correct. History taught in school should reflect the country's ethnic diversity⁷⁶⁴ and correctly portray the roles played by national minorities in the history of the relevant State.⁷⁶⁵ Schoolbooks and other educational materials should avoid negative stereotypes.⁷⁶⁶ Furthermore, it is important that States undertake to allocate sufficient resources for the achievement of the objectives mentioned in Art 12 (1).⁷⁶⁷

Since the European concept of education in matters relating to national minorities, as enshrined in the FCNM, is one of multicultural and intercultural education, special problems may arise where educational policies and processes "*...are dominated by top-down philosophies and practice, and where the curriculum is emancipated only with great difficulty from the ethos of a founding nation or dominant nation which may invest curricula with culturally limiting perspectives*".⁷⁶⁸ The teaching of history appears to be

⁷⁵⁹ Advisory Committee Opinion on Italy, ACFC/INF/OP/I(2002)007, Para 53.

⁷⁶⁰ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 39-40;

⁷⁶¹ Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 65, 104.

⁷⁶² Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 56.

⁷⁶³ Compare: Thornberry (2006), 378.

⁷⁶⁴ Compare: Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 36; Advisory Committee Opinion on Norway, ACFC/INF/OP/I(2003)003, Para 53.

⁷⁶⁵ Advisory Committee Opinion on Ukraine, ACFC/INF/OP/I(2002)010, Para 58.

⁷⁶⁶ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 57; Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 47; Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I(2004)001, Para 61.

⁷⁶⁷ Compare: Advisory Committee Opinion on Norway, ACFC/INF/OP/I(2003)003, Para 55; Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 20.

⁷⁶⁸ Thornberry (2006), 391.

of particular concern, because it is a natural forum for evoking national memories or constructing national identities through the selection of information. Historical texts and history curricula should, therefore, be drafted with special sensitivity to the historical role of minorities.⁷⁶⁹

Where school curricula or textbooks are revised, States should provide representatives of persons belonging to national minorities with the opportunity to participate in the process in order to safeguard the interests and needs of those concerned. Although this aspect is not explicitly addressed in the text of the Framework Convention or the Explanatory Report, such an input in educational matters affecting national minorities is suggested by Art 15 FCNM.⁷⁷⁰

The participation of persons belonging to national minorities in matters of educational policies is also addressed in The Hague Recommendations. According to the Recommendations, States should create conditions under which minorities may participate in the development of policies and programmes related to minority education (Para 5); endow regional and local authorities with appropriate competences in respect of minority education, thereby facilitating participation in the process of policy formulation (Para 6); adopt measures to encourage parental involvement and choice in the educational system at the local level, including in the field of minority language education (Para 7). Finally, Para 19 of The Hague Recommendations stipulates: *“The curriculum content related to minorities should be developed with the active participation of bodies representative of the minorities in question.”*

In order to achieve the objective of fostering *“knowledge of the culture, history, language and religion of their national minorities and of the majority”*, States should *“...inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities”*.⁷⁷¹ The Explanatory Report to the FCNM and the use of the words *“inter alia”* clarify that the list of these means is not exhaustive and that States should also consider the use of other means.⁷⁷² In practice, the lack of training officers and qualified teachers⁷⁷³ (versed in both the minority and majority language) and a shortage of

⁷⁶⁹ Compare: Thornberry (2006), 391-392.

⁷⁷⁰ Thornberry (2006), 372.

⁷⁷¹ Art 12 (2) FCNM

⁷⁷² Compare: Explanatory Report, Para 71; Thornberry (2006), 381.

⁷⁷³ Compare: Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 65; Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 53; Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 40.

textbooks⁷⁷⁴ seem to be among the most frequent shortcomings with regard to the means mentioned in Art 12 (2) FCNM.

It is important to note that the provision encourages the facilitation of “...contacts among students and teachers of different communities...” as a means to foster the mutual knowledge of the history, culture and language of the minority and the majority. Contacts and relationships across communal frontiers and between various ethnic groups, in particular among young people, should provide a good basis to create a lasting climate of mutual understanding and tolerance.⁷⁷⁵ Thus, the facilitation and encouragement of inter-communal contacts among students at various levels of education is probably one of the essential preconditions for the achievement of the aims envisaged by all of the instruments for the protection of minority rights, and measures aiming at the promotion of such contacts surely have the potential to show long-lasting results for the benefit of the minority as well as of the majority.

In addition to issues relating to the content of education, the FCNM also addresses the issue of minorities’ access to education, as Art 12 (3) FCNM requires that States “...promote equal opportunities for access to education at all levels...”. While it is regrettable that the obligation seems rather soft, in that it does not oblige the States to “provide equal access”, the provision nevertheless seems to have some potential.

According to the Advisory Committee, equal opportunities for access to education require that “...rights to and in education need to be institutionalized and safeguarded in clear and coherent legal acts”, and that State parties have to “...dedicate the financial resources necessary for the implementation of adopted legislation at national, regional and local level”.⁷⁷⁶

It must be observed that neither the text nor the Explanatory Report specifies a comparator in relation to which the “opportunities” should be “equal”. In order not to result in equality with other disadvantaged groups, the obligation should be read as meaning equal with the population at large or with the majority population. The term “equal” should be understood in its normal meaning in the field of international minority rights law as equality in fact, and not merely in law.⁷⁷⁷

⁷⁷⁴ Compare: Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 65; Advisory Committee Opinion on Austria, ACFC/INF/OP/I(2002)009, Para 55; Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 48.

⁷⁷⁵ Compare: Thornberry (2006), 383; Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 16.

⁷⁷⁶ Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 20.

⁷⁷⁷ Thornberry (2006), 372.

The Advisory Committee seems to interpret the requirement to promote equal opportunities for access to mean that States must engage in policies of supporting access to education for persons belonging to national minorities according to their different requirements and demands.⁷⁷⁸ As in relation to other minority rights, the implementation of equality requires a strategy and active measures on the part of the governments.⁷⁷⁹ “Access” implies various aspects, including problems such as widespread absence from school among pupils belonging to a specific minority group.⁷⁸⁰

It is significant that Art 12 (3) FCNM explicitly refers to education “*at all levels*”. Probably due to the fact that education at the primary level is generally secured for persons belonging to national minorities within European States, the Advisory Committee reports tend to focus on education at higher levels. In this regard, the Advisory Committee seems to be of the opinion that under-representation of persons belonging to national minorities at secondary or higher level is contrary to Art 12 (3) FCNM and requires positive action on the part of the State. In particular the extension of education in minority languages to university level is recommended.⁷⁸¹ In this respect, THORNBERRY has observed that it is necessary to stress the importance of higher education for persons belonging to national minorities, because “...*minorities need intellectuals and skilled people so that their culture is not infantilized or stunted in growth*”⁷⁸².

It has already been stated above that the provisions of The Hague Recommendations also encourage States to provide minority language education at the different educational levels including higher education.

4.7.1.5 The Establishment of Private Educational Institutions

International instruments for the protection of national minorities acknowledge the right of minorities to establish their own educational institutions as an alternative or supplement to public provision.⁷⁸³

Art 13 FCNM provides:

⁷⁷⁸ Compare: Thornberry (2006), 384; Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 10.

⁷⁷⁹ Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 63-69.

⁷⁸⁰ Advisory Committee Opinion on Armenia, ACFC/INF/OP/I(2003)001, Para 63-69.

⁷⁸¹ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 105.

⁷⁸² Thornberry (2006), 386.

⁷⁸³ Thornberry, Patrick: “Article 14” in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 412.

“(1) Within the Framework of their educational systems, the Parties shall recognize that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.

(2) The exercise of this right shall not entail any financial obligation for the Parties.”

According to Paragraph 32.2 of the Copenhagen Document, persons belonging to national minorities have the right “...to establish and maintain their own educational, cultural and religious institutions, organisations and associations, which can seek voluntary financial and other contributions as well as public assistance, in conformity with national legislation.”

This right of persons belonging to national minorities may also be analysed in relation to the system of protection of the ECHR, whereby it must be observed that it is not entirely clear whether a State may be justified in prohibiting the establishment of private schools for national minorities under Art 2 of Protocol 1 to the ECHR. The relevant case law mainly focuses on the encouragement of the State to provide education in a pluralist manner and does not specifically address the issue of private educational facilities,⁷⁸⁴ although it would seem that a right of persons to establish private schools may be derived from the provision.⁷⁸⁵ One may certainly argue that the very general provision of the first sentence of Art 2 of Protocol 1 to the ECHR, stipulating that “no person shall be denied the right to education”, also protects the right to establish private educational facilities, particularly in cases where the official institutions do not provide a specific form of instruction, for example of or in a minority language. As a minimum, one should expect that any limitation on the option to establish private educational facilities requires an objective and reasonable justification.

Under the ECHR, the right to establish and maintain private educational institutions may also be justified on the grounds that “...the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”⁷⁸⁶, a provision which has the purpose of operating as a check against possible indoctrination.⁷⁸⁷ Where such convictions are not respected by the State, for example by a lack of respect for the history and culture of a minority, by neglecting an intercultural approach in education, or by indoctrinating children with certain forms of nationalist ideas, or through an excessive emphasis on the official language, one can argue that persons should be permitted to provide adequate education in accordance with these convictions in private institutions: “The effect of the second sentence of the article on parental choice allows parents either to enrol their

⁷⁸⁴ Compare: Thornberry (2006), 399.

⁷⁸⁵ Ovey/ White (2006), 380.

⁷⁸⁶ Art 2 of Protocol 1 to the ECHR, sentence 2.

⁷⁸⁷ Compare: Ovey/ White (2006), 382.

*children in State education, to withdraw their children from the State system, and educate them privately whether at a private school or at home, or to enforce respect for their religious and philosophical convictions by alleging a violation of the second sentence of Art 2.*⁷⁸⁸

The Hague Recommendations also address the right to establish private educational institutions and specify the obligation not to hinder the enjoyment of this right: *“In accordance with international law, persons belonging to national minorities, like others, have the right to establish and manage their own private educational institutions in conformity with domestic law. These institutions may include schools teaching in the minority language.”*⁷⁸⁹ Paragraph 9 of The Hague Recommendations specifies: *“Given the right of persons belonging to national minorities to establish and manage their own educational institutions, States may not hinder the enjoyment of this right by imposing unduly burdensome legal and administrative requirements regulating the establishment and management of these institutions.”*

The right of national minorities to establish and maintain their own private educational institutions must be seen as an important complement to the other educational rights described above and it can be regarded as a necessary defence mechanism in cases where the State does not provide adequate education in public institutions.⁷⁹⁰ While it has been asserted that *“...as elsewhere in education, there is a tension between state control and personal freedom; between the desideratum of enabling and facilitating social participation on the one hand and, on the other, recognizing a community’s right to choose its own means of securing the protection and development of its ethnic, linguistic, and religious identity...”*, one is probably right to argue that *“...the element of freedom to choose is the essence of the right.”*⁷⁹¹

According to the Explanatory Report to the FCNM, the exercise of the right to set up and manage private educational institutions under Art 13 (1) FCNM is subject to the requirements of the national education systems, and particularly to the regulations relating to compulsory schooling. Private educational institutions may be subject to the same forms of supervision as other establishments, particularly with regard to teaching standards, but once these standards are met, the qualifications awarded by the institutions must be officially recognized. The relevant national legislation must be based on objective criteria and conform to the principle of non-discrimination.⁷⁹²

⁷⁸⁸ Ovey/ White (2006), 382.

⁷⁸⁹ The Hague Recommendations (1996), Para 8.

⁷⁹⁰ Thornberry (2006), 396.

⁷⁹¹ Thornberry (2006), 396.

⁷⁹² Explanatory Report, Para 72.

Thus, while it is acknowledged that the State has a right to oversee the process of the establishment of private educational institutions for national minorities from an administrative perspective and in conformity with national legislation, “...it must not prevent the enjoyment of this right by imposing unreasonable administrative requirements which might render it practically impossible for national minorities to establish their own educational institutions.”⁷⁹³

State Reports and Advisory Committee Opinions provide little information on the situation of private educational institutions of national minorities within the member States to the Framework Convention. In most cases, persons belonging to national minorities have the same right to set up such institutions as other citizens.

While Para 1 of Art 13 FCNM recognizes the right of persons belonging to minorities to set up and manage private educational facilities, Para 2 stipulates that “the exercise of this right shall not entail any financial obligation for the Parties.”

It must be noted that, despite this negation of financial obligations, such obligations may result from the principle of non-discrimination. In cases where the State provides financial support for certain private educational institutions, it must not exclude comparable private institutions of national minorities without sufficient justification. While the Explanatory Report only points out that Para 2 does not exclude the possibility of financial contributions on the part of the State, the Advisory Committee encourages governments to provide subsidies for minority schools and participate in the assessment of alternative possibilities for funding minority schools.⁷⁹⁴

The Hague Recommendations do not call upon States to fund educational institutions of minorities, but only stipulate that “Private minority language educational institutions are also entitled to seek their own sources of funding without hindrance or discrimination from the State budget, international sources and the private sector.”⁷⁹⁵

4.7.2 The Kurds and the Turkish Education System

4.7.2.1 The Kurdish Language and Private Educational Institutions in the Turkish Education System

The Turkish Constitution addresses the issue of education in chapter three, which refers to “*Social and Economic Rights and Duties*”. The right to education is guaranteed by Art 42 of the Turkish Constitution, entitled “*Rights and Duties of Training and Education*”, which provides in Para 1 in very straightforward language:

⁷⁹³ Explanatory Note to The Hague Recommendations Regarding the Education Rights of National Minorities (1996), 7.

⁷⁹⁴ Compare: Advisory Committee Opinion on Austria, ACFC/INF/OP/I (2002) 009, 2002, Para 58-59.

⁷⁹⁵ The Hague Recommendations (1996), Para 10.

“No one shall be deprived of the right of learning and education”

Art 42 of the Turkish Constitution contains, however, certain clauses capable of limiting the scope of the right and the form by which it may be exercised.⁷⁹⁶ These limitations have serious consequences for the education rights of persons belonging to the Kurdish minority.

The emphasis on the Turkish language as an important element of the “Turkish Nation” is also evident in Art 42 of the Turkish Constitution, as Para 9 states: *“No language other than Turkish shall be taught as a mother tongue at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved.”*

While the restriction can be interpreted as a legitimate constitutional basis for the promotion of the learning of the official Turkish language, it constitutes a major obstacle to the education of minority languages, effectively prohibiting the teaching of minority languages like Kurdish (the Kurdish dialects) as a mother tongue in Turkish schools.

The reference to international treaties is meant to provide an exception for the languages of those minorities protected by the Treaty of Lausanne, which provides in Art 40:

“Turkish nationals belonging to non-Moslem minorities shall enjoy the same treatment and security in law and in fact as other Turkish nationals. In particular, they shall have an equal right to establish, manage and control at their own expense, any charitable, religious and social institutions, any schools and other establishments for instruction

⁷⁹⁶ Art 42 of the Turkish Constitution (as amended on 09.02.2008) provides in full:

“No one shall be deprived of the right of learning and education.

The scope of the right to education shall be defined and regulated by law.

Training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state.

Institutions of training and education contravening these provisions shall not be established.

The freedom of training and education does not relieve the individual from loyalty to the Constitution.

Primary education is compulsory for all citizens of both sexes and is free of charge in state schools.

The principles governing the functioning of private primary and secondary schools shall be regulated by law in keeping with the standards set for state schools.

No one should be deprived of the right to higher education due to any reason not explicitly written in the law. Limitations on the exercise this right shall be determined by the law.

The state shall provide scholarships and other means of assistance to enable students of merit lacking financial means to continue their education. The state shall take necessary measures to rehabilitate those in need of special training so as to render such people useful to society.

Training, education, research, and study are the only activities that shall be pursued at institutions of training and education. These activities shall not be obstructed in any way.

No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education. Foreign languages to be taught in institutions of training and education and the rules to be followed by schools conducting training and education in a foreign language shall be determined by law. The provisions of international treaties are reserved.”

*and education, with the right to use their own language and to exercise their own religion freely therein.*⁷⁹⁷

Furthermore, Art 41 of the Treaty of Lausanne provides:

“As regards public instruction, the Turkish Government will grant in those towns and districts, where a considerable proportion of non-Moslem nationals are resident, adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Turkish nationals through the medium of their own language. This provision will not prevent the Turkish Government from making the teaching of the Turkish language obligatory in the said schools.

In towns and districts where there is a considerable proportion of Turkish nationals belonging to non-Moslem minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budgets for educational, religious, or charitable purposes.

The sums in question shall be paid to the qualified representatives of the establishments and institutions concerned.”

Since the Treaty of Lausanne is interpreted as only covering non-Muslim minorities and the Articles 40 and 41 of the treaty expressly refer to non-Muslim nationals, members of the Kurdish population may not rely on these guarantees.

Since Art 42 Para 9 only prohibits the teaching of any language other than Turkish as a mother tongue, one may assume that the teaching of minority languages as foreign languages would be possible. However, it is questionable whether such teaching as a foreign language is consistent with the aims envisaged by the European instruments for the protection of national minorities, because it does not recognize the minority language as an important aspect of the identity of persons belonging to the minority and as part of the cultural wealth of the country. For persons belonging to a minority with a different mother tongue, the minority language is not a foreign language.

With regard to Turkish students whose mother tongue is Turkish, teaching of the Kurdish language as a foreign language would appear permissible under the Turkish Constitution and would also be consistent with the aims and purposes of minority protection.

In accordance with the overall Turkish policy of suppressing any form of expression of minorities' identities and the importance accorded to language as a defining element of the Turkish nation, it has not been possible for Kurds to learn or teach their language

⁷⁹⁷ Art 40 of the Treaty of Lausanne.

even in private institutions.⁷⁹⁸ In recent times, however, some efforts have been made by the Turkish authorities with regard to the teaching of minority languages and the Kurdish language in particular. The overall ban on the public use of the Kurdish language has been lifted, and the Turkish Foreign Language Education and Teaching Law, which contained a prohibition on teaching any language other than their mother tongue to Turkish nationals was amended in 2002. In December 2003, a regulation entitled "*Teaching in Different Languages and Dialects Traditionally Used by Turkish Citizens in their Daily Lives*" came into force.⁷⁹⁹

In theory, it is now possible to learn different languages and dialects which are traditionally used by Turkish citizens in their daily lives, including the Kurdish language. Unfortunately, the amended laws and the regulation do not explicitly refer to minority languages and still contain restrictive clauses which may be used to restrict the teaching of minority languages like Kurdish. In particular, it is emphasized that such courses cannot be contrary to the fundamental principles of the Turkish Republic enshrined in the Constitution and the indivisible integrity of the State with its territory and nation.⁸⁰⁰ Once again this reflects the traditional, overall nationalist policy of the Turkish authorities and also corresponds to the text of Art 42 of the Turkish Constitution, which provides that teaching and training shall be conducted along the lines of the principles and reforms of Atatürk, and emphasizes the obligation of the individual to be loyal to the Constitution.

The new legislation nevertheless allowed private courses in Kurdish for the first time. Six private schools started teaching Kurdish (Kurmanji dialect) in Van, Batman and Sanliurfa in April 2004, in Diyarbakir and Adana in August 2004, and in Istanbul in October 2004.⁸⁰¹ However, these schools did not receive financial support from the Turkish State and were, in accordance with the applicable legislation, subject to restrictions concerning, among other things, the curriculum, the appointment of teachers, the timetable and the attendees. In particular, students needed to have completed basic education and therefore had to be older than 15.⁸⁰² A number of applications to establish language courses have been rejected by the authorities on the grounds that the curricula focus on culture and history and not on language teaching.⁸⁰³ In addition to the numerous restrictions set forth by law, the establishment of private Kurdish language courses was, in several instances, also impeded by the local

⁷⁹⁸ Compare: Yildiz/Muller (2008), 87.

⁷⁹⁹ Compare: European Commission: *Turkey 2004 Progress Report*, 49; ECRI: *Third Report on Turkey* (2004), Para 63.

⁸⁰⁰ Compare: Yildiz/Muller (2008), 88.

⁸⁰¹ European Commission against Racism and Intolerance: *Third Report on Turkey* (2004), Para 63.

⁸⁰² European Commission: *Turkey 2004 Progress Report*, 49.

⁸⁰³ Compare: Yildiz/Muller (2008), 88.

authorities, who were unwilling to implement the applicable legislation, imposing undue bureaucratic hurdles to organisations trying to set up Kurdish language courses.⁸⁰⁴

In the course of the year 2005, all existing courses teaching the Kurdish language were closed down by their owners. The decision to close the courses was mainly motivated by a lack of financial resources and the restrictions mentioned above. The owners claimed that there was only limited demand for such courses, mainly due to the fact that it was necessary to pay for them.⁸⁰⁵

While, at least in theory, the teaching of Kurdish is permitted in private institutions, the teaching of Kurdish in the state education system remains banned, as Art 42 of the Turkish Constitution has so far remained unchanged.⁸⁰⁶ Thus, children whose mother tongue is not Turkish still cannot learn their mother tongue in the public school system.⁸⁰⁷ As education in and of the Kurdish language may only be provided by private educational institutions and all private courses offering Kurdish were closed down in 2005, there are no opportunities to learn Kurdish in either the public or the private schooling system.⁸⁰⁸

Turkey has been encouraged by the European Commission against Racism and Intolerance (ECRI) to revise Art 42 of the Constitution which prohibits the teaching of any language other than Turkish as a mother tongue in State schools. At the same time, ECRI emphasizes the importance of ensuring that children whose mother tongue is not Turkish have sufficient opportunities to learn Turkish.⁸⁰⁹

While there have been some commendable efforts undertaken by Turkey to enable persons belonging to national minority to receive education in their mother tongue, further measures are needed in order to comply with the obligations under the European Instruments for the protection of national minorities.

Art 42 Para 9 of the Turkish Constitution, which prohibits the teaching of non-Turkish languages as a mother tongue should be revised. Education of and in minority languages should be provided in public schools in accordance with the stipulations of the Framework Convention for the Protection of National Minorities. To this end, the Turkish authorities should collect sufficient data to identify those regions where there is sufficient demand for education in the Kurdish language in order to provide such education where required. In order to be able to offer teaching in and of Kurdish, the necessary textbooks should be developed, and due care should be taken in the

⁸⁰⁴ Compare: Yildiz/Muller (2008), 88.

⁸⁰⁵ European Commission: *Turkey 2005 Progress Report*, 37.

⁸⁰⁶ Compare: Yildiz/Muller (2008), 88.

⁸⁰⁷ ECRI: *Third Report on Turkey* (2004), Para 63.

⁸⁰⁸ Compare: Yildiz/Muller (2008), 88; European Commission: *Turkey 2010 Progress Report*, 33.

⁸⁰⁹ ECRI: *Third Report on Turkey* (2004), Para 63 and 67.

recruitment and training of teachers of the Kurdish language. Education in and of the Kurdish language should not only be catered for at primary level, but the Turkish authorities should also foster minority language education at higher levels, including at the university.

In addition to the introduction of the Kurdish language into the public schooling system, attention should be paid to Kurdish education in private educational facilities. Undue restrictions should be removed from legislation, and the applicable laws should be appropriately implemented in practice. In view of the fact that financial difficulties constitute the major obstacle for the establishment and maintenance of private educational facilities for national minorities in Turkey, the Turkish authorities should consider public funding or try to identify alternative measures for the financing of such educational institutions in consultation with Kurdish representatives.

These measures are without prejudice to the obligation of Turkish pupils, whether of Turkish or Kurdish origin, to learn the official Turkish language in school. As long as the promotion of the Turkish language among students of Kurdish origin does not affect the opportunity to learn their Kurdish mother tongue, the learning of the Turkish language must be seen as a chance for better integration into the Turkish society.

4.7.2.2 Discriminatory Language in Schoolbooks and in the Education System

The European Commission noted in its 2004 Progress Report on Turkey that Turkish history books for the school year 2003/2004 still portrayed minorities as untrustworthy, traitorous and harmful to the State. The Commission pointed out that the authorities had started to review discriminatory language in schoolbooks and that in March 2004, a regulation had been issued in which it was stipulated that school textbooks should not discriminate on the basis of race, religion, gender, language, ethnicity, philosophical belief, or religion.⁸¹⁰

In its 2005 Progress Report on Turkey, however, the European Commission judged that, despite the work of the National Committee of Education on the review of discriminatory language in schoolbooks, which had been ongoing for two years at the time of the Report, the history books for the school year 2005/06 still portrayed minorities with the same negative attributes. The Commission mentioned that the History Foundation, which is assisting the Committee, had issued a number of recommendations calling on the Ministry of Education *inter alia* to amend textbooks such that they promote an image of a pluralist society in which diversity is perceived as

⁸¹⁰ European Commission: *Turkey 2004 Progress Report*, 48.

an asset, not a threat. The Commission also referred to a recent report on Turkey issued by ECRI in which the Turkish authorities are encouraged to “...*revise school curricula and textbooks ... in order to heighten pupils’ awareness of the advantages of multicultural society*”.⁸¹¹

In its “*Third report on Turkey*”, ECRI also noted that school textbooks may still convey negative views of some minority groups, and it encouraged the Turkish authorities to supervise the quality of school textbooks, “...*which must not contain any derogatory or insulting references to any minority group whatsoever*”.⁸¹²

However, the review process seems to have produced rather limited results. In 2006, the European Commission had to note in its Progress Report on Turkey that Turkey had made limited progress concerning education, that the 2005 recommendations of ECRI on school curricula and textbooks as well as on the functioning of minority schools remained valid, and that further efforts were needed to remove discriminatory language from textbooks.⁸¹³ This last statement was re-emphasized in the European Commission’s 2007 Progress Report on Turkey.⁸¹⁴

The promotion of mutual understanding and tolerance is, on the one hand, one of the aims inherent in the protection of persons belonging to national minorities. On the other hand, such promotion must also be seen as the principal means by which adequate protection and promotion of national minorities may be realised. Where young people are confronted with negative stereotypes and derogatory attributes of minority groups, they will confront persons belonging to national minorities with mistrust and intolerance, hampering all other legislative and administrative efforts made by States and international bodies towards the protection of national minorities. The avoidance of such negative attributes and a correct and truthful representation of the identities, basic characteristics and historical role of national minorities in school curricula and school textbooks cannot be over-estimated.

Accordingly, the Turkish authorities should be further encouraged to remove any negative stereotypes from the education system, and to promote mutual understanding of minorities and the majority in school. In view of the violent conflict which was caused by the inappropriate treatment of the Kurdish minority, the fostering of an open-minded, tolerant approach towards the Kurdish population and the specific characteristics of their identity in Turkish education system seems imperative to show younger generations that there is not necessarily a link between a certain group of the population and a specific political problem or conflict.

⁸¹¹ European Commission: *Turkey 2005 Progress Report*, 36.

⁸¹² ECRI: *Third Report on Turkey* (2004), Para 38.

⁸¹³ European Commission: *Turkey 2006 Progress Report*, 21.

⁸¹⁴ European Commission: *Turkey 2007 Progress Report*, 21.

In order to be able to foster the knowledge of the characteristics and history of the Kurdish minority, appropriate scientific research should be promoted in Turkey. Such research would not only serve the self-awareness and the promotion of the Kurdish population, but would certainly also contribute to the cultural wealth of the Turkish population.

The Turkish authorities should take care that public education ensures contact between the Turkish population and Turkish citizens belonging to the Kurdish minority. The importance of contacts and relationships across communal frontiers and between various ethnic groups for the creation of a lasting climate of mutual understanding and tolerance has already been indicated above. *“In particular in countries that have experienced conflict or are experiencing interethnic tension or aggressive nationalism, the need to ensure contact, dialogue and integration is a compelling priority.”*⁸¹⁵ Fostering contacts and dialogue between Turkish and Kurdish students in order to learn from and about each other should therefore be seen by the Turkish authorities as a chance to overcome some of the difficulties between Turks and Kurds that have caused so much harm to the whole Turkish population.

4.7.2.3 Access to Education

The existence of basic data on the different groups of the population and the needs and aspirations of these groups is a precondition for any active educational policy.⁸¹⁶ Without such data, it is impossible to identify problematic areas in the field of minority education. Consequently, the Turkish authorities should be encouraged to collect such data and identify the needs and aspirations of the Kurdish population in order to engage in an adequate educational policy for the Kurdish minority.

Art 12 (3) FCNM requires States to *“promote equal opportunities for access to education at all levels”*. It must be emphasized in this context, that the refusal of the State to provide education in the Kurdish language may result in students of Kurdish origin being disadvantaged in terms of access to education. If children have only been taught and have primarily, or exclusively, used Kurdish at home, they may have difficulties at school when they are taught Turkish for the first time and are also taught

⁸¹⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 18.

⁸¹⁶ Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on Education under the Framework Convention for the Protection of National Minorities*, ACFFC/25DOC(2006)002, (2006), 10.

all other subjects of the curriculum in Turkish.⁸¹⁷ Such difficulties may prevent students of Kurdish origin reaching higher levels of education.

Furthermore, one must bear in mind that the south-eastern provinces, which are the traditional homeland of the Kurds in Turkey, constitute the least developed in economic terms, and poorest regions of Turkey. This situation may force children of Kurdish origin to abandon school rather early in order to be able to work and support their families financially.

Since the obligation to promote equal access to education must be interpreted in an active manner, it is not sufficient for the Turkish State to only provide schools which teach exclusively in the Turkish language. Instead, the authorities should adopt appropriate measures to enable children of Kurdish origin, as well as children with other non-Turkish ethnic backgrounds, to go to school and to reach higher levels of education. If Kurdish children have equal opportunities for access to education, they are provided with better opportunities to assert both their Kurdish as well as their Turkish identity, which may result in the ability to integrate better into the Turkish State, its culture and its society, without being forced to deny their Kurdish origin, language and cultural heritage. Furthermore, better education will result in better professional chances, which may lead to better economic conditions for the Kurdish parts of the population.

Thus, the promotion of equal access to education for Kurdish people not only assists the Kurdish population and entails compliance with the European instruments for the protection of minorities, but it is one important step for the Turkish State towards creating a multicultural pluralist society, based on the principles of tolerance and inter-cultural dialogue, and it may also assist in countering economic problems in certain regions of the State.

4.8 Freedom of Assembly and Freedom of Association

4.8.1 The Right to Freedom of Assembly and Freedom of Association of Persons Belonging to a National Minority

4.8.1.1 Freedom of Assembly and Freedom of Association

Like the right to freedom of expression, the right to freedom of assembly and the right to freedom of association are basic human rights that are particularly important for persons belonging to a national minority to preserve their identity. These freedoms are necessary in order that persons belonging to a minority may unite and associate to

⁸¹⁷ Compare: Yildiz/Muller (2008), 88.

express and protect their common characteristics and interests, and the protection of these freedoms is essential for persons belonging to a national minority to be able to enjoy their rights individually as well as in community with others.⁸¹⁸ More particularly, freedom of association is a prerequisite for the exercise of certain other minority rights, such as the right to create private media (Art 9 FCNM), the right to have private educational and training establishments (Art 13 FCNM), or the right to effective participation in public affairs (Art 15 FCNM).⁸¹⁹ Accordingly, European instruments relating to the protection of minorities specifically provide for the protection of freedom of assembly and freedom of association of persons belonging to national minorities.

Art 7 FCNM provides:

“The Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.”

The specific importance of freedom of association for national minorities is also acknowledged by the Copenhagen Document which provides that persons belonging to national minorities *“...have the right to establish and maintain their own educational, cultural and religious institutions, organizations or associations”*.⁸²⁰

According to Art 23 FCNM⁸²¹, freedom of assembly and association in the context of the Framework Convention must be understood as in conformity to the right to freedom of assembly and the right to freedom of association as protected by Art 11 ECHR:⁸²²

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

*2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.”*⁸²³

⁸¹⁸ Compare: Art 3 (2) FCNM; Machnyikova (2006), 204.

⁸¹⁹ Compare: Machnyikova (2006), 205.

⁸²⁰ Compare: Art 2 Para 4 of the UN Declaration on the Rights of Persons Belonging to National or, Ethnic, Religious and Linguistic Minorities: *“Persons belonging to minorities have the right to establish and maintain their own associations.”*

⁸²¹ Art 23 FCNM: *„The rights and freedoms flowing from the principles enshrined in the present framework Convention, in so far as they are subject of a corresponding provision in the Convention for the Protection of Human Rights and Fundamental Freedoms or in the Protocols thereto, shall be understood so as to conform to the latter provisions.”*

⁸²² Compare: Machnyikova (2006), 198;

⁸²³ Art 11 ECHR.

In view of the fact that the ECHR does not specifically deal with the protection of minorities, the standards provided by the ECHR and the interpretation of the ECtHR only provide minimum standards for the interpretation of the obligations stemming from the instruments for the protection of national minorities, in particular Art 7 FCNM. Under the FCNM, States are obliged to respect and fulfil the rights contained in Art 7, taking account of the particular circumstances of the minorities. The implementation of these obligations requires not only respect for of these rights and freedoms, but rather the facilitation of their exercise and enjoyment by persons belonging to national minorities through the provision of an adequate legislative and institutional framework.⁸²⁴

Furthermore, the Explanatory Report to the FCNM clarifies that Art 7 FCNM may imply positive obligations for the State-Parties to protect the freedoms enumerated therein against violations which do not emanate from the State.⁸²⁵ Thus, the FCNM ensures horizontal protection of associations and assemblies of national minorities against acts of third parties aiming at the infringement of the enjoyment of these rights. Such protection may be of particular importance in States with a particular “nationalist” tradition, where national minorities are likely to face hostile acts on the part of persons belonging to the majority who perceive associations and assemblies of national minorities as incompatible with their nationalist views.

Under the FCNM, States are only allowed to impose those limitations on the rights and freedoms enshrined in the FCNM which are provided for in equivalent provisions of other international instruments, in particular in the ECHR.⁸²⁶ Consequently, States are only allowed to limit or restrict the right to freedom of association and freedom of assembly of persons belonging to national minorities in accordance with Art 11 (2) ECHR. Any interference with the right to freedom of association or freedom of assembly thus must be in accordance with, or prescribed by law, the aim of the limitation must be legitimate, in that it corresponds to one of the aims enumerated in Para 2 of Art 11 ECHR, and the limitation must be necessary in a democratic society (the interference must be proportional in securing the legitimate aim).⁸²⁷ “*Necessary in a democratic society*” means that the interference responds to “*a pressing social need*”, while the proportionality principle requires a check whether “*the interests of society as*

⁸²⁴ Compare: Machnyikova (2006), 199.

⁸²⁵ Explanatory Report, Para 52.

⁸²⁶ Art 19 FCNM: „*The Parties undertake to respect and implement the principles enshrined in the present framework Convention making, where necessary, only those limitations, restrictions or derogations which are provided for in international legal instruments, in particular the Convention for the Protection of Human Rights and Fundamental Freedoms, in so far as they are relevant to the rights and freedoms flowing from the said principles.*”

⁸²⁷ Compare: Ovey/White (2006), 222.

a whole override the interests of the individual".⁸²⁸ In the assessment of the necessity of a limitation, States are accorded a certain margin of appreciation, which allows them to consider the individual circumstances, but they are obliged to take due care not to interfere with the principles characterizing a "*democratic society*".⁸²⁹ In general, the ECtHR adopts a narrow interpretation when dealing with exceptions to rights enshrined in the ECHR.⁸³⁰ More particularly, the ECtHR has highlighted the importance of freedom of association and the need for the rigorous supervision of limitations to this right when it has affirmed "*...the direct relationship between democracy, pluralism and the freedom of association and has established the principle that only convincing and compelling reasons can justify restrictions on that freedom.*"⁸³¹

4.8.1.2 The Right to Freedom of Assembly and National Minorities

The right to freedom of assembly under Art 11 ECHR only covers peaceful assemblies.⁸³² A system of prior notification is acceptable under Art 11 ECHR, and States are also allowed to require prior information on the object of the association organizing the assembly in order to assess whether it rejects democratic principles or incites hatred or violence.⁸³³ The prohibition of an assembly requires specific grounds of justification in accordance with Para 2 of Art 11 ECHR. A systematic ban of assemblies of certain groups or organisations, such as, for instance, of assemblies of a national minority, is not in accordance with Art 11 ECHR.

The right to freedom of assembly is closely associated with the right to freedom of expression under Art 10 ECHR and will frequently need to be considered in light of the latter.⁸³⁴ The expression of politically sensitive opinions, such as calls for autonomy or even separatist ideas, does not automatically justify the prohibition of an assembly, as long as they are expressed in the context of a peaceful assembly and do not incite hatred or the use of violent measures.⁸³⁵ Although the promotion of such opinions by national minorities may be considered a threat to national security and territorial integrity under Art 11 (2) ECHR, these elements must not be used to restrict the rights

⁸²⁸ Ovey/White (2006), 222 and 232.

⁸²⁹ Compare: Ovey/White (2006), 233; see chapter on freedom of expression above.

⁸³⁰ Compare: Ovey/White (2006), 222; Logemann (2004), 190.

⁸³¹ *Gorzeliak and Others v. Poland*, App. 44158/98, Judgement (Grand Chamber) of 17.02.2004, Para 88; compare: *Socialist Party and others vs. Turkey*, App. 21237/93, Judgement of 25 May 1998; *United Communist Party of Turkey and others v. Turkey*, App. 19392/92, Judgement of 30 January 1998.

⁸³² Frowein/Peukert (1996), Art 11 Recital 4.

⁸³³ Compare: *Freedom and Democratic Party (ÖZDEP) v. Turkey*, App. 23885/94, ECHR 1999-VIII; Machnyikova (2006), 199.

⁸³⁴ Ovey/White (2006), 335.

⁸³⁵ Compare chapter on freedom of expression above.

of national minorities to express their opinions by use of democratic means in order to pursue their political goals. The prohibition of an assembly where such controversial opinions are expressed by persons belonging to a national minority in a peaceful way will usually not be “*necessary in a democratic society*”.

The right to freedom of assembly may also include the right to be protected against interference from private parties. This has been acknowledged by the ECtHR in the case of *Plattform “Ärzte für das Leben” v. Austria*, where the Court held that “...*effective freedom of assembly cannot...be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11...Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.*”⁸³⁶ The idea of positive obligations of States to protect assemblies from acts by third parties has also been introduced into the system of protection of the Framework Convention.⁸³⁷ Thus, States may be obliged to protect an assembly of persons belonging to a national minority against acts by other individuals, such as (violent) counter-demonstrations by nationalist groups or associations.

As in the case of all other minority rights, States must take due care that persons belonging to national minorities are not directly or indirectly discriminated against in the exercise of their right to freedom of assembly.⁸³⁸

Most European States that are parties to the Framework Convention seem to fulfil their obligations under Art 7 FCNM in relation to the right to freedom of assembly, as the Advisory Committee has rarely issued any specific comments on their implementation.

4.8.1.3 The Right to Freedom of Association and National Minorities

The right to freedom of association protects the right to choose whether or not to form and join associations for different purposes. The scope of legitimate purposes is considered to be broad, covering different sorts of organisations, including political parties.⁸³⁹

Art 11 ECHR requires that states must provide the necessary framework in order that citizens are able to form entities through which they may act collectively in a field of mutual interest.⁸⁴⁰ Freedom of Association not only covers the formation of an

⁸³⁶ *Plattform “Ärzte für das Leben” v. Austria*, Judgement of 21 June 1988, Series A no. 139.

⁸³⁷ Explanatory Report, Para 52.

⁸³⁸ Art 14 and Art 11 ECHR; Art 4 FCNM.

⁸³⁹ Compare: Machnyikova (2006), 206; Ovey/White (2006), 336-337; the right to form and join political parties of national minorities will be discussed in the chapter on political participation.

⁸⁴⁰ Frowein/Peukert (1996), Art 11 Recital 6.

association, but also the activities involved in the pursuance of the purposes of such associations.⁸⁴¹ Art 14 ECHR, in conjunction with Art 11 ECHR, requires that associations of national minorities are subject to the same conditions – in particular in respect of the legal recognition of associations – as other associations with comparable goals. The importance of the rights enshrined in Article 11 ECHR suggests that states only have a narrow margin of appreciation regarding the limitations that are allowed according to Art 11 (2) ECHR.

Under the regime of the ECHR, states must allow associations that promote the identity of a national minority, or that advocate minority rights. In the case of *Sidiropoulos & Others v. Greece*⁸⁴², the ECtHR held that the authorities' refusal to register an association established by a minority with the aim of promoting the culture of that minority constituted a breach of Art 11 ECHR. The Court emphasised that democratic societies have to tolerate the discussion of a wide range of opinions including those opposed to officially sanctioned positions. Since it was not established that the association in question fostered separatist intentions by the use of violent means, the refusal of the authorities to register the association was an interference with its members' freedom of association which was not justified. The establishment of an association with the purpose of promoting the interests and the identity of a minority does not in itself constitute a threat to national security. It can be concluded, on the basis of this judgement, that the refusal of states to accept associations of groups based on arguments such as that the group is not considered to be a national minority, or that the promotion of the minority's culture poses a threat to the territorial integrity or national security, may thus violate the obligations of states, not only under the FCNM, but also under Art 11 ECHR.

In the case of *Gorzelik and Others v. Poland*⁸⁴³, the ECtHR has further commented on the role of associations of national minorities in a democratic society and the importance of freedom of association for persons belonging to national minorities: "*While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural*

⁸⁴¹ Frowein/Peukert (1996), Art 11 Recital 7.

⁸⁴² *Sidiropoulos & Others v. Greece*, App. 26695/95, Judgement of 10 July 1998, Para 40-47; Reid (1998), 228.

⁸⁴³ *Gorzelik and Others v. Poland*, App. 44158/98, Judgement (Grand Chamber) of 17.02.2004.

identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively. **The Court recognises that freedom of association is particularly important for persons belonging to minorities, including national and ethnic minorities, and that, as laid down in the preamble to the Council of Europe Framework Convention, ‘a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity’.** Indeed, forming an association in order to express and promote its identity may be instrumental in helping a minority to preserve and uphold its rights.”⁸⁴⁴

Freedom of association is also a necessary prerequisite for persons belonging to national minorities to be able to participate in public affairs. As political parties are associations protected by Art 11 ECHR, the right to freedom of association also guarantees the right of national minorities to form and join their own political parties. This aspect of the right will be discussed in detail in Chapter 4.9 on political participation below. However, it should be mentioned at this point that the ECtHR has clarified that Art 11 ECHR not only protects the individual’s right to form and join associations including political parties, but that it also covers the activities of the association once it is established. In the case of *United Communist Party of Turkey and Others v. Turkey*⁸⁴⁵, the Court held that freedom of association not only concerns the formation of a party, but also guarantees the right of the party to carry out its political activities. The dissolution of a party or an association must therefore satisfy the requirements of Art 11 (2) ECHR if it is not to violate the right to freedom of association under Art 11 (1) ECHR.

The protection of the communal life of persons belonging to national minorities is further strengthened by Art 17 (2) FCNM: “*The Parties undertake not to interfere with the right of persons belonging to national minorities to participate in the activities of non-governmental organisations, both at the national and international levels.*”

⁸⁴⁴ *Gorzelik and Others v. Poland*, App. 44158/98, Judgement (Grand Chamber) of 17.02.2004, Para 92-93 (emphasis added).

⁸⁴⁵ *United Communist Party of Turkey and others v. Turkey*, App. 19392/92, Judgement of 30 January 1998.

In a similar way, paragraph 32.6 of the Copenhagen Document refers to the right “...to establish and maintain organisations or associations within their country and to participate in international non-governmental organizations.”

The activities of NGOs may be very important for the identity of a national minority as well as for society as a whole, but despite their possible positive role for the State, they are likely to encounter hostilities and forms of hindrance on the part of the latter.⁸⁴⁶ Art 17 (2) FCNM, as well as the relevant paragraph in the Copenhagen Document, highlight the importance of NGOs for national minorities through recognition of the right of persons belonging to national minorities to participate in the activities of these organisations. As such, these provisions reinforce the guarantees of freedom of association and assembly.

The provision is also important in that it introduces an international dimension to the right to freedom of association of persons belonging to national minorities. This aspect is particularly important for trans-frontier or dispersed minorities, and it is also relevant for the monitoring of states' compliance with international instruments by international NGOs.⁸⁴⁷

4.8.2 The Framework for Kurdish Assemblies and Associations in Turkey

The right to freedom of assembly and association is guaranteed by Art 33 and Art 34 of the Turkish Constitution.⁸⁴⁸

Art 33 of the Turkish Constitution (as amended on October 17, 2001) provides:

“Everyone has the right to form associations, or become a member of an association, or withdraw from membership without prior permission.

No one shall be compelled to become or remain a member of an association.

Freedom of association may only be restricted by law on the grounds of protecting national security and public order, or prevention of crime commitment, or protecting public morals, public health.

The formalities, conditions, and procedures governing the exercise of freedom of association shall be prescribed by law.

Associations may be dissolved or suspended from activity by the decision of a judge in cases prescribed by law. In cases where delay endangers national security or public

⁸⁴⁶ Jackson-Preece, Jennifer: “Article 17”, in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 500.

⁸⁴⁷ Jackson-Preece (2006), 501.

⁸⁴⁸ The right to form political parties is provided for in Art 68 of the Turkish Constitution; compare chapter on political participation.

order and in cases where it is necessary to prevent the perpetration or the continuation of a crime or to effect apprehension, an authority designated by law may be vested with power to suspend the association from activity. The decision of this authority shall be submitted for the approval of the judge in charge within twenty-four hours. The judge shall announce his decision within forty-eight hours, otherwise this administrative decision shall be annulled automatically.

Provisions of the first paragraph shall not prevent imposition of restrictions on the rights of armed forces and security forces officials and civil servants to the extent that the duties of civil servants so require.

The provisions of this article are also applicable to foundations.”

Art 34 of the Turkish Constitution (as amended on October 17, 2001) provides:

“Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.

The right to hold meetings and demonstration marches shall only be restricted by law on the grounds of national security, and public order, or prevention of crime commitment, public health and public morals or for the protection of the rights and freedoms of others.

The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law.”

When considering the text of the constitutional guarantees of freedom of assembly and association, one must conclude that in terms of the aims which justify the restriction of these freedoms, the text of the constitutional provisions is basically in line with the requirements set out in Art 11 ECHR. Nothing in the text of the Articles indicates that restrictions on the right to freedom of association and assembly are permitted specifically in relation to persons belonging to national minorities.

The Turkish law on associations originally contained provisions which restricted the formation and the activities of associations of national minorities. The old Art 5 of the Law on Associations prohibited associations from pursuing the destruction of the indivisibility of the Turkish State and Nation, from having as their purpose propagation of the claim that minorities based on class, racial, linguistic, religious, or regional difference exist on the territory of the Republic of Turkey, and from creating minorities by protecting, promoting, upholding or spreading any culture and language other than

the Turkish one.⁸⁴⁹ Thus, associations whose aim was the promotion of minority culture or minority languages were, as such, prohibited.⁸⁵⁰

The Turkish Law on Associations was amended in 2004 and these explicit prohibitions and restrictions were partly eased. These legal reforms increased the scope for associations of national minorities to establish their own cultural associations, and the law allowed for the use of minority languages in unofficial correspondence. However, the Law on Associations continued to prohibit associations whose purpose was to “create” forms of discrimination on the grounds of race, religion, sect or region or “create minorities” on these grounds, and destroy the unitary structure of the Republic of Turkey. As ECRI pointed out, it would seem difficult to distinguish between associations which “claim” that minorities exist (previous wording) and those whose purpose is to “create” minorities (actual wording).⁸⁵¹ Furthermore, the broad interpretation of the prohibition of purposes protected by the constitution still puts pressure on Kurdish minority associations, as advocating peaceful solutions to the situation of the Kurds in Turkey or promoting the Kurdish language has been, and still could be, classified as a threat to national unity and security.⁸⁵² What is more, the law prescribes that associations must notify the authorities before they may accept funds received from foreign countries, and, according to reports, associations have often faced difficulties when applying for registration.⁸⁵³ Despite these findings, the European Commission concluded already in 2009 that overall, “*the legal framework on associations is broadly in line with European standards*”, admitting, however, that considerable progress needs to be made as regards its implementation, since associations still face disproportionate scrutiny of their activities, which in some cases has led to judicial proceedings.⁸⁵⁴

A particular problem with regard to the right to freedom of association is the formation and prohibition of Kurdish political parties in Turkey. These issues will be dealt with in the chapter on political participation, but it is worth noting at this point that the European Commission unambiguously criticized in this respect that “*the case of the political party DTP confirmed the need for changes to the legal framework, including the Constitution.*”⁸⁵⁵

⁸⁴⁹ ECRI: *Third report on Turkey* (2004), Para 17.

⁸⁵⁰ Pan, Christoph: „*Minderheitenrechte in der Türkei*“, in: Pan, Christoph/Pfeil, Beate-Sibylle (Eds.): *Minderheitenrechte in Europa, Handbuch der Europäischen Volksgruppen* Vol. 2, 2nd Edition, Wien: Springer Wien New York 2006, 563.

⁸⁵¹ ECRI: *Third report on Turkey* (2004), Para 17.

⁸⁵² Compare: Pan (2006), 563; MRG-Report (2007), 23.

⁸⁵³ Compare: Yildiz/Müller (2008) 63-64.

⁸⁵⁴ European Commission: *Turkey 2009 Progress Report*, 20.

⁸⁵⁵ European Commission: *Turkey 2010 Progress Report*, 21.

The Turkish legal framework for freedom of assembly has been qualified by the European Commission as being in line with European standards.⁸⁵⁶ In particular the legal reforms which were introduced in 2002 have limited the authorities' restrictive powers.⁸⁵⁷ However, certain problems seem to persist in practice.

In particular, assemblies of persons belonging to the Kurdish population are often faced with undue limitations and excessive use of force on the part of the police.⁸⁵⁸ The Kurdish "Newroz" celebrations in spring and demonstrations in the south-east of the country related to the Kurdish issue have often been marred by violence, regularly resulting in incidents of disproportionate police violence. A serious problem in this respect seems to be the fact that judicial and administrative proceedings against members of the security forces are often not carried out effectively.⁸⁵⁹ Furthermore, investigation and videotaping of the activities of NGOs by the authorities are reason for concern.⁸⁶⁰

In view of the importance accorded to freedom of assembly and freedom of association in democratic societies in the case law of the ECtHR, it appears questionable whether the Turkish legislation and its practical application by the Turkish authorities does, in fact, correspond to European standards. The ability to form associations is essential for persons belonging to national minorities in order to preserve and promote the basic features of their identity and to enjoy other rights such as freedom of expression, or the opportunity to create their own media or educational facilities. Expressions of the Kurdish identity have traditionally been considered as a threat by the Turkish State, and the current legislation on freedom of association still seems to facilitate the restrictions imposed on Kurdish cultural organisations and NGOs whose aim is the promotion of human rights and the cultural rights of the Kurdish population. With regard to freedom of association, police violence and videotaping specifically targeting Kurdish assemblies seem hardly compatible with a European conception of democracy. Overall, one must, therefore, conclude that the Turkish authorities need to undertake further efforts to effectively guarantee freedom of association and freedom of assembly to persons belonging to the Kurdish minority.

⁸⁵⁶ European Commission: *Turkey 2008 Progress Report*, 16.

⁸⁵⁷ MR-Report (2007), 24.

⁸⁵⁸ European Commission: *Turkey 2009 Progress Report*, 19.

⁸⁵⁹ Compare: European Commission: *Turkey 2008 Progress Report*, 16; *Turkey 2009 Progress Report*, 19; *Turkey 2010 Progress Report*, 21.

⁸⁶⁰ Compare: European Commission: *Turkey 2008 Progress Report*, 17; *Turkey 2009 Progress Report*, 19.

4.9 Political Parties, Political Participation and Participation in Public Life

4.9.1 Introduction

The right of all segments of society to full and effective participation in the process of democratic decision making is inherent to our view of a modern, democratic and constitutional State.⁸⁶¹ While Art 2 ICCPR in conjunction with Art 26 ICCPR already provides the right of everyone to take part in public affairs, to vote and to be elected without discrimination on grounds such as race, colour, language or religion, the European instruments for the protection of national minorities go still further, beyond this standard, and contain further obligations for States regarding political participation of national minorities and their participation in public life.

The Copenhagen Document stipulates that the “...*participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and the promotion of the identity of such minorities.*”

Within the framework of the OSCE, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, which have been elaborated by numerous international experts on the protection of human rights and minority rights, provide further specification of the content of the right to effective participation. The Lund Recommendations emphasize that “*effective participation of national minorities in public life is an essential component of a peaceful and democratic society*”, specifying that “*experience in Europe and elsewhere has shown that, in order to promote such participation, governments often need to establish specific arrangements for national minorities*”.⁸⁶²

Finally, Art 15 FCNM contains a legally binding obligation for the contracting states in respect of effective participation of national minorities:

“*The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.*”

WELLER has argued that Art 15 FCNM is a key and foundational provision as it represents a vision for governance and life in modern and diverse societies. In addition to the requirements of special protection from discrimination and prosecution, as well

⁸⁶¹ Weller, Marc: “Article 15” in: Weller, Marc (Ed): *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, Oxford: Oxford University Press 2006, 430.

⁸⁶² Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note (1999), Para 1.

as of the promotion of the minority's identity, Art 15 FCNM adds the element of genuine integration and co-governance, as "*...the right to full and effective participation in public affairs and in cultural, social and economic life grants access to the state and the society it serves in all its aspects.*"⁸⁶³

According to the Explanatory Report, Art 15 FCNM aims, above all, to encourage real equality between persons belonging to national minorities and those forming part of the majority.⁸⁶⁴ Consequently, one can say that Art 15 FCNM, like other instruments for the protection of national minorities, is consistent with the idea that, since democracy implies the rule of the majority, it is important that non-dominant groups feel represented in the processes of democratic decision-making, especially in spheres particularly affecting them.

Art 15 FCNM is phrased in very general terms, making it difficult to deduce the exact content of the provision's obligations. However, state parties have reported quite extensively on the implementation of this article and the Advisory Committee Opinions and the Explanatory Report also provide useful guidance. Additionally, certain aspects also fall within the scope of other international legal instruments, and there has been considerable legal research by scholars, which helps to identify the most important requirements for the promotion of effective participation of national minorities in public life.

It, nevertheless, must be admitted that, as in relation to other minority rights, it is very difficult to assess "standards" in this field. There are numerous ways in which a state can design its constitutional system with regard to the political participation of its citizens without depriving it of its democratic characteristics, and international law and international monitoring bodies seem to accord states a wide margin of appreciation in this regard. Some constitutional designs may facilitate the participation of minority groups, whereas others may only put persons belonging to national minorities on an equal footing with persons belonging to the majority, which may – at least in combination with other legal provisions – sometimes adversely affect the ability of minority groups to enjoy political participation.

The aim of this chapter is thus to show to what extent certain constitutional designs and legal provisions hinder or prevent political participation of minority groups in a manner incompatible with European instruments for the protection of national minorities, and to give an overview of possible ways to facilitate and promote effective participation in public affairs.

⁸⁶³ Weller (2006), 430.

⁸⁶⁴ Explanatory Report, Para 80.

4.9.2 The Right to Form and Join Political Parties

4.9.2.1 European Standards

The right of every person to form and to join political parties is guaranteed through the right to freedom of association under Art 11 ECHR. Restrictions of this right are only permissible under the conditions of Para 2 of the Article. In the case of the *United Communist Party of Turkey and others v. Turkey*⁸⁶⁵ the ECtHR has not only held that political parties fall within the scope of Art 11 ECHR, but that they are, in fact, entitled to a high level of protection because of their important role in any democracy.⁸⁶⁶

*“Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The Court has already held that such scrutiny was necessary in a case concerning a Member of Parliament who had been convicted of proffering insults...; such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.”*⁸⁶⁷

Besides its importance for the interpretation of Art 11 ECHR and its application on political parties, this case is also of particular relevance in relation to the situation of political parties representing Kurdish interests in Turkey, because the ECtHR found that references in the Communist Party’s constitution to the “*Kurdish nation*”, perceived by the Turkish government as a threat to the territorial integrity of the Turkish State, did not justify the dissolution of the party. The court argued that the dissolution was not justified, because the party had advocated a political rather than a violent solution to the Kurdish question: *“The Court considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find,*

⁸⁶⁵ *United Communist Party of Turkey and others v. Turkey*, App. 19392/92 (133/1996/752/951), Judgement (Grand Chamber) of 30 January 1998.

⁸⁶⁶ Compare: Ovey/White (2006), 337.

⁸⁶⁷ *United Communist Party of Turkey and others v. Turkey*, App. 19392/92 (133/1996/752/951), Judgement (Grand Chamber) of 30 January 1998, Para 46.

according to democratic rules, solutions capable of satisfying everyone concerned.”⁸⁶⁸
The dissolution of the party was therefore disproportionate and violated Art 11 ECHR.⁸⁶⁹

Further guidance as to the interpretation of Art 11 in relation to political parties in general, and the ECtHR’s assessment of the Turkish tradition of dissolving pro-Kurdish parties in particular, can be found in the case of the *Socialist Party and others vs. Turkey*.⁸⁷⁰ The Socialist Party was dissolved by the Turkish Constitutional Court because one of its leading members, the applicant Mr Perinçek, had issued various publications in which he had, inter alia, distinguished two nations – the Kurdish nation and the Turkish nation – and had called for constitutional changes to the benefit of the Kurds. According to the Constitutional Court, through these statements the party officials had advocated the creation of minorities within Turkey and, ultimately, the establishment of a Kurdish-Turkish federation, to the detriment of the unity of the Turkish nation and the territorial integrity of the State. It was argued by the Constitutional Court that the Socialist Party was ideologically opposed to the nationalism of Atatürk, which was the most fundamental principle underpinning the Republic of Turkey. Although different methods had been used, the aim of the Socialist Party’s political activity was similar to that of terrorist organisations. As the Socialist Party had promoted separatism and revolt its dissolution was considered to be justified by the Turkish Constitutional Court.⁸⁷¹

In its assessment of the case, the ECtHR first referred to dialogue and public debate as principal characteristics of democracy (as in the case of the *United Communist Party of Turkey and Others* judgement cited above). The Court then analysed Mr Perinçek’s statements and judged that it found nothing in them that could be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles. The ECtHR stated that the applicant had, on the contrary, stressed on a number of occasions the need to achieve the proposed political reform in accordance with democratic rules, through the ballot box and by holding referenda, at the same time speaking against a former culture of advocating violence and the use of force to solve

⁸⁶⁸ *United Communist Party of Turkey and others v. Turkey*, App. 19392/92 (133/1996/752/951), Judgement (Grand Chamber) of 30 January 1998, Para 57.

⁸⁶⁹ *United Communist Party of Turkey and others v. Turkey*, App. 19392/92 (133/1996/752/951), Judgement (Grand Chamber) of 30 January 1998, Para 55-57; compare: Ovey/White (2006), 338; Similar conclusions in relation to the dissolution of Turkish political parties were reached by the ECtHR in the following cases: *Socialist Party and others vs. Turkey*, App. 21237/93 (20/1997/804/1007), Judgement (Grand Chamber) of 25 May 1998; *Freedom and Democracy Party vs. Turkey*, App. 23885/94, Judgement of 8 December 1999.

⁸⁷⁰ *Socialist Party and others vs. Turkey*, App. 21237/93 (20/1997/804/1007), Judgement (Grand Chamber) of 25 May 1998.

⁸⁷¹ *Socialist Party and others vs. Turkey*, App. 21237/93 (20/1997/804/1007), Judgement (Grand Chamber) of 25 May 1998, Para 43.

problems between nations in society. While the Court accepted that these phrases had been directed at citizens of Kurdish origin, constituting an invitation to rally together and assert certain political claims, it ruled that it found no trace of any incitement to use violence or infringe the rules of democracy, and that these statements were no different from those made by other political groups that were active in other countries of the Council of Europe.⁸⁷²

The ECtHR then referred to the Constitutional Court's criticism that the applicant had made a distinction between the Kurdish nation and the Turkish nation, thereby pleading in favour of creating minorities and the establishment of a Kurdish-Turkish federation, to the detriment of the unity of the Turkish nation and the territorial integrity of the State, and that, ultimately, the Socialist Party had advocated separatism. The ECtHR noted in this regard that, read together, the applicant's statements had put forward a political programme with the essential aim being the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis. While reference had been made to the right to self-determination of the "*Kurdish nation*" and its right to "*secede*", these statements, read in their context, had not encouraged secession from Turkey but had sought rather to stress that the proposed federal system could not come about without the Kurds' freely given consent, which should be expressed through a referendum: "*In the Court's view, the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.*"⁸⁷³

The essential role accorded to political parties in a democracy is not only evident in the judgements of the ECtHR, but also manifested in the activities of other international organisations. For instance, the "*Guidelines on Prohibition of Political Parties and Analogous Measures*" adopted by the European Commission for Democracy through Law (Venice Commission) also stipulate that the prohibition or dissolution of political parties should only be used as the last resort under exceptional circumstances: "*Prohibition or enforced dissolution of political parties may only be justified in the case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and*

⁸⁷² *Socialist Party and others vs. Turkey*, App. 21237/93 (20/1997/804/1007), Judgement (Grand Chamber) of 25 May 1998, Para 45-46.

⁸⁷³ *Socialist Party and others vs. Turkey*, App. 21237/93 (20/1997/804/1007), Judgement (Grand Chamber) of 25 May 1998, Para 47.

freedoms guaranteed by the constitution. The fact alone that a party advocates a peaceful change of the Constitution should not be sufficient for its prohibition or dissolution."⁸⁷⁴ Thus, the Venice Commission only recognises the threat or use of violence as the sole legitimate criterion for dissolution of political parties.⁸⁷⁵

Due to the outstanding importance of political parties in elections to legislative bodies, the freedom to form political parties also seems to be (implicitly) incorporated in Art 3 of Protocol 1 to the ECHR which guarantees that the "*...High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*". The rights that may be derived from this freedom include the right to form parties, the right of parties to exist, freedom of action (in particular in the course of election campaigns), and the right to present their candidates and objectives (during election campaigns).⁸⁷⁶ One might therefore conclude that this provision could strengthen the legal guarantees already provided by Art 10 and Art 11 ECHR. It must, nevertheless, be noted that the ECtHR has so far failed to address the question of whether and to what extent Art 3 of Protocol 1 also protects the right to form political parties, and has only discussed this issue in relation to Art 11 ECHR.⁸⁷⁷

Since Art 11 ECHR guarantees the right of every person to freedom of association, which includes political parties, persons belonging to national minorities are entitled to form and join political parties in the same way as every other individual under the ECHR. Furthermore, as Art 14 ECHR requires that the rights and freedoms guaranteed by the ECHR must be protected without discrimination, states may not restrict the right to form and join political parties of persons belonging to national minorities solely on the basis of their ethnic origin or language.

The right of persons belonging to national minorities to form political parties and organisations is also implicitly recognized by Art 7 FCNM which refers to the right of every person belonging to a national minority to freedom of peaceful assembly and freedom of association.⁸⁷⁸ Thus, persons belonging to national minorities have the right to form and join political parties representing their interests under the same conditions

⁸⁷⁴ European Commission for Democracy through Law (Venice Commission): *Guidelines on Prohibition of Political Parties and Analogous Measures*, 1999, Para 3.

⁸⁷⁵ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 58.

⁸⁷⁶ Compare: Hillgruber/Jesteadt (1994), 76.

⁸⁷⁷ Compare: Ovey/White (2006), 398.

⁸⁷⁸ Compare: Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 75.

as persons belonging to the majority, and states must recognize such associations of national minorities without discrimination. Prohibitions on the foundation of political parties based on ethnic background on a constitutional level are contrary to Art 11 ECHR (as well as to Art 22 ICCPR) and must be seen as a violation of international law.⁸⁷⁹

While the registration of organisations and political parties of national minorities may be subject to the fulfilment of certain conditions (in the same way as organisations and political parties of persons belonging to the majority), such requirements should not be designed in such a way that they limit, unreasonably and in disproportionate manner the ability of persons belonging to minorities to form such organisations, and thereby limit their ability to participate in political life and decision-making processes.⁸⁸⁰

As Art 11 ECHR not only covers the right to form or join a political party, but also the activities that are carried out in accordance with the aim of the association in question⁸⁸¹, the right to freedom of association also protects the activities of parties representing a national minority. State Parties to the Framework Convention should ensure that parties representing or including persons belonging to national minorities have adequate opportunities in election campaigning, which may imply the display of electoral advertising in minority languages.⁸⁸² Legal requirements such as the exclusive use of the official language of the state in any activities of a political party should be lifted, as they may result in a prohibition in fact of political parties of national minorities.⁸⁸³ As already described above, the judgements in the case of *United Communist Party of Turkey and others v. Turkey* and in similar cases against Turkey indicate that political parties may advocate on minority rights and political solutions, even in particularly tense situations, as long as they do not incite violence.⁸⁸⁴

The importance of political parties is also highlighted by The Lund Recommendations: *“The regulation of the formation of political parties shall comply with the international law principle of freedom of association. This freedom includes the freedom to establish*

⁸⁷⁹ Blumenwitz (1995), 90.

⁸⁸⁰ Compare: Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 76.

⁸⁸¹ Compare: Frowein/Peukert (1996), 413.

⁸⁸² Compare: Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 75.

⁸⁸³ Compare: Blumenwitz (1995), 90.

⁸⁸⁴ Compare: *United Communist Party of Turkey and others v. Turkey*, App. 19392/92 (133/1996/752/951), Judgement (Grand Chamber) of 30 January 1998; *Socialist Party and others vs. Turkey*, App. 21237/93 (20/1997/804/1007), Judgement (Grand Chamber) of 25 May 1998; *Freedom and Democracy Party vs. Turkey*, App. 23885/94, Judgement of 8 December 1999.

*political parties based on communal ideas as well as those not identified exclusively with the interests of a specific community.*⁸⁸⁵

While it may be argued that national minorities do not necessarily have to be entitled to have their own political parties, because their interests may be equally well represented by other political parties (of the majority), it must be emphasized that, on a European level, the relevant instruments for the protection of national minorities clearly indicate that the possibility of minorities' political representation through other parties may be insufficient.⁸⁸⁶ Minorities must be entitled to establish their own parties for the representation of their particular interests.

While in all European States the foundation and the activities of political parties are guaranteed by Art 11 ECHR, the national legal orders of many States also provide mechanisms for the prohibition or dissolution of political parties. While there appears to be a considerable diversity in respect of the legally acknowledged grounds for prohibition and dissolution and the applicable procedure, the Venice Commission has, nevertheless, identified that there are common European standards in this regard. Evaluating that there is no common European model of national rules on party closure as regards the (formal) legal regulation, the Venice Commission notes that *"...there is clear common European approach in that there is a common democratic legacy that political parties are not prohibited and dissolved. Even in States with seemingly wide rules on party closure there is 'extreme restraint' in how these rules are applied. The threshold for applying (or even invoking) these rules is extremely high. The very few examples to the contrary only serve to confirm this common legacy.*⁸⁸⁷

*This practice demonstrates a clear common European approach to the classic 'liberal dilemma' of how a democracy should respond to those forces that threaten it – namely by way of open debate and through democratic channels. There is a common practice for allowing parties which advocate fundamental changes in the form of government, or which advocate opinions that the majority finds unacceptable. Political opinions are not censored by way of prohibition and dissolution of the political party concerned, while illegal activities by party members are sanctioned through the ordinary criminal law system.*⁸⁸⁸

⁸⁸⁵ Lund Recommendations (1999), Para 8.

⁸⁸⁶ Compare: Weller (2006), 440; Blumenwitz (1995), 129.

⁸⁸⁷ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 18.

⁸⁸⁸ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 19.

Furthermore, the fact that a large number of European States have no regulation of party prohibition at all led the Venice Commission to conclude “*that such rules are not essential to the smooth functioning of democracy*”.⁸⁸⁹

4.9.2.2 Kurdish Political Parties in Turkey

The Turkish Constitution provides for political parties in the Articles 68 (as amended on July 23, 1995) and 69 (as amended on July 23, 1995 and October 17, 2001). According to Art 68 of the Turkish Constitution, “*citizens have the right to form political parties and in accordance with the established procedure to join and withdraw from them*”.

Art 68 (2) of the Turkish Constitution declares that “*political parties are indispensable elements of democratic political life*”, and according to Para 3 of the provision, “*political parties can be formed without prior permission and shall pursue their activities in accordance with the provisions set forth in the Constitution and Law*.”

Para 4 of Art 68 imposes restrictions to be observed by political parties: “*The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the State, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime*.”

Art 69 of the Turkish Constitution, entitled “*Principles to be Observed by Political Parties*”, stipulates that the decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Art 68 “*...may be rendered only when the Constitutional Court determines that the party in question has become the centre for the execution of such activities*.”⁸⁹⁰ The Constitutional Court may decide to dissolve a political party only after the filing of a suit by the office of the Chief Public Prosecutor of the Republic (Art 69 Para 5). According to Para 6 of Art 69 of the Turkish Constitution, the permanent dissolution of a political party shall be decided when it is established that the statute and programme of the political party violate the provisions of the fourth paragraph of Art 68. The next Paragraph defines the conditions under which a political Party may be permanently dissolved due to its activities: “*The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court*

⁸⁸⁹ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 21.

⁸⁹⁰ Art 69 Para 1 of the Turkish Constitution (as amended on July 23, 1995 and October 17, 2001).

determines that the party in question has become a centre for the execution of such activities. A political party shall be deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.⁸⁹¹

As an alternative to the permanent dissolution of a party in accordance with the above-mentioned paragraphs, the Constitutional Court may also rule that the party concerned is deprived of State aid wholly or in part with respect to the intensity of the actions brought before the court.⁸⁹²

The permanent dissolution of a political party also has consequences for the people involved, since *"the members, including the founders of a political party whose acts or statements have caused the party to be dissolved permanently cannot be founders, members, directors or supervisors in any other party for a period of five years from the date of publication in the official gazette of the Constitutional Court's final decision and its justification for permanently dissolving the party."*⁸⁹³

The constitutional principles governing the foundation of political parties and the exercise of their activities have been transferred in a very detailed manner into the Law on Political Parties, a law which appears to be very much shaped by Kemalist principles and the concept of nationalism.⁸⁹⁴ In particular Sec 81 of Law No. 2820 on the regulation of political parties has traditionally been of relevance in relation to the formation of political parties representing the Kurdish minority:

"Political parties shall not

(a) assert that there exist within the territory of the Turkish Republic any national minorities based on differences relating to national or religious culture, membership of a religious sect, race or language; or

*(b) aim to destroy national unity by proposing, on the pretext of protecting, promoting or disseminating a non-Turkish language or culture, to create minorities on the territory of the Turkish Republic or to engage in similar activities..."*⁸⁹⁵

⁸⁹¹ Art 69 Para 7 of the Turkish Constitution (as amended on July 23, 1995 and October 17, 2001).

⁸⁹² (Art 69 Para 8 of the Turkish Constitution (as amended on July 23, 1995 and October 17, 2001).

⁸⁹³ Art 69 Para 10 of the Turkish Constitution (as amended on July 23, 1995 and October 17, 2001).

⁸⁹⁴ Rumpf (2004), 44.

⁸⁹⁵ Quoted in: *United Communist Party of Turkey and others v. Turkey*, App. 19392/92, Judgement of 30 January 1998, Para 12; compare: Yildiz/Muller (2008), 68.

According to the Venice Commission, both the wording of the Turkish legislation as well as its actual application is fundamentally different to the common European standards regarding the prohibition or dissolution of political parties. *“The Turkish legal restrictions are stricter than the European approach, with more material restrictions on party programmes and activities, a lower general threshold, and fewer procedural obstacles for initiating a procedure of prohibition or dissolution. The fundamental difference, however, concerns the way the rules have been applied ...”*⁸⁹⁶ Turkey has a long and persistent tradition of banning political parties on the basis of the above-mentioned constitutional and legal provisions. Unlike in other member states of the Council of Europe where the instrument of the prohibition of political parties is used very cautiously, the extensive use of the (rather formalistic) Turkish procedure for the dissolution of parties has led to a significant restriction of the diversity of political parties in Turkey, which appears hardly compatible with a modern democracy.⁸⁹⁷

In particular, political parties representing Kurdish interests have been a regular target of dissolution procedures, primarily based on alleged violations of the provisions protecting the indivisible integrity of the Turkish State and nation. The United Communist Party of Turkey was dissolved in 1991, the Socialist Party in 1992, the Freedom of and Democracy Party in 1993, the People's Labour Party (HEP) in 1993, its successor, the Democracy Party (DEP) in 1994, and the People's Democracy Party (HADEP) in 2003.⁸⁹⁸ The prohibition of these political parties, which represented Kurdish interests, spoke of a Kurdish and a Turkish nation, or advocated solutions to the conflict in the Turkish South-East, was based on the argument that these parties promoted separatism and violated the principle of the indivisible integrity of the Turkish territory and nation.⁸⁹⁹

It is difficult to understand how the mere existence of a political organisation representing parts of the population based on their ethnic origin, which does not incite to hatred or violence in its political agenda, should, as such, constitute a threat to the sovereignty and integrity of a democratic state. Legal and constitutional provisions aiming at the protection of the integrity of the state or prohibiting the incitement to

⁸⁹⁶ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 65.

⁸⁹⁷ Rumpf (2003), 109.

⁸⁹⁸ Compare: European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 93-95.

⁸⁹⁹ Compare: Yildiz/Muller (2008), 69-71.

hatred based on ethnic origin or race should not be used excessively, as this must be seen as an abuse for the purpose of restricting political parties of minorities.⁹⁰⁰

As already described above, the dissolution of Turkish political parties representing Kurdish interests has led to several procedures before the ECtHR, where the court has finally held, in each case, that the dissolution of the party constituted a violation of the guarantees of the ECHR by the Turkish authorities.⁹⁰¹ In its judgements, the ECtHR rejected the Turkish argument that the reference to a distinct Kurdish nation or the debate of the situation of a particular group of the state's population justified the dissolution of a political party, considering that the parties in question participated in the state's political life in accordance with democratic rules. The dissolution of the parties was, therefore, disproportionate and violated Art 11 ECHR.⁹⁰²

Despite some reforms of the relevant provisions of the Turkish Constitution in recent years, the law on political parties has not yet been subject to substantial amendments, and there still remains a wide margin of appreciation for prosecutors and judges of the Constitutional Court to deliberately dissolve parties with a close link to a minority group. Besides the extensive list of material grounds justifying the dissolution of parties, the procedure itself must also be criticised. In particular, the fact that the public prosecutor may initiate closure procedures ex officio at his/her own discretion, without any form of political checks and balances, has been criticised by the Venice Commission. According to the Commission, this procedure stands in contrast to other European states and is problematic *“since the initiation of the procedure by itself will normally be a dramatic event that may have severe impact on the political climate and may cause considerable instability.”*⁹⁰³

So far, the reforms on legislation governing political parties have proved insufficient in practice. As the European Commission stated in 2008, *“the closure cases against the AKP and the DTP illustrate that the current legal provisions applicable to political parties still do not provide political actors with an adequate level of protection from the State's interference in their freedom of association and freedom of expression.”*⁹⁰⁴ Although the Constitutional Court did not dissolve the governing AKP – a party which is not specifically representing Kurdish interests – it nevertheless imposed financial

⁹⁰⁰ Compare: Blumenwitz (1995), 88 and 90.

⁹⁰¹ Compare: *United Communist Party of Turkey and others v. Turkey*, App. 19392/92 (133/1996/752/951), Judgement (Grand Chamber) of 30 January 1998; *Socialist Party and others vs. Turkey*, App. 21237/93 (20/1997/804/1007), Judgement (Grand Chamber) of 25 May 1998; *Freedom and Democracy Party vs. Turkey*, App. 23885/94, Judgement of 8 December 1999; see chapter 4.9.2.1.

⁹⁰² See the summary of the Court's reasoning in the previous chapter.

⁹⁰³ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 86.

⁹⁰⁴ European Commission: *Turkey 2008 Progress Report*, 18.

sanctions on the party for having performed anti-secular activities. Referring to the Constitutional Court's decision, the Venice Commission made the criticism that even the reformed rules on the prohibition of political parties in Turkey still left room for an excessive intervention with the freedom of political parties, as neither the material standards nor the standards of proof are in accordance with the standards applied by the ECtHR or advocated by the Commission. *"The practice of the Constitutional Court therefore shows that the Turkish constitutional and legal rules on the prohibition of political parties do not only make it too easy to prohibit a political party but that these rules are also applied in a way incompatible with European standards."*⁹⁰⁵

According to the Venice Commission, the situation of political parties in Turkey differs from the common European practice in three respects: the extensive list of criteria justifying the dissolution of a political party goes beyond the criteria recognized as legitimate by the ECtHR and the Venice Commission; the procedural rules for initiating proceedings on the prohibition or dissolution allow for more arbitrary initiatives which are less subject to democratic control than in other European countries; the Turkish tradition of regular application of the legislative provisions on party closure has no parallel in any other European country, and it shows that the prohibition and dissolution of political parties is not regarded as an extraordinary measure, which it should be, but as a regular one.⁹⁰⁶

While the Venice Commission welcomed the recent amendments of Art 68 and Art 69 of the Turkish Constitution, namely the introduction of the qualification that the party has to become the "*centre*" of the activities prohibited by the Constitution as well as the new requirement of a 3/5 majority of the Constitutional Court for dissolving a political party, it concluded that the provisions in Art 68 and Art 69 of the Turkish Constitution and the relevant provisions of the Law on political parties together still formed a system which, as a whole, is incompatible with Art 11 of the ECHR as interpreted by the ECtHR and the criteria for the dissolution of political parties adopted by the Venice Commission.⁹⁰⁷

The incompatibility of the Turkish legislation governing political parties with European standards is demonstrated by the fact that, unlike in the case of the governing AKP, the closure procedure against the pro-Kurdish DTP resulted in a dissolution of the party,

⁹⁰⁵ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 101-102.

⁹⁰⁶ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 105.

⁹⁰⁷ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 106.

mainly based on the argument that the party's leading officials did not clearly and unequivocally distance themselves from the PKK. Under Articles 68 and 69 of the Turkish Constitution and the applicable provisions of the Law on Political Parties, the party was sentenced as being a "*focus of activities against the indivisible integrity of the State*".⁹⁰⁸

Although it must be admitted that it would have been preferable had the party officials of the DTP left no doubt about the fact that they do not support the PKK and their violent actions, it is not immediately obvious that the mere failure to expressly do so may constitute a threat or be in violation of the constitutional principles to be respected by a political party, or that it makes a political party the centre of activities violating the provisions of the fourth paragraph of Art 68 of the Turkish Constitution. In any case, such behaviour may not be used to justify the dissolution or prohibition of a political party in accordance with European standards. Furthermore, it should be kept in mind that a political party as a whole should not be held responsible for the individual behaviour of its members if such behaviour was not authorised by the party within the framework of political, public and party activities.⁹⁰⁹ According to the common European approach, illegal activities by party members should be sanctioned through ordinary criminal law, not through the dissolution of the party.⁹¹⁰

At the time the Venice Commission adopted its "*Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*" in March 2009, the closure case against the DTP was still pending, and, referring to the frequent dissolution of pro-Kurdish parties, the Venice Commission stated: "*The forthcoming decision of the Constitutional Court in the DTP case will presumably provide an indication as to whether the constitutional amendments already adopted will lead to a more liberal practice with respect to the closure of such parties.*"⁹¹¹ After the dissolution of the DTP, this indication is quite clear. The actual legislation still does not provide sufficient protection for political parties, in particular those representing the Kurdish minority, and further, far-reaching reforms are necessary, as "*Turkey still needs to bring its legislation on political parties in line with European standards.*"⁹¹²

⁹⁰⁸ European Commission: *Turkey 2010 Progress Report*, 7.

⁹⁰⁹ European Commission for Democracy through Law (Venice Commission): *Guidelines on Prohibition of Political Parties and Analogous Measures*, 1999, Para 4.

⁹¹⁰ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 19.

⁹¹¹ European Commission for Democracy through Law (Venice Commission): *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, 2009, Para 95.

⁹¹² European Commission: *Turkey 2009 Progress Report*, 7.

According to the European Commission, the closure of the DTP confirmed “*the need for changes of the legal framework*” governing associations and political parties, including the Constitution. A government proposal to amend the Constitution to this end, which had been part of a larger reform package and would have made the closure of political parties more difficult, was, however, rejected by the Turkish parliament in May 2010.⁹¹³

So far, the Turkish authorities seem not to have realised that the greatest danger to a true democracy does not result from the existence and activities of political parties representing Kurdish interests, but from the constant refusal to enter into dialogue with elected representatives of the largest minority group on its territory. Through the dissolution of the DTP, the Turkish state has missed another opportunity to constructively communicate with political representatives of the Kurdish minority. As long as pro-Kurdish political parties are dissolved although they do not themselves incite violence or hatred, but simply try to engage in the democratic process to the benefit of the Kurdish minority, it will be impossible to find a peaceful solution to the situation in the Turkish South-East and an adequate approach towards the protection of Kurdish minority rights.

4.9.3 Participation in Elections and Representation in Legislative Bodies

4.9.3.1 The Right to Free Elections under Article 1 of Protocol 1 to the ECHR

It is a very important aspect of the political representation of national minorities that the situation of the minority group and the specific interests of their members must be respected in legislation. National minorities should therefore be represented within the national and regional legislative bodies of a state.

Democracy is the only accepted form of legitimating political power within Europe and its political bodies and institutions, in particular the Council of Europe and the European Union.⁹¹⁴ Since “*representative government through free, fair and periodic elections is the hallmark of contemporary democracy*”⁹¹⁵, the basic elements of democracy are protected within international human rights treaties, including the ECHR. According to Art 3 of Protocol 1 to the ECHR, the “*High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure*

⁹¹³ European Commission: *Turkey 2010 Progress Report*, 8 and 21.

⁹¹⁴ Compare: *United Communist Party of Turkey and others v. Turkey*, App. 19392/92, Judgement of 30 January 1998, Para 45: “*Democracy is without doubt a fundamental feature of the European public order.*”

⁹¹⁵ Explanatory Note to the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999), Para 7.

the free expression of the opinion of the people in the choice of legislature". This provision not only requires free election, but that the exercise of political power must be subject to a freely elected legislature. The rights and freedoms protected by the Convention must be guaranteed by law, and may only be restricted on the basis of laws. Art 3 of Protocol 1 to the ECHR strengthens this structure by requiring that these laws must be enacted by a legislature responsible to the people. "*Free elections are thus a condition of the 'effective political democracy' referred to in the Preamble...*" of the ECHR, "*...and of the concept of a democratic society which runs through the Convention*".⁹¹⁶

Although the text of Art 3 Protocol 1 is different from those of other provisions of the ECHR, the article does not only contain an obligation for the contracting states. The subjective rights of the individual to vote and to stand for election are implicit in Art 3 of Protocol 1.⁹¹⁷ Thus, Art 3 Protocol 1 recognizes the principle of universal suffrage, which encompasses the right to vote and to stand for elections.

Despite the importance of the rights protected by Art 3 of Protocol 1 to the ECHR, these rights are not absolute. Since the imprecise text of the article leaves room for implied limitations, the legal order of the contracting states may make the right to vote and to stand for election subject to certain conditions.⁹¹⁸ Although the ECtHR acknowledges that the states have a wide margin of appreciation in this sphere, restrictions on the rights in question have to meet certain requirements. When considering limitations of the rights protected by Art 3 of Protocol 1, the ECtHR "*....has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim and that the means applied are not disproportionate...In particular, such conditions must not thwart the free expression of the opinion of the people in the choice of the legislature.*"⁹¹⁹

The wording of Art 3 of Protocol 1 to the ECHR only encompasses elections to the "*legislature*". Although the exact scope of the term is not clear and partly depends on the individual constitution of the state in question, one can say that it includes national parliaments with supreme legislative powers, but also autonomous regional legislative bodies if they possess inherent primary rulemaking power.⁹²⁰

⁹¹⁶ Ovey/White (2006), 388.

⁹¹⁷ Compare: Hillgruber/Jestadt (1994), 63; Frowein/Peukert (1996), 835-836; Ovey/White (2006), 389.

⁹¹⁸ Ovey/White (2006), 389.

⁹¹⁹ *Mathieu-Mohin and Clerfayt v. Belgium*, Judgement of 2 March 1987, Series A, NO 113; (1988) 10 EHRR 1, Para 52; Compare: Ovey/White (2006), 391; and *Santoro v. Italy*, App. 36681/97, Judgement of 1 July 2004, Para 54.

⁹²⁰ Compare: Ovey/White (2006), 391.

It must be noted that the ECHR usually considers issues regarding the formation of political parties in relation to Art 11 ECHR and has so far failed to address the question of whether the right to form and maintain political parties falls within the scope of Art 3 of Protocol 1 ECHR.⁹²¹ Due to the important role of political parties in modern democracies one could probably deduce such a right from Art 3 of Protocol 1 to the ECHR.⁹²²

For persons belonging to national minorities, the guarantee of participation in elections to legislative bodies is particularly important because it enables them to take part in the political decision-making processes. Through this participation, they are able to co-determine and influence the legal conditions of their existence and their environment, which allows them to improve their situation.⁹²³ Although Art 3 of Protocol 1 does not mention national minorities and does not oblige states to favour national minorities in the electoral system⁹²⁴, the provision nevertheless contains an implicit guarantee in their favour. Since cases of alleged violations of this provision will mostly involve the exclusion of certain groups of individuals from the right to vote and to be elected, the provision also implicitly protects minority groups and their right to participation in the electoral process.⁹²⁵

However, the scope of protection of the provision for persons belonging to a minority is limited because of a variety of factors. It has been explained above that, under national law, the rights guaranteed by Art 3 of Protocol 1 to the ECHR are not absolute, but may be made subject to certain conditions. In this context, it must be considered that the rights protected by this Article are guaranteed in order to ensure the free expression of the people's opinion in the choice of the legislature. States are free to design the voting system they want to apply, as long as the system does not affect such free expression.⁹²⁶ Provided that this goal is achieved, states have a wide margin of appreciation with regard to the voting principles they apply, and they may also restrict the rights protected by Art 3 of Protocol 1. Since no specific voting system is mandatory under Art 3 of Prot 1 ECHR⁹²⁷, systems that have a negative impact on the representation of national minorities and systems that are favourable for minorities may be permissible, and restrictive clauses such as percentage thresholds are thus not necessarily a violation of the ECHR.⁹²⁸

⁹²¹ Ovey/White (2006), 398.

⁹²² See: chapter on political parties.

⁹²³ Compare: Hillgruber/Jesteadt (1994), 53.

⁹²⁴ Frowein/Peukert (1996), 840.

⁹²⁵ Compare: Hillgruber/Jesteadt (1994), 53.

⁹²⁶ Compare: Hillgruber/Jesteadt (1994), 63; Ovey/White (2006), 393.

⁹²⁷ Frowein/Peukert (1996), 838.

⁹²⁸ Compare: Hillgruber/Jesteadt (1994), 70-73.

While the exclusion of certain individuals may be consistent with Art 3 of Protocol 1 to the ECHR as a result of the legal provisions governing national elections, wider disqualifications may nevertheless violate the provision. As it is acknowledged that the principle of equality of all citizens of the state is inherent to the guarantees of Art 1 of Protocol 1 to the ECHR⁹²⁹, the systematic exclusion of persons belonging to a national minority from participation in elections will, without doubt, be a violation of the Article, at least in conjunction with Art 14, which prohibits discrimination in relation to the rights protected by the Convention and its protocols.

In view of the fact that the purpose of Art 3 of Protocol 1 to the ECHR is the free expression of the will of the people, it is not necessary that every vote has equal political power or equal influence over the outcome of the election. Hence, national minimum thresholds of votes as prerequisites for parties to enter parliament seem permissible, even though the expression of the will of many voters is undoubtedly ignored.⁹³⁰ These minimum threshold requirements tend to particularly reduce the chances of parties representing national minorities gaining seats in legislative bodies. On the other hand, since it is not necessary under Art 3 of Protocol 1 that every vote has the same influence it would also be in accordance with the provision if the votes of persons of national minorities were given additional weight in order to facilitate their representation in the elected body.⁹³¹

It is evident that the implementation of the rights guaranteed under Art 3 of Protocol 1 to the ECHR involves delicate questions of political power. The distribution of a certain amount of political influence to one individual or a group of individuals necessarily affects the powers of other individuals who also benefit from the rights under this provision. Specific participatory rights of minority groups will thus necessarily influence or diminish corresponding rights of the majority, and vice versa.⁹³² As the regime of the ECHR leaves the state with a wide margin of appreciation, it is primarily up to the state to decide these questions of power, but with due respect for the conditions established under international human rights and minority rights law.

With regard to the above considerations, one can conclude that under the ECHR, the promotion of political representation of persons belonging to national minorities is neither prohibited nor obligatory, as long as the national legal order allows the free expression of the will of the people.

⁹²⁹ Frowein/Peukert (1996), 837.

⁹³⁰ Compare: Frowein/Peukert (1996), 837, 840; Ovey/White (2006), 397: A minimum threshold of 5% of the votes to be able to take part in the distribution of seats in parliament does not violate Art 1 Prot 1 ECHR.

⁹³¹ Compare: Hillgruber/Jesteadt (1994), 70.

⁹³² Compare: Hillgruber/Jesteadt (1994), 54.

4.9.3.2 The Promotion of Minorities' Participation in the Electoral Process

As has been described in the introduction to this chapter, the European legal instruments for the protection of national minorities contain explicit requirements with regard to political representation. These requirements are vaguely formulated, but there are many implications that political representation of national minorities should also be improved and safeguarded through specific promotion in national or regional electoral systems.

Art 15 FCNM provides that *"Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."* The Explanatory Report enumerates certain measures which the Parties could promote in the framework of their constitutional systems in order to create these conditions. Among these measures is the *"...effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels"*.⁹³³ This formulation is very vague and does not specify the means by which this aim can be achieved, but it is clear that states are encouraged to adopt measures facilitating the access of persons belonging to national minorities to national or regional parliaments. In this context, the Advisory Committee has stressed that the *"...participation of persons belonging to national minorities in electoral processes is crucial to enable minorities to express their views when legislative measures and public policies of relevance to them are designed"*.⁹³⁴

The Lund Recommendations also highlight the importance of the voting rights of persons belonging to national minorities: *"Experience in Europe and elsewhere demonstrates the importance of the electoral process for facilitating the participation of minorities in the political sphere. States shall guarantee the right of persons belonging to national minorities to take part in the conduct of public affairs, including through the rights to vote and to stand for office without discrimination."*⁹³⁵ After referring to the requirement of permitting the formation and activity of political parties in accordance with the international law principle of freedom of association⁹³⁶, the Lund Recommendations give examples of how the electoral system should facilitate minority

⁹³³ Explanatory Report, Para 80.

⁹³⁴ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 80.

⁹³⁵ The Lund Recommendations (1999), Para 7.

⁹³⁶ The Lund Recommendations (1999), Para 8.

representation and influence, which include: proportional representation systems; single-member districts where minorities are territorially concentrated; some forms of preference voting where the voters rank candidates in order of choice; lower numerical thresholds for representation in the legislature.⁹³⁷

When analysing the state reports on the implementation of the FCNM one can assert that virtually all states have a legal system establishing formal equality of all citizens in terms of voting and the right to form political parties. It should be noted, however, that even where such legislation is in place, there may be cases where effective equality might be endangered because the constitution is designed as the constitution of a particular nation or ethnic group rather than the constitution of all the citizens of the state.⁹³⁸

There can be little doubt that the standards set by European instruments for the protection of minority rights and human rights require political parties for national minorities to be allowed and the possibility of these political parties participating in elections to national or regional legislative bodies (Art 11 ECHR). The claim that the interests of national minorities may also be represented by other political parties is not sufficient justification for the exclusion of such parties.⁹³⁹

Even if there is no explicit prohibition of political parties of national minorities, certain legal provisions may have restrictive effects on their activities and limit their ability to participate effectively in the electoral process. The requirement for candidates to use certain languages or only the official language of the state during national or local elections constitutes a massive impediment to political activities by national minorities, and the Advisory Committee has opposed such language requirements.⁹⁴⁰ It should be considered in this context that (formal) political representation is meaningless where the state demonstrates from the start that it will not recognize the particular features of the minority group.⁹⁴¹ Accordingly, disguised restrictions on political participation by national minorities must be avoided, making it necessary not only to scrutinize the text of the legislative framework on political parties and participation in elections and campaigns, but also the practical outcome of such legislation in its implementation.⁹⁴²

⁹³⁷ The Lund Recommendations (1999), Paras 9.

⁹³⁸ Weller (2006), 435.

⁹³⁹ Compare: Weller (2006), 440; Blumenwitz (1995), 129: The admission of political parties of national minorities is of fundamental importance for the political representation of national minorities; In the case of Albania, the Advisory Committee has explicitly welcomed the removal of restrictions in place on persons belonging to national minorities forming their own political parties, Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 71.

⁹⁴⁰ Advisory Committee Opinion on Estonia, ACFC/INF/OP/I (2002) 005, Para 55; Advisory Committee Opinion on Russian Federation, ACFC/INF/OP/I (2003) 005, Para 106.

⁹⁴¹ Blumenwitz (1995), 88.

⁹⁴² Weller (2006), 441.

The drawing of electoral zones may, for example, also have a negative impact on the chances of national minorities successfully electing their representatives to parliament.⁹⁴³

The Advisory Committee has not disputed the fact that states are free to decide on their electoral system and arrangements for parliamentary representation.⁹⁴⁴ It is consequently not possible to identify an electoral system that is most appropriate for the representation of national minorities under the FCNM. Aspects that are considered to be relevant by the Advisory Committee are the degree of consistency between the legal requirements aimed at facilitating political representation of national minorities in a given state and their implementation in practice, and the level of representation that has been achieved in relation to the population balance. Where national minorities are not sufficiently represented in proportion to their presence as a percentage of the population, additional measures must be adopted on the part of the State. While the Advisory Committee acknowledges that there are limits to what an electoral system can guarantee in terms of minority promotion, it nevertheless encourages states “...to give further consideration to ensuring that the necessary guarantees – electoral or consultative – exist to allow for effective participation of all persons belonging to national minorities in the political process.”⁹⁴⁵

One could expect that an electoral system based on the concept of proportionate representation also guarantees appropriate representation of national minorities. At least in cases where the national minority is relatively large in numbers, their political parties will gain sufficient votes to be able to enter parliament.⁹⁴⁶ But sometimes an electoral system based on the concept of proportionate representation will not be sufficient to allow representatives of national minorities to access legislative bodies. This may be the case where the national minority is rather small, or where the electoral system requires minimum thresholds of votes for parties to be represented in parliament.

To allow for political integration of the national minority in such cases, it seems appropriate to actively promote them in the electoral system. One way would be to lower or lift completely minimum thresholds, at least for political parties or candidates representing national minorities. The aim of these thresholds is to avoid very “small” parties entering parliament in order to safeguard the parliament’s efficiency and

⁹⁴³ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 73.

⁹⁴⁴ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 81.

⁹⁴⁵ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 72.

⁹⁴⁶ Blumenwitz (1995), 133

decision-making ability. However, formal equality of minority parties with other “small” parties in this regard leads to a factual inequality. Due to its function as a link between the state and the national minorities, and because of its personally and/or territorially limited field of activity, a political party representing national minorities is not comparable to other “small” parties. “Small” parties are characterised as such because they have not gained many votes in the elections, whereas minority parties are characterised as such through their function and field of activity – aspects that are outside the electoral process. Since these two types of parties are not comparable, a difference in the treatment of parties representing national minorities is legitimate and consistent with the principle of equality.⁹⁴⁷

The Advisory Committee has noted in one case that a 5 % threshold reportedly reduced the chances of national minorities being represented in parliament.⁹⁴⁸ As it is permitted to promote representation in parliament by special measures, it would be possible to provide an exemption for persons belonging to national minorities and their representatives or parties from national thresholds of minimum votes for parliamentary representation.⁹⁴⁹

Another way to facilitate representation of national minorities in legislative bodies is the introduction of parliamentary seats reserved for minority representatives or of quotas where the number of seats which are reserved for minority representatives is dependent on the demographic size of the minority.⁹⁵⁰ This is also envisaged in the Lund Recommendations, which propose “...*special representation of national minorities, for example, through a reserved number of seats in one or both chambers of parliament or in parliamentary committees...*” as one possible form of special arrangement ensuring an opportunity “...*for minorities to have an effective voice at the level of the central government...*”⁹⁵¹

Quotas or reserved seats are a relatively rare phenomenon in Europe and are mainly used in states that have recently suffered from ethnic tension or conflict.⁹⁵² One example is Croatia, where provision has been made for national minorities with a share of the population exceeding 8 % to be proportionately represented in the lower chamber of parliament. Smaller minorities are guaranteed one seat in the upper

⁹⁴⁷ Compare, for a more detailed discussion on this issue: Blumenwitz (1995), 134.

⁹⁴⁸ Advisory Committee Opinion on Lithuania, ACFC/INF/OP/I (2003)008, Para 75.

⁹⁴⁹ Advisory Committee Opinion on Germany, ACFC/INF/OP/I (2002) 008, Para 63; Compare: Weller (2006), 444; Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008) 001, adopted on 27 February 2008, Para 82.

⁹⁵⁰ Blumenwitz (1995), 135.

⁹⁵¹ The Lund Recommendations (1999), Para 6.

⁹⁵² Weller (2006), 441.

chamber.⁹⁵³ However, the Advisory Committee made the criticism that these guarantees were not implemented in an appropriate manner.

Another way to provide for representation in parliament is to guarantee one parliamentary representative to persons belonging to national minorities who have failed to gain sufficient votes to enter parliament.⁹⁵⁴ In Slovenia, one seat is reserved for each of two minorities which are elected through separate lists, without precluding the election of persons belonging to or representing national minorities through the ordinary electoral process.⁹⁵⁵

Representation of national minorities in parliament could also be facilitated through the design of electoral districts.⁹⁵⁶ If an electoral district covers a territory mainly inhabited by persons belonging to national minorities, this offers a good chance for a representative of this minority to enter parliament by way of direct mandate. In cases where a territory is inhabited by large numbers of a minority, but where this minority still does not form the majority, one could establish an electoral district with two representatives, since one of them would most probably represent the minority group.⁹⁵⁷ The promotion of single-member-districts, which is mentioned in the Lund Recommendations as one possible way of facilitating representation in legislative bodies, is based on the same idea.

Access to parliament for persons representing national minorities could also be facilitated by allowing co-operation between political parties such that, in certain electoral districts, a political party which does not primarily focus on national minorities supports the political party or a single candidate representing the minority group.⁹⁵⁸

Finally, it should be noted that minority representation should not only be promoted at the national level, but also in relation to legislative bodies elected at regional or local level.⁹⁵⁹

4.9.3.3 Electoral Participation of the Kurds in Turkey

Turkey is a democratic State and Art 67 of the Turkish Constitution defines the terms and conditions under which Turkish “...citizens have the right to vote, to be elected and to engage in political activities independently or in a political party, or to take part in a

⁹⁵³ Croatia State Report, ACFC/SR (1999) 5, 154.

⁹⁵⁴ Romania State Report, ACFC/SR (1999) 11, 53.

⁹⁵⁵ Slovenia State Report, ACFC/SR (2000) 4, Para 113.

⁹⁵⁶ Compare: Weller (2006), 445; Blumenwitz (1995), 137.

⁹⁵⁷ Blumenwitz (1995), 137.

⁹⁵⁸ Blumenwitz (1995), 136.

⁹⁵⁹ Compare: Weller (2006), 445.

referendum”, in conformity with national legislation.⁹⁶⁰ According to Art 67 of the Turkish Constitution, “*all Turkish citizens over 18 years of age shall have the right to vote in elections and to take part in referenda. The exercise of these rights shall be regulated by law.*”⁹⁶¹

In principle, people of Kurdish origin who are Turkish citizens have the same right to vote and to be elected as other Turkish citizens under the Turkish Constitution. However, for various reasons, the Kurds encounter serious difficulties with regard to political representation of their particular interests as a minority in legislative bodies.

Turkey is a perfect example of the observations made above, that the political participation of national minorities is hampered where the constitution is not primarily designed as the constitution of a state and all its citizens, but as the constitution of a specific nation.⁹⁶² As one of the basic and most fundamental features of the Turkish Constitution, nationalism has naturally had an enormous impact on the Turkish legal framework governing political parties, political participation and democratic representation. In particular, the long and constant tradition of dissolving pro-Kurdish parties must be seen as a result of this nationalistic conception of the Turkish legislation and corresponding implementation relating to political activities. Considering that, depending on the estimates, people of Kurdish origin constitute between 10% and 20% of the overall Turkish population, the prohibition of pro-Kurdish parties should not only be discussed with regard to Art 11 ECHR, but also in relation to the rights guaranteed under Art 3 Protocol 1 ECHR. It appears to be questionable that a legal framework and corresponding practice that enables the authorities to ban the activities and even the existence of political parties which, at least in theory, are designed to represent 10 to 20% of the total population, can be qualified as “*conditions which will ensure the free expression of the opinion of the people in the choice of legislature*”. In a modern democracy, where political representation is ensured via political parties, representation of minority groups becomes impossible if political parties which particularly address issues concerning these groups are systematically dissolved, and their members banned from political activities.

Besides the constant threat of being dissolved, there are also other impediments to the activities of parties willing to represent the Kurdish population. The Law on Political Parties still requires that only the Turkish language may be used during public political meetings and events and in official writings.⁹⁶³ This formal prohibition remained unchanged during the last package of reforms, although in 2010, the Law on

⁹⁶⁰ Art 67 (1) of the Turkish Constitution (as amended on October 17, 2001)

⁹⁶¹ Art 67 (3) and (4) of the Turkish Constitution (as amended on October 17, 2001)

⁹⁶² Compare chapter 3.

⁹⁶³ ECRI: *Third report on Turkey* (2004), Para 18.

fundamental principles of elections and the electoral registry was amended, de facto allowing use of Kurdish in election campaigns, in oral and written publicity material during election campaigns. This inconsistent legal framework seems to have led to contradictory decisions in court cases against Kurdish politicians.⁹⁶⁴

The prohibition of the use of any other language than Turkish still incorporated in the Law on Political Parties not only restricts the activities of political parties without reasonable justification, but it is also a clear manifestation of the reluctance, on the part of the Turkish state, to accept other languages as basic features of the identity of minority groups living in Turkey. Even if Kurdish parties are not formally prohibited, the legal framework for political activities imposes unjustified restrictions on the performance of their activities, and clearly demonstrates that political representation of minority groups and the interests resulting from the identity of these groups are not accepted by the state. Thus, while one must make the positive comment that the use of the Kurdish language by politicians and political parties during the last local election campaign did not result in legal actions⁹⁶⁵, and that, meanwhile, the restrictions of the use of any language other than Turkish has already been removed from parts of the legislation applicable to political activities, this prohibition still needs to be completely removed from legislation.

In addition to the restrictions and prohibitions of pro-Kurdish parties, another reason why political representation of the Kurdish population has hardly been possible in the past is a national electoral threshold of 10%. A political Party may only enter parliament if it has achieved 10% of the total votes in Turkey.⁹⁶⁶ Past elections have shown that while pro-Kurdish parties were able to achieve considerable (relative) majorities in south-eastern provinces with a large Kurdish population, these parties were unable to attain the nationwide 10% threshold.⁹⁶⁷

The 10% threshold has already been challenged by two former DEHAP candidates before the ECtHR.⁹⁶⁸ The applicants alleged a breach of Article 3 of Protocol 1 to the ECHR on account of the fact that they had not been elected to the National Assembly in the parliamentary elections of 3 November 2002 despite the score of 45.95% of the

⁹⁶⁴ European Commission: *Turkey 2010 Progress Report*, 8 and 33.

⁹⁶⁵ European Commission: *Turkey 2009 Progress Report*, 28.

⁹⁶⁶ Section 33 of Law no. 2839 (as amended on 23 May 1987) provides:

“In a general election parties may not win seats unless they obtain, nationally, more than 10% of the votes validly cast... An independent candidate standing for election on the list of a political party may be elected only if the list of the party concerned obtains sufficient votes to take it over the 10% national threshold...”

⁹⁶⁷ Yildiz/Muller (2008), 67.

⁹⁶⁸ *Yumak and Sadak v. Turkey*, App. 10226/03, Judgement of 30 January 2007; the case was then referred to the Grand Chamber: *Yumak and Sadak v. Turkey*, App. 10226/03, Judgement (Grand Chamber) of 08 July 2008.

votes cast in the constituency of Şırnak achieved by DEHAP (the party on whose list they had stood for election). They explained that their party, which had polled 6.22% of the national vote, had failed to reach the electoral threshold of 10% and had accordingly been deprived of parliamentary representation. In particular, they argued that the national threshold of 10% was “disproportionate and arbitrary, and impaired the very essence of the right guaranteed by Article 3 of Protocol No. 1. It deprived a large proportion of the population of the possibility of being represented in parliament. In the parliamentary elections of 1987, 1991, 1995 and 1999 the proportion of the votes cast in favour of parties not represented in parliament had been, respectively, 19.4% (about 4.5 million votes), 0.5% (about 140,000 votes), 14% (about 4 million votes) and 18.3% (about 6 million votes). The results of the 2002 election had led to a “crisis of representation”, since 45.3% of the votes – that is, about 14.5 million votes – had not been taken into consideration and were not reflected in the composition of parliament.”⁹⁶⁹

Furthermore, the applicants stressed the question of regional representation. “They asserted that the parties from the south-eastern part of the country did not have a single member of parliament, although they could count on about two million votes. They submitted in that connection that the electoral threshold had been fixed in particular to block the representation of the Kurdish people of the region. In addition, whereas DEHAP was the leading party in thirteen provincial constituencies and the second strongest in two more, it had not obtained a single seat in parliament.”⁹⁷⁰

After analysing the applicable Turkish legislation, relevant documents of the Council of Europe regarding electoral thresholds, as well as comparative law in other European states, the ECtHR finally held that the Turkish nationwide 10% threshold did not violate Art 3 of Protocol 1 to the ECHR. However, the decision was very much based on the individual circumstances prevailing at that time, and the Court explicitly expressed the view that a lowering of the threshold would be desirable, which makes it appear appropriate to quote the relevant passages of the decision:

“77. Consequently, while noting that it would be desirable for the threshold complained of to be lowered and/or for corrective counterbalances to be introduced to ensure optimal representation of the various political tendencies without sacrificing the objective sought (the establishment of stable parliamentary majorities), the Court considers that it is important in this area to leave sufficient latitude to the national decision-makers. In that connection, it also attaches importance to the fact that the electoral system, including the threshold in question, is the subject of much debate

⁹⁶⁹ *Yumak and Sadak v. Turkey*, App. 10226/03, Judgement of 30 January 2007, Para 44.

⁹⁷⁰ *Yumak and Sadak v. Turkey*, App. 10226/03, Judgement of 30 January 2007, Para 45.

within Turkish society and that numerous proposals of ways to correct the threshold's effects are being made both in parliament and among leading figures of civil society... What is more, as early as 1995 the Constitutional Court stressed that the constitutional principles of fair representation and governmental stability necessarily had to be combined in such a way as to balance and complement each other...

78. In the light of the above conclusions, the Court does not consider that Turkey has overstepped its wide margin of appreciation with regard to Article 3 of Protocol No. 1, notwithstanding the high level of the threshold complained of.

*79. Accordingly, there has been no violation of Article 3 of Protocol No. 1.*⁹⁷¹

The case was later referred to the Grand Chamber, which rendered its judgement on 08 July 2008 and also concluded that the Turkish threshold, in spite of being the highest of all the thresholds applied in Europe, did not violate Article 3 of Protocol 1 to the ECHR. It should be noted, however, that the Court also stated that, in general, a 10% electoral threshold appears excessive, and that only the individual circumstances would justify the threshold:

"In that connection, it concurs with the organs of the Council of Europe, which have stressed the threshold's exceptionally high level and recommended that it be lowered... It compels political parties to make use of stratagems which do not contribute to the transparency of the electoral process. In the present case, however, the Court is not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1."⁹⁷²

Interestingly, the court's assessment that the correctives and guarantees limited the effects of the high threshold was partly based on the argument that the DTP, DEHAP's successor, was able to form a parliamentary group after its members had won 20 seats in parliament as independent candidates in the elections of 22 July 2007.⁹⁷³

Considering the high proportions of votes cast, in particular in Turkey's south-eastern provinces, which have not resulted in parliamentary representation in the past, the ECtHR's decision that the 10% threshold does allow for the free expression of the will of the people is, in fact, somewhat surprising. This is made even more so by the fact that the Court states that the threshold is the highest in Europe, that it appears excessive, and that the relevant documents of the Council of Europe recommend a lowering of the threshold. It seems as if the Court was unwilling to render a judgement

⁹⁷¹ *Yumak and Sadak v. Turkey*, App. 10226/03, Judgement of 30 January 2007, Para 77-79.

⁹⁷² *Yumak and Sadak v. Turkey*, App. 10226/03, Judgement (Grand Chamber) of 08 July 2008, Para 147.

⁹⁷³ *Yumak and Sadak v. Turkey*, App. 10226/03, Judgement (Grand Chamber) of 08 July 2008, Para 25 and 138.

unfavourable to a member state in an area which, at its core, is a political question of the distribution of powers with possibly far-reaching consequences, thus covering a question which is politically sensitive in general, and results in particular tensions in the individual case of Turkey. However, it must be accepted that the ECtHR has now clarified that the Turkish threshold does not violate the guarantees of Article 3 of Protocol 1 to the ECHR.

Since the ECHR does not confer special protection to national minorities, the Court's decision does not, however, mean that the 10% threshold is in compliance with European standards relating to the protection and promotion of minorities. While even European instruments for minority protection do not prohibit electoral thresholds as such, it remains questionable whether an electoral system can be qualified as enabling political representation of minority groups when the nationwide threshold effectively bars political parties representing the largest minority group within the respective state from entering parliament. There is no common European standard on national electoral thresholds, but in most European states the threshold is not higher than 5%, making a 10% threshold appear rather excessive. And although it must be admitted that in a multi-ethnic state like Turkey, the admittance of too many small parties might lead to enormous difficulties in the parliamentary decision-making process, the electoral process should nevertheless be designed in such a way that large ethnic groups like the Kurds have the possibility of being adequately represented if their voting behaviour expresses such a desire. In other words: if the majority or large parts of an ethnic group vote in favour of a political party or a person representing this group, a nationwide threshold should not completely prevent the access of this representative to parliament. If Turkey wishes to maintain the 10% threshold, the Turkish government should at least think about introducing additional legal provisions ensuring political participation of representatives of minorities such as the Kurds. Such legislation might consist of the introduction of a certain number of reserved seats for Kurdish representatives or of certain quota based on the size of the Kurdish population and the total number of seats in parliament. Considering that large numbers of Kurds inhabit certain south-eastern provinces in Turkey where pro-Kurdish parties traditionally gained many votes in past elections, it might even be appropriate to exempt parties and representatives who have received a certain regional majority in the respective electoral districts from the nationwide threshold.

It is evident that access to parliament alone will not ensure that the interests of the Kurds will be adequately taken into account in political decision-making, but it is nevertheless an important prerequisite for effective political participation in a democracy. In addition, parliamentary representation is probably also of symbolic

importance for the Kurdish minority, which should not be underestimated. Accordingly, the opportunity to enter parliament without artificial hurdles seems an absolute priority for adequate political participation of the Kurds in Turkey, as it enables Kurdish representation at the highest constitutional level and may contribute to a collective feeling of solidarity with the Turkish State and its organs.

In considering the last elections of 22 July 2007, which enabled 20 pro-Kurdish representatives to gain seats in the Turkish parliament, one could possibly argue that the conditions in Turkey already provide sufficient opportunities to enable minority groups to be represented in parliament in an appropriate manner. However, this result was only possible because these representatives were nominated as independent candidates, circumventing the nationwide threshold. Once they had entered parliament, these independent candidates formed a parliamentary group, enabling the pro-Kurdish DTP to be represented in parliament.⁹⁷⁴ A state which is committed to a pluralist democracy and the protection and promotion of minority rights, shared values of the member states of the EU, should provide an electoral framework which also enables a political party representing the largest minority group to be elected to parliament as a party instead of forcing its members to resort to other means.

In addition to the maintenance and restrictive application of a legal framework particularly disfavouring minority parties, Turkey is reported to have traditionally also resorted to other measures in order to impede the activities of parties with a pro-Kurdish agenda. Raids of party offices, threats, arrests, arbitrary detention and prosecution of pro-Kurdish politicians and sympathizers seem to have been part of a general policy aimed at discouraging political representation of the Kurdish population.⁹⁷⁵ Before the elections of July 2007, in February and March 2007, a series of arrests, searches, seizures and prosecutions directed at members of the DTP as the most recent of the successive pro-Kurdish parties was reported, and it has been argued that these actions were intended to jeopardize the participation of the independent pro-Kurdish candidates nominated by the DTP in the 2007 elections.⁹⁷⁶ Following the elections, and again in 2009, numerous investigations and court cases have been launched against officials and executives of the DTP for violating the Law on political parties which still prohibits the use of languages other than Turkish in political life.⁹⁷⁷ Criminal prosecutions against DTP were initiated, and in July 2009, the

⁹⁷⁴ MRG-Report (2007), 25; in the same manner, the threshold was also circumvented by parties representing other groups.

⁹⁷⁵ Compare: Yildiz/Müller (2008), 71.

⁹⁷⁶ MRG-Report (2007), 25.

⁹⁷⁷ Compare: European Commission: *Turkey 2008 Progress Report*, 26; Der Standard: "40 Festnahmen kurdischer Politiker und Anwälte", 14. April 2009.

Deputy Chief Prosecutor of the Court of Cassation, who is in charge of political parties, applied for the removal of the parliamentary immunity of several DTP members, the charges against them including the use of the Kurdish language in Parliament.⁹⁷⁸

On 16 November 2007, the Chief Public Prosecutor at the Court of Cassation applied to the Constitutional Court for closure of the DTP, pursuant to Articles 68 and 69 of the Constitution and the relevant provisions of the Law on Political Parties. He also requested that 221 former and present members of the Party be banned from membership in political parties for the duration of five years. The DTP was accused of engaging in activities against the unity and integrity of the country. As the 2008 Progress Report on Turkey issued by European Commission explicitly points out, this case and the closure case against the governing AKP “...illustrate that the current legal provisions applicable to political parties do not provide actors with an adequate level of protection from the State’s interference in their freedom of association and freedom of expression”.⁹⁷⁹ As already mentioned above, the DTP was finally dissolved by the Constitutional Court on 11 December 2009, which led to riots among parts of the Kurdish population.

Considering the increasing tensions about the “Kurdish Question” and the renewed violence in the Turkish South-East, it seems particularly regrettable that the Turkish authorities have not yet recognized political participation of Kurdish representatives in the election process and in parliament as a possible means to peacefully solve the problems arising from the Kurdish question. The obstruction of the activities of political representatives and the dissolution of the DTP must be seen as another missed opportunity to find a peaceful solution to the situation in the South-East and ameliorate the legal and practical framework for the Kurdish population in Turkey through political dialogue.

4.9.4 Effective Participation in Decision-Making

4.9.4.1 Measures to Ensure Effective Participation in Decision-Making

According to the Lund Recommendations, “...States should ensure that opportunities exist for minorities to have an effective voice at the level of the central government, including through special arrangements as necessary.” Depending on the circumstances, such arrangements may include: special representation in parliament or in parliamentary committees through a number of reserved seats and other forms of guaranteed participation in the legislative process; formal or informal understandings

⁹⁷⁸ European Commission: *Turkey 2009 Progress Report*, 29.

⁹⁷⁹ European Commission: *Turkey 2008 Progress Report*, 6.

for allocating cabinet positions to members of national minorities, seats in the supreme or constitutional court or in lower courts, positions on advisory bodies or other high-level organs; mechanisms to ensure that minority interests are considered within relevant ministries; special measures in the civil service and provision of public services in the minority language.⁹⁸⁰ Furthermore, The Lund Recommendations propose that, in order also to promote participation of national minorities at regional or local levels, states should adopt the same measures as those regarding representation at the national level.⁹⁸¹

The Explanatory Report to the FCNM also proposes measures to be promoted by the state parties in order to ensure effective participation in public life in additional areas to that of parliamentary representation. These proposals include measures of “...consultation with persons belonging to national minorities, by means of appropriate procedures and, in particular, through their representative institutions...” when the state parties are contemplating legislative or administrative measures likely to affect these persons directly.⁹⁸² It has been pointed out that such measures require the fulfilment of two elements: persons belonging to national minorities must be able to set up their own organisations to articulate and defend their interests, and these bodies must be given the means to influence relevant decisions.⁹⁸³

In this context, the Lund Recommendations also emphasize that when institutions and procedures are created in accordance with these recommendations, both the substance and the process are important. Governmental authorities and minorities should pursue an inclusive, transparent and accountable process of consultation in order to maintain a climate of confidence.⁹⁸⁴ It thus seems that the FCNM and the Lund Recommendation both acknowledge that appropriate procedures to ensure an open dialogue between government authorities and members of national minorities are one of the cornerstones for a successful political participation by national minorities.

Further measures enumerated by the Explanatory Report are the direct involvement of persons belonging to national minorities “...in the preparation, implementation and assessment of national and regional plans and programmes likely to affect them directly”, and the undertaking of studies, “...in conjunction with these persons, to assess the possible impact on them of projected development activities”.⁹⁸⁵

⁹⁸⁰ The Lund Recommendations (1999), Para 6.

⁹⁸¹ The Lund Recommendations (1999), Para 11.

⁹⁸² Explanatory Report, Para 80.

⁹⁸³ Weller (2006), 446.

⁹⁸⁴ The Lund Recommendations (1999), Para 5.

⁹⁸⁵ Explanatory Report, Para 80.

The practice of European states shows that there are numerous ways in which the effective participation of national minorities in decision-making processes can be facilitated. Many state parties have established special offices to address minority issues and the Advisory Committee has pointed out that they can be very useful in developing a coherent policy in this field.⁹⁸⁶ It is very rare that special ministries are set up for minority representation, but there are other options to bring issues before the highest levels of policy-makers, for example through specialized commissioners or departments.⁹⁸⁷

Another possible way to ensure minority representation is the establishment of focal points for minority issues or the use of advisory boards within those ministries that are most relevant for minorities, such as, the ministry for education. Such institutions make it possible to “mainstream” minority concerns in the most important areas of policy, which may additionally be co-ordinated through a national office for minority affairs. Apart from the fact that the establishment of a special ministry for national minorities will be difficult to achieve for political reasons within a state, it should also be noted that such ministries bear the risk of being forced to support majority decisions.⁹⁸⁸

Participation of national minorities within the principal decision-making bodies may also be facilitated at the level of legislature. Models allowing for adequate representation within legislative bodies have already been discussed above, but simple representation does not necessarily mean that the representatives are able to influence relevant decisions. In issues that are particularly relevant to persons belonging to national minorities, it may, therefore, be appropriate to provide mechanisms that prevent the rule of the majority over the minority. One possible way is the establishment of a special “Commissioner” for national minorities, an institution similar to that of an ombudsman. Such a person would be nominated by the parliament, but independent from it, and would be responsible for the political control of the executive through parliament in issues relevant to minorities.⁹⁸⁹

A much stronger mechanism is the introduction of a right of veto for representatives of national minorities in parliament in issues directly affecting the rights of national minorities. All provisions in the field of language, culture, and education which might influence the rights of persons belonging to national minorities would consequently require the consent of the political representatives of the minority groups in parliament.⁹⁹⁰

⁹⁸⁶ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 69.

⁹⁸⁷ Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 67.

⁹⁸⁸ Compare: Blumenwitz (1995), 128.

⁹⁸⁹ Blumenwitz (1995), 138.

⁹⁹⁰ Blumenwitz (1995), 139.

In states with a large minority or with two or more groups with similar population size, the ballot in parliament on issues important to the minority group(s) could be held separately for each linguistic or ethnic group after common deliberation. Laws could only be adopted if they gain majority approval in each linguistic group.⁹⁹¹ In my opinion, such a mechanism would be impossible to implement in states with multiple minority groups of different sizes, because, in such a situation, the adoption of a law will almost certainly not be approved by every group and will make decision-making almost impossible.

Another possible way to represent and express the interests and needs of persons belonging to national minorities in parliament is the introduction of a special committee for minority issues. The composition and responsibilities of such a committee can be established in a variety of ways. For example, it can be composed of representatives of all minority groups, discussing all inter-ethnic issues, or there may be a committee for every (large) minority representing the specific interests of this group.⁹⁹²

In practice, states more often provide for “softer” forms of participation by way of consultation.⁹⁹³ This consultation usually functions through the establishment of advisory or consultative councils of national minorities, and it may take place at the national as well as at the regional level in a variety of minority issues. These issues may include, among others, participation in the preparation of governmental strategies regarding matters of concern for national minorities; commenting on draft legislative measures and decrees; monitoring of the situation of the minorities; advising of national and regional governments in minority issues; providing a forum for exchange with governmental and parliamentary officers; issuing of policy guidance for public authorities.⁹⁹⁴

Advisory and consultative bodies as one form of facilitating participation in decision-making are also addressed in the Lund Recommendations: “*States should establish advisory or consultative bodies within appropriate institutional frameworks to serve as channels for dialogue between governmental authorities and national minorities. Such bodies might also include special purpose committees for addressing such issues as housing, land, education, language, and culture...*”⁹⁹⁵ According to the Recommendations, “*these bodies should be able to raise issues with decision-makers, prepare recommendations, formulate legislative and other proposals, monitor developments and provide views on proposed governmental decisions that may*

⁹⁹¹ Blumenwitz (1995), 140.

⁹⁹² Blumenwitz (1995), 141.

⁹⁹³ Compare: Weller (2006), 447.

⁹⁹⁴ Compare: Austria State Report, ACFC_SR(2000)03, 73; Weller (2006), 447.

⁹⁹⁵ The Lund Recommendations (1999), Para 12.

*directly or indirectly affect minorities. Governmental authorities should consult these bodies regularly regarding minority-related legislation and administrative measures in order to contribute to the satisfaction of minority concerns and to the building of confidence.*⁹⁹⁶ To ensure that these bodies may effectively perform their tasks, the competences and working procedures of consultative bodies should be clearly established, in principle by way of legislation. The relevant legislation should thus guarantee regular and timely contact between the consultative bodies and governmental departments and ensure early consultation in cases where legislative or administrative measures or other projects involve issues of concern for national minorities.⁹⁹⁷

Besides general consultative bodies representing all national minorities within the state, it is also possible, and may be advisable, to set up specialist bodies dealing with the concerns of one particular national minority, or of persons belonging to a national minority who are in a unique position. Another variant is the establishment of consultative bodies within particular ministries responsible for issues of particular relevance for national minorities. It should nevertheless be noted that consultation should not be restricted to very narrow functional or thematic areas, such as culture.⁹⁹⁸

Consultation may even take place in the absence of established consultative bodies, for example by way of letting representatives of national minorities speak before the parliament. However, where the existence or the scope of the obligation to negotiate in such informal procedures is unclear, states should establish guidelines clarifying the nature and scope of the obligation⁹⁹⁹, and create a more consolidated structure for the consultation process.¹⁰⁰⁰

Concerning personal membership within consultative councils, several aspects should be considered. One should think about nominating members of already existing parties and organisations of national minorities. In the nomination process due care needs to be taken to achieve a balance between different political or ideological orientations among groups representing the same minority, at the same time ensuring that the organisations from which one chooses the members are indeed widely representative. If the bodies consist of representatives of national minorities and government officials,

⁹⁹⁶ The Lund Recommendations (1999), Para 13.

⁹⁹⁷ Compare: Advisory Committee Opinion on Lithuania, ACFC/INF/OP/I(2003)008, Para 79.

⁹⁹⁸ Weller (2006), 450.

⁹⁹⁹ Compare: Advisory Committee Opinion on Finland, ACFC/INF/OP/I(2001)002, Para 50.

¹⁰⁰⁰ Compare: Advisory Committee Opinion on Norway, ACFC/INF/OP/I(2003)003 Para 61 and 97

it might be of concern if the latter are in the majority, as this might make the council appear unrepresentative or highly influenced by the government.¹⁰⁰¹

4.9.4.2 Proposals of Mechanisms to Ensure Effective Influence of the Kurdish Minority in Political Decision-Making Processes in Turkey

There appear to be no effective institutions or mechanisms aiming at or resulting in effective participation of the Kurdish population (or any other minority group) in political decision-making processes in Turkey. This is not surprising as, within the nationalistic concept of the Turkish constitutional system, the Kurds are not considered as a minority, but as part of the Turkish population and the Turkish nation.

There are a variety of ways by which such participation in decision-making can be facilitated, and there do not seem to be any stringent requirements or specific minimum standards in respect of the extent to which such measures have to be taken. States should adopt such measures where they appear appropriate, and they should take into account the individual circumstances within their territory to identify the most adequate solutions. Considering the intensity of the problems resulting from the situation of the Kurds in Turkey and the violence that has occurred so far, instruments and mechanisms ensuring participation in political decision-making, in particular in issues of relevance to the Kurdish minority, should be seen as a chance of helping to resolve these problems.

As there are a variety of minority groups in Turkey, a good option to ensure the influence of these groups in political decision-making would be the establishment of advisory or consultative bodies. These bodies should be established by law and provided with public funds distributed on the basis of clearly established legal proceedings. The applicable law should provide that these bodies must be consulted in the legislative process in those thematic fields usually affecting the interests of the minority groups, such as education, language and culture. By way of such a consultative procedure, it would be possible to ensure that Turkish legislation does not (unintentionally) threaten those interests that are considered to be vital for the preservation of the minority groups' identities. In addition, this constant consultation would improve the dialogue between the different groups, helping to avoid tensions and furthering mutual understanding.

It must be admitted that it may be difficult to define those groups for which such a consultative body has to be established. This decision should not be based on

¹⁰⁰¹ Extensive considerations regarding the composition of consultative bodies can be found in: Weller (2006), 448-449, with further references.

ideological grounds or a traditional concept of which group is considered to be a minority, but on statistical data and evaluation of the necessity for such a body to enable the group to express their interests and needs. Considering the size of the Kurdish population and the sensitivity of the situation of the Kurds in relation to the Turkish State, there can be little doubt that the establishment of an advisory or consultative body for the Kurdish population would be to the benefit of both Kurds and Turks. Concerning the composition of such a Kurdish consultative body, it must be envisaged that it consists of Kurdish representatives, and not of officials appointed by the Turkish authorities. For example, the representatives could be elected by the Kurdish population in special elections held at periodic intervals.

While consultative and advisory bodies for the minority groups in Turkey seem to be an adequate way to ensure influence on the political decision-making process, the introduction of other measures and procedures would probably encounter more resistance on the part of the Turkish authorities for fear of losing sovereignty. In addition, it must be considered that models strengthening the influence of representatives of minorities within parliament presuppose that these representatives were able to gain sufficient votes, or that special procedures exist which ensure such representation in parliament (see chapter on legislative representation above). History shows that the elected representatives of the Kurds have regularly encountered difficulties in entering parliament because they were unable to reach the nationwide 10% threshold. Measures strengthening the political power of national minorities within parliament would thus have to be combined with measures facilitating access of minorities to parliament in order to weaken majority rule in issues of vital concern for minorities and their identity. If the Kurds could be represented in parliament to an extent corresponding to their population size, it might well be that any additional measures for participation in decision-making within parliament would not be necessary, as the Kurdish representatives – as members of a particular pro-Kurdish party or of any other party – would have sufficient influence by way of normal parliamentary proceedings.

4.9.5 Executive Representation

4.9.5.1 The Promotion of Access to Posts in the Public Services as a Useful Means to Facilitate Effective Participation in Public Life

Although executive representation, which may be described as access to public offices, is not directly addressed in Art 15 FCNM and other instruments for minority protection,

it is an important element of effective participation of persons belonging to national minorities.¹⁰⁰²

At the national level, executive representation of national minorities within the government will be difficult to facilitate since ministerial appointments usually depend on which political parties participate in the government (coalition).¹⁰⁰³ One can only expect the appointment of persons belonging to a national minority to ministerial posts if the political party representing that minority participates in the government. It should be noted, however, that according to The Lund Recommendations, formal or informal understandings for allocating cabinet positions and other high positions in politically important bodies to members of national minorities constitute a possible form of arrangement facilitating the participation of national minorities in political decision-making.¹⁰⁰⁴

While representation at senior governmental level usually remains rare, provision must be made for equal representation of persons belonging to national minorities as public servants in public agencies serving central governmental functions.¹⁰⁰⁵ *“Public administration should, to the extent possible, reflect the diversity of society. This implies that State Parties are encouraged to identify ways of promoting the recruitment of persons belonging to national minorities in the public sector, including recruitment into the judiciary and the law enforcement bodies. Participation of persons belonging to national minorities in public administration can also help the latter better respond to the needs of national minorities.”*¹⁰⁰⁶

Commitment by states to achieve proportional representation, in particular through the adoption of specific legislation, seems to be rare, and the Advisory Committee has repeatedly criticised the low level of participation of persons belonging to national minorities in public service, calling for political strategies and measures to promote such participation.¹⁰⁰⁷ Considering that states are encouraged to find ways of promoting the recruitment of persons belonging to national minorities in public service, it may not be sufficient that all candidates for such posts in public services have equal chances and that candidates are not excluded from such posts because they belong to a minority. Accordingly, special measures should be envisaged to actively promote

¹⁰⁰² Weller (2006), 451.

¹⁰⁰³ Weller (2006), 451.

¹⁰⁰⁴ The Lund Recommendations (1999), Para 6.

¹⁰⁰⁵ Weller (2006), 452.

¹⁰⁰⁶ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 120.

¹⁰⁰⁷ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 75.

minority participation in the civil service.¹⁰⁰⁸ In cases where persons belonging to national minorities have been systematically excluded from public services, the adoption of such promotional measures alone is not sufficient, as states are also required to establish individual remedies for the victims of such exclusion.¹⁰⁰⁹

Proportionate representation of persons belonging to national minorities in public offices is even more important at regional or local level than at the national level.¹⁰¹⁰

Regional and local authorities are frequently in direct contact with the population, and appropriate minority representation at these levels will consequently not only help the authorities to better respond to the needs of persons belonging to the minority group, but it will also contribute to the building of confidence between the minority population and the organs of the state.

Special measures are also required in certain functional areas of public administration, where national minorities are traditionally underrepresented, such as in the judiciary and the administration of justice, as well as in the police.¹⁰¹¹

In order not to indirectly prevent the recruitment of persons belonging to national minorities to posts in the public service, state language proficiency requirements placed on public administration personnel as well as other qualification requirements should not go beyond what is necessary for the post of service at issue. States should also provide specific support to facilitate the learning of the official language for applicants and personnel belonging to a national minority.¹⁰¹² Policies on the recruitment of civil servants favouring those with minority language proficiency are a positive way of promoting and enhancing minority participation in public administration and facilitating the use of minority languages in dealings between citizens and the administrative authorities as provided for in European minority rights law.¹⁰¹³

¹⁰⁰⁸ The Lund Recommendations (1999), Para 6.

¹⁰⁰⁹ Advisory Committee Opinion on Croatia, ACFC/INF/OP/I(2002)003, Para 57.

¹⁰¹⁰ Weller (2006), 452.

¹⁰¹¹ Compare: Advisory Committee Opinion on Albania, ACFC/INF/OP/I(2003)004, Para 75; Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 122.

¹⁰¹² Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 126.

¹⁰¹³ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 160.

4.9.5.2 Access of Persons Belonging to the Kurdish Minority to Posts in Public Services in Turkey

The Turkish Constitution and Turkish legislation provide that access to posts in the public service is bound to objective criteria. Art 70 of the Turkish Constitution stipulates: *"No criteria other than the qualifications for the office concerned shall be taken into consideration for recruitment into public service"*. In practice, however, it seems that minorities do not have equal access to public offices in Turkey, and in particular non-Muslims and Kurds not denying their Kurdish identity are still discriminated against in the respective recruitment procedures.¹⁰¹⁴

Since it is not sufficient for European states to put in place the formal legal conditions to enable equal access to posts in the public service for persons belonging to national minorities, but it is required that these laws are appropriately implemented and that additional measures are adopted to allow proportionate representation of national minorities in the public service, the Turkish authorities should be encouraged to implement the relevant legislation appropriately and to promote access of members of minorities to posts in the public service.

In the South-East of Turkey in particular, but also in the big cities with a considerable Kurdish population, access of persons belonging to the Kurdish minority to posts in the public service should be promoted by the Turkish authorities. This would facilitate contact between the State and its Kurdish citizens, who sometimes have difficulties with the Turkish language, and it would help the Kurdish population to better identify with the Turkish State and its institutions. In addition, through the employment of people of Kurdish origin who are capable of using the Kurdish language, the Turkish State could easily fulfil its obligation to allow the use of the Kurdish language in dealing with public administration in areas where there is sufficient demand. Furthermore, the use of Kurdish police officers in the South-East might also help to reduce tensions between the Kurdish population and the security forces in this region, which should be one of the principle aims of the Turkish authorities' policies with respect to the Kurdish minority.

4.9.6 State Structure and Models of Autonomy

4.9.6.1 Decentralisation and Local Self-Governance

The opportunities for minorities to participate in public life very much depend on the constitutional structure of the State and the way in which legislative and executive

¹⁰¹⁴ MRG-Report 2007, 25.

power is distributed among different political bodies. The idea that the distribution of public authority is an important tool to facilitate the participation of minorities in public life is consequently also evident in the European instruments for the protection of minorities.

According to the Copenhagen Document, *“the participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned.”*¹⁰¹⁵

The Lund Recommendations contain a chapter on self-governance, emphasizing that under certain circumstances, effective participation of minorities in public life may best be achieved *“...through territorial or non-territorial arrangements of self-governance, or a combination of such arrangements”*.¹⁰¹⁶

The idea that decentralization or the introduction of autonomy arrangements may be a good option to allow for and facilitate effective participation of national minorities in public life is also consistent with Art 15 FCNM and is explicitly addressed in the Explanatory Report to the Framework Convention, which provides that *“...in order to create the necessary conditions for such participation by persons belonging to national minorities, Parties could promote – in the framework of their legal systems – inter alia...”* measures such as *“...decentralised or local forms of government.”*¹⁰¹⁷

One must bear in mind that the constitutional systems of European states vary considerably, and that it is not possible to assess “European standards” in this regard. While some European states have a rather centralized structure, others consist of a federal structure, and there are very few states that have established arrangements for self-governance for a certain territory or group. However, there are some good examples of constitutional arrangements specifically aiming for effective participation of national minorities, and some considerations about such arrangements may nevertheless be helpful to demonstrate to what extent changes to the Turkish constitutional system might help to improve political participation of the Kurdish minority.

In general terms, one may conclude that decentralization and sub-national forms of government may be an appropriate tool to further the integration of a minority within a state. Problems may best be solved within smaller communities, where the authorities

¹⁰¹⁵ Copenhagen Document, Para 35.

¹⁰¹⁶ The Lund Recommendations (1999), Para 14.

¹⁰¹⁷ Explanatory Report, Para 80

are in direct contact with the individuals and are thus capable of finding appropriate solutions to the problems of their citizens. This is particularly convincing with regard to linguistic and cultural aspects of life, which are often only important for a certain territorially concentrated community. In accordance with the principle of subsidiarity, political representation of minorities should consequently take place at the lowest level of the structure of a state.¹⁰¹⁸

The importance of local authorities as one of the “*main foundations of any democratic regime*” is also emphasized in the Preamble of the European Charter of Self-Governance, which further declares “*that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe*”, and that “*it is at local level that this right can be most directly exercised*.”¹⁰¹⁹ The Charter defines the concept of local self-governance in Article 3: “*Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population*.”¹⁰²⁰

According to BLUMENWITZ, the connection between local self-governance and the protection of minorities may be a key to ensure the preservation of the minorities’ cultural identity. The local authorities are usually in frequent and direct contact with persons belonging to national minorities and will consequently know best about the needs of the population, and their democratic legitimacy will guarantee that they care for these needs. A state may therefore foster political representation of national minorities at the local level by transferring the competence for those issues which are most important for national minorities and the preservation of their identity to the local authorities.¹⁰²¹

There are examples of European states which have made provision for political participation of persons belonging to national minorities by way of local arrangements of self-governance. In Croatia, for instance, national minorities have the right to proportional representation within the organs of local or regional administrations, resulting in rather extensive participation in those regions where they constitute the majority of the population.¹⁰²² In Finland, where the local communities have relatively far-reaching powers under their constitutionally guaranteed self-administration, it is

¹⁰¹⁸ Blumenwitz (1995), 91.

¹⁰¹⁹ Council of Europe: European Charter of Local Self-Governance, 15.10.1985.

¹⁰²⁰ European Charter of Local Self-Governance (1985), Art 3.

¹⁰²¹ Compare: Blumenwitz (1995), 91.

¹⁰²² Report submitted by Croatia pursuant to Art 25 paragraph 1 of the Framework Convention for the Protection of National minorities, ACFC/SR(1999)005, received on 16 March 1999, 138-140; Pan: *Minderheitenrechte in Kroatien*, in: Pan/Pfeil (2006), 251.

argued that the communities have become almost more important to the citizens than the administration exercised by the national authorities of the state. The communities are competent for matters relating to public services such as school, education, social services or health-care. Consequently, communities with a Swedish-speaking minority have some sort of limited local autonomy.¹⁰²³

Political representation of minorities through communal self-governance may further be improved through the introduction of models of specific self-governance arrangements for minorities. Such a model has been established in Hungary, where national and ethnic minorities have the constitutional right to set up self-administrations with clearly defined powers and responsibilities at the local as well as at the national level. These self-administrations of minorities, which are established on the basis of elections, have far-reaching powers at local level, their consent being required for the adoption of measures in matters relating to school, the media, culture or use of language. In matters of country-wide importance, the organs of these self-administrations for minorities represent the minorities through the provision of information and statements in matters particularly affecting the respective minority.¹⁰²⁴ The model of specific minority-self-administration, which may be introduced into an existing system of local self-administration, can be described as a groundbreaking concept for minority-protection.¹⁰²⁵

The Lund Recommendations also refer to territorial arrangements of local administration as possible means to ensure the political participation of national minorities: *“All democracies have arrangements for governance at different territorial levels. Experience in Europe and elsewhere shows the value of shifting certain legislative and executive functions from the central to the regional level, beyond the mere decentralization of central government administration from the capital to regional or local offices. Drawing on the principle of subsidiarity, States should favourably consider such territorial devolution of powers, including specific functions of self-government, particularly where it would improve the opportunities of minorities to exercise authority over matters affecting them.”*¹⁰²⁶

Such local, regional or autonomous administrations, which correspond to the specific historical and territorial circumstances of the relevant minorities, may undertake

¹⁰²³ Pan: Minderheitenrechte in Finnland, in: Pan/Pfeil (2006), 163.

¹⁰²⁴ Report submitted by Hungary pursuant to Art 25 paragraph 1 of the Framework Convention for the Protection of National minorities of 21 May 1999, ACFC/SR(1999)010, 94-104; Pan: *Minderheitenrechte in Ungarn*, in: Pan/Pfeil (2006), 603; Blumenwitz (1995), 93.

¹⁰²⁵ Blumenwitz (1995), 94.

¹⁰²⁶ The Lund Recommendations (1999), Para 19.

numerous functions regarding issues such as education, culture, use of the minority language, environment, local planning, housing, health and other social services.¹⁰²⁷

When analysing the state reports to the FCNM, WELLER noted that “...*the regional layering of authority has been mainly addressed through the related notion of devolved local governance.*” According to him, “...*it is one of the most consistent features of the state reports submitted thus far that they consistently focus on structures of locally devolved governance as a means of satisfying the requirements of Article 15.*”¹⁰²⁸ Many states have reported on the number of local councils and other local bodies where persons belonging to national minorities are represented in large numbers.

The Advisory Committee has stated that decentralized or local forms of government are often an important factor in the creation of the necessary conditions for effective participation of persons belonging to national minorities in decision-making, which is particularly important where national minorities are concentrated in certain areas.¹⁰²⁹

However, the Advisory Committee has also highlighted the fact that a positive impact of decentralization for national minorities is subject to certain conditions. In order to ensure that decentralization and devolution processes have a positive effect for persons belonging to national minorities in practice, “...*it is crucial to clearly define the respective competencies of sub-national and central authorities*”, and “*it is also important to provide local authorities with appropriate resources to enable them to carry out their tasks effectively*”.¹⁰³⁰ As always, the principle of the rule of law is essential for an effective guarantee of minority rights and human rights.

4.9.6.2 Autonomy Arrangements

Effective Participation of national minorities in political decision-making may also be guaranteed through models of territorial, personal or functional autonomy.¹⁰³¹ While the notion of autonomy appears in different contexts with different meanings, in international law it is often defined as a concept where parts of the state’s territory are

¹⁰²⁷ The Lund Recommendations (1999), Para 20.

¹⁰²⁸ Weller (2006), 438.

¹⁰²⁹ Compare: Advisory Committee Opinion on Azerbaijan, ACFC/INF/OP/I (2004) 001, Para 76; Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 129.

¹⁰³⁰ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 130.

¹⁰³¹ It has already been indicated in the excursus in Chapter 2.4 above that autonomy arrangements are also considered as an appropriate way to effectively grant the right to internal self-determination to a people.

authorized to govern themselves in certain matters by enacting laws and statutes, but without constituting a state of their own.¹⁰³² For the purpose of this chapter, autonomy is understood as comprising the competence to enact legislation as well as to enforce it, or, in other words, the ability to regulate one's own affairs without interference by the national authorities, thus going beyond local self-administration in more or less decentralized states.

Autonomy regimes for national minorities will usually allow the respective minorities to regulate those affairs that are relevant for their (cultural) survival and development within the state and will promote their participation in the public life of the state. This devolution of power in minority-relevant issues from the state to the minority itself is consistent with the above-mentioned principle of subsidiarity and aims to ensure the functioning of democracy by preventing the alienation of the individual from the state. Controversial topics such as language, culture and education, which are essential for the identity of minorities, may thereby be protected from interference by the state, and in particular from the dictate of the majority.¹⁰³³

The introduction of autonomy arrangements for minorities is also of advantage for the state. The duties of the national authorities in certain political fields such as culture and social services are fulfilled by another authority. Furthermore, ethnic tensions are eased because the members of the minority are encouraged to take responsibility in official affairs of the state, and members of the minority themselves are in a position to decide sensitive questions without interference by the majority.¹⁰³⁴

The Framework Convention does not provide for a right of persons belonging to national minorities to autonomy, whether territorial or cultural, but the Advisory Committee has examined the functioning and impact of territorial and cultural autonomy arrangements in states where they exist. The Committee has commented favourably on these arrangements, pointing out that they can foster a more effective participation in various areas of life, emphasizing the need that the corresponding constitutional and legislative provisions providing for such arrangements should clearly specify the nature and scope of the autonomy regime and the competencies of the autonomous body.¹⁰³⁵

¹⁰³² Compare: Heintze (1997), 22.

¹⁰³³ Compare: Blumenwitz (1995), 95; Eide: *Final Text of the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities*, (2001): "...the duties of the State to protect the identity of minorities and to ensure their effective participation might in some cases be best implemented by arrangements for autonomy in regard to religious, linguistic or broader cultural matters."

¹⁰³⁴ Compare: Blumenwitz (1995), 96; Heintze (1997), 25.

¹⁰³⁵ Advisory Committee on the Framework Convention for the Protection of National Minorities: *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural*,

On a theoretical basis, one can distinguish three concepts of autonomous arrangements: territorial autonomy, personal autonomy, and functional autonomy.

The concept of territorial autonomy implies that a certain area inhabited by large numbers of a specific minority is given a special legal status which exceeds the competences of other regional or local executive units in issues relevant for the minority. Hence, the establishment of a regime based on the concept of territorial autonomy only seems to be appropriate if two preconditions are met: first, the national minority must live in a territorially centralized way on a specific territory, and second, the minority must constitute the majority in this territory.¹⁰³⁶

Since a territorial autonomy regime includes all the people living within the territory in question, the protection of the minority within the minority is an important aspect that should be respected in the establishment of such a regime. The rights of people living in the autonomous area who do not belong to the minority which constitutes the majority in the respective area must be protected and these people must be represented in the local authorities.¹⁰³⁷

Some European states have established regimes that can be qualified as systems of territorial autonomy. In Italy, certain regions inhabited by considerable numbers of persons belonging to a minority group have been endowed with autonomous powers for reasons of minority protection. These regions include “Valle d’Aosta”, “Friuli-Venezia Giulia” and “Trentino-Alto Adige”, the latter consisting of the provinces “Trentino” and “Bolzano”. For each of these regions, a special statute is applicable which takes into account the multilingual constitution of the population of the respective region, and which defines the organs to be established and the competence they may exercise. Accordingly, these territorial autonomies dispose of their own legislative organs vested with considerable legislative powers as well as of regional or provincial governments with corresponding executive structures.¹⁰³⁸

In Spain, the constitution of 1978 continued the centralistic tradition, at the same time fostering decentralization and autonomous tendencies.¹⁰³⁹ Avoiding the term “minorities”, the Spanish constitution emphasizes the need to support all the peoples of

Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 133-137.

¹⁰³⁶ Compare: Blumenwitz (1995), 106; Heintze (1997), 39; Marko/Tretter/Boric (1993), 28.

¹⁰³⁷ Compare: The Lund Recommendations (1999), Para 21.

¹⁰³⁸ Compare: Report Submitted by Italy pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities, 03 May 199, ACFC/SR(1999)007, 67-73; Pan, „Die Minderheitenrechte in Italien“, in: Pan/Pfeil (2006), 226-229.

¹⁰³⁹ Blumenwitz qualifies the Spanish system of “Comunidades Autonomas” as “asymmetric federalism” (“asymmetrischer Föderalismus”), distinguishing it from the “ethnic federation” (“ethnische Föderation”) established within the USSR and former Yugoslavia, and from the “poly-ethnic federation” (“poly-ethnische Föderation”), a model that can be found in Switzerland; Blumenwitz (1995), 114-124.

Spain to preserve their culture, traditions, languages and institutions. Certain “nationalities”, which are clearly distinguishable from the rest of the population on the basis of cultural and linguistic features, traditionally disposing of clearly definable territories within the Spanish territory, have been endowed with autonomous powers. These nationalities are the Catalans, the Basques and the Galicians. Based on this concept of nationalities, the following territorially defined autonomous regions have been established: The Basque region, Catalonia and Galicia.¹⁰⁴⁰

According to Art 2 of the Spanish Constitution, every region may, in principle, decide to become a “nationality” with a corresponding statute. Such a decision requires the approval of the national parliament. On the basis of these provisions, additional autonomous regions have been established in regions traditionally inhabited by Catalans: Valencia and the Balearic Islands.¹⁰⁴¹

All of these autonomous regions dispose of legislative and executive organs and their competence is defined within the respective autonomy statutes. There is a certain scope concerning possible powers of the autonomous communities, allowing for a transfer of competence on all issues not explicitly conferred to the central state, but the state has the competence to enact laws imposing necessary general principles, which may also be valid for the autonomous regions, if this is in the public interest. The competences of the different autonomous communities thus vary considerably, but the Basque region in particular has a rather wide range of powers.¹⁰⁴²

The Spanish system of autonomous communities is generally considered as a good example of a minority-friendly structuring of a multi-national state. Unfortunately, there are still groups and parties within the Spanish nationalities, in particular among the Basques and Catalans, which stand up for independence of the regions in question, sometimes not refraining from violent means.¹⁰⁴³

4.9.6.3 Non-Territorial Concepts of Autonomy

As an alternative to the concept of territorial autonomy, participation of persons belonging to national minorities in political decision-making may also be facilitated by non-territorial forms of governance, which “...are useful for the maintenance and development of the identity and culture of national minorities.”¹⁰⁴⁴ Such non-territorial arrangements may consist of some sort of functional layering of public authority

¹⁰⁴⁰ Compare: Pfeil, Beate Sibylle: „Die Minderheitenrechte in Spanien“, in: Pan/Pfeil (2006), 521.

¹⁰⁴¹ Pfeil: „Die Minderheitenrechte in Spanien“, in: Pan/Pfeil (2006), 521.

¹⁰⁴² Pfeil: „Die Minderheitenrechte in Spanien“, in: Pan/Pfeil (2006), 523.

¹⁰⁴³ Pfeil: „Die Minderheitenrechte in Spanien“, in: Pan/Pfeil (2006), 523.

¹⁰⁴⁴ The Lund Recommendations (1999), Para 17.

resulting in forms of functional or personal autonomy for persons belonging to a national minority. The issues most susceptible to regulation by such non-territorial arrangements include education, culture, use of minority language, religion, and other matters crucial to the identity and way of life of national minorities.¹⁰⁴⁵

Since Art 15 FCNM emphasizes the need to generate the conditions necessary for the effective participation of persons belonging to national minorities in particular in relation to issues “*affecting them*”, mechanisms promoting participation in decisions relating to the above-mentioned offer a good opportunity for states to comply with the obligations under the FCNM. Although participation in this field can be achieved through consultative bodies and other mechanisms, as described above, the functional devolution of decision-making powers and administrative functions to the minority may sometimes be more appropriate.¹⁰⁴⁶

In theory, one can distinguish two models of autonomy which are based on a non-territorial concept.¹⁰⁴⁷ In a system of “functional autonomy”, the state endows private organisations of persons belonging to national minorities with the task of fulfilling public duties in certain thematic areas.¹⁰⁴⁸ As well as the promotion of language and culture, the media and certain aspects of education in particular, for example parts of the curricula, may be relatively well organised by private organisations.

The second form can be called “personal autonomy”. In such a model, the national minority itself is endowed with a formal legal status and is recognized as a legal subject. As such, the minority is empowered to fulfil legislative and administrative functions in some or all of the aforementioned issues. These functions are exercised by a representative organ on behalf of the minority. This organ must be established by (constitutional) law and its members should be elected on a democratic basis. The advantages of this model are that it is formally institutionalized and comprises all persons belonging to the minority, no matter where they live. Furthermore, it is a good way to avoid internal conflicts among minority organisations, because the representative organ of the minority, as a democratically legitimated representative of the minority population, is capable and responsible for the legally binding expression of the will of the minority in precisely defined sensitive issues.¹⁰⁴⁹ The disadvantage of such personal autonomy arrangements is that the minority groups remain dependent on representing their interests vis-à-vis the national organs of the state and on

¹⁰⁴⁵ The Lund Recommendations (1999), Para 18.

¹⁰⁴⁶ Weller (2006), 438.

¹⁰⁴⁷ Blumenwitz (1995), 96-106.

¹⁰⁴⁸ For a more detailed description of this concept compare: Blumenwitz (1995), 96-99; Heintze (1997), 37-38.

¹⁰⁴⁹ Compare: Blumenwitz (1995), 99-106; Heintze (1997), 42-46.

participating in decision-making processes at national level via the participatory mechanisms described above (Chapters 4.9.2 to 4.9.5), without being able to enforce such representation and participation against the will of the majority.¹⁰⁵⁰

Interestingly, the millet system in the Ottoman Empire can be qualified as a system of personal autonomy, where the members of religious minorities were able to maintain their own rules and institutions in the fields of culture, language and education.¹⁰⁵¹

In the practice of European states, there are cases where the minority is endowed with a formal legal status and is able to exercise functions of decision-making and administration.¹⁰⁵² Some European states have introduced mechanisms of co-decision between representative institutions of persons belonging to national minorities and national legislative and administrative bodies. In Serbia, for example, a form of self-government by national minorities in the fields of language and script, education, information and media, and culture is established through the election of “*National Councils*”. The number of representatives belonging to these councils is dependent on the total number of persons belonging to the minority. The way in which these representatives are chosen is regulated by law, and provides for various mechanisms, such as representation through members of parliament or regional assemblies representing minorities, or nomination by certain minority organisations.¹⁰⁵³

There are many ways in which the constitutional design and special constitutional arrangements, in particular concepts of autonomy, may create the conditions for facilitating the effective participation of persons belonging to national minorities. As the distribution of decision-making powers and administrative powers may take place in various forms, states should, taking account of the individual circumstances, endeavour to identify those arrangements which are most adequate to ensure political representation of minorities.¹⁰⁵⁴

4.9.6.4 Adequate Constitutional Arrangements for the Promotion of Kurdish Political Participation

The Turkish authorities have traditionally been reluctant to grant ethnic or linguistic minorities a minimum of specific protection or additional rights. Hence, it may seem rather utopian to discuss possible ways of restructuring the state system or even propose possible models of autonomy, which may provide minorities like the Kurds with

¹⁰⁵⁰ Compare: Marko/Tretter/Boric (1993), 27.

¹⁰⁵¹ Blumenwitz (1995), 100.

¹⁰⁵² Weller (2006), 439.

¹⁰⁵³ Serbia and Montenegro State Report, ACFC/SR(2002)003, 103-104.

¹⁰⁵⁴ Compare: Heintze (1997), 26.

the possibility of actively participating in the political decision-making processes, at least in those affairs particularly affecting them. Since the European instruments for the protection of minorities mention such models as adequate means of ensuring the political participation of minorities, and the existence of such models in certain European states seems to have produced positive results, it should nevertheless be considered whether some sort of autonomous regime might seem appropriate to foster political participation by the Kurds in Turkey. Even if this may be only of academic interest at the moment, one may hope that in the future such considerations may have practical implications in Turkish politics, and may even influence the structure of the Turkish State, enabling the Kurdish minority to participate more fully in political decision-making processes in Turkey. The following considerations should be seen as a starting point for further discussions and will, therefore, not go into much detail as to the exact arrangement and organisation of the various models, or the exact powers that should be transferred from the national authorities to the autonomous bodies.

The protection of specific rights of the Kurds as well as of other minorities, and in particular political representation of these minorities, could be considerably improved by transferring powers from the Turkish national authorities to regional or local authorities. If such a shift of powers involved matters of education or the media, important aspects of the Kurdish identity could be dealt with in direct contact between the authorities and the members of the minorities, which would probably lead to solutions that are adequate for the individual situation. By employing persons belonging to the respective minorities within the local and regional administration, the Turkish State could also provide the necessary services in the minority language and would ensure that the authorities are able to appropriately identify the needs of the minorities. Such a general restructuring of the constitution and a transfer of competence to the local authorities would be to the benefit of all Turkish citizens, not only those of Kurdish origin.

A further step could be the introduction of the constitutional preconditions for the establishment of specific minority self-administrations in those communities which are inhabited by large numbers of persons belonging to the Kurdish minority.

Considering that the Kurds traditionally live in the south-eastern regions of the Turkish territory, one might argue that the introduction of some sort of territorial autonomy might best enable the Kurdish population to take part in political decision-making. Based on statistical data on the numerical size and quota of the Kurdish population in the different Turkish provinces, certain of these provinces might be endowed with regional legislative and executive bodies competent for specific, clearly defined issues such as education, language and culture. A precondition for the establishment of such

bodies would be the acknowledgement of the Kurdish language as second official language, which should be used in dealings between citizens and the authorities as well as in internal communications by the administrative organs.

While it seems advantageous that such territorial arrangements would allow the exact definition of the area of application of the legislation enacted by the local authorities, and would facilitate the administration and implementation of national legislation, as well as of the legal acts of the autonomous authorities, there are numerous risks and disadvantages that must be taken into account.

Firstly, it must be mentioned that the territory covered by an autonomous regime could be considered as being the exclusive territory of the specific minority group. A territorial regime for the regions traditionally inhabited by the Kurds may lead to the association being made that this region is Kurdish territory. Considering this, the introduction of such an arrangement appears rather unlikely, because the Turkish authorities will fear that such a link between the Kurds and a specific region will lead to renewed claims for independence and secession. What is more, such fears might in fact be justified. Considering that the introduction of a territorial regime (as unlikely as this may be) may, in fact, strengthen still existing claims for secession raised by certain parts of the Kurdish population, this might lead to renewed violence instead of peaceful co-existence and political co-operation.

Secondly, it must be noted that even in those areas inhabited by large numbers of Kurds, there is also a considerable number of people belonging to other ethnic and/or linguistic groups. Any regime allowing for territorial autonomy should thus contain mechanisms protecting these minorities within the (Kurdish) minority, which may render such a territorial regime rather complicated or even impracticable in the end.

Finally, one must not forget that nowadays large numbers of the Kurdish population no longer live in the south-eastern regions of Turkey. These people would not be covered by any territorial autonomy in the south-eastern regions, exempting large numbers of the Kurds from the benefit of such a regime.

Thus, it remains highly questionable whether an autonomous regime in support of the Kurds in Turkey should take the form of territorial autonomy. Considering the dispersion of the Kurds over the whole territory of Turkey and the ideological problems that might result from the identification of a "Kurdish territory", a system of autonomous decision-making and administration should probably better be linked to the individual's affiliation to the Kurdish population rather than the inhabitation of a specific territory.

A possible way of ensuring the participation of the Kurds in decisions concerning the main features of their identity would be the introduction of some sort of functional autonomy. Certain duties and responsibilities of the Turkish State could be conferred to

Kurdish associations, which would have to be vested with limited public power and sufficient public funds in order to fulfil these duties. Naturally, the tasks and duties that could be transferred to Kurdish associations would have to be restricted to a very limited range of domains, such as education, the preservation of culture, or the media. But although the range of issues was limited, a model of functional autonomy would nevertheless allow the Kurds to autonomously regulate those aspects of public life that are most essential for the preservation of their identity. The fact that such a model of autonomy is not explicitly linked to a specific territory could avoid raising fears of secession, and it would also cover those persons belonging to the Kurdish minority who do not live in the traditional territory, although a certain territorial concentration would probably be required, if only for financial reasons.

However, it remains questionable whether a model of functional autonomy is an adequate way of ensuring political participation of the Kurds in Turkey. As BLUMENWITZ¹⁰⁵⁵ points out, functional autonomy may only be effective where the potential for ethnic conflict is very limited, in particular where the minority is rather small, which is definitely not the case given the size of the Kurdish minority in Turkey. The formation of associations and their exercise of public powers and duties will probably not function where the minority consists of millions of people, since this will almost certainly lead to organisational problems and questions of concurrence between those associations willing to exercise these powers. Where the potential for conflict is very high, as in the case of the Kurds in Turkey, such a model of autonomy may also be easily used by the state as a means of political pressure, in particular if the associations' powers are not firmly rooted in the constitutional system.

Following the systematic distinction between the three models of autonomy described above, another possible way of providing the Kurds in Turkey with a certain degree of autonomous decision-making power would be the introduction of a system of “personal autonomy”. The Kurdish population would have to be constitutionally recognized as a statutory body, responsible for the autonomous fulfilment of specific tasks and duties, in particular in the fields of education, language and culture. Like the Christians and Jews under the “Millet-System” of the Ottoman Empire, the Kurds could similarly be entitled to manage their own cultural and educational institutions. This would not only allow the Kurds to preserve the main features of their identity, but it would also ease the workload of Turkey’s national authorities, because parts of their duties would be exercised by autonomous Kurdish authorities.

¹⁰⁵⁵ Blumenwitz (1995), 96-106.

The representative organs of the Kurdish minority, as a statutory body, should be elected according to democratic principles, which would ensure consistent and homogenous actions in the domains covered by the autonomous statute. Problematic issues, such as funding and membership of the individual to the statutory body, should be regulated by constitutional law. It should be ensured that the body has sufficient funds to fulfil its duties, and that the existence of a statutory body should not undermine the freedom of the individual to choose whether or not he or she wishes to be treated as being part of the Kurdish minority.¹⁰⁵⁶

It must be emphasized that the possibility of providing the Kurds in Turkey with autonomous competences within the Turkish State has necessarily been only roughly described. In the event that the Turkish authorities one day come to a point where they unconditionally acknowledge the Kurdish population as a minority to the extent that the introduction of some sort of autonomy becomes an issue, it will be necessary to find an appropriate individual solution. This solution should take into account the specific conditions prevailing at that time, in order to establish an autonomous regime which ensures that the needs of the Kurds are cared for, and which fits into the constitutional structure of the Turkish State.

It is evident that the introduction of some sort of self-administration or autonomous regime would require an intense reform of the constitutional structure of the Turkish State, and it is far from likely that such reforms will take place in near future. However, the Turkish authorities should bear in mind that people will feel more closely connected and be more loyal to a state which cares for the needs of its citizens and allows them to actively and effectively participate in the public decision-making process, in particular in affairs which affect them directly. Claims for secession and independence are not fuelled by the granting of political and cultural rights and the establishment of autonomous powers, but by the suppression of a minority's collective identity and the denial of political participation. The more the Kurds are able to decide about questions of immediate importance for their identity and existence, the more they will feel represented within the Turkish State, and calls for secession and claims for independent statehood on the part of the Kurdish people will become much more unlikely.

¹⁰⁵⁶ Compare: Blumenwitz (1995), 96-106.

4.9.7 Effective Participation in Cultural, Social and Economic Life

Effective Participation in cultural, social and economic life can be seen as the aim of many of the minority rights provisions described so far, but there are some additional aspects that deserve consideration.¹⁰⁵⁷

With regard to adequate participation in social and economic life in particular, persons belonging to national minorities regularly face severe problems and disadvantages in comparison to persons belonging to the majority. In areas with compact minority populations, the economic situation and quality of life are often inferior to other areas of the state. Where the economic situation of persons belonging to national minorities is generally worse than that of the majority, states should engage in the development of specific measures to limit such structural differences and improve opportunities in such economically depressed areas. Representatives of persons belonging to national minorities should be involved in the planning, implementation and monitoring of policies and projects which have an impact on or are directed at addressing the economic situation of the minorities.¹⁰⁵⁸

The systematic economic underdevelopment of some of the south-eastern provinces in Turkey is an issue which should be specifically targeted by the Turkish authorities, who should introduce measures promoting economic activities in these areas. The Turkish government has already introduced the so-called South-East Anatolia Project (GAP), which is based on four pillars: economic development, social development, infrastructure development and institutional strengthening.¹⁰⁵⁹ In the course of this project, investments in irrigation, road transport, health and education were given priority. A monitoring, evaluation and reporting mechanism specific to the GAP was announced but has not yet been established.¹⁰⁶⁰

While such a programme aiming at economic development should be welcomed, due care should be taken that the interests of the local population are respected, and that economic projects do not harm the living conditions of parts of the population or the cultural heritage of the region's population. Projects such as the Ilisu-dam have raised fears in this respect.

¹⁰⁵⁷ The participation of minorities in economic progress and development is explicitly referred to in Art 4 Para 5 of the UN Declaration on the Rights of Persons Belonging to National or, Ethnic, Religious and Linguistic Minorities: “States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country.”

¹⁰⁵⁸ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 42-46.

¹⁰⁵⁹ European Commission: *Turkey 2008 Progress Report*, 27.

¹⁰⁶⁰ European Commission: *Turkey 2009 Progress Report*, 30.

*“Participation of persons belonging to national minorities covers a wide range of issues, from access to adequate housing, health care, social protection (social insurance and social benefits), to social welfare services and access to work.”*¹⁰⁶¹ The collection of data in respect of these issues can be seen as a necessary prerequisite and a first step to developing policies ensuring that persons belonging to national minorities may effectively participate in economic and social life.¹⁰⁶² In addition, anti-discrimination legislation should be in place to prevent the systematic discrimination of persons belonging to national minorities in their access to services and jobs. It has already been stressed that the recruitment of civil servants with minority language proficiency may be a useful measure to facilitate communications between individuals and the authorities, strengthening the confidence of persons belonging to national minorities in the state, and enabling the authorities to better understand the needs of the citizens.

As persons belonging to national minorities are often disadvantaged in respect of their access to the labour market, unnecessary restrictions, such as language requirements, in the access to specific economic activities or jobs, in particular posts in the public service, which are not necessary to perform the activity in question, should be removed.¹⁰⁶³

In any case, states should endeavour to ensure that national minorities are not only given the chance to enjoy the same rights and opportunities in cultural, social and economic life as persons belonging to the majority, but that they may actively participate in the decision-making processes designing the framework of these aspects of life.

The Turkish authorities should be constantly reminded of the fact that measures aiming at the improvement of the social and economic conditions of the Kurdish minority will contribute considerably to a peaceful co-existence of Turks and Kurds within the Turkish State. Accordingly, Turkey should be encouraged to collect data on the Kurdish population and their economic and social situation, and, in consultation with persons belonging to the Kurdish minority, to further engage in systematic policies in order to

¹⁰⁶¹ Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 24.

¹⁰⁶² Compare: Advisory Committee Opinion on Albania, ACGC/INF/OP/I(2003)004, Para 75; Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 30.

¹⁰⁶³ Compare: Advisory Committee on the Framework Convention for the Protection of National Minorities: Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFFC/31DOC(2008)001, adopted on 27 February 2008, Para 54-55.

reduce the economic and social inequalities between the various ethnic, linguistic and religious groups living on Turkish territory.

4.10 Trans-Frontier Contacts

4.10.1 European Standards

International law acknowledges the right of persons belonging to national minorities to maintain personal contacts across frontiers.

Art 17 (1) FCNM stipulates:

*“The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage.”*¹⁰⁶⁴

Like many other Articles of the Framework Convention, Art 17 (1) is based on a provision contained in the Copenhagen Document, stipulating that persons belonging to national minorities have the right *“...to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs.”*

The Explanatory Report points out that the undertakings contained in Art 17 are *“...important to the maintenance and development and the culture of persons belonging to a national minority and to the preservation of their identity (see also Article 5, paragraph 1).”* A specific provision on the right to establish and maintain contacts within the territory of a state was considered unnecessary and, therefore, not included in the FCNM, since such a right was felt to be adequately covered by other provisions, particularly Art 7 as regards freedom of assembly and of association.¹⁰⁶⁵

Art 17 FCNM particularly addresses those ethnic, religious, linguistic or cultural groups which are divided by existing international frontiers. Such groups may constitute minorities in more than one state (so-called “dispersed minorities”), but it is also possible that the group forms a minority in one state and the majority in a neighbouring state (so-called “kin minorities” who possess a “kin state”).¹⁰⁶⁶

¹⁰⁶⁴ Compare: Art 4 Para 5 of the UN Declaration on the Rights of Persons Belonging to National or, Ethnic, Religious and Linguistic Minorities: *“Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States with whom they are related by national or ethnic, religious or linguistic ties.”*

¹⁰⁶⁵ Explanatory Report, Para 83-84.

¹⁰⁶⁶ Jackson-Preece (2006), 488.

The right to establish cross-frontier contacts in particular, although not exclusively, with other members of the same group aims at lessening the consequences of the separation of the group resulting from the historical developments that lead to the drawing of the actual frontiers. It must be emphasized in this context that Art 17 respects these frontiers and is not intended to serve as a justification or support for secessionist tendencies or claims by minorities – an interpretation which is also based on Art 21 FCNM.

In this context, it is important to note that Art 17 (1) FCNM only protects “*free and peaceful contacts*”. Trans-frontier contacts of national minorities must not involve the use of violent means or the preparation of such means, and the aims of these contacts must be in conformity with the fundamental principles of international law.¹⁰⁶⁷ Thus, the limitation to “*free and peaceful contacts*” is a reinforcement of Art 21 FCNM: “*Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular to the sovereign equality, territorial integrity and political independence of States.*”

Trans-frontier contacts may occur in two different forms: by movement of persons; or by communication of thoughts, opinions and ideas, cultural and artistic expression, and social and scientific knowledge. While free movement of persons within the territory of a state is acknowledged in international human rights law under certain conditions, the extent to which trans-frontier movement has to be allowed is less clear. On a European level, free movement across frontiers only seems to be guaranteed for EU citizens in relation to the territory of the EU member states, but this guarantee is subject to numerous conditions specified by secondary EU-law and may even be restricted on a temporary basis for new member states.¹⁰⁶⁸

Art 17 (1) FCNM seems to imply that border controls and visa requirements, although they certainly are legitimate under international law, should not impose undue limitations upon the mobility of persons belonging to national minorities.¹⁰⁶⁹ The principle of non-discrimination requires that persons belonging to national minorities must be able to cross frontiers under the same or even more favourable conditions as persons belonging to the majority.

Freedom of communication, more often referred to as freedom of expression, is a basic human right acknowledged in a number of international human rights treaties. Its basic elements, its function in a democracy and its importance for persons belonging to

¹⁰⁶⁷ Jackson-Preece (2006), 498.

¹⁰⁶⁸ Jackson-Preece (2006), 490-495.

¹⁰⁶⁹ Jackson-Preece (2006), 490.

national minorities have already been described above. The provision of Art 17 (1) FCNM reinforces the right to freedom of expression by underscoring its trans-frontier applicability.¹⁰⁷⁰ Communication by persons belonging to national minorities across frontiers may only be restricted under the same conditions as communication within the state.

So far, the Advisory Committee has not found a violation of the right to trans-frontier communication.

4.10.2 The Situation of the Kurds in Turkey

Art 23 of the Turkish Constitution (as amended on October 17, 2001) guarantees everyone's right to freedom of residence and movement. According to Paragraph two of the provision, the *"freedom of residence right may be restricted by law for the purpose of preventing offences, promoting social and economic development, ensuring sound and orderly urban growth, and protecting public property; freedom of movement may be restricted by law for the purpose of investigation and prosecution of an offence, and prevention of offences. A citizen's freedom to leave the country may be restricted on account of civic obligations, or criminal investigation or prosecution."* All of the cited purposes can be considered to be legitimate reasons for the restriction of the right to freedom of movement and residence. Finally, Para 3 of Art 23 stipulates that citizens may not be deported, or deprived of their right of entry to their homeland.

While there do not seem to be unjustified legal provisions restricting the right of persons belonging to a minority to establish and maintain contacts, there are claims of discrimination of members of minority groups at the level of administration. In particular, Kurdish intellectuals have faced problems in connection with the issuance of passports, as the authorities regularly argue that their departure from the country would be detrimental to the country's interests.¹⁰⁷¹

Another aspect which appears problematic in the context of the right to trans-frontier contacts is the restriction on the import of publications dealing with "Kurdish topics" or the Kurdish people. Such publications are seized by the public authorities on the grounds of protecting the indivisibility of the Turkish State, public security and morals according to Art 28 of the Turkish Constitution.¹⁰⁷²

Another serious problem is the internal displacement of the Kurds and its social consequences. The displacement of thousands of Kurds from their traditional

¹⁰⁷⁰ Jackson-Preece (2006), 496.

¹⁰⁷¹ Compare: Pan: *"Die Minderheitenrechte in der Türkei"*, in : Pan/Pfeil (2006), 565.

¹⁰⁷² Compare: Pan: *"Die Minderheitenrechte in der Türkei"*, in : Pan/Pfeil (2006), 565.

homelands in the Turkish South-East in the course of the conflict between the state and the PKK has led to serious social difficulties for the displaced , the majority of whom have fled to the big cities in Western Turkey, where many of them live in poverty. Furthermore, being thus dispersed makes it difficult for these people to maintain contacts with other Kurds and to preserve their identity. While it may be argued that this displacement was not mainly caused by the state and its security forces, but by the violent acts of the PKK, it must be noted that the government still has not introduced policies producing the necessary economic and social conditions to allow the displaced to return to their traditional homelands.¹⁰⁷³

In order to guarantee the right to free trans-frontier contacts to members of the Kurdish minority, the Turkish authorities must ensure that all Kurdish people willing to leave the country may do so under the same conditions as other Turkish citizens. Restrictions of the right to leave the country should only apply on the grounds enumerated in Art 23 of the Turkish Constitution, which must be interpreted in line with the relevant international legal documents on a non-discriminatory basis. One must not forget that the Kurds constitute a minority in every state in which they live. Under these circumstances, the right to maintain cross-frontier contacts acquires vital importance for the preservation of a common Kurdish identity.

Since the right to trans-frontier contact also covers trans-frontier information and, as such, re-enforces the right to freedom of information and expression, it is essential that it is possible for the Kurds send and receive information from abroad. While the seizure of publications for security reasons is legitimate, this must not lead to an actual ban on the importation of all publications dealing with Kurdish issues. A state which cares for its citizens does not need to fear the introduction of ideas from abroad as long as they are expressed by peaceful means.

¹⁰⁷³ Compare: Pan: “*Die Minderheitenrechte in der Türkei*”, in : Pan/Pfeil (2006), 565.

5 Conclusions

5.1 The Historical Framework

Like most European States, the Turkish State does not consist of an ethnically homogenous population, but of numerous different ethnic, linguistic and religious groups. Since the establishment of the Republic, this heterogeneous population has had a decisive influence on the ideological foundation of the Turkish political and constitutional system. The population's diversity has never been seen as a source of enrichment for the Turkish State and its society, but as a constant threat to the State's territorial and political integrity.

Through the more or less artificial creation of the "Turkish Nation", the ideological and political principles introduced by Atatürk and the founders of the Republic sought to eliminate any risk to the integrity of Turkish State which might result from this diversity. Atatürk's concept of nationalism, which is still one of the pillars of the ideological foundation of the Turkish political and constitutional system, was based on the idea that the Turkish nation was not defined by ethnic, linguistic, historical, or cultural characteristics of the population, but that it consisted of all people with Turkish citizenship with the collective desire to form the Turkish nation. However, Turkish nationalism was by no means independent of ethnic, linguistic, historical or cultural criteria. In order to foster the unity of the "Turkish Nation" and indoctrinate the population in this concept, policies were introduced which had the object of suppressing and finally eliminating these different characteristics, and promoting the Turkish language, culture and historical heritage. The idea of the existence of minorities with distinct features and a different identity was incompatible with this concept.

As the largest distinguishable minority group on Turkish territory, the Kurds were constantly considered as a particular threat to Turkish unity. Accordingly, measures aiming at the promotion of the "Turkish Nation" through the elimination of linguistic and cultural differences specifically targeted the Kurdish population. This inevitably lead to resistance on the part of the Kurdish minority, which was not only expressed by peaceful means, but also through the use of violence. The formation of the PKK and its fight against the Turkish State by way of terrorist attacks, which finally lead to an internal armed conflict, must seen behind this background of forced assimilation, although this does not mean that terrorist attacks may be justified from a legal or any other point of view.

The history of violence which has marked the development of the political, legal and factual situation of the Kurds in Turkey has a decisive impact on any considerations intended to identify possibilities for the peaceful existence of a distinct Kurdish minority within the Turkish State. The reaction of the Turkish State to the actions of the PKK has lead to numerous, systematic human rights violations, many of which have lead to judgements of the ECtHR. In this respect, it must be emphasized that where a State has massive security concerns in relation to terrorist attacks, these must not lead to a denial of fundamental human rights as guaranteed by the ECHR and other international conventions. Even in the fight against systematic terrorism, a modern democratic State has to abide by the principle of the rule of law, and must not resort to torture or deliberate, disproportionate interference with other fundamental rights, such as the right to life, the right to freedom of expression, the right to personal freedom, the right to private life, or the right to property. In particular where such violations of human rights and fundamental freedoms not only target the aggressors themselves, but also the civilian population, the respective State should be made responsible by the international community and the competent monitoring bodies. At a national level, such violations should neither be ordered nor tolerated by the highest officials, and any perpetrators of acts violating human rights should be brought before a judge, and punished in accordance with applicable law. The fight against terrorism may be conducted successfully by the use of measures in accordance with legislation governing the activities of the police and national criminal law. It does not require special legislation or a deviation from the principle of the rule of law.

In addition to the issue of human rights violations, the fight against terrorism has lead to additional resistance on the part of the Kurdish population. As many Kurdish people who did not support the PKK have nevertheless been victims of actions on the part of the security forces, the fight against terrorism has most probably increased the resistance of the Kurdish population to the Turkish State. On the other hand, the violent actions committed by the PKK have caused numerous civilian victims among the Turkish population. This has generated hostility among the Turkish population vis-à-vis the Kurdish population and has fuelled nationalist tendencies among politicians and civilians. Accordingly, political and legal measures aiming at the protection and promotion of the Kurdish population will be met with disapproval by parts of the Turkish population and should, therefore, be accompanied by measures for the promotion of tolerance. Similarly, any efforts of the part the Turkish authorities to find a peaceful solution to the conflict should also be able to overcome the mistrust of the Kurdish population.

The fact that the situation of the Kurds in Turkey has been marked by violence and conflict in the past might lead to the conclusion that the whole issue is merely a question of terrorism and national security. The Turkish authorities have, in fact, regularly justified their restrictive policies in relation to the Kurds with the argument that Turkey does not have a problem with minorities, but with terrorism. In view of the linguistic, cultural and historical differences between Turks and Kurds, as well as the historical development of the situation of the Kurds in Turkey, it is evident that the “Kurdish Question” is primarily a political and a legal question – a question of a minority within a national State. Accordingly, the solution to the related problems may only be found through political and legal measures, and not through violence and warfare.

5.2 The Kurds in Turkey and the People’s Right to Self-Determination

From the point of view of international law, one possible approach to the situation of the Kurds in Turkey is to analyse this situation under the people’s right to self-determination. Considering the traditional differentiation between the concepts of internal and external self-determination, one may argue that a solution to the situation of the Kurds may best be found either by ensuring effective political participation through a truly representative government, or through the establishment of an independent legal entity or State based upon external self-determination.

It must be borne in mind that the concept of self-determination is one of the most controversial issues in international law. Questions on whether the Kurds in Turkey are entitled to claim the right to self-determination, or whether this concept is in fact capable of leading to a peaceful solution satisfying both Kurds and Turks, should probably be dealt with in a more detailed way than is possible in the framework of this thesis, which has a different focus. However, even if one is merely touching upon the issue of the Kurds in Turkey and the right to self-determination, one immediately identifies numerous problematic aspects. It is not clear whether the Kurdish population in Turkey can be qualified as a people under international law. If they can be defined as a people, the exact scope of their right to self-determination is hard to determine. Are they only entitled to be represented by the government? Do they have a right to autonomy? Is there even a right to secession and to the establishment of an independent Kurdish State?

In addition to legal aspects in respect of the Kurds and the right to self-determination, one must also be aware that the right to self-determination is a delicate issue in both political and psychological terms. Governments are very sensitive about questions of

territorial and national integrity. Given that the Turkish State has a nationalistic tradition, with policies particularly aiming at the preservation of the Turkish nation and the integrity of the Turkish territory, there has been, and will be, intense opposition to any idea or concept which might imply the separation of parts of the Turkish territory to the benefit of the Kurds. In so far as the concept of self-determination involves questions of secession and independence, it should also be questioned whether such far-reaching political changes are, in fact, desired by the majority of the Kurdish population. If the (majority of the) Kurdish population is mainly interested in additional political participation and the protection and preservation of the basic characteristics of their Kurdish identity, it is questionable whether one should promote any ideas which go beyond the full and unconditional guarantee of human rights and minority rights within an existing sovereign State, thereby risking opposition and additional tension.

In respect of the relationship between the people's right to self-determination and minority rights, the traditional approach has long been that only peoples are entitled to self-determination, and minorities only to minority protection. Quite apart from the question of adequate definitions and distinguishing criteria to separate the terms "people" and "minority", it appears doubtful whether such a strict distinction between the two concepts is still appropriate.

When the principle of self-determination was brought up against the background of the First World War, the idea was that every people should have its own independent State. Later on, the principle became linked to decolonisation, meaning that every people should be free from external oppression. Nowadays, the right to self-determination is not seen primarily as an external concept, but also as an expression of the idea that the government should represent all the people living within the territory of the State. Thus, self-determination is merely seen as a right to political representation, and not primarily defined as a right to independent statehood free from external oppression. In addition, like the protection of human rights, the right to self-determination is firmly rooted in international human rights law. Minority rights and the right to self-determination are human rights, inherent to every human being and to the benefit of each individual human being, and they should not be granted only to artificially identified groups defined as a "people".

The idea of political representation and political participation in its various possible forms is an indispensable part of a modern concept of minority rights law. From this point of view, effective minority rights protection and promotion may in fact also realise the principle aim pursued through the concept of (internal) self-determination, namely effective political representation. Democracy, participation in elections, decentralised forms of government and models of autonomy are adequate concepts to realise

political participation and the representation of groups of people with distinct characteristics living in nation States, no matter whether these concepts are analysed under the title of minority rights or self-determination. Accordingly, self-determination and minority rights should not be seen as strictly separated, mutually exclusive legal instruments, but as legal concepts which are both based on human rights and essentially pursue the same goals. As self-determination is, however, in most cases politically more sensitive than minority rights protection, and as the content of this right is less clearly defined, it seems sufficient, in the first instance, to analyse the situation of the Kurds in Turkey in accordance with European minority rights standards and to claim additional rights as provided for in European minority rights law, instead of invoking the peoples' right to self-determination.

5.3 The Kurds in Turkey – A Minority

Despite the elaboration of numerous international legal and political documents relating to the protection and promotion of ethnic, linguistic, religious or national minorities, the international community of States has, for political reasons, so far avoided providing, or not been able to provide, a legally binding definition of the term minority or national minority. Despite this deficiency it is nevertheless possible to find an appropriate definition of the term minority in order to identify those groups to which international minority rights instruments are applicable. Most of the definitions elaborated by scholars, and within the framework of organs of international organisations, mainly contain the same elements, indicating widespread consensus on the issue. A minority (or national minority) may thus best be defined as a group which is numerically inferior to the rest of the population of the State in which they live, which is in a non-dominant position, whose members (being nationals of the State) possess ethnic, religious or linguistic characteristics differing from those of the rest of the population, and who show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.¹⁰⁷⁴

When applying this definition to the Kurds in Turkey, there can be little doubt that under international standards, the Kurds in Turkey do qualify as a (national) minority. As such, the minority status of the Kurds is independent of formal legal or political recognition on the part of the Turkish State.

The Turkish authorities have traditionally refused to acknowledge the existence of a Kurdish or of any other ethnic or linguistic minority within the Turkish State. Based on

¹⁰⁷⁴ Compare chapter 3.1.1 above.

the Turkish concept of nationalism, minorities have only been accepted on the basis of the Treaty of Lausanne which, according to the official Turkish interpretation, only covered religious minorities such as Christians and Jews. The idea of the existence of ethnic or linguistic minorities has traditionally been, and still appears, incompatible with the ideological principles of the Turkish constitutional order and the very specific meaning of the “Turkish Nation”. It is not surprising that in 2010, the European Commission had to state in its Progress Report on Turkey that “*Turkey’s approach to minority rights remains restrictive*”.¹⁰⁷⁵

Within a European framework, however, the existence of minorities and the fulfilment of the corresponding obligations of States to protect and promote the existence of such minorities’ identities are not something which is left to the discretion of the national States. As part of the protection of universal human rights, the protection of minorities does not belong to the reserved domain of States. Where minorities exist on the territory of a national State, they are entitled to additional rights and specific protection, independent of the State’s ideological foundation. Notwithstanding this legal approach, effective protection and promotion of minorities primarily depends on the political will and the legal framework of the respective nation State. In view of the current ideological concept of the Turkish constitutional order and the corresponding premises of traditional Turkish policies, the introduction and effective implementation of specific minority rights for the benefit of the Kurds and other minority groups within Turkey will be difficult to realise. Against the background of the changing political conditions in Europe in general, and the desire of the Turkish State to be further integrated into the European Community of States, a fundamental change of attitude in respect of ancient ideological principles, as well as far-reaching legal reforms of the constitutional and legal order, consequently seem to be of fundamental importance in order to fully and effectively guarantee human rights and minority rights in accordance with European standards.

5.4 The Kurds in Turkey and Minority Rights

5.4.1 Equality and Non-Discrimination

It must be acknowledged that Turkey has made considerable progress in the field of human rights protection and minority protection in recent years. The prospect of future EU-membership has led to constitutional and legal reforms as well as to a more tolerant approach towards minority groups. However, much remains to be done in

¹⁰⁷⁵ European Commission: *Turkey 2010 Progress Report*, 32.

order to effectively protect and promote the identity of minorities such as the Kurds, in accordance with the standards set by European instruments for the protection of national minorities.

In respect of the principle of equality and non-discrimination, there seem to be considerable deficiencies in the Turkish legal order, as well as in the treatment of the Kurds in everyday life. The principle of equality and non-discrimination prohibits that persons belonging to a minority are discriminated against by law or factual treatment due to their specific characteristics, such as different language, different ethnic background or religion. Furthermore, at a European level, the principle of equality is usually understood as meaning effective equality (equality in fact), and not formal equality, meaning simple equality in law. While the same facts should be treated in the same way, different facts require different treatment. Accordingly, persons belonging to minorities should be treated differently where their affiliation with the minority requires difference in treatment in order to result in effective equality with persons belonging to the majority. Based on this concept, all European instruments for the protection of minorities explicitly or implicitly allow for, or even demand, preferential treatment of persons belonging to national minorities where this is necessary and proportional to the aim pursued.

In contrast to this understanding of equality in the context of international minority protection, the Turkish interpretation of the principle of equality, which is rooted in the Turkish Constitution, prohibits preferential treatment for minorities like the Kurds. Based on a rather formalistic concept of equality, all Turkish citizens should be treated as equal, without any differences on grounds such as language or cultural background, which implies a prohibition of preferential treatment for minorities such as the Kurds. Although this understanding would at least imply that the Kurds should be treated the same as ethnic Turks, they are still faced with discrimination in everyday life. The Turkish authorities should be encouraged to adopt measures against the discrimination of persons belonging to national minorities, and to introduce a different approach in the interpretation of the principle of equality. Effective protection and promotion of persons belonging to the Kurdish minority requires preferential treatment in order to provide full and effective equality with persons belonging to the Turkish majority.

5.4.2 Protection and Promotion of the Kurdish Identity

International instruments for the protection of national minorities unequivocally prohibit the assimilation of persons belonging to national minorities and they also ban policies aiming at the alteration of the proportions of the population. Since the foundation of the

Turkish Republic, the history of Turkey's treatment of the minorities living on Turkish territory has been marked by attempts at forced assimilation and forced relocation. Fortunately, one can now state that in general, Turkey seems to have abandoned such systematic policies and measures specifically aiming at the assimilation and relocation of the Kurdish population. However, military actions against the PKK sometimes have/had the effect of driving the civilian population from their traditional homelands. The Turkish authorities should take due care that the Kurdish civilian population is effectively protected in the fight against terrorism, and that effective remedies are provided in order to recompense the victims of past policies of assimilation or relocation.

European instruments for the protection of minorities do not only contain prohibitions of certain policies of the State, but also primarily demand the adoption of measures of protection and support. It is not sufficient that States refrain from attempts at forced assimilation, but they are required to actively promote the conditions necessary for persons belonging to national minorities to express and develop the main characteristics of their identity. So far, Turkey has not engaged in coherent policies or remarkable measures for the promotion the Kurdish identity.

Effective protection and promotion of persons belonging to minorities may not only be reached through legal reforms and policies at the level of central government. In particular where the relations between the majority and the minority have been marked by controversial ideologies, tension, and even by violence in the past, a peaceful co-existence of the majority and one or more minorities requires a fundamental and widespread change of attitude. Accordingly, instruments for the protection of minorities call upon States to engage in policies for the promotion of mutual understanding and tolerance. Such measures should include the enactment and implementation of legislation which targets discrimination and crimes based on racist motives, but also promotional measures in areas such as the media and education. In addition, the principal political actors should show their commitment to tolerance and the fostering of a multi-cultural society.

Although it is evident that the authorities of a State will not be able to change the attitudes and viewpoints of the population from one day to the next through legal and political means, appropriate measures will certainly help to introduce a process of change. Where the society is confronted with different cultures, languages and viewpoints in an open-minded and tolerant manner in the media, in the education system, and in political debate, people are less likely to perceive such differences as a threat.

In the Republic of Turkey, ethnic, linguistic and cultural diversity is traditionally identified as a menace to the unity of the State and the “Nation”. Accordingly, minorities and the basic features of their different identity are either eliminated from public life or portrayed in a negative way. Acts of hostility on the part of the police or private actors specifically directed against persons belonging to the Kurdish minority reportedly often incur no consequences for the perpetrators. The Kurdish minority, as such, is not adequately portrayed and represented in the media and in the education system. In the public view, the Kurds seem to be associated with terrorism and crime. And political parties use nationalist slogans and motives in order to oppose any measures aiming at the introduction of minority rights and the creation of conditions allowing for the display and development of the distinct features of the Kurdish minority.

It must be admitted in this context that in most European States there are political parties which define themselves partly through nationalistic motives and xenophobic attitudes, and that prejudices and negative stereotypes exist and are fostered by political actors and the media in other European States as well. It is also a fact that, unfortunately, support for such policies and attitudes seems to have increased in many European States, including Austria, in recent years. This is a serious cause for concern, and the authorities, political actors, and all representatives of the media in every European State should be encouraged not to engage in such policies and behaviour, but to promote values such as respect, tolerance and open-mindedness vis-à-vis different ethnic, linguistic, national or religious identities.

In Turkey, however, such tendencies and behaviours seem particularly harmful, because unlike in most other European States, there is no legal framework which specifically protects minority groups and the main characteristics of their identity. Furthermore, the violent conflict in the Turkish South-East is a considerable source of prejudices and animosity against the Kurdish population, which should not be unnecessarily fuelled and promoted.

The Turkish government should be encouraged to engage in systematic policies aiming at the promotion of mutual understanding and tolerance between persons belonging to the majority and those belonging to the Kurdish minority. While the commencement of Kurdish broadcasting may be seen as a first positive step, it is certainly not sufficient. The Kurds and the characteristics of their identity should be also adequately and truthfully portrayed in media which address the majority. Furthermore, the Kurdish minority as well as other minorities should be adequately addressed and portrayed in the education system, to avoid the emergence of intolerant attitudes and behaviour among children. All political actors, including those who are not represented in government, should be encouraged to refrain from acts and speeches which are likely

to foster intolerance and xenophobia to the benefit of the whole society living within the Turkish State. The “Turkish Nation” consists of a multi-cultural society, and Turkey and its population should be proud of its cultural wealth and diversity.

The question of how a State should treat minority groups living on its territory is certainly a very sensitive and controversial one. The complexity of the question is further increased where it involves issues such as ideological traditions, severe ethnic tensions, terrorist acts and even a violent internal conflict within the State in question. In such a situation, a broad-minded and far-reaching public debate appears absolutely necessary in order to find a peaceful solution which takes into account the interests of the various groups concerned and which is, if not completely satisfying, at least acceptable to every group.

A precondition for such an open debate is proper respect for the right to freedom of expression. But the Turkish authorities have traditionally sought to suppress the expression of opinions on the existence of minorities in Turkey and the need for the protection of these minorities. In particular expressions of opinions and viewpoints on the violent situation in the South-East and of proposals for a peaceful solution to the conflict have been restricted on the part of the State. These restrictions regularly took the form of the seizure of publications and criminal prosecution and conviction of the individuals responsible. Very often, statements on minority rights to the benefit of the Kurds or on the conflict in the South-East were qualified as support for the PKK. While there have been improvements with respect to the guarantee of freedom of expression in Turkey in the recent past, problems remain which are further impeding the promotion of mutual understanding and tolerance between minorities and the majority population, restricting the discussion of a variety of sensitive issues in accordance with the values of a democratic society.

5.4.3 Freedom of Expression

The right to freedom of expression is one of the most fundamental human rights in a modern democracy, and limitations of this right are only permitted under certain clearly defined preconditions which must be interpreted restrictively. While the conflict in the Turkish South-East is certainly a very sensitive issue, this must not lead to the prohibition of expressions of thoughts and opinions which are not in accordance with the public view-point of the government. Only explicit calls for and incitement to violence or hatred may be subject to sanctions. Claims for minority rights may by no means be seen to justify restrictions of the right to freedom of expression, even if the official view of the government is that no such minorities exist.

In a modern democracy, the individual has to be entitled to criticise the government, to contest the official viewpoints of the government, to oppose traditional ideological foundations of the State by peaceful means, and to express opinions which involve politically sensitive issues and propose innovative solutions. A functioning pluralist democracy need not fear such opinions, but should be able to cope with them in a peaceful way. Furthermore, in particular in sensitive issues, the government should take into consideration the various viewpoints and opinions that are expressed in the public debate in order to be able to find solutions which correspond to the interests, needs and desires of the people concerned.

While it has been observed that there is an increasingly open debate on sensitive issues such as the Kurdish Question and minority rights, the Kurdish legal framework and its implementation are still not consistent with the right to freedom of expression under Art 10 ECHR. In particular the regular resort to criminal law and anti-terror legislation to sanction opinions and view-points contrary to the official positions of the State in relation to the Kurdish issue are a cause for concern. In this respect, Turkey still has to undertake considerable reforms to bring the legal system and its implementation in line with European standards.

5.4.4 The Media

The media plays an important role in the protection and promotion of minorities today. It is not only an important carrier of opinions and ideas, but may also contribute considerably to the promotion and the development of different cultures and languages. Accordingly, European instruments for the protection of national minorities provide specific obligations of States in the field of the private as well as the public media.

The Turkish State has recently introduced measures in the field of the media which must be seen as constituting considerable progress in the protection and promotion of the Kurdish identity in Turkey. While broadcasting in Kurdish was, under certain rather restrictive conditions, already permitted through private Kurdish broadcasters, January 1, 2009 saw the start of broadcasting in Kurdish on a Turkish public channel. In 2010 the legal framework on broadcasting was further amended and most restrictions on broadcasting in the Kurdish language at regional level were removed. Finally, a considerable number of radio stations and TV channels were given permission to broadcast in Kurdish at regional level.

These positive tendencies have to be welcomed as a step in the right direction. The authorities should be encouraged to closely monitor that the more liberal legislation is appropriately implemented in practice in order to avoid undue interference with the

rights of persons belonging to the Kurdish or any other minority regarding broadcasting in the minority language. As financial difficulties in private broadcasting may still be a considerable obstacle for the Kurds to effectively produce and transmit broadcasts in Kurdish, the Turkish State should also think about funding of regional TV and radio channels. In the long term, it should also be considered to extend broadcasting in minority languages and on minority issues also to the national level, as in such a way, the media could contribute considerably to the promotion of a multi-cultural and tolerant society in Turkey.

5.4.5 The Kurdish Language

The use of the minority language is one of the most important means through which persons belonging to a minority may assert their identity. The right to use one's language of choice, including minority languages, in private and in public, is well established in international human rights and minority rights law. In respect of the use of the Kurdish language in the private as well as in the public sphere, Turkey has made considerable progress in the most recent past. While the Kurdish language was prohibited for long periods during the last century, there is no longer any formal legal ban of the Kurdish language in most areas of life.

However, there remain some problematic aspects in respect of the use of the Kurdish and other minority languages in Turkey. Certain constitutional and legal provisions may still be interpreted as providing a basis for the restriction of the use of the Kurdish language in public life. In addition, while the law on associations has been amended and mainly allows for the use of minority languages during the activities of associations, and although there have even been legal amendments *de facto* allowing for the use of Kurdish in election campaigns, there are still restrictions on the use of the Kurdish language in political activities, because the Law on Political Parties still prohibits the use of minority languages in certain areas of political activities. Since members of political parties were, until very recently, sentenced to prison terms for using the Kurdish language during election campaigns, it is questionable whether the right to use the minority language is yet fully guaranteed in Turkey.

European instruments for the protection of minorities not only demand linguistic freedom in respect of minority languages, but they also contain obligations of States which require positive action. Under certain conditions, States should provide an appropriate framework for the use of the minority language in relations between persons belonging to a minority and the administrative authorities. Considering that the Kurds fulfil the required preconditions in certain regions, the Turkish authorities should

enact appropriate legislation and create the necessary factual preconditions in order to ensure that persons belonging to the Kurdish minority may use their mother tongue in dealings with the administrative authorities at regional and local level. In addition to these rights in the area of the administrative authorities, the Turkish authorities should also ensure that the linguistic rights in criminal proceedings of persons belonging to the Kurdish minority are appropriately safeguarded in practice, in particular through the provision of sufficiently trained interpreters.

In respect of the right to use personal names in the minority language, one can assert that the right to give children names in a minority language and the corresponding obligation of States to accept and use these names are well established in European human rights and minority rights law. One must welcome the fact that the Turkish legal framework in principle no longer prohibits the use of Kurdish names. However, practical problems seem to remain, as the Kurdish language contains letters which are non-existent in the Turkish language. The Turkish authorities are reported to refuse to register names which contain these letters, which appears problematic in respect of European human rights and minority rights standards. While it is acknowledged that practical problems in respect of different scripts or the use of different letters may justify a pragmatic approach in the registration of names, such problems may not lead to a denial of the right to use names in the minority language. The Turkish authorities should be encouraged to adopt an adequate approach in the registration of Kurdish names which contain letters unknown to the Turkish alphabet, for example through the writing of the name in phonetic form or the use of adequate computer programmes.

Under the right to freedom of expression in accordance with Art 11 ECHR, respect for displays of private signs and private information in the language of choice, including the minority language, should be self-evident. This right is further strengthened by corresponding provisions in various European instruments for the protection of minorities. While there do not appear to be formal legal impediments to the right of persons belonging to the Kurdish minority to display signs and information in the Kurdish language, it seems that the authorities tend to partially disrespect this right in practice, forcefully removing such signs in certain cases. As respect for human rights and minority rights may not be ensured only through the provision of an adequate legal framework, the Turkish government should monitor carefully that the applicable legal framework is appropriately implemented in practice, and that authorities at regional and local level do not act on a deliberate basis and in violation of the principle of the rule of law.

Local names and topographic indications are generally of great symbolic or even ideological importance for states as well as for minority groups within States.

Accordingly, the question of whether such geographic indications are displayed in the official language, or, at least in addition, in the minority language, is a very sensitive one. The introduction of an obligation for States to allow the display of such indications also in the minority language may thus be considered as a very progressive step in minority rights law which is met with certain resistance on the part of some States.

After the foundation of the Turkish Republic, the Turkish State made intensive efforts to change the Kurdish names of towns, villages and the topographic indications of places into Turkish. These measures were part of the general policy which had the aim of creating the Turkish nation and extinguishing any expression of a distinct cultural, linguistic and historical identity. In consideration of this political tradition, the recent erection of a considerable number of bilingual signs of villages in the Turkish south-east as part of the newly introduced reforms by the governing AKP can be qualified as a remarkable step in Turkish policies regarding the Kurdish population. The AKP should be encouraged to proceed with these measures in all regions where this appears appropriate (under consideration of the criteria established by Art 11 Para 3 of the FCNM), taking due care that these reforms are based on sufficiently clear legislation, which is properly implemented in practice.

5.4.6 Education

Education, as a basic human right which is indispensable for the full enjoyment of other human rights and freedoms, is of particular importance for persons belonging to national minorities. Accordingly, international legal documents on the protection of national minorities contain considerable obligations for States in the field of the educational rights of members of minority groups. The aim of these provisions is two-fold: education shall enable persons belonging to minorities to fully participate and integrate in the larger society of the State while at the same time contributing to the preservation and development of the particular features of the minorities' distinct identities. Educational rights of persons belonging to national minorities generally cover the learning of and in the minority language, equal access to education, fostering knowledge of the culture, history, language and religion of the national minorities and of the majority of the State through education, as well as the establishment of private educational institutions by and for persons belonging to a minority.

So far, the Kurds in Turkey are not able to learn their Kurdish mother tongue in the public education system. While, in theory, the Kurds are allowed to establish their own private educational institutions to teach the Kurdish language, a rather restrictive legal framework with undue limitations for such private education facilities, as well as a lack

of sufficient resources, renders this right more or less devoid of practical meaning. In the public school system, the curriculum and school textbooks do not always provide a true and objective picture of minority groups in Turkey, and it seems that no efforts are made to foster the knowledge of the people about the Kurdish minority in the public education system. Furthermore, it appears that young people belonging to the Kurdish minority are still disadvantaged with respect to access to the education system.

The Turkish government should be encouraged to introduce the teaching of and in the Kurdish language in the public education system at the various levels, including universities. This would improve the chances of persons belonging to national minorities to attain higher levels of education and it could also be to the benefit of students with Turkish as a mother tongue, who would be enabled to learn another language. Of course, students belonging to the Kurdish minority should also be provided with adequate opportunities to learn the Turkish language in order to be able to fully participate in the larger Turkish society. The promotion of the education of students of Kurdish origin in the South-East would even provide them with better chances in their later professional life, which could lead to an improvement in the poor economic and social conditions under which many Kurds have to live today. Thus, better education of the Kurdish population would also be to the benefit of the Turkish state.

Fostering knowledge of the culture, history and language of the Kurdish minority among Kurdish and Turkish students, as well as promoting contacts between these groups could strengthen mutual understanding and tolerance, which would help to prevent the continuance of the current tense relationship and the emergence of renewed violence and hatred between these groups.

According to the governing AKP, the pro-Kurdish reforms that the AKP is willing to introduce will also include measures in the field of education. Considering the importance of education in minority protection, one can only hope that the Turkish government is willing and able to implement such reforms, and that they do not only consist of cosmetic legal amendments, but have far-reaching practical effects as well.

5.4.7 Freedom of Association and Freedom of Assembly

Freedom of association and freedom of assembly are fundamental human rights, which are of particular importance for persons belonging to national minorities. These freedoms are useful means for the realisation of certain other minority rights, for example the establishment of private educational facilities, or the creation of private media, and they are a prerequisite for the collective exercise of minority rights in

general. Under the ECHR, persons belonging to national minorities must not be discriminated against in their enjoyment of the right to freedom of association and freedom of assembly, and States may only restrict these rights within the limitations of Art 11 (2) ECHR. Accordingly, persons belonging to national minorities are entitled to hold assemblies or form associations under the same conditions as persons belonging to the majority. Limitations of these freedoms must be scrutinized very carefully under Art 11 (2) ECHR, in particular where they specifically affect the exercise of these human rights by persons belonging to national minorities, as this may be an implication for direct or indirect discrimination, which must be avoided.

Together with the right to freedom of expression, the right to freedom of assemblies enables persons to express their viewpoints and opinions as well as certain features of their distinct identity, for example through assemblies which form part of cultural events or public celebrations. As long as the assembly does not resort to violence, and the views expressed do not incite hatred or violence, assemblies of persons belonging to national minorities may not be prohibited or dissolved, even if the opinions expressed, or the culture which is displayed, does not correspond to the officially sanctioned viewpoints of the State in question. In addition, States may be obliged to protect assemblies of persons belonging to national minorities against hostile acts by third parties.

Associations play an important part in the promotion and development of the identity of national minorities. A State may not prohibit associations or their activities just because they promote the idea of the existence of a specific minority, try to promote the cultural or linguistic particularities of such a group, or call for additional rights or for a change of politics in relation to minorities. On a European level, the right to freedom of association even covers the establishment of political parties which are meant to specifically represent persons belonging to national minorities.

The Turkish legal framework governing the freedom of assembly of persons belonging to national minorities appears to be basically in line with European instruments for the protections of human rights and minority rights. In practice, however, problems appear to remain, as assemblies of persons belonging to the Kurdish minority in particular tend to be the target of frequent and disproportionate use of force on the part of the Turkish security forces. It is of particular concern that such incidents generally do not result in appropriate investigations to assess whether the use of force was appropriate.

There have been some commendable amendments in the Turkish legal framework on associations which specifically improve the situation of associations of persons belonging to national minorities. However, there are still some restrictive provisions which specifically target minority associations, and there are still incidents reported

where the authorities do not fully respect the right of freedom of association of persons belonging to national minorities.

The Turkish authorities should commit themselves to respect in full the right to freedom of assembly and freedom of association. It should be examined whether specific legal provisions tend to specifically restrict the exercise of these rights by persons belonging to national minorities such as the Kurdish one, and unjustified limitations on the part of the authorities and security forces should result in appropriate investigations and convictions, if necessary.

5.4.8 Political Participation and Participation in Public Life

In a modern democracy, all segments of society should be able to fully and effectively participate in the political decision-making processes. This includes the political participation of persons belonging to minority groups, in particular in questions which particularly affect these minorities. Accordingly, European instruments for the protection of national minorities set forth that states have to provide the conditions which are necessary for such participation in public life.

While the obligations of States in the field of political participation are broadly formulated to allow states a margin of appreciation with respect to their political and constitutional design, these general formulations allow for a variety of measures and systems aiming at the promotion of political participation of minority groups. Most international documents, the corresponding monitoring bodies, as well as the practice of European States provide useful guidance in respect of different models which may improve the possibilities of political participation and representations of minority groups at the various levels of public life.

The right of persons belonging to national minorities to establish their own political parties is well established in international law, as it is covered by the right to freedom of association under Art 11 ECHR. European instruments for the protection of minorities consider the formation of political parties and the representation of minority groups through these parties as an important way in which political participation of minority groups may be ensured.

There are numerous additional measures a State may adopt in order to ensure full and effective participation of persons belonging to minorities in public life and political decision-making. In the electoral system, specific legal provisions may be introduced which improve the chances of minority groups being represented in national and local parliaments. Such electoral designs include systems of reserved seats or quotas for minority representatives in the representative bodies, an appropriate design of electoral

districts, or the inapplicability of minimum thresholds for political parties representing minority groups. Besides ensuring representation in elected bodies, States should consider the introduction of mechanisms which enable minority groups to effectively influence political decisions at national and regional level, in particular in questions which affect them directly. Such influence may be fostered through consultative bodies, special ministries for minority questions, legal provisions which guarantee the participation of minority representatives in certain parliamentary committees, or veto rights for minority representatives in parliamentary decisions in certain thematic areas. Furthermore, participation in public life should be guaranteed through promoting the representation of persons belonging to national minorities in the executive of the State. Since the public administration should reflect the diversity of the population, States should remove provisions which contain undue obstacles to persons belonging to national minorities to work in the administration. Where necessary, States should specifically promote the recruitment of persons belonging to minority groups, in particular where they are traditionally under-represented.

The effective participation in public life of persons belonging to the national minority, as well as of those belonging to the majority, is dependent on the constitutional design of the State. In particular, constitutional models which are marked by a certain degree of decentralisation or which have even introduced regional and local forms of governance may have positive effects on the participation of the minority population in political processes.

One of the most effective ways of ensuring full and effective participation in political decision-making processes seems to be the introduction of territorial or non-territorial models of autonomy arrangements which endow minority groups with certain legislative and administrative powers. While it must be acknowledged that the introduction of autonomy arrangements will usually require a fundamental reform of a State's constitutional system, governments should nevertheless consider such far-reaching reforms where the specific situation within the respective state justifies it. Such models of autonomous arrangements may even be to the benefit of the state, which is relieved of certain functions and duties. A clear definition of the powers and competences granted, which may be limited to those aspects of life which are most important for the preservation and expression of the minority's identity, reduces the risk of conflicts and resurgence of politically unpopular questions of secession and independence.

International instruments for the protection of minorities oblige states to ensure full and effective participation in public life and decision-making processes, and they propose a variety of ways in which this may be promoted. It is the task of the national States to

identify the most appropriate model in the individual case by taking into account the individual circumstances.

Effective participation in public life not only encompasses the issue of participation in political decision-making processes, but also issues of economic well-being and access to public services in aspects which are of fundamental importance for everyday life. These issues cover access to housing, jobs, medical care and other social services. Persons belonging to minority groups in particular are frequently subject to economic disadvantages and discrimination in respect of access to public services, and the traditional homelands of minority groups are often among the economically least developed and poorest regions within States. States are encouraged to promote economic development and to adopt measures to improve the economic situation of minority groups which face economic difficulties, and to engage in policies aiming at equal access of persons belonging to national minorities to services and benefits of everyday life.

In general, Turkey has so far failed to guarantee and promote effective political participation of the Kurdish minority. The history of political parties representing the Kurds has been marked by dissolution and criminal prosecution. The recent dissolution of the DTP, which seemed to be a legitimate representative of the Kurdish minority in Turkey, must be criticised when considered in terms of minority protection and must be classed as a considerable set-back in the efforts to find a peaceful solution to the conflict in the Turkish South-East.

The dissolution and prohibition of political parties in general, and of parties representing minorities in particular, is a very rare phenomenon in Europe. Political parties are among the most essential political actors in a modern democracy, and legal provisions and procedures providing for the prohibition or dissolution of such parties should be applied in the most restrictive manner. Minority groups are entitled to political representation within the State in which they live. Accordingly, international instruments for the protection of minority rights and human rights either implicitly or explicitly protect political parties representing minority groups in order to ensure political participation and representation on equal footing with parties representing the majority. The restrictive legal regime governing political parties and the excessive use of the instrument of dissolution procedures in respect of political parties representing the Kurdish minority in Turkey fall short of European legal standards. But what is even more important is that, through the dissolution and prohibition of pro-Kurdish parties, the Turkish authorities eliminate legitimate representatives of the Kurdish population and an opportunity to find a peaceful solution to the Kurdish issue through the democratic means of dialogue and consensus.

Another problematic aspect which prevents effective political participation of the Kurds in national political decision-making is the ten per cent threshold in national elections. As it is required that a political party receives ten per cent of the votes cast in national parliamentary elections in order to be able to enter parliament, Kurdish political parties have regularly not been able to participate in parliament. This is of particular concern, as these parties have traditionally gained a high percentage or even the majority of the votes in many of the Kurdish populated areas, but were unable to reach the nationwide ten per cent threshold. Considering the success of pro-Kurdish parties at local levels and their wide-spread acceptance among the Kurdish minority, the Turkish authorities should be encouraged either to lower the national threshold or to provide for adequate exceptions from this precondition in order to ensure political representation of the Kurds in Turkish parliament.

Besides the issue of political parties and parliamentary representation, the Turkish authorities should consider the introduction of additional measures for the promotion of Kurdish political participation in political decision-making processes. International legal instruments and the practice of European States offer a wide range of possible measures, enabling the Turkish authorities to choose those models which would be the most adequate under the individual circumstances prevailing in Turkey. However, the adoption of such measures requires the unequivocal acknowledgement of the existence of a Kurdish minority within the Turkish State and a true commitment to the European values of democracy, pluralism, and the protection of human rights and minority rights.

Considering the actual circumstances in Turkey, the adoption of far-reaching constitutional reforms resulting in the introduction of autonomy arrangements for the Kurds in Turkey appears to be a utopian ideal. But once the existence of the Kurdish minority and the requirement of their political participation have been accepted, endowing the Kurdish minority with autonomous powers may be seen as the final aim of a long political process. At the moment, it would already be a considerable progress in human rights standards if issues such as autonomy for the Kurdish minority could be publicly discussed without the risk of criminal prosecution.

In addition to the promotion of Kurdish political participation, the Turkish authorities should also engage in policies aiming at the amelioration of the economic situation in the Kurdish-dominated areas. The Turkish South-East, the traditional homeland of the Kurds in Turkey, is among the economically least developed and poorest regions of the Turkish State. A coherent policy with the aim of improving this situation could contribute considerably to finding a peaceful solution to the tense situation in the South-East. The improvement of the living conditions, the economic situation, and access to the benefits

of a well-developed infrastructure would probably improve the relationship between persons belonging to the Kurdish minority and the public authorities, and would reduce the risk of the emergence of radical nationalist views and renewed violence on the part of the Kurdish population. The Turkish government should be encouraged to adopt economic measures as part of a coherent policy leading to a general improvement of the economic situation of the Kurdish population.

Effective minority protection includes full and effective participation in political decision-making and public life in general. In particular, where the relationship between the majority and the public authorities on the one hand, and the minority group on the other hand is traditionally characterized by ethnic tension and conflict, a peaceful solution that respects the interests of everyone concerned may only be found through democratic processes. Only by way of political representation will a minority group be able to communicate its interests, needs and desires. The exclusion of minority representatives from the political processes necessarily leads to rejection, alienation and protest in relations between the minority group and the State. Where the minority feels represented within the institutions of a State, and where the State respects the identity of the minority group and endows them with additional rights and special protection, the minority group will certainly lose any interest in violent acts of protest or in the foundation of an independent State.

Accordingly, greater opportunities for political participation, additional rights and adequate economic conditions should not be seen as a threat to territorial integrity and national unity, but as guarantors for political stability and the peaceful co-existence of various groups within the existing borders of a State. Unfortunately, it seems that this has not yet been realised by the Turkish State which has missed all the opportunities for political dialogue with representatives of the Kurdish population.

5.5 The European Union, Turkey and the Kurds

The prospect of EU membership and the beginning of accession negotiations has initiated a large package of political and legal reforms in Turkey. This has led to a considerable improvement in Turkey's human rights record and has even brought additional freedoms for the Kurdish population to be able to express their identity. While these reforms fell far short of resolving all the problematic issues in the field of human rights and minority rights protection, the EU and its member States seemed to be willing to reward the efforts of the AKP government by starting accession negotiations, even if they must have had severe doubts about the fulfilment of the political Copenhagen Criteria.

However, the Turkish reform process seems to have slowed down considerably since the beginning of accession negotiations. There seem to be various reasons for this development. One of them appears to be the critical view which has been adopted by the governments of certain EU member States in respect of full membership for the Republic of Turkey. This rejection of Turkey expressed by certain EU members has caused a similar reaction within the Turkish society and Turkish politics. It appears that after a period of widespread enthusiasm for EU membership, support for EU accession may be decreasing.

There are additional factors which have caused a slow-down in the process of reforms regarding human rights and minority protection. The years following the beginning of accession negotiations saw renewed violence on the part of the PKK. In 2007, a period of instability and political turmoil surrounding the governing AKP party lead to early national elections and finally even to a closure case against the AKP, which, however, did not lead to the dissolution of the party. These events were mainly caused by accusations from parts of the military and other political parties that the AKP was trying to implement a hidden Islamic agenda, which was considered to be a threat to the principle of laicism. These factors resulted in an observable increase in Turkish nationalism among the Turkish population, and once again those discussions and opinions intensified which seemed to promote the idea that the acceptance of different identities and the granting of minority rights posed a severe threat to the unity of the Turkish nation and the integrity of the Turkish territory. Naturally such a climate was not conducive to the introduction of additional reforms aiming at the safeguarding of human rights and fundamental freedoms as well as for the implementation of minority rights.¹⁰⁷⁶

The EU has played an important role in the reform process in Turkey, resulting in an improvement of the human rights situation which was, in parts, also to the benefit of the Kurds. The EU and its member States still have the chance and the responsibility for supporting the Turkish government in bringing the Turkish State in line with the standards of a modern European democracy. However, the EU may only continue its role as promoter of human rights and minority rights in Turkey if it is unequivocally committed to Turkey becoming a member of the EU in the future. If Turkey's political actors and Turkish society feel that accession to the EU is not the necessary outcome of successful reforms and negotiations, there will be a lack of motivation for the implementation of additional reforms.

¹⁰⁷⁶ Compare: Kirisci, Kemal: „*The Kurdish Question and Turkey: Future Challenges and Prospects for a Solution*“, ISPI Working Paper, Issue 24 – December 2007, 2-3.

On the other hand, the EU and its member States should clearly and unequivocally state that Turkey's membership of the EU is conditional upon its meeting the political Copenhagen Criteria effectively and in full. As a community of values and not as a mere economic community, the member States of the EU share a common set of legal and political instruments for the protection of human rights and minority rights. While the implementation of these instruments may take different forms and does not necessarily lead to an equal level of protection, one may nevertheless identify certain minimum standards. In order to be accepted by the European community of States, Turkey must meet these minimum standards. This includes the acknowledgement of the Kurdish minority with its distinct identity as well as the full and effective guarantee of a set of human rights and minority rights which enables the expression, development and promotion of the Kurdish identity. In particular in relation to its Kurdish population, however, it must be concluded that, so far, Turkey does not fully comply with the political Copenhagen Criteria, as it cannot be said that its institutions do in fact fully guarantee "*respect for and protection of minorities*".¹⁰⁷⁷

The Kurdish issue in Turkey is not primarily a question of terrorism and security, but an issue of human rights and minority rights. Accordingly, it is not an internal matter which only concerns the Turkish State, but lies within the responsibility of the international community. If the EU and its member States wish to preserve their credibility and are willing to accept their responsibility in respect of the Kurds in Turkey and the whole Turkish population, they must not accept any compromise in human rights protection and the protection of Kurdish minority rights in Turkey.

The sensitivity of the Turkish State in respect of the acknowledgement of minorities, and its reluctance to grant additional cultural and political rights to these minorities, is rooted in historical developments and a specific conception of Turkish nationalism, which has served as an ideological basis for the Turkish State and its constitution since the foundation of the Republic. As this specific concept of nationalism and the corresponding emphasis on the integrity of the Turkish nation and Turkish territory are major impediments to reform processes aimed at further democratisation and the protection and promotion of human rights and minority rights, it remains doubtful whether Turkey will be able to bring its constitutional and legal system in line with European standards. It seems that a fundamental change of attitude and the elaboration of a new constitution are necessary preconditions for the creation of a framework where members of the Kurdish minority may enjoy their human rights and minority rights.

¹⁰⁷⁷ European Council in Copenhagen, Conclusions of the Presidency, 21-22 June 1993, SN 180/1/93, 7.A.3; compare: Art 2 of the Treaty on the European Union.

Such a fundamental change of attitude will not be easy to achieve. However, against the background of EU accession negotiations, a public debate about ancient ideologies and constitutional designs seems to be imperative. EU membership means integration into a community of States which, on the one hand, are characterized by a common set of values, but which are, on the other hand, characterized by extreme diversities. The population of the EU and its member States consists of numerous ethnic groups with a variety of different characteristics such as language, religious belief, culture, historical background and political tradition. Accordingly, the EU may only function if the political actors and the majority of the population share values such as pluralism, tolerance and mutual respect, and if they are willing to live together within a political system which is based on the concepts of pluralist democracy, the rule of law, and the protection of human rights and minority rights.

Where the ideological framework and the constitutional design of a State indicate that these common values and political principles are not fully and unconditionally respected, it is doubtful that such a State is able and willing to fully integrate into the EU. As the Turkish Constitutional and legal system, based on the ideological principle of Turkish nationalism, do not even provide for respect, protection and promotion of the various minority groups traditionally existing within Turkish borders, the question should be raised whether Turkish State will, in fact, be able to fully integrate into a community of States with much more diverse characteristics.

From a European point of view, the Turkish political tradition and its underlying ideological framework appear to be outdated concepts which are incompatible with the political self-perception of the EU and its member States. Considering that Turkish history has seen so much violence and suffering even in the most recent past, one could expect that even the Turkish society and Turkish political actors are aware that some aspects of the ancient politics and political ideas have clearly failed. Unfortunately, traditional ideological concepts, in particular those which create the feeling of belonging to a particular group or nation which is superior to others, are often hard to overcome, as they are fixed in the minds of the people. Consequently, it will be difficult to establish a political and legal system which fully and unconditionally respects minority rights and neglects the idea of the Turkish nation, but it will be even harder to persuade all parts of the population of the positive effects of such reforms.

One can only hope that with the support of the EU and its member States, the responsible actors in Turkey will be able to create a climate of change, and to introduce the necessary reforms, enabling all people and all the different ethnic, linguistic and religious groups to express, preserve and develop their identity. The creation of such a political and legal framework, characterized by the values of a pluralist democracy, the

rule of law, tolerance, and respect for human rights and minority rights would not only be to the benefit of the Kurdish minority, but to the benefit of Turkish society as a whole.

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Abbreviations

Advisory Committee	Advisory Committee on the Framework Convention for the Protection of National Minorities
AKP	Justice and Development Party
Art	Article
Copenhagen Document	Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990
DEP	Democracy Party
DTP	Democratic Society Party
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
Explanatory Report	Explanatory Report to the Framework Convention for the Protection of National Minorities
FCNM	Framework Convention for the Protection of National Minorities
HADEP	People's Democracy Party
HEP	People's Labour Party
ICCPR	International Covenant on Civil and Political Rights
OSCE	Organisation for Security and Cooperation in Europe
Para	Paragraph
PKK	Kurdistan Workers Party
Sec	Section
SP	Socialist Party

Annexe

Abstract

The conviction that minorities living within modern Nation States are in need of specific protection and promotion beyond the guarantees provided by universal human rights standards has also had an impact on the enlargement policies of the EU. The political criteria of Copenhagen, which have to be fulfilled by every State which desires to become a member State of the EU, not only require that the candidate country's institutions guarantee democracy, the rule of law and human rights, but also respect for and protection of minorities. A similar reference is made in Art 2 of the Treaty on the European Union. The decision of the organs of the EU to open accession negotiations with Turkey was thus conditional upon Turkey's fulfilment of these political criteria, including the existence of adequate provision for minority protection. Besides Turkey's poor human rights record, its treatment of the different minority groups living on its territory in particular give rise to serious doubts about whether the Turkish State does, in fact, comply with European standards in the field of minority rights and human rights, as required for EU-membership. In particular the situation of the Kurds, who form the largest minority in Turkey, must be seen as one of the decisive elements in the assessment of whether Turkey in fact respects and protects its minorities.

In order to understand Turkey's approach to the issue of minority protection and its treatment of the Kurdish population, it is first necessary to take a look at the historical events leading from the foundation of the Republic up to the present day. In particular the emphasis placed on nationalism and the idea of the Turkish nation has traditionally led to the adoption of policies which sought to deny any collective identity apart from the Turkish one. As the largest minority group with distinct ethnic, linguistic and cultural features, the Kurds were traditionally seen as a threat to the unity of the Turkish State and Nation, and were therefore particularly targeted by assimilating policies. When parts of the Kurdish population finally organised by forming the PKK and began to commit violent attacks on the Turkish authorities, this resulted in an internal armed conflict which not only caused numerous casualties, but also led to numerous human rights abuses and the adoption of a more restrictive legislation, with detrimental effects for the situation of the Kurdish population. Any analysis of the Turkish political and legal framework and its effects for the protection and promotion of Kurdish minority rights must necessarily take account of this historical background.

Based on the ideological concept of a uniform Turkish Nation, the Turkish constitutional system does not recognize the possibility of the existence of ethnic or linguistic

minorities in Turkey. Being part of the protection of human rights, minority protection is, however, not part of the reserved domain of States. Accordingly, the definition of a minority should not be left to the sole discretion of the respective State and its willingness to acknowledge a minority's existence, but must be construed in accordance with international standards in minority rights law. As an analysis of the features of the Kurdish population in Turkey leads to the conclusion that the Kurdish population does constitute a minority under internationally acknowledged definitions, the Turkish State is under the obligation to provide specific protection and promotion to its citizens with Kurdish background.

Following the violent events and inter-ethnic conflicts in south-eastern Europe in the last decade of the twentieth century, European States have made quite an effort to produce political and legally binding documents relating to the protection and promotion of ethnic, linguistic and religious minorities. Among these instruments, the Framework Convention for the Protection of National Minorities and the Copenhagen Document in particular appear to set quite detailed standards for European States in the field of minority protection. In addition, the European Language Charter, the European Convention of Human Rights and Fundamental Freedoms, and the practice of European States in the implementation of these international instruments provide useful guidance as to the required level of minority protection and promotion.

Thus, having established that the Kurdish minority in Turkey is entitled to specific protection, it is necessary to define the rights and obligations provided for within these international minority rights instruments and to compare these identified European standards with the legal and factual conditions governing the situation of the Kurds in Turkey. Through this detailed analysis, it is possible to assess whether Turkey in fact respects and protects its Kurdish minority, in accordance with European minority rights law and in fulfilment of the political criteria of Copenhagen, or whether there are still areas where further efforts need to be made by the Turkish authorities in order to bring Turkey in line with European standards.

Zusammenfassung

Die Überzeugung, dass Minderheiten in modernen Staaten speziellem Schutz und besonderer Förderung bedürfen, die über die Garantien des allgemeinen Menschenrechtsschutzes hinausgehen, hat auch in der Erweiterungspolitik der EU ihren Niederschlag gefunden. Die politischen Kriterien von Kopenhagen, welche von jedem Staat, der Mitglied der EU zu werden beabsichtigt, erfüllt werden müssen, sehen daher vor, dass Kandidaten als Voraussetzung für die EU-Mitgliedschaft nicht nur Demokratie, das Rechtsstaatsprinzip und den Schutz der Menschenrechte zu garantieren haben, sondern auch Respekt und Schutz für ihre Minderheiten. Ein ähnlicher Verweis auf diese Grundwerte findet sich nun auch in Art 2 des Vertrages über die Europäische Union.

Die Entscheidung der Organe der EU, Beitrittsverhandlungen mit der Türkei aufzunehmen, setzte somit voraus, dass die Türkei diese politischen Kriterien erfüllt, also insbesondere auch über entsprechende Vorkehrungen für den Minderheitenschutz verfügt. Abgesehen von der verbesserungsbedürftigen Situation in Bezug auf den Schutz der allgemeinen Menschenrechte ist jedoch nicht zuletzt auf Grund der Behandlung der verschiedenen Minderhengruppen in der Türkei zu bezweifeln, dass der türkische Staat tatsächlich die für eine EU-Mitgliedschaft erforderlichen Standards im Bereich des Minderheiten- und Menschenrechtsschutzes erfüllt. Dabei ist insbesondere die Situation der Kurden als größte Minderheit innerhalb der Türkei als entscheidendes Merkmal bei der Beurteilung der gegenüber Minderheiten geübten Politik und ihres ausreichenden Schutzes anzusehen.

Um den türkischen Zugang zu Fragen des Minderheitenschutzes im allgemeinen und der Behandlung der Kurden im besonderen zu verstehen, ist es zunächst notwendig, einen Blick auf die historischen Entwicklungen von der Gründung der türkischen Republik bis zum heutigen Tag zu werfen. Insbesondere die Bedeutung, die in der Türkei dem Nationalismus und der Idee der türkischen Nation beigemessen wird und wurde, hat dabei stets zu einer Politik beigetragen, die versucht hat, kollektive Identitäten, die nicht der türkischen entsprachen, zu verleugnen und zu unterdrücken. Als größte Minderheit mit eigenständigen sprachlichen, ethnischen und kulturellen Merkmalen wurden insbesondere die Kurden traditionell als Bedrohung für die Einheit des türkischen Staates und der türkischen Nation gesehen und waren daher besonders von assimilierenden politischen Maßnahmen betroffen. Als sich Teile der kurdischstämmigen Bevölkerung durch die Gründung der PKK organisierten und mit gewalttätigen Angriffen auf die türkischen Behörden begannen, kam es schließlich zu einem internen bewaffneten Konflikt. Dieser forderte nicht nur zahlreiche Opfer,

sondern führte auch zu zahlreichen Menschenrechtsverletzungen und dem Erlass noch strengerer und restriktiverer Gesetze mit negativen Auswirkungen auf die Situation der Kurden. Dieser historisch komplexe Hintergrund muss notwendigerweise bei jeglicher Analyse der türkischen politischen und rechtlichen Rahmenbedingungen eines allfälligen Schutzes und der Förderung der kurdischen Minderheit miteinbezogen werden.

Basierend auf dem ideologischen Konzept einer einheitlichen türkischen Nation ist in der türkischen Verfassung keine Anerkennung der Existenz ethnischer oder sprachlicher Minderheiten vorgesehen. Doch der Minderheitenschutz ist Teil des Menschenrechtsschutzes und gehört damit nicht zu den internen Angelegenheiten der Staaten. Dementsprechend darf auch die Definition der Minderheit nicht einzig und allein dem Ermessen des jeweils betroffenen Staates und seiner Bereitschaft zur Anerkennung von Minderheiten überlassen werden, sondern muss in Übereinstimmung mit internationalen Standards im Bereich der Minderheitenrechte gefunden werden. Da eine Analyse der wesentlichen Identifikationsmerkmale der kurdischen Bevölkerung zu dem Schluss führt, dass die Kurden in der Türkei eine Minderheit im Sinne international anerkannter Definitionen darstellen, ist der türkische Staat dazu verpflichtet, für besonderen Schutz und Förderung der kurdisch-stämmigen Bevölkerung zu sorgen.

Nach den gewaltsamen Ereignissen und ethnischen Konflikten im Süd-Osten Europas Ende des zwanzigsten Jahrhunderts haben die europäischen Staaten große Anstrengungen unternommen, um politisch und rechtlich verbindliche Dokumente zum Schutz und zur Förderung ethnischer, sprachlicher und religiöser Minderheiten zu schaffen. Unter diesen Dokumenten setzen insbesondere die Rahmenkonvention zum Schutz nationaler Minderheiten und das „Kopenhagen-Dokument“ relativ detaillierte Standards im Bereich des Minderheitenschutzes für die Staaten fest. Darüber hinaus stellen die Europäische Sprachencharta, die Europäische Menschenrechtskonvention, sowie die Praxis europäischer Staaten bei der Implementierung all dieser Instrumente sinnvolle und wichtige Richtlinien für die Feststellung des erforderlichen Niveaus des Minderheitenschutzes und der Minderheitenförderung zur Verfügung.

Auf Grundlage der Feststellung, dass die kurdische Minderheit in der Türkei berechtigt ist, besonderen Schutz in Anspruch zu nehmen, ist es daher erforderlich, die in diesen internationalen Minderheitenschutzinstrumenten vorgesehenen Rechte und Pflichten zu definieren und die in dieser Weise definierten europäischen Standards mit der rechtlichen und faktischen Situation der Kurden in der Türkei zu vergleichen. Auf Grundlage einer solchen detaillierten Analyse ist es letztlich möglich festzustellen, ob die Türkei ihre kurdische Minderheit in Übereinstimmung mit europäischem Minderheitenschutzrecht und in Erfüllung der politischen Kriterien von Kopenhagen

respektiert und schützt, oder ob es Bereiche gibt, in denen weitere Maßnahmen durch den türkischen Staat gesetzt werden müssen, um den Minderheitenschutz in der Türkei in Übereinstimmung mit europäischen Standards zu bringen.

Lebenslauf

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