

## THE EU CONDITIONALITY OF MINORITY PROTECTION AND ITS LIMITS

### -With Some Remarks on its Application to Turkey-

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#### Abstract

The Copenhagen political criteria have gained a wide interest among scholars in Turkey, as these conditions have been very crucial for Turkey's accession to the European Union. One of these criteria is 'respect for and protection of minority'. This paper tries to reveal the limits of the conditionality of minority protection as EU membership condition and it is accompanied with some observations on the application of this condition to Turkey. In this respect, it is explored in the first place that under what kind of historical and political circumstances the conditionality was formulated. Next, the rules that deal, mostly indirectly, with minority protection within the EU law are summarized. Following this summary, an account on the limits of conditionality of minority protection is presented. After all, some remarks, as reflected in the Regular Progress Reports issued on Turkey, on the application of the conditionality of minority protection to Turkey are made.

*Keywords:* the Copenhagen political criteria • the conditions of EU membership • minority protection • the limits of conditionality of minority protection

#### Özet

Kopenhag siyasi kriterleri Türkiye'de akademisyenler arasında, bu kriterlerin Türkiye'nin AB üyeliği için önemli olması dolayısıyla büyük bir ilgi kazanmıştır. Bu kriterlerden biri de 'azınlıklara saygı ve onların korunması'dır. Bu makale, AB'ye üyelik şartı olan azınlık hakları korunmasının sınırlarını ortaya koymaya çalışmaktadır. Buna ilaveten, bu şartın Türkiye'ye uygulanmasına ilişkin bazı gözlemlere yer vermektedir. Bu bakımdan, öncelikle, azınlıkların korunması şartının hangi tarihsel ve siyasi koşullar altında formüle edildiği açıklanmıştır. Devamında ise, AB mevzuatında azınlıkların korunmasıyla, çoğunlukla dolaylı olarak, ilgili olan kurallar özetlenmiştir. Bunu özetini takiben, azınlık hakları koşulunun sınırlarına ilişkin daha genel bir açıklama yapılmıştır. Son olarak, bu koşulun, İlerleme Raporlarında yansıyan biçimiyle, Türkiye'ye uygulanmasına yönelik bir takım görüşler sunulmuştur.

*Anahtar sözcükler:* Kopenhag siyasi kriterleri • AB üyelik koşulları • azınlıkların korunması • azınlık hakları korunması koşulunun sınırları

## Introduction

Turkey, in the process of accession to the EU, has been struggling with improving its human rights records, in which the minority-related matters have occupied an important

place (The Commission Progress Report, 1998). For this reason, Turkey, since its candidate status has been declared by the EU at Helsinki Summit in 1999, has changed its legislations and adopted new ones swiftly concerning, inter alia, human rights issues. In these efforts, one of the main aims is to achieve a (more) stable democratic political system based on the principle of rule of law. As stated by a scholar, this process is to lead to a fundamental transformation to the country, albeit some obscurities. (Akçam, 2004, s. 2).

Turkey have introduced changes - which comprise a number of amendments to the Constitution, adopting new laws, such as the Criminal Code, the Civil Code, and many other amendments to different laws and secondary legislations concerning various issues (Örücü, 2004, s. 607-621)- mainly with a view to fulfilling the membership criteria. As known, the Copenhagen political criteria <sup>1</sup> require the candidate countries to comply with several conditions in order to become an EU member. Among these criteria is *'respect for and protection of minority'*

The criterion of *'respect for and protection of minority'* seems extremely problematic and challenging for Turkey's accession to the EU. In this regard, human rights in general and minority protection in particular are very critical elements of the accession negotiations. (De Witte, 2004, s. 112) As pointed by Dilek Kurban, *"Turkey's recognition as an official candidate for accession to the EU has brought to the country's agenda an issue that had been long suppressed in the collective consciousness of society: minority rights"*(2003/2004, s. 151; 2004/2005, s. 341) (see also Jung, 2002/2003, s. 128). Therefore, if Turkey is to achieve a more stable democratic regime based on the principle of rule of law under the EU accession process, one of the immediate indications of it is expected to be seen in the shift of Turkey's historical approach towards minorities.

This paper deals with the conditionality of minority protection <sup>2</sup> as an EU membership criterion and with some remarks on its application to Turkey. More precisely, the concern of this paper is to determine the limits of the conditionality of minority protection, and then provide some observations on how the EU has applied this to Turkey. In

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<sup>1</sup> Presidency Conclusions, Copenhagen European Council 1993, which can be found at [http://www.europarl.europa.eu/enlargement/ec/pdf/cop\\_en.pdf](http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf)

<sup>2</sup> When the term *'conditionality'* is used alone in this paper, it refers to *'the EU conditionality of minority protection'*, unless stated otherwise.

accomplishing the latter aim, the main tool for the analysis will be the regular (progress) reports, which have been issued and released by the European Commission annually since 1998.

Through presenting some observations on the application of the conditionality to Turkey by the EU (Commission), it may be possible to predict which of two ways the EU is about to incline on the issue of minority protection (and rights). The two ways here refers to what Professor Bruno De Witte (2000, s. 21-22; 2004, s. 109-110) had put forward long ago on the future (possible) directions awaiting the EU on the issue of minority protection, in that he proposed that after the accession of the Central and Eastern European Countries (CEECs) to the EU on 1 May 2004, EU's concern with minority protection would lead it to face with two possible scenarios or directions: *spill-over scenario and status quo scenario*. According to the former scenario, the accession of the CEECs to the EU would lead the EU to adopt internal standards or to take measures on minority protection, while according to the latter one, the accession of the CEECs would not give rise to any changes in EU law concerning minority protection; therefore, the *status quo* - which basically meant that minority matters would fall within the competence of each member state rather than the EU's institutional capacity - would be maintained. In this respect, the assessment of which of the two scenarios is currently at play at the EU's internal level can be grasped - at least it can be traced- through observing the EU Commission's application of the conditionality to Turkey.

Before embarking on the analysis of the Reports, a brief introduction to what the conditionality means to the EU should be untangled. To do so, it is necessary to outline under what sort of circumstances the conditionality was formulated and what was the underlying motivations of the EU in adopting and introducing it. In addition to this, it is also essential to outline the EU law that, one way or another, deal with minority protection. By doing so, it may provide us with a normative basis for measuring the compliance of Turkey with the conditionality and general tendency of the EU towards the issue at stake.

After all, the Progress Reports issued on Turkey will be briefly taken up. In doing so, the focus - as the scope of the paper is limited- will be on the certain issues, mainly on the

definition problem of minorities as employed in the Regular Progress Reports. Following this, the limits of the conditionality as an EU membership criterion will be identified with a view to shedding light on the future potential impacts of this criterion.

However, it should be mentioned at the outset that the EU is not the only actor that has an impact on the issues of human rights and minority protection in Turkey. The Council of Europe's (CoE) and the Organisation for Security and Cooperation in Europe's (OSCE) mechanisms and standards also play roles. Moreover, the EU conditionality, that is the Copenhagen criteria, has been highly influenced by the latter two organisations' efforts on the same subjects. Therefore, it is important to consider the efforts of the latter two European organisations on minority protection. Especially, the efforts of the CoE in developing the minority protection standards shall be taken into account for two reasons. First, the CoE standards are also important to the EU as general minority protection standards, and second, as the recent Council of Europe's Parliamentary Assembly Resolution (1704/2010) reveals that Turkey will have to encounter the demand to sign the main effective minority protection tools of the CoE, which is "the Framework Convention for the Protection of National Minorities" and "the European Charter for Regional or Minority Languages" developed by the CoE (Resolution 1704/2010, parag. 16).

### **EU's Concern with Minority Protection**

#### **A brief history of the minority concern of the EU, the CoE and the OSCE**

What lied behind the adoption of the conditionality of minority protection and what were its underlying motivations and rationales will be uncovered below.

Before going into the details, it should be noted that the history of the conditionality in particular and EU's involvements in minority protection in general cannot be grasped fully and adequately through isolating it from other European organisations' enterprises, i.e. that of the CoE and the OSCE. That is to say that the EU is not the only actor that has been playing a role in minority protection at the European level, but the CoE and the OSCE as well have been playing role in this field, not only so but also more actively and importantly than the EU (Toggenburg, 2008, s. 95). The latter two organisations' endeavours concerning

minority protection have been seriously taken into account by the former (Kymlicka, 2008, s. 13). So, when considering the conditionality, all these institutions' engagements and efforts should be taken into account together.

Gabriel Toggenburg (2004, s.5-6) demonstrates that EU's initial engagement in the issue at stake dated back to 1980s. According to him, EU's interest in the subject emerged, first, from an internal initiative, that is, an (EU Parliament) attempt to determine a charter of rights for traditional minority groups existing in nine Member States then. However, this attempt- due to lack of constitutional or treaty basis in EU law at that time and lack of political consensus- failed. Notwithstanding this failure, the EU Parliament's attempt culminated in generating a growing political interest of the EU in protecting minorities with a number of policy tools devoted to this issue (Toggenburg, 2004, s. 6).

On the other hand, EU's main involvement in minority protection has been directly linked with its eastern enlargement (Toggenburg, 2004, s. 7). This means that the first and the main policy developed by the EU on minority protection was motivated by its external relations. Therefore, the minority concern of the EU at large, which was initially applied through the policy of conditionality as of 1993, was a result of certain historical circumstances, that is, the collapse of eastern bloc countries. This account has been revealed fully and in-depth in the literature. It is, thus, not coincidental that since the conditionality was primarily adopted to be directed to the CEECs, a significant number of literatures on the conditionality have focused on minority matters with reference to the CEECs (See among others, Kochenov, 2007; Haughton, 2007; Hughes, 2003; Topidi, 2003; Pentassuglia, 2001).

Prior to the EU's initiative of introducing the conditionality however, there was another attempt - but from another European organisation, i.e. the Conference on Security and Cooperation in Europe (CSCE), which later became the OSCE - to set up a minority protection tool in the European region. In its conference on the Human Dimension of the CSCE held in Copenhagen on 29 June 1990, the CSCE adopted a document- known now as *the Copenhagen Document or Principles-*, which covered a large number of principles concerning human rights, democracy and rule of law. And a specific part of this Document

was devoted to minority-related matters, which contained a various number of issues.<sup>3</sup> This Document is said to provide the EU with a basis for its intention to introduce the Copenhagen political criteria and the conditionality of minority protection (De Witte, 2000, s. 5; Hughes, 2003, s. 5).

Another source that had also an effect on the adoption of the EU conditionality is found in another EU action, i.e. the initiative for the matter of recognition of the newly established states in the Eastern Europe in early 1990s. The EU - the EC then and its twelve member states- reached at a common position in Brussels on 16 December 1991 concerning the recognition of those new states. They adopted and released a document, titled *Declaration on the Guidelines on Recognition of new States in Eastern Europe and the Soviet Union*,<sup>4</sup> according to which minority protection should be ensured by those states 'in accordance with the commitments subscribed to in the framework of the CSCE'; their recognition by the EC and European states would be possible thereupon (De Witte, 2000; Pospisil, 2006, s. 21-23).<sup>5</sup> This position of the EC was in conformity with what was suggested by the Badinter (Arbitration) Committee, which had been set up within the initiative of a Peace Conference so as to provide legal arguments to the EC for the recognition of the newly established states – the Republics of Croatia, Macedonia and Slovenia- in the Eastern Europe. The Badinter Committee stressed - in its four opinions delivered on the 14th of January 1991- on the importance of protection of minorities, especially for Croatia, in order for the recognition to be granted.<sup>6</sup>

Apart from these initiatives, there were also other attempts from the European organisations to deal with minority issues. Although they were not directly linked with the conditionality, they are worth mentioning here. In this regard, one of the crucial enterprises of the OSCE in spreading minority protection standards was the establishment of the OSCE

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<sup>3</sup> Part IV of the Copenhagen Document (paragraph from 30 to 40) is devoted to minority related issues. The Document can be found at [http://www.osce.org/documents/odihr/2006/06/19392\\_en.pdf](http://www.osce.org/documents/odihr/2006/06/19392_en.pdf) See explanation on *the Document*, (De Witte, 2000: 3. See more on Copenhagen Document and also on the role of CSCE's concerning minority protection (Helgesen, 1992)

<sup>4</sup> The text of the Document can be found at [intlaw.univie.ac.at/uploads/media/D\\_85n.doc](http://intlaw.univie.ac.at/uploads/media/D_85n.doc)

<sup>5</sup> See for an evaluation on the recognition of these states (Warbrick, 1992, s. 473-482).

<sup>6</sup> See for the text and a brief comment on the Opinions of the Badinter Committee (Pellet, 1992, s.178-185). See also for a discussion on the Committee's Report (Preece, 1998, s. 45-47).

High Commissioner on National Minorities (HCNM) along with the mission offices in several post-communist countries in 1992. However, the most important step was the adoption of the Framework Convention for the Protection of National Minorities (hereinafter Framework Convention) by the CoE in 1995 and its advisory bodies and reporting mechanism (Kymlicka, 2006, s. 37).<sup>7</sup> This Convention provides for a large number of rights dedicated to national minorities existing in the CoE member states.<sup>8</sup> The European Charter for Regional or Minority Languages adopted by the CoE too is another important legal tool dealing with minority languages.

In line with these developments - and before the adoption of Framework Convention, the EU (and the North Atlantic Treaty Organisation-NATO)<sup>9</sup> acknowledged minority protection as a condition, first in 1991 (the above-mentioned Document on the recognition of new states) and then by introducing it into the Copenhagen political criteria in 1993 (Kymlicka, 2006, s. 36).

Looking at this briefly-summarized history of the EU conditionality, Kymlicka is of the view that the success of accommodation of minority protection (and rights) in western countries is a result of internal negotiations rather than external pressure. However, it does not mean that the external influence did not have any role in developing minority rights in western countries. Nevertheless, before the adoption of the Framework Convention, the term -national minorities- is said to be unknown to the Western countries (Kymlicka, 2006, s. 39). What they tried to do in this period was to monitor the post-communist state, but in doing so, they did not have any proper conceptual tool to deal with their own minorities in the same manner they required from those post-communist countries (Kymlicka, 2006, s. 39).

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<sup>7</sup> It was stated that the FCNM, like the conditionality of the EU, was primarily directed to CEECs, (De Witte, 2000, s. 1).

<sup>8</sup> The scope and limit of the FCNM and challenges arising from it are compiled comprehensively by (Verstichel, De Witte, Lemmens, & Alen, 2008) There were an attempt to adopt a protocol concerning minority protection which would be annexed to the European Convention on Human Rights, but it was unsuccessful.

<sup>9</sup> NATO approved the conditionality of minority protection in 1994 with a document titled *The Partnership for Peace Framework Document*. See for this (Preece, 1998, s. 50).

As seen that the conditionality, which primarily directed to the CEECs countries, was constructed through the initiatives of different actors at the European level, therefore attitudes of actors determined the scope and implementation of it. Even though there have been an explicit, and sometime implicit, cooperation between these three organisations their approaches to the issue have differed in the course of time - be it an active support for minority protection or a 'silence position'- (Sasse, 2008, s. 845),<sup>10</sup> since their natures and main interests have been different (Toggenburg, 2008, s. 95-96). In this sense, it can be said that the underlying motivations have determined the scope and limits of the conditionality.

### **Underlying motivations of the conditionality**

In order to understand the underlying motivations and rationales of why the EU adopted the conditionality as a criterion for the membership (and also why other European organisations have developed recommendations (the OSCE) or adopted an international convention and a language charter (CoE)), it is inevitable to refer to, among other things, early circumstances underwent in the post-communist era, and this helps understand the scope and limits of the conditionality stemming from this background (Sasse, 2008, s. 842).

As said by Kymlicka (2006, s.36), *"the story begins with the collapse of communism in Central and Eastern Europe in 1989."*<sup>11</sup> After the communist regimes collapsed, the fear that communism would be replaced with ethnic conflicts or war in the European region became a widely-shared feeling at that time (Kymlicka, 2008, s. 12; Toggenburg, 2004, s. 7). This fear that constituted one of the main motivations behind the adoption of the conditionality (Sasse, 2008, s. 847) emerged from the growing nationalism among ethnic groups, not only among minorities, but also among majorities (Preece, 1998, s. 3). As serious ethnic conflicts- which occurred between Croats and Serbs and Bosnians, and which caused an ethnic cleansing- showed that this fear was not only a hypothetical, but the real one. It was increased by the stipulations of those post-communist countries, such as Hungary, Slovakia,

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<sup>10</sup> For example Krzysztof Drzewicki states that the primary mandate of the OSCE-HCNM is to attempt to prevent ethnic conflict before it comes out. Therefore, it does not extent to all minority related issues. (Drzewicki, 2008)

<sup>11</sup> On the other hand, Jennifer Jackson Preece argues that in fact the minority question in Europe was not a new phenomenon at the time of the collapse of communism, but it had frozen after the Second World War era. (Preece, 1998, s. 4).



and Estonia etc. where different nations, separated from their kin states, have continued to live under the sovereignty of other-nations' states.<sup>12</sup> The attitudes of the ruler nations in these states towards their minorities increased that fear, accordingly the situations in these countries were considered as potentially dangerous, and regarded as a threat to the peace in the European region.

Kymlicka spells out some further motivations that underlie the conditionality. For example, he claims that one of the motivations of the European organisations, apart from the one expressed above, was to prevent the large number of refugees that had been assumed to arise from the ethnic conflicts within the post-communist countries. Another reason lied behind the adoption of the conditionality, he goes on, was to find out or measure how really those countries' political systems were ready and reached a maturity to become a member to these organisations, especially to the EU (and the NATO) (Kymlicka, 2008, s. 13-14).

In this scene, the European organisations found themselves in a difficult situation and they believed that they had to do something to re-build and ensure the security and peace in the region. So, they adopted the above-mentioned measures on the protection of minorities to achieve this aim.

### **EU's internal concern with minority protection**

In contrast to its initiatives described above, the EU initially did not set up a body or a mechanism. Nor did it adopt standards ascribed specifically to follow up the conditionality. What the EU has opted for is that it has supported the works of the OSCE and the CoE on minority protection and it has forced the candidate post-communist countries to conform to the latter two organisations' standards and mechanisms (Kymlicka, 2006, s. 37). This is mostly what the EU had assessed in the Progress Reports issued on the CEECs.

In this regard, despite the fact that EU's has contributed, albeit limited, to minority protection in European region through its external policy, this external policy initially was

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<sup>12</sup> See for some events that took place in these countries (Preece, 1998, s. 43-44).

not reflected prominently to its internal affairs for the benefit of minorities existing in the EU Member States (Toggenburg, 2004, s. 4). Although there have been various attempts to add minority protection tools to EU law, today there are only very loose and modest legal tools in the primary sources. In other words, there is no source which is, directly and in a far-reaching manner, assigned to minority protection (De Witte, 2004, s. 110).

The first source which concerns with the issue at stake is found in the Amsterdam Treaty that entered into force on 1 May 1999. This Treaty re-introduced the criteria adopted by the Copenhagen European Council in 1993 as the EU's values, that is, *principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States* (Article 6(1) of the EU Treaty). These values are endorsed as the conditions of the application for membership in article 49 of the EU Treaty as amended by the Amsterdam Treaty. As seen that the condition of minority protection is excluded from these values. For that reason, Gwendolyn Sasse and James Hughes argue that the EU abandoned the minority protection conditionality, since the binding legal text does not incorporate it (Hughes, 2003, s. 10-11). However, this view seems not acceptable as the later developments have showed that the EU did not give up its concern with minority protection, which can be clearly seen in the Progress Reports issued for various countries during the accession process. Thus, the mentioned view is not accepted.

The Amsterdam Treaty conferred the competence on the EU to take necessary measures against discrimination on the base of, among other things, *ethnic origin* (Article 13 of the EC Treaty). This provision led to the adoption of two directives in 2000, known as Race Equality (*Implementing the Principle of Equal Treatment between Persons irrespective of Racial or Ethnic Origin*) and Employment Equality (*Establishing a General Framework for Equal Treatment in Employment and Occupation*) Directives. These two European Council Directives, especially the former one, under the provision of Article 13 EC are considered as the most relevant and strong tools of the EU law assigned, *indirectly*, to minority protection (De Witte, 2006, s. 146; Schutter, 2008, s. 236).

Potential contributions of article 13 and of the two Directives to minority protection seem that they are confined to an indirect way in coping with the issue, in that they do not

confer positive rights on minorities of member states, but aim to prevent discriminatory practices, with which minorities mostly face.<sup>13</sup> Despite their indirect way in dealing with the minority issue, the mentioned-sources should be considered as improvements in the sense that they have brought a growing concern of the EU with the issue.

In addition to article 13 EC Treaty, there are also two other articles, which are indirectly related with minority issues. These are article 149 (new article 165 after the Lisbon Treaty) and 151 (new article 167 after the Lisbon Treaty) of EC Treaty. These two articles involve in the fields of *education* and *culture* respectively. According to these, the Community can contribute, while (respectively) '*fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems, and their cultural; and linguistic diversity and their national and regional diversity*', to field of education and culture of member states. The wordings of the articles demonstrate the limits of the competence of the EU in these two fields, in that they stress on the principle of *subsidiarity*. Therefore, the EU cannot harmonize these fields through legislations, but it can take incentive measures and support the member states financially in their activities on these fields (De Witte, 2004, s. 118), which can indirectly (and sometimes directly) promote minority languages and cultures.

Apart from these legal sources, there have been a number of attempts to include a minority protection tool to the primary sources of EU law. One of these attempts is the EU Charter of Fundamental Rights drafted and approved in 2000 (De Witte, 2004), re-adapted in 2007. In article 21 and under the title of non-discrimination, any discrimination based on, inter alia, membership of a *national minority* is prohibited. As seen in this text, minority protection is again tried to be guaranteed in an indirect way.

Even though it can be said that this is the first step, but not the ultimate one, the very wording of the text proves the contrary. In this sense, it can be said that the text is written very cautiously, in that only *national minority* is comprised, although there is still no legally binding definition of term in the international law and literature. Another provision that concerns with the same issue is article 22 of the same Charter. It is enshrined in this article

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<sup>13</sup> In fact, the wording of article 13 is disputed on whether or not it allows for affirmative actions; the answer seems to be negative. See on that (Toggenburg, 2008, s. 99-100).

that “*the Union shall respect cultural, religious and linguistic diversity*”. This is, to some extent, a repetition of what has been already stipulated in article 151(1) (new 167) of EC Treaty. This Charter became valid and legally binding with the entering into force of the Treaty of Lisbon as there is a reference to the Charter in the Treaty of Lisbon (article 6).<sup>14</sup>

The Treaty of Lisbon, in addition to reference to the Charter, inserts into the values of the EU the minority rights (Article 1-3), which reads as:

“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.”

Although, the Charter and the Treaty of Lisbon are the most clear symbols of the growing concern of the EU with minority protection in its institutional capacity, albeit in a piecemeal manner (De Witte, 2004, s. 122-23), they are yet the reflections of the loose or the modest approach towards minority protection.<sup>15</sup> The EU’s approach is loose due to the fact that the issue of minority protection *per se* is problematic to some of the EU member states, like France and Greece. This point makes it clearer why the drafters of the Charter refused to incorporate into it a number of positive rights dedicated to minorities rather than negative one, i.e. anti-discrimination clause (De Witte, 2004; see also Pospisi, 2006).

In order to understand this loose or modest approach of the EU to minority protection, referring to some suggestions of a number of scholars from the literature will be enlightening; they also indicate possible future engagement of the EU in minority protection. It is suggested in the literature that the EU should not opt for taking a more comprehensive and firm approach to the matter, because -as said above- the sensitive nature of the minority issues to some member states, like France and Greece, can provoke and even exacerbate the ‘principled opposition of several member states’ (De Witte, 2004, s. 123). It is rather proposed that the EU should choose to cooperate closely with the CoE and the OSCE

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<sup>14</sup> In fact, there was also a reference to the same Charter in the Treaty Establishing a Constitution for Europe, but that Treaty or known as EU constitution could not be put into effect due to the refusals in the referendums by some member states, such as France and Netherlands.

<sup>15</sup> Even though the Treaty of Lisbon is put into force, the way of formulating the provision of minority protection would probably not be interpreted- due to lack of political consensus- as it confers specific rights on minority groups existing in the EU member states (De Witte, 2006 s. 145).

HCNM on minority protection standards and mechanisms. In this propose, the focus is on the fact that the EU should not cause duplication of standards or mechanisms, but exploit those of the CoE and the OSCE. This approach was clearly embraced and supported by *the Bolzano/Bozen Declaration on the Protection of Minorities in the Enlarged European Union*; a declaration adopted by a group of experts on the subject in a conference co-sponsored by the European Commission in 2004. In this line, Rainer Hofmann and Erik Friberg, in an article which is resulted from this conference, advocate that the EU should consider acceding to the Framework Convention for the Protection of National Minorities (Hofmann, 2004).

Keeping in mind the preceding parts, we can now turn to the issue of the general limits of the EU conditionality, which comes out of the more macro view to the issue. In this account, Kymlicka's opinion is of high relevance and significance.

### **Limits of the Conditionality of Minority Protection**

At the political level, the EU's involvement in the minority issues in general and the conditionality in particular seem to fall short of providing a general and far-reaching account on minority protection and rights. The limits of the EU's endeavours can be noticed from foregoing chapters. The controversial and politically problematic nature of minority matters significantly in these attempts, for some negative connotations has been attributed to it, like 'secession'.

For the EU, the limits undergoing in the political level concerning minority protection determines the legal limits as well. As mentioned, the EU does not still have an institutional competence in making legislations for harmonizing the area of minority rights, although there have been a number of sources in the primary sources of EU law. In this regard, what Kymlicka underlines concerning with the limits of European organisations' efforts on minority standards and mechanisms is very much illuminating and extremely important.

To start with, Kymlicka argues that there has been a growing tendency to develop minority protection standards in international as well as the European level for decades. This tendency is thought to be as a remedy of the Westphalian system of sovereign nation-states, which, for long, avoided (national) minorities. Although there is no homogenous and unique

approach to the remedy, the states have shown their commitments to follow it- an accommodation of national minorities to the political unity in some degree, mainly under a tolerance-based system (Kymlicka, 2006, s. 35).

Consistent with this, Kymlicka further argues that what the European organisations (the EU, the CoE and the OSCE) advanced as the standards of minority protection at the outset was primarily influenced by the minority protection system of the League of Nations (Preece, 1998, s. 73).<sup>16</sup> However, that system had only imposed 'unilateral obligations on the newly created states' (De Witte, 2000, s. 4). Furthermore, it had focused on protecting specific minorities in specific countries; therefore, it was not general in nature. Accordingly, it could not be a sufficient source for the European organisations to follow.

On the other hand, after the Second World War and under the auspices of the United Nations, there was not a general minority rights framework in international law applicable universally to all minorities, because minority rights in this era was approached and conceived within the general framework of individual human rights (Preece, 1998, s. 95),<sup>17</sup> except the right to self-determination and cultural rights as stipulated in article 1 and article 27 of the ICCPR respectively. In this regard, what European organisations chose to do was to seek a balance and to maintain the standards of minority protection in-between the right to self determination as defined by article 1 of the ICCPR and cultural rights as defined in article 27 of the same Covenant.

Article 27 of the ICCPR could somehow be used as guidance by the European organisations (Kymlicka, 2006, s. 40). However, it could not have taken the European organisations forward, since it merely stresses on negative, non-interference rights,<sup>18</sup> which would not be enough for those minority groups as they were demanding more than negative rights, such as using their languages in the public services, which requires public funding for minority schools, universities and media, local or regional autonomy, right to political

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<sup>16</sup> See more on the minority protection system of League of Nations, (Preece, 1998, s. 67-94).

<sup>17</sup> See more on the characteristics of minority protection in post- Second World War period (Preece, 1998, s. 95-120).

<sup>18</sup> However, it should be mentioned that the approach that the Human Rights Committee holds with regard to article 27 makes this account disputable, in that the Human Rights Committee discusses that article 27 should be understood as it may lead to granting affirmative action policies or not. See on this account, (Scheinin, 2008)

representation etc. In that sense, Kymlicka claims that in order for the European standards on minority rights to be a useful tool to solve those (real and potential) ethnic conflicts, they had to bring more; some positive rights rather than negative ones; article 27 thus would not be enough to solve these conflicts (Kymlicka, 2006, s. 40).

Even though the standards developed mainly by the CoE and the OSCE go beyond the scope of article 27, they, however, failed when considering certain issues, such as claims relating to territorial autonomy, design of official language status etc. (Kymlicka, 2006, s. 43). Therefore, Kymlicka believes that the current level of minority protection standards of the European organisations is beyond to provide a tool which is necessary to give answers to the real or the core problem: the demand of autonomy or self-government of those ethnic groups.

Consistent with this, Kymlicka further claims that the European organisations have been dealing with less controversial topics, such as cultural rights and political rights. By doing so, he goes on, the European organisations believe that if these two categories of rights are guaranteed by the states in the European region, then other more controversial matters can be overcome (Kymlicka, 2008, s. 11-12).<sup>19</sup>

Therefore, instead of encouraging the idea of autonomy or self-government, according to Kymlicka, the European organisations have supported '*right to effective participation*' among these two alternatives on minority protection or minority rights. The right to effective participation refers to the idea that minorities shall be able to participate in all public matters, especially in one which are closely of their concerns and/or which affect them (Kymlicka, 2008, s. 28-29). By adopting this third way of minority protection, it is intended that radical demands of minority- primarily the right to self-determination- would be prevented. Its flexible and unclear nature seems to provide such kind of tool for modest state-minority relations, because the focus of the right to effective participation is on the non-discriminatory measures, such as equal right to vote and participation, right to run for office etc.

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<sup>19</sup> Preece uses almost the same arguments, (Preece, 1998, s. 3-13, s. 42-43) and also other chapters,

According to Kymlicka, there might be different readings of the right to effective participation; therefore different outcomes may range from the loosest perception towards the robust one. It means that due to the flexible and modest nature of the right to effective participation, it might or would not affect the outcome of particular policies in which minority groups would be allowed to participate. More clearly, even though minority groups are allowed to participate in the political process, outcome of that process will not be different, because those policies would be subjected to be voted, and the majority will gain what it wants to adopt at the last resort. Therefore, in practice the *effective* character of this right is forgotten or put aside intentionally. In that sense, that practice might lead again to adopt another position which might require a more robust minority protection and power sharing between state and minority groups, which again would be likely rejected by the states (Kymlicka, 2008, s. 29-30). Thus, here arises a dilemma, which, it seems, the conditionality cannot solve.

After having elaborated the general and particular limits of the conditionality, we can now turn to its application to Turkey. Here however, only some observations as seen in the Regular Progress Reports issued by the European Commission will be provided.

### **Application of the Conditionality to Turkey**

#### **- Some Remarks on the Regular Progress Reports-**

One thing should be pointed out at the outset so as to understand the Turkey's position towards its minorities. The Republic of Turkey has recognized, under the Treaty of Lausanne signed in 1923, only the non-Muslim minorities that kept on living in Turkey after the Ottoman Empire collapsed. These are Armenians, Greeks and Jews. Except for these, Turkey has not granted minority status to any other group. Moreover, Turkey has been reluctant to do so as seen in the reservations made with regard several international conventions which contains provisions directed to the protection of minorities, such as (the



reservation to article 27 of) the International Covenant on Civil and Political Rights (ICCPR).<sup>20</sup> This constitutes the actual paradigm of Turkey concerning the minority protection.

### **General remarks**

To start with, a few general aspects of the Reports and a number of remarks should be called attention. First of all, the information employed in these Reports concerning the compliance of Turkey with the Copenhagen criteria, including the conditionality of minority protection, has been collected from different sources including that of international organisations, such as the CoE and the OSCE and national and international NGOs. However, in some occasions, there is no direct reference to the sources, and when there is one, it is sometimes not easy to predict which sources were referred to and how they were assessed. Therefore, the process of drawing up of the Reports and exploiting the information therein is not very transparent.<sup>21</sup>

Secondly, as a structural aspect of the Reports, it is observable that the scope of the Reports became gradually broader. However, this remained so until the decision on opening of the accession negotiations was taken on 3 October 2005. In this sense, the most comprehensive Report in terms of measuring the conditionality of human rights and minority protection was the one released in 2004. After 2005, the scope of the Reports has become narrower since Turkey was deemed to have met with the Copenhagen political criteria.

As mentioned above, the EU has, most of the time, chose to support the works of two other European organisations (the CoE and the OSCE) and forced the CEECs to comply with these organisations' standards, since it has not had its own. This determination is very much true on the Turkish case as well. In this sense, Turkey has been invited many times to sign the Framework Convention and the European Charter for Regional or Minority Languages. At the same time, Turkey has been also persistently forced to cooperate with the

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<sup>20</sup> The reservation reads as follows: "The Republic of Turkey reserves the rights to interpret and apply the provisions of Article 27 of the ICCPR in accordance with the related provision and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes."

<sup>21</sup> In fact this is an issue which is criticised by the Bolzano/Bozen Declaration.

OSCE-HCNM. However, Turkey has not yet signed any of these nor has started cooperating with the HCNM. This situation has been repeatedly denounced by the Commission.

In spite of this disapproval, the decision on opening of the accession negotiations to Turkey was taken on 3 October 2005. Therefore, it seems that acceding to the Framework Convention (and to the Minority Language Charter) and cooperation with the HCNM is not treated by the EU as obligatory- but rather desirable- for satisfying the conditionality. The EU's action, therefore, seems to be inconsistent with what has been suggested to the EU's about creating a close and increasing cooperation with two the CoE and the OSCE on the issue of minority protection (Toggenburg, 2008, s. 118). This can be explained only by the fact that there have been member states within the EU that have not yet signed the Framework Convention, for example France and Greece.

Another point with regard to Reports is that the Commission has a loose approach in its policy of assessing and monitoring the conditionality, which stems from the lack of clear standards and benchmarks in EU law to measure the compliance. Some implications of this view can be seen in the language and structure preferences of the Commission observed in the Reports. For example, the term 'cultural rights' was removed from the sub-title of '*Economic, Social and Cultural Rights*' in 2004- which was being used under this title as from 1998- and was placed into the sub-title of '*Minority Rights, Cultural Rights and the Protection of Minorities*' as from 2004. The reason why this change was made is not clear, yet it seems that the Commission has been inclined to associate cultural rights with minority rights. It is normal to think that the cultural rights are closely linked with minority rights, but the unclear point is why the Commission employed earlier the *cultural rights* under a different title. This might be explained with the fact that the EU opts for a loose manner, or a disguised language for the protection of minorities. This tendency is even clearer in language of *cultural diversity*, which was employed within the scope of protection of minorities in Turkey for the first time with the Report of 2006 (Commission, 2006, s. 22). The choice of this language somehow shows that a modest approach is about to come to the fore.

Consistent with the idea that the EU has endorsed a loose way of coping with minority protection, the Commission's concern with the issue seems to center mainly around Turkey's lack of comprehensive and general anti-discrimination legislation. This latter

point have been mentioned in the Reports since 2001 (Commission, 2002, s. 28; Commission, 2003, s. 25) and the importance of transposition of the anti-discrimination *acquis* of the EU based on Article 13 of the EC Treaty has been underscored.

### **Problem of definition of minority**

Although the Commission has named several groups existing in Turkey as *minority*, no clear definition of the term, or at least a consistent use of it, has been provided as from the first Report (1998) to the last one (2009). Nor any reference was made to the relevant international conventions or literature concerning the definition of the term. It seems on the one hand that the Commission does not want to restrict itself with a definition of the term; therefore it wants to have a flexible framework that can be employed to include (or exclude) any group. On the other hand, this position seems that it has confined the Commission to proposing more robust minority protection tools.

As linked with the matter of definition of minority, another point also poses some problems, which are about the Commission's approach towards the issue of officially recognized and non-recognized minorities. As mentioned at the outset of this part, Turkey has recognized only those groups as minorities which are covered by the Treaty of Lausanne, namely Armenian, Greek and the Jewish people living in Turkey. Although the approach of the Commission towards officially recognized minorities is straightforward in terms of definition, the problem however arises from the approach towards the non-recognized minority groups. For example, while the Commission clearly called the Assyrian Orthodox minority, it named the Alevi (or Alawis) people as non-Sunni Muslims *community*, but it did not clearly name them as minority group nor did it, at least, discuss whether the Alevis is a minority group or not. Furthermore, *the Laz and the Pontus* (culture) were mentioned for the first time in the Report of the year 2002 (Commission, 2002, s. 42), but then they were not mentioned in the years to come (2003 and 2004). Therefore, it is not discernible whether or not the *Laz* and the *Pontus* people are treated as minority group by the Commission. Again, the Roma people have been mentioned under the title of minority rights and protection of minorities in the last years, but no clear reference was made as regards to definition.

Furthermore, in the Report of the year 2000, the wording about the minority status of the Kurds was made cautiously. The statement that “regardless of whether or not Turkey is *willing* (emphasise added) to consider any ethnical groups with a cultural identity and common traditions as ‘national minorities’, member of such groups are clearly still largely denied certain basic rights” (Commission, 2000, s. 19) gives the impression that the EU conceives of minority status as only for those that are recognized by the Turkish state under the Treaty of Lausanne. This position of the Commission however vaguely differed in the following years. It can thus be inferred from the Commission’s approach that it has not had a clear definition of minority.

An operational definition could be helpful to determine which group will be identified as minority and thereby will be beneficiary of the protection and the rights granted thereupon. The most significant problem about this issue arises from whether existence of minorities in a state is a matter of subjective determination of that state or it is based on facts. The answer to this question provided by international law literature is the latter one, that is, the existence of minority in a country is a matter of fact.<sup>22</sup> This means that a state cannot subjectively determine whether it has minorities or not. The Commission’s approach in this regard seems to be obscure one. If the Commission does not want to put itself in a position which might cause some problems in terms of politically sensitive nature of the issue, it could prefer referring to the relevant international documents or literature, but it has refrained doing so.<sup>23</sup>

Notwithstanding the problem about the definition of ‘minority’, what might be, in the view of the Commission, the characteristics of a group to be identified as *minority* was, to some extent, provided for in the Report of 2007. The Commission disclosed a statement

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<sup>22</sup> This view is endorsed by the Human Rights Committee under article 27 of the ICCPR. See (Scheinin, 2008, s. 25-26). It is also endorsed by the ECtHR in the cases of *Ahmet Sadik v. Greece* in 1996 and *Sidiropoulos and Others v. Greece* in 1998, quoted from (Thornberry, 2004, s. 42).

<sup>23</sup> The definition of the term ‘minority’ is problematic not only for the EU, but also for the other international organisations dealing with minority rights, such as the CoE, the OSCE and the UN. In that sense, there has been as yet no legally binding definition of the term in international law, although there have been a number of attempts to provide one. These attempts are very well documented and summarised in (Pentassuglia, 2000). The monograph summarises the attempts at providing a definition by the UN, the OSCE and the CoE pp. 1-10. See also for the summary of the definitions of those organisations including the League of Nations and also for scholarly discussion on definitions, (Preece, 1998, s. 14-29).

that *'this approach* (Turkey's approach of granting minority status only to those groups recognized by the Treaty of Lausanne) *should not prevent Turkey from granting specific rights to certain Turkish citizens on the grounds of their ethnic origin, religion or language* (emphasise added), *so that they can preserve their identity"* (Commission, 2007, s. 21). As a result of this, if a group has these (four) peculiar features, the Turkish state should be able to confer some specific rights on that group regardless whether or not that group is minority.

Although this might seem to be compatible with the Commission's position, referring to language of cultural diversity, which the EU has exploited and paid more attention in the Reports since 2006, it is not difficult to predict that this very wide scope would not be agreed to by the Turkish state, when one thinks of its historical position. Needless to mention that migrant groups would not be included within this scope - since the Commission endorsed the idea that those who might be beneficiary of some specific rights need to be *citizens* of Turkey, although this issue has been discussed in the literature that whether or not migrant groups can be treated as minorities.

### **Concluding Remarks**

To sum up, in this article, the EU conditionality is explained and discussed. It accompanied with some remarks concerning its application to Turkey. In first place, it is explored in what kind of circumstances the conditionality was formulated. Later, the rules that deal, mostly indirectly, with minority protection in EU law were summarized. After all, the some remarks on the application of the conditionality to Turkey were provided.

As explored above, the primary aim of the conditionality was to prevent ethnic conflicts in the European region, then to obtain and entrench security and peace. Therefore, this immediate aim laid down the limits and scope of the conditionality. Once this primary goal was accomplished, the EU moved to less problematic aspects of minority question and in that sense it introduced tools mostly dealing with anti-discrimination measures.

The account that Kymlicka argues for the limits of the endeavours of the European organisations on minority protection can be noticeable in the application of conditionality to Turkey by the EU. The EU has been applying the conditionality to Turkey in a loose manner, even looser than the one applied to the CEECs.

Although the Turkey's accession process to the EU has brought some positive outcomes concerning human rights in general and minority rights in particular, the suspicion towards the issue prevents furthering the improvements. Nevertheless, it might be too early to predict at this moment whether the leverage of the EU's conditionality will lead to further solutions in this respect. Whether the leverage of the accession process to the EU will bring a real paradigm shift in Turkey's approach towards the minority groups remains as a challenge for the Turkish political actors in the short and medium term under the EU accession process.

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### YAZAR HAKKINDA

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### ÖZET

Türkiye'nin AB'ye üyelik sürecinde özellikle insan hakları meselesi ve bu meselede de azınlıklarla ilgili sorun, çözülmesi gereken önemli siyasi ve hukuki konular olarak karşımızda durmaktadır. Bu bakımdan, AB'ye üyelik kriteri olan 'azınlıklara saygı ve onların korunması' şartı, Türkiye'nin üyeliği sürecinde aşılması gereken önemli konulardan biridir. Literatürde genel olarak Türkiye'nin bu konuda neyi yaptığı ve yapmadığı hususu ağırlıklı olarak incelenmiş ve incelenmeye devam etmektedir.

Bu makalede ise temel amaç, Türkiye'nin azınlık hakları konusunda ne yapıp yapmadığını değerlendirmekten çok, bu meselenin AB tarafından nasıl ele alındığını ve kriterin sınırlarının ne olduğunu ortaya koymaktır. Bu maksatla makalede, 'azınlıkların korunması' meseleninin AB üyelik kriteri olarak nasıl ortaya çıktığı tarihsel olarak kısaca ele alınmaktadır. Bu yapılırken, kriterin benimsenmesi sürecinde AB'nin diğer uluslar arası kurumlarla nasıl etkileşim içinde olduğu ve bu kurumların (AGİT ve Avrupa Konseyi) süreci

nasıl etkilediği üzerinde durulmaktadır. Devamında ise, AB hukukunda azınlıkların korunması hususunun nasıl düzenlendiği hususu incelenmektedir.

Bu incelemede görülmüştür ki AB, tarihsel olarak konuya giderek artan bir ilgi göstermesine ve hukuki kapsamı genişletmesine rağmen, hala tam olarak kapsayıcı, azınlıklara pozitif haklar sağlayan hukuki düzenlemelere sahip değildir. Bunun temel sebeplerinden biri, bazı birlik üyesi devletler nezdinde (başta Fransa, Yunanistan) azınlıklar meselesinin sorunlu olmasıdır. Bu nedenle AB, kurumsal kapasitesinde konuyu daha çok ayrımcılık yasağı temelinde ele almaktadır. Ancak, özellikle Will Kymlicka'nın görüşlerinden hareketle, meselenin bu şekilde ele alınmasının, konunun özünü yakalamaktan - ki bu, genel olarak etnik çatışmaların önlenmesi olarak belirlenmektedir- ve meseleyi çözmekten uzak olduğu söylenebilir.

Doğu blokunun çökmesi sonucu, başlangıçta, Orta ve Doğu Avrupa ülkelerine yönelik bir üyelik kriteri olarak kabul edilen azınlıkların korunması meselesi hakkında AB'nin, özellikle 2004 yılındaki genişleme sonucu bu meselede nasıl bir yol izleyeceği merak edilimekteydi. Buna ilişkin olarak da iki senaryo üzerinde durulmaktaydı. Buna göre, AB, kurumsal kapasitesinde (ya da başka bir deyişle AB hukukunda), ya bütün üye ülkelerde bulunan azınlıklara yönelik kapsamlı ve pozitif haklar tanıyan bir sürece girecek ya da hala devam eden ve daha çok ayrımcılıkla mücadele biçiminde tanımlanabilecek politikasını devam ettirecek. Bu senaryolardan ikincisinin halan geçerli olduğu, azınlıkların korunması kriterinin, (yıllık ilerleme raporlarına yansıyan biçimiyle) Türkiye'ye uygulamasından hareketle söylenebilir. Ve bunun devamında da denilebilir ki *bizatihi* bu kriterin kendisinin, Türkiye'nin azınlıklara ilişkin tarihsel tutumunu değiştirmesi, AB'nin kendi içinde bu konudaki tarihsel tutumunu değiştirmesiyle bağlantılıdır. Tabi bunu söylerken, Türkiye'deki iç politikaki oluşabilecek gelişmeler değerlendirme dışı bırakılmıştır.