

European Commission
for Democracy through Law

Commission européenne
pour la démocratie par le droit

EXPLANATORY REPORT ON THE PROPOSAL FOR A
EUROPEAN CONVENTION FOR THE PROTECTION OF
MINORITIES

Strasbourg, 11 March 1991

PLEASE NOTE

The proposal for a Convention for the protection of minorities has been prepared by the European Commission for Democracy through Law (*).

The proposal was published by decision of the Commission, in order to enable the interested circles to be informed and make their views known. It has been submitted to the Committee of Ministers of the Council of Europe.

This document contains an Explanatory Report prepared by the Secretariat of the Commission.

Publication at this stage does not imply the agreement of the Committee of Ministers with the contents of either the proposal for a Convention or the Explanatory Report, nor does it in any way engage the political responsibility of the Committee of Ministers and the member States of the Council of Europe.

(*) The European Commission for Democracy through Law is a consultative body of the Council of Europe on matters of constitutional law. It is composed of experts who have achieved international fame through their experience in democratic institutions or by their contribution to the enhancement of law and political science. To date 20 member States have appointed an expert (Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Norway, Portugal, San Marino, Spain, Sweden, Switzerland and Turkey). Bulgaria, Poland, Romania and Yugoslavia also participate as associate members.

Introduction

1. At the Hungarian, Italian and Yugoslavian authorities' request, the European Commission for Democracy through Law set up a Working Party on the protection of minorities chaired by Mr F. Matscher, member of the Commission in respect of Austria. At its first meeting (Strasbourg 4 May 1990), the Working Party held a general discussion in which participated experts and representatives of minorities. At its second meeting (Venice, 25 May 1990) the Working Party prepared a "set of principles on national minorities" on the basis of a report by Mr Malinverni, member of the Commission in respect of Switzerland. This set of principles, adopted by the Commission at its 4th meeting (Venice 25-26 May 1990), was presented by the President of the Commission, Mr La Pergola, at the CSCE meeting in Copenhagen in June 1990.
2. At its third meeting (Paris 20-21 September 1990) the Working Party prepared a preliminary draft European Convention for the Protection of Minorities which was first discussed at the 5th meeting of the Commission (Venice 9-11 October 1990). This text took into account both the declaration adopted in Copenhagen at the CSCE meeting and the Brincat report presented to the Parliamentary Assembly (AS/Jur (42) 5), which was the basis for Recommendation 1134 (1990). In addition to listing the rights recognised, the text included provision for control machinery to ensure fulfilment of the obligations accepted by the Parties.
3. At its fourth meeting (Venice, 7 February 1991) the Working Party exchanged views with the Parliamentary Assembly members concerned and finalised the text which was submitted to the Commission at its meeting in Venice on 8 and 9 February 1991. The Commission adopted it and decided to forward it to the Committee of Ministers.

General considerations

4. At the beginning of its works, the Working Party decided, despite the fact that problems vary from one country to another, that it would be preferable to examine the situation of minorities in Europe as a whole and not in a specific State or group of States. The purpose of this study was to set out general principles for inclusion in an international legal instrument.

5. The Commission also examined proposals to supplement the European Convention on Human Rights with a provision extending the scope of Article 14 - which prohibits all discrimination in the exercise of the rights recognised by the Convention - by prohibiting all forms of discrimination. While acknowledging the merits of such a proposal and the purpose it could serve, the Commission considered that the protection of the rights of minorities was a specific issue and it seemed wiser to deal with it by means of a specific legal instrument and control mechanism rather than by amending the European Convention on Human Rights or adopting an Additional Protocol thereto.

The Commission declared itself in favour of an overall solution to the problem of minorities rather than specifically protecting minorities according to their ethnic, religious or linguistic character. The fact is that minorities are usually ethnic, religious and linguistic at the same time. On the other hand, while both concentrated minorities and scattered minorities should be dealt with, these two categories may call for different solutions. In particular, territorial solutions can apply only to the first category.

Moreover, since the purpose of the proposal for a Convention is to proclaim fundamental rights, these rights must apply to all the minorities covered by the definition contained in this proposal.

6. Solutions to the problems of minorities lie in, on the one hand, the respect of the principle of non-discrimination and, on the other, positive action such as proclaiming collective and individual rights. The rights which should be recognised include the right to identity, the right to preserve one's own culture, the right to education, the right to use one's own language and the right to practice one's own religion, but it is also important to regulate relations between the minority and the State.

7. The drafters of the proposal took into account the rights proclaimed by the Committee on Local and Regional Authorities in Europe's Resolution 192, namely the right to dignity, to education, to cultural expression, to certain facilities in relations with administrative authorities, and to access to the mass media.

8. The Commission also sought to remain consistent with the works on minority and regional languages being carried on within the Council of Europe. It is important to note that linguistic aspects occupy a central position in the approach adopted to the question of minorities and that, in this way, the draft European Charter on Regional and Minority Languages deals, for example, with questions such as relations with the administrative and judicial authorities of the States in which minorities live. On the other hand, the draft Charter does not deal with other issues concerning minorities which are not directly related to linguistic problems, such as participation in political life.

9. The drafters of the proposal worked on the basis of the view that minorities should in no way be treated as nationalities and should exist within the territorial limits of States.

In this respect it is important to bear in mind the experience of the inter-war period and not to regard minorities as separate entities aspiring to emancipation but as groups entitled, because of their specific features, to special protection within the State. Minorities, for their part, should content themselves with the places in which they live and must remain. The solution to their problems does not lie in a change of frontiers, this being an essential factor for Europe's political stability. Minorities should not behave like "nationalities" seeking to fight against the State.

10. According to the Commission, the adoption of domestic law measures is a prerequisite to solving the problem of minorities: first of all, the structure of the State should guarantee the autonomy of minorities, through federal political systems, through regionalisation, or through the granting of a special status to certain territories. Next, domestic law should ensure that the fundamental rights proclaimed by the constitution are respected, particularly the principle of equality.

11. However, such measures could prove not to be sufficient and international law measures also need to be adopted, in the form of specific treaties, for example, between Italy and Austria or between Denmark and Germany, or through general human rights conventions, for example Article 14 of the European Convention on Human Rights or Article 27 of the International Covenant on Civil and Political Rights, or through a legal instrument concerning minorities exclusively.

12. The purpose of the proposal is not to replace domestic or international measures existing or being drafted but to provide an overall framework, a body of binding international rules to be applied as extensively as possible. To this end, it can and indeed must be supplemented by domestic measures in each State Party to it.

Observations on the articles of the proposal for a Convention

PREAMBLE

13. The Preamble, modelled on those of the European Treaties, refers to the statutory aims of the Council of Europe: defence of democracy, respect for human rights and the principle of the rule of law.
14. The proposal for a Convention contains five chapters:
- I - General Principles,
 - II - Rights and Obligations,
 - III - Control Machinery,
 - IV - Amendments,
 - V - Final Provisions.

CHAPTER I GENERAL PRINCIPLES

Article 1

15. The purpose of Article 1 of the proposal is to specify, just as with the protection of human rights, that the protection of minorities does not fall within the reserved domain of States (Article 2, paragraph 7 of the United Nations Charter).

16. In addition, it seemed necessary to recognise rights as belonging not only to individual members of minorities but to the minorities as such, since minorities are not only the sum of a number of individuals but represent also a system of relations among them. Without the concept of collective rights the protection of minorities would be somewhat limited.

The drafters of the proposal acknowledged that such a principle did not reflect the present state of positive law: while this might be so for protection of the rights of individuals belonging to the minority, it is not the case with the rights of the minority as such (see Article 27 of the International Covenant on civil and political rights). They nevertheless considered that the proposal should go beyond a mere codification of international law and aim to develop it progressively.

It is important however not to exaggerate the difference between these two systems of protection. In the text of the proposal most of the rights recognised concern individuals. Only one article recognises rights for groups: Article 3 (right of minorities to be protected against any activity capable of threatening their existence; right to the respect, safeguard and development of their identity); moreover, two provisions place on States obligations in respect of minorities : Article 13 (obligation to refrain from forced assimilation) and Article 14 (obligation to favour the effective participation of minorities in public affairs in particular in decisions affecting the regions where they live or in the matters affecting them).

17. Paragraphs 2 and 3 are designed to counterbalance paragraph 1. They stress the importance of the fundamental principles of international law and stipulate that the protection of the rights of minorities must comply with these principles.

Article 2

18. The definition of minorities is a delicate problem and one solution might be not to include a specific definition in the text but to rely on the usual meaning of the word.

19. However, the drafters of the proposal preferred to define the framework within which the rights set forth should be applied. According to the definition adopted, only persons possessing the nationality of the State on whose territory they reside are protected. It was noted that the question of migrant workers had already been dealt with in a Council of Europe Convention and that further works could be carried out in this matter.

20. The proposal for a Convention does not make enjoyment by minorities or their members of the rights set forth in the text conditional upon the obligation of previous acknowledgement. According to paragraph 2, any group meeting the definition of paragraph 1 must be treated as a minority; hence, all the provisions of the Convention must apply to it.

21. For the remainder, paragraph 3 is identical in substance to the first sentence of paragraph 32 of the Copenhagen Declaration, which states that to belong to a national minority is a matter of individual choice and no disadvantage may arise from the exercise of such choice. Although the text of the proposal does not specifically say so it goes without saying that this principle applies also to the choice not to belong to a minority.

CHAPTER II RIGHTS AND OBLIGATIONS

Article 3

22. The first right afforded to minorities is the right to continue to exist, in other words to be protected against any activity capable of threatening their existence. The provision applies equally to the activities of the State or of a group of individuals which could result in the disappearance of the minority.

Article 4

23. This provision is central to the proposal for a Convention. Non-discrimination, within the meaning of the proposal is a general principle which applies to all the recognised rights of citizens.

24. The second paragraph permits "positive discrimination" in favour of the minority. The fact is that while non-discrimination may appear to be sufficient to resolve many of the problems of minorities, the very nature of minorities implies that special measures should be taken in favour of persons belonging to them.

Therefore, non-discrimination within the meaning of the proposal does not denote formal equality between individuals belonging to the minority and the rest of the population, but rather substantive equality.

The term "rest of the population" was preferred to "majority" because the latter could be difficult to define in certain States where the population is composed of various minorities and no one group has an actual majority.

Article 5

25. The freedom of association is afforded to all citizens and, by virtue of Article 4, persons belonging to minorities must also enjoy this right. However, it seemed necessary to make explicit reference to it in the proposal for a Convention since it is an especially important right for minorities, with a view to promoting or strengthening their "common features". This expression refers to the definition of minorities as appearing in Article 2, paragraph 1.

26. In addition to the right of association, Article 5 proclaims the right to maintain contacts with other members of the minority. As it is the case with the right to associate, the right to maintain contacts is aimed at promoting or strengthening common features.

27. This right particularly concerns minorities scattered throughout the territory of one or more States. Persons belonging to such groups often account for an extremely small proportion of the population of the region they live in but at national level they may form a higher percentage.

28. Moreover, this right applies to the many minorities which have settled close to frontiers and possess the same ethnic, religious and linguistic characteristics as the populations of the neighbouring State. The right to maintain contacts with the populations of neighbouring States, including travelling regularly to those States, is of great importance for the life of the minority and its members.

29. The rights provided for by this Article must be exercised in accordance with national legislation, under the terms of Article 15, paragraph 2 of the proposal. In particular this Article is not aimed at allowing minorities to form political parties on the mere basis of one's belonging to the minorities.

Article 6

30. Article 6 of the proposal for a Convention is inspired by paragraph 32.2 of the Copenhagen Declaration. It proclaims the right to a cultural life and a cultural identity differing from that of the majority of the population. The provision is drafted in very general terms in order to cover all forms of safeguarding and developing the identity and culture of the persons concerned.

Article 7

31. The use of their language is an important right for people belonging to minorities. For linguistic minorities it is the principal means of affirming their existence and preserving their identity.

It also enables people belonging to a minority to exercise their freedom of expression.

This Article states a general principle. The precise modalities for the exercise of this right are set forth in the Draft European Charter of Regional and Minority Languages.

Article 8

32. Given the difficulties involved in recognising the right of a minority to use its own language in its relations with the administrative authorities, Article 8 of the proposal for a Convention includes the wording "as far as possible" and does not proclaim an absolute right.

This proviso means that the right will not exist in particular when the financial means of the State concerned are insufficient or when the number of persons belonging to the minority concerned is too small.

The principle applies either in a particular region or in the whole State according to whether the minority forms a substantial percentage of the region's or of the State's population.

33. It was considered preferable not to state a principle whereby, where the minority accounted for a certain percentage of the total population, the State would be obliged to declare the minority's language an official language throughout its territory or even in a part thereof.

34. The proposal for a Convention deliberately avoids specifying the percentage above which people belonging to a minority shall be entitled to address administrative authorities in their own language. It seemed preferable to opt for flexible wording to take account of the individual circumstances of the State concerned, including its financial resources. The Committee referred to in Article 18 will have to interpret the notion of "substantial percentage" when examining individual situations brought before it.

Article 9

35. The second and third sentences of Article 9 give the State an alternative: either to organise, in State schools, schooling in the mother tongue of the minority, or to allow children belonging to the minority to attend private schools in which schooling is given in their mother tongue. The drafters of the proposal for a Convention regard either of these solutions as sufficient to ensure schooling in the language of the minority. The State concerned will choose between the two options depending on its particular circumstances and financial resources.

36. The proposal for a Convention nevertheless entitles the State to demand that, where the second alternative is chosen, the official language of the State be also taught in private schools, as it is in State schools.

Article 10

37. Article 10 is based on Article 9 of the European Convention on Human Rights.

38. It guarantees worship, practice and observance as well as religious teaching.

Article 11

39. This principle is inspired by Article 13 of the European Convention on Human Rights. It is important to stress that the effective remedy is not necessarily a legal remedy.

Article 12

40. This Article states the conditions under which the rights and freedoms set forth in Articles 5, 7 and 10 may be restricted. It is inspired by sub-paragraphs 2 of Articles 8 to 11 of the European Convention on Human Rights. Restrictions must be prescribed by law, justified by an aim of public interest and must respect the principle of proportionality.

Article 13

41. The aim of the provision is to prevent the assimilation of minorities by a modification of the proportions of the population. Although some thought that such a principle could threaten the sovereignty of the State and that citizens of the majority group were entitled to settle anywhere, this provision was regarded as essential by the drafters of the proposal for a Convention.

Moreover, the Article only prohibits States from conducting policies to populate areas or displace populations - regardless of whether they belong to a minority or the majority - with the aim of modifying the proportions of the population in a region inhabited by a minority, which would result in a dwindling minority.

Article 14

42. The drafters of the proposal for a Convention preferred not to include an obligation for the State to ensure proportional parliamentary representation of minorities since this principle seemed difficult to implement.

However, they decided to set forth the obligation for the State to favour the effective participation of minorities in decisions affecting the regions where they live or in the matters affecting them.

Moreover, it is necessary for States to take account of the presence of one or more minorities on their territory when dividing the territory into political and administrative sub-divisions, as well as into constituencies.

43. This provision concerns the minority's obligations towards the State and towards the majority.

44. The word "region" must be understood in this article and throughout the Convention in its geographical meaning of an entity of national territory rather than in its political, judicial or administrative meaning.

Article 15

45. This provision concerns the obligations of people belonging to minorities towards the State and towards the majority. In this context the drafters of the proposal for a Convention considered that the equality which applies to rights also applies to obligations.

46. Persons belonging to a minority are bound to observe the obligations to the State deriving from citizenship. The authors of the proposal for a Convention decided not to lay down any specific obligation of loyalty for the minority.

47. Persons to belonging to minorities are also obliged to comply with national legislation. However, this does not mean that national legislation need not comply with the proposal's provisions. Indeed, one of the control machinery's objectives is to ensure such compliance.

48. Persons belonging to minorities must also respect the rights of others. Reference is made in this respect to a situation in which a minority group at national level is a majority group in one part of the State concerned.

Article 16

49. The purpose of Article 16 of the proposal for a Convention is to take account of a not infrequent situation in Europe, in which a minority section of the population of a State accounting for a small proportion of the national population represents the majority of the population of one region of that State. In such a situation the population of the majority at national level - or that of another minority - becomes the minority in that region and it is therefore important to ensure that they do not suffer from any discrimination.

Article 17

50. The purpose of this article is to ensure that the implementation of the proposal for a Convention does not interfere with the application of national or international legal texts relating to human rights which would be more favourable to minorities. This article sets out therefore the principle that the most favourable provision shall apply, which is also present in other International Conventions (for example, Article 60 of the European Convention on Human Rights).

CHAPTER III CONTROL MACHINERY

51. The solution adopted is that of an independent body of experts, regarded by the authors of the proposal for a Convention as preferable to a political committee composed of representatives of States or a judicial body.

Article 18

52. Article 18 sets up the body responsible for ensuring the observance of the obligations entered into by the parties in application of the proposal for a Convention. It is entitled the European Committee for the Protection of Minorities ("the Committee").

Article 19

53. To allow for the particular situation of small States, the expression "in principle" has been added to the general principle which states that no two members of the Committee may be nationals of the same State, the purpose of which is to allow exceptions where justified by the particular situation.

54. As regards the qualifications of the members of the Committee, paragraph 2 stipulates that they shall be chosen from among persons known for their competence or having experience in the field of Human Rights and in particular in the field covered by the proposal for a Convention. It was not thought desirable to specify in detail the professional fields from which members of the Committee might be drawn. It is clear that they do not have to be lawyers.

55. Under paragraph 3, the Committee members serve in their individual capacity. This guarantees their independence and impartiality. Accordingly, it is expected that candidates who have a conflict of interests or who otherwise might encounter difficulties in satisfying the requirements of independence, impartiality and availability will not be proposed or elected. It is also expected that a member of the Committee who might have such difficulties with regard to an individual situation would not participate in any activity of the Committee relating to that situation.

Article 20

56. The procedure for the election of members of the Committee is basically the same as that laid down in Article 21 of the European Convention on Human Rights for the election of members of the Commission.

It is considered appropriate that the same electoral procedure should be followed for filling casual vacancies (death or resignation).

The term of office has been fixed at 4 years, and members may be re-elected.

Provision is made for the partial renewal of the Committee after an initial period of two years. The procedure chosen is drawn from the corresponding versions of Articles 22 and 40 of the European Convention on Human Rights.

57. Paragraph 6 contains the modalities for appointment of the members of the Committee in respect of States which are not members of the Council of Europe. The drafters of the proposal for a Convention considered in fact that it was not possible for these members to be elected by the Committee of Ministers, on which only members States of the Council of Europe sit.

This solution is inspired by the procedure followed for the appointment of Ad hoc judges in international jurisdictions.

Article 21

58. Having regard to the specific characteristics of the Committee's functions as provided for in the present proposal, it is specified that the Committee shall meet in camera.

Article 22

59. This paragraph provides, in accordance with international practice, that the Committee shall draw up its own rules of procedure. They will regulate organisational matters normally found in such rules, including the election of the chairman.

Paragraph 3, specifying that the secretariat of the Committee shall be provided by the Secretary General of the Council of Europe, is inspired by the usual practice of this organisation.

Article 23

60. As a result of the solution opted for in Article 18, the Committee and the Parties must co-operate to ensure more effective protection of minorities and greater respect of the rights recognised by the proposal for a Convention. Article 23, paragraph 1 proclaims this principle of co-operation.

61. Paragraph 2 stipulates that the Parties shall afford the Committee the facilities necessary to carry out its tasks, namely free access to the territory of the Parties and the right to travel without restriction within it, and the right to communicate freely with any person in order to fulfil its tasks. The provision thus sets out some of the facilities the Committee is entitled to expect from the Parties but the latter must also offer any other forms of assistance necessary to its work.

Article 24

62. Article 24 stipulates that the Parties shall submit to the Committee reports on the application of the provisions of the proposal for a Convention. A first report must be submitted within one year of the entry into force of the proposal for a Convention for the Party concerned. Further reports must be submitted at three-yearly intervals or at the Committee's request.

Despite the workload this represents for governments, the drafters of the proposal for a Convention regard this as a necessary procedure insofar as it is the only form of compulsory monitoring, since the acceptance of petitions from States and individuals is optional.

Article 25

63. The drafters decided that State petitions should not be compulsory but optional. It was pointed out that in matters relating to minorities it was possible that a large number of State petitions would be introduced. The compulsory character of accepting State petitions might dissuade some States from ratifying the proposal for a Convention.

Article 26

64. The right of individual petitions is also optional. An individual may only seize the Committee if the State concerned has accepted the competence of the Committee to receive such petitions. Therefore States are entitled to ratify the proposal for a Convention without accepting the right of individual petition, as they are entitled not to accept the right of State petition.

Article 27

65. Article 27 sets out the standard rule according to which all domestic remedies must be exhausted. The fact is that the control machinery set up by the proposal for a Convention is subordinate to and does not aim to supplant national machinery, but only to control their decisions with respect to the provisions of this proposal for a Convention.

66. This provision sets out the classical conditions of admissibility of individual petitions, which are common to most of the international treaties for the protection of human rights.

Article 28

67. Article 28 defines the procedure for examining petitions declared admissible by the Committee.

68. The Committee initially attempts to ascertain the facts, for which purpose it may conduct an investigation and enjoys the facilities provided for by Article 23, paragraph 2.

69. In accordance with the usual practice of international control bodies, the Committee endeavours to reach a friendly settlement of the matter. If it succeeds, the procedure ends with the sending of a report to the State or States concerned. The proposal for a Convention does not specify whether this document is public. This decision will be for the Committee to take, for each petition, when drawing up the friendly settlement.

Article 29

70. If no friendly settlement is reached, the proposal for a Convention authorises the Committee to declare whether the facts in question disclose a breach of the proposal for a Convention, and to make recommendations. These findings form a report to be sent to the Committee of Ministers, to the State or States concerned and to the Secretary General of the Council of Europe.

71. The drafters of the proposal for a Convention considered it preferable not to precise the exact powers of the Committee of Ministers which will take such measures as it thinks fit.

Article 30

72. Article 30 addresses the particular relationship between this proposal for a Convention and the European Convention on Human Rights which is referred to in the Preamble. The obligations of the Parties under the European Convention on Human Rights are not affected. Nor are the powers conferred by that Convention on the European Court and Commission of Human Rights and the Committee of Ministers. Accordingly, the Committee set up by the present proposal for a Convention will not concern itself with matters raised in proceedings pending before them, and will not itself formulate interpretations of the provisions of the European Convention on Human Rights.

CHAPTER IV - AMENDMENTS TO ARTICLES OF
THE PROPOSAL FOR A CONVENTION

Article 31

73. As with other Council of Europe treaties, the proposal for a Convention contains a provision relating to amendments. Amendments may be proposed by the Parties or by the Committee of Ministers. They shall be communicated to all the member States of the Council of Europe, to all States invited to sign the proposal for a Convention in accordance with the provisions of Article 32 and to all States which have acceded or have been invited to accede to the proposal for a Convention in accordance with the provisions of Article 34.

74. The proposal shall also be submitted to the Committee which will give the Committee of Ministers its opinion on the amendment.

75. The Committee of Ministers, which adopted the original text of this proposal for a Convention, is also competent to adopt any amendment.

76. After its adoption by the Committee of Ministers, the amendment shall come into force after all the Parties have informed the Secretary General of their acceptance thereof.

CHAPTER V - FINAL PROVISIONS

77. With a few exceptions, the provisions contained in this chapter are based on the "Model final clauses for conventions and agreements concluded within the Council of Europe", which was adopted by the Committee of Ministers of the Council of Europe at the 315th meeting of Ministers' Deputies in February 1980. Most of these articles do not therefore require any special comment, but the following points should be explained.

78. The text of the proposal for a Convention contains no clause relating to reservations; in accordance with the Vienna Convention on the Law of Treaties, this means that reservations which are not contrary to the purpose and aim of the treaty shall be accepted. Such a solution seemed preferable to excluding the possibility of making any reservations at all insofar as it should render the proposal for a Convention more readily acceptable by a greater number of States.

Article 32

79. The proposal for a Convention is open for signature by member States of the Council of Europe and non-member States which have participated in its elaboration. The purpose of this provision is to take account of the fact that some non-member States have played an active part in its elaboration.

Article 34

80. Accession on the invitation of the Committee of Ministers is restricted to European States, contrary to the rules applying to most of the conventions drawn up within the Council of Europe, which are open for accession by all States. It was thought that the very purpose of the proposal for a Convention and the restricting provisions contained therein applied at this stage only to European States.