

Strasbourg, 12 February 1996

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CDL (96) 2

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

D R A F T

**OPINION
ON THE PROVISIONS OF THE EUROPEAN CHARTER
FOR REGIONAL OR MINORITY LANGUAGES
WHICH SHOULD BE ACCEPTED
BY ALL THE CONTRACTING STATES**

[Draft]

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Introduction

The European Commission for Democracy through Law (Venice Commission) has been requested by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights to study the question whether "it is possible to arrive at a hard core of rights in the European Charter for Regional and Minority Languages, to be accepted by all Contracting States to that convention" (cf. Assembly Order No. 513 (1996)).

At its 24th plenary session (Venice, 8-9 September 1995) the Commission decided to instruct its Sub-Commission on the Protection of Minorities to study this question on the basis of a preliminary report prepared by Mr Maas Geesteranus. The sub-commission held two meetings on this question, on 23 November 1995 and 29 February 1996.

This opinion was prepared by the sub-commission on the basis of a report by Mr Maas Geesteranus and contributions from Mr Malinverni and Mr Matscher. It was adopted by the Commission at its 26th plenary session (Venice, 1-2 March 1996).

1. The concern to guarantee the hard core of minority language rights in Europe

The Venice Commission shares the concern expressed in the Bindig report (Doc. 7442 of 20 December 1995) on the rights of national minorities, a concern which has given rise to the Parliamentary Assembly's proposal to study the possibility of identifying a hard core of obligations to which all States Party to the European Charter for Regional or Minority Languages should subscribe. In this connection, it stresses that the knowledge of and possibility of employing the mother tongue constitutes the essence of the cultural identity of a minority, ie with the loss of its language, a minority may well lose its identity and eventually disappear.

The Commission agrees with the Assembly rapporteur that there is an unquestionable lacuna in the European Convention on Human Rights with regard to the special protection of the rights of linguistic minorities. Although Article 14 of the Convention together with Article 2 of the Additional Protocol does allow for some degree of protection in this area (cf. judgment of the European Court of Human Rights in the Belgian language case, judgment on the merits on 27 June 1968, Series A No. 6), the Convention does not explicitly guarantee any linguistic freedom; moreover, the case law of the bodies of the Convention does not appear to specify that such rights might derive from the right to freedom of expression (Article 10; see for example the "Sadik Ahmet v. Greece" case, currently pending before the Court), freedom of thought and conscience (Article 9) or Article 3 of Protocol No. 1 (cf. the "Mathieu-Mohin and Clerfayt v. Belgium" case of 2 March 1987, Series A No. 113).

The Venice Commission has already defined, in its proposal for a European Convention for the Protection of Minorities, the principles which must be applied and the rights which must be guaranteed in the area of protection of linguistic minorities. According to Articles 7, 8 and 9 of the proposal, whenever a minority reaches a substantial percentage of the population of a region or of the total population, in State schools, obligatory schooling shall include, for pupils belonging to that minority, study of their mother tongue. The Commission has recognised that the guarantee of education in the mother tongue is the keystone of safeguarding and promoting the language of a minority group.

Several provisions of the framework Convention for the Protection of National Minorities (Articles 9.1, 10-14 and 17) and of the draft of the Additional Protocol to the European Convention on Human Rights contained in Parliamentary Assembly Recommendation 1255 (Article 8.1)¹ are along the same lines. It clearly emerges that no one may be prevented from learning the language of his choice, in this case a minority language, in conformity with national legislation and providing that it does not interfere with the teaching of official languages.

In the view of the Venice Commission, the question raised is not whether linguistic rights must benefit from a collective guarantee at European level (it has no doubt about this) but whether the creation of a hard core on the basis of the provisions of the European Charter for Regional or Minority Languages is an appropriate way to ensure those rights.

2. The purpose of the Charter

The European Charter for Regional or Minority Languages is intended to protect and promote regional or minority languages as an endangered component of the European cultural heritage. For that reason, emphasis is placed upon the cultural dimension and the use of these languages in several aspects of life, such as education (Article 8), the courts (Article 9), relations with the administrative authorities (Article 10), the media (Article 11), cultural activities and facilities (Article 12), economic and social life (Article 13) and transfrontier exchanges (Article 14).

At first sight, the Charter does not seek to create individual or collective rights for persons who use regional or minority languages in a State. It attempts to safeguard "the value of interculturalism and multilingualism" as an "important contribution to the building of a Europe based on the principles of democracy and cultural diversity", but always "within the framework of national sovereignty and territorial integrity" (cf. the preamble to the Charter and paragraph 10 ff of the explanatory report). Moreover, the definition of regional or minority languages as set forth in the Charter in Article 1.a.i only covers languages which are traditionally used within the territory of a State by its nationals and are different from the official language(s) of the State, and does not include either the languages of migrants or dialects (Article 1.a.ii).

¹ Cf. also Article 27 of the International Covenant on Civil and Political Rights, Articles 4.2 and 4.3 of the Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities adopted by the United Nations General Assembly on 18 December 1992 and Article 5.c of the Convention against Discrimination in Education of 14 December 1960.

Notwithstanding the stated objective of the authors in the explanatory report (para. 10 f.), the Charter is quite naturally considered both within the Council of Europe and elsewhere as a basic instrument for the protection of minorities (cf. Parliamentary Assembly, Bindig report on the rights of national minorities, Doc. 7442; Recommendation 1285 (1996); Order No. 513 (1996); A Verdoodt, the right to use a language of one's choice, written communication presented at the 8th Colloquy on the ECHR (September 1995); P Thornberry and M A Martin Estebanez, The Council of Europe and Minorities, publ. Council of Europe, September 1994; P Kovacs "La protection des langues des minorités ou la nouvelle approche de la protection des minorités?" in: Revue générale de droit international public, Volume 97/1993/2; P Blair "The Protection of Regional or Minority Languages in Europe", in: Publications de l'Institut du Fédéralisme Fribourg Switzerland; EUROREGIONS, Volume 5, Journal 1).

This should come as no surprise. Not only does the scope of the various instruments for the protection of minorities already adopted, proposed or in the course of drafting cover very similar areas, but the provisions of these instruments also include the problem of minority languages.

Thus, for example, part of the principles set out in Part II, Article 7, of the Charter, notably Article 7.1.d ("the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life") is found in the following documents:

- Article 10.1 of the framework Convention for the Protection of National Minorities ("The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing");
- Article 7.1 of Parliamentary Assembly Recommendation 1201 ("Every person belonging to a national minority shall have the right freely to use his/her mother tongue in private and in public, both orally and in writing");
- Article 7 of the Venice Commission's proposal for a European Convention for the Protection of Minorities ("any person belonging to a linguistic minority shall have the right to use his language freely, in public as well as in private");
- Article 2.1 of the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities ("persons belonging to minorities have the right ... to use their own language, in private and in public, freely and without interference or any form of discrimination");
- Article 27 of the International Covenant on Civil and Political Rights ("in those States in which... linguistic minorities exist, persons belonging to such minorities shall not be denied the right ... to use their own language").

Focusing first on languages and only then on traditional linguistic minorities in the European States, the Charter advocates a number of positive measures in favour of minority languages on the part of the Contracting States.

However, given the need to bear in mind the complexity and diversity of the situation of regional and minority languages in Europe, the Charter has provided itself with a special structure enabling it to cope with the problem of the special nature of each situation by modifying its requirements accordingly.

3. Structure of the Charter: the "à la carte" system

3.1 The European Charter for Regional or Minority Languages offers States two levels of commitment.

Part II, Article 7, of the Charter defines the objectives and principles pursued, which constitute a "common core", ie obligations which must be accepted by all States Parties. No reservations may be made to Article 7.1, in conformity with Article 21.

Part III contains a choice of specific commitments for implementing the principles set forth in Part II. In accordance with Article 2, paragraph 2, of the Charter, States may freely specify the languages to which they agree to have Part III apply, and for each language chosen they may indicate which provisions of Part III shall apply. The same provision states that "each Party undertakes to apply a minimum of 35 paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter".

3.2 This selective system has obvious advantages. For regional or minority languages, as defined in Article 1, paragraph a, of the Charter, the State agrees to a dual commitment whose mechanism is set out in Articles 2 and 3 of the Charter.

The State Party to the convention "undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1" (Article 2.1); the State then specifies at the time of ratification to which language(s) it undertakes to apply 35 paragraphs or sub-paragraphs (at a minimum) chosen from among the provisions of Part III of the Charter (Article 3.1).

The State's freedom of choice is only relative, because apart from the numerical provisions of Article 2, paragraph 2, in making its choice the State must also take into consideration the "needs and wishes expressed by the groups which use such languages" (Article 7.4). Thus, its choice cannot be arbitrary, but will be dictated by the desire to adopt for each regional or minority language the wording which best fits the characteristics and state of development of that language (cf. paragraph 46 of the explanatory report).

3.3 This particular structure of the Charter and its logic of being adaptable to the extreme variety of situations of regional and minority languages is in marked contrast to the concept of a list of uniform obligations which must be accepted by all the Contracting States of the Charter.

But it is important to emphasise that the idea of a certain hard core is by no means alien to the Charter. A hard core already exists in the Charter, in Part II, Article 7, and states "that each Party shall undertake to apply (certain principles) to all regional or minority languages used in its territory", as defined by the Charter.

4. Article 7 as the "hard core" of the Charter

4.1 Article 7 enumerates a number of principles and objectives which constitute the necessary framework for the preservation and promotion of regional and minority languages.

The Article does not contain specific rules, but seeks to define the foundations upon which "the Parties shall base their policies, legislation and practice" (Article 7.1) for "all the regional or minority languages spoken within (a) territory" (Article 2.1).

These objectives and principles are enumerated in the explanatory report under six main headings (para. 58 f. of the report):

- recognition of regional or minority languages (Article 7, para. 1.a);
- respect for the geographical area of each regional or minority languages (Article 7, para. 1.b);
- need for positive action for the benefit of regional or minority languages (Article 7, paragraphs 1.c and d) (*sub-paragraph d endorses an activity in favour of the free use of the minority language, both orally and in writing, both in private and in public. This sub-paragraph adopts the principle laid down in the framework Convention for the Protection of National Minorities (Articles 9, 10.1 and 10.2), which is likewise set forth in Article 7 of the proposal for a European Convention for the Protection of Minorities, drafted by the Venice Commission, and Article 2.1 of the United Nations Declaration on the Rights of Persons belonging to Minorities*);
- guarantee of the teaching and study of regional or minority languages (Article 7, paragraph 1.f and h);
- facilities afforded to non-speakers of regional or minority languages to acquire a knowledge of them (Article 7, paragraph 1.g);
- relations between groups speaking a regional or minority language.

4.2 Furthermore, Article 7, paragraph 2, the scope of which extends to the entire national territory, contains a non-discrimination clause which amounts to recognition of the admissibility of positive discrimination:

"Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it".

However, "the adoption of special measures in favour of regional or minority languages (...) is not considered to be an act of discrimination against the users of more widely used languages". This positive discrimination follows logically from the very objective of the Charter, which is to stop the decline of regional and minority languages and, where possible, promote their use in order to contribute to "the maintenance and development of Europe's cultural wealth and traditions" (cf. Preamble to the Charter).

5. The function of Part III of the Charter

5.1 The question has been raised whether a "hard core" composed of certain provisions of Part III of the Charter is conceivable with a view to strengthening the protection of minority languages.

Pursuant to the provisions of Article 2, paragraph 2, of the Charter, in respect of "each language specified at the time of ratification, acceptance or approval ... each Party undertakes to apply a minimum of 35 paragraphs or sub-paragraphs chosen from among the provisions of Part III". It is also stated that "any Party may, at any subsequent time, notify the Secretary General that it accepts the obligations arising out of the provisions of any other paragraph of the Charter not already specified in its instrument of ratification ..." or that it will apply Part III of the Charter to other regional or minority languages used on its territory (Article 3.2). On the other hand, a State may not deny a regional or minority language the benefit of the provisions to which it has subscribed (unless it denounces the entire Charter, within the meaning of Article 22).

5.2 Given the extreme diversity of situations of minority languages in Europe, the Commission considers that the too rigid wording of the provisions of Part III makes none of them very amenable to being accepted by all Contracting States for all regional or minority languages without exception.

5.3 Moreover, the Commission is duty-bound to stress the importance of Part III of the Charter:

It transforms into specific commitments the general principles defined in Part II. Once a Contracting State accepts the provisions of Part III, it assumes international responsibility for any failure to comply with the obligations into which it has itself entered, even though those obligations vary from one Contracting Party to another and even from one regional or minority language to another. Furthermore, it undertakes to accept monitoring as set out under Part IV of the Charter.

5.4 The Venice Commission notes that, pursuant to the explanatory report (paragraphs 42, 43 and 49), States are not compelled to accept both Parts II and III of the Charter, and it remains possible in principle for a State to ratify the convention without specifying a language for the purposes of the application of Part III. In that regard, the Commission emphasises that the decision of a State not to extend to a language the benefit of the provisions of Part III must be based on reasons which lie within its own discretion but that such reasons must be compatible with the spirit, objectives and principles of the Charter.

5.5 In the view of the Commission, the "hard core" constituted by Part II of the Charter and the protection afforded to a language or languages by virtue of the provisions of Part III give the European Charter for Regional or Minority Languages a special character, making it suited, in principle, to the situation of historical regional and minority languages in Europe.

6. Conclusion

In the opinion of the Commission,

6.1 The concept of a hard core as envisaged by the Parliamentary Assembly is contrary to the spirit and working system of the European Charter for Regional or Minority Languages;

6.2 The Charter already has a "hard core" of principles (Part II) which guarantees the effectiveness of the protection that it affords;

6.3 In any event, the provisions of Part III, given their wording and the detailed fashion in which they regulate the subject-matter, are hardly suitable for the creation of a hard core likely to be accepted by all Contracting States;

6.4 Moreover, a hard core of linguistic rights may be derived from the obligations provided for in the framework convention, notably in Articles 5.1, 6, 9.1, 10-14 and 17. The effectiveness of the protection that the latter offers will depend largely upon the implementation of the mechanism to ensure compliance with its provisions.