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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Opinion of the European Commission for Democracy through Law on the proposal drawn up by the Committee on Legal Affairs and Human Rights for an additional protocol to the European Convention on Human Rights concerning the rights of minorities (AS/Jur (44) 23 and AS/Jur (44) 41).

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I

1. The European Commission for Democracy through Law has examined with the greatest interest the proposed additional protocol to the European Convention on Human Rights prepared by the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly. The Commission's wish is that, like the proposed European convention for the protection of minorities which it adopted itself on 8 February 1991, this text may contribute to the setting up of an international instrument that will at long last give minorities the protection they so badly need and which is still cruelly lacking today, as is demonstrated by the tragic events of which Europe and the entire world are now the helpless witnesses.

2. The Venice Commission further notes that, where the standard-setting part is concerned, the text in question differs very little from its own draft, except for the fact that it secures fewer rights to minorities, as will be seen below.

II

3. The fundamental difference between the two drafts lies in the protection machinery they envisage: a self-contained convention instituting a European committee for the protection of minorities on the one hand, and on the other hand an additional protocol to the ECHR, its observance to be ensured by the European Commission and Court of Human Rights.

4. It is appropriate to restate the reasons why our Commission, after pondering the pros and cons of the two solutions at length, finally opted for a separate convention.

a) Firstly, at the time when we commenced work, most if not all of the states of central and eastern Europe, where the question of the protection of minorities arises most acutely, were not members of the Council of Europe or contracting parties to the ECHR. That being so, the possibility of an additional protocol to the latter could not be entertained. It should be remembered in this connection that of the three states which instructed the Commission to draw up a draft convention on minorities, only one (Italy) was then a member of the Council of Europe: the other two (Hungary and Yugoslavia) were not.

It is true that the situation in this regard has since changed and that several central and eastern European states are now, or are about to become, members of the Council of Europe. Despite this - welcome - fact, however, the argument for a separate convention remains wholly valid. It is by no means certain that all these states, especially in central Europe where very grave minority problems exist, will one day be members of the Strasbourg organisation.

b) Apart from these practical considerations there are other reasons for the choice made by the Venice Commission.

ba) An additional protocol to the ECHR would admittedly have advantages. The protection of minorities would be safeguarded by bodies that already exist, and this would obviate the

creation of another organ operating in an adjacent area and with a potential for conflict with the existing ones. On reflection, however, it may be wondered whether the judicial procedure instituted by the ECHR, possibly culminating in a Court judgment, is really the best way of solving the problems of minorities.

bb) Firstly, while it is closely linked to the protection of human rights, the protection of minorities does present far more marked political features which impinge much more closely on the sovereignty of states. For example, when a minority claims greater autonomy, or even secession, it is not really raising a question of law but a political issue to which a court, whose function is limited to determining breaches of the law where they occur, will be hard put to find a solution. In such a hypothesis a non-judicial body such as the committee envisaged in our draft convention could more easily suggest a compromise solution than a court could.

Moreover, for a dispute to be resolvable by a judicial body, the rights invoked before it must be enforceable in the courts. But it is not certain that this is true of all the rights to which minorities should be entitled. Prime examples are the provisions setting forth general principles as goals to be achieved rather than specific subjective rights for persons belonging to minorities, or those which give states a very wide margin of discretion as to the means to be employed (eg. Articles 8 and 9 in the Venice Commission's draft). But the same applies to those rules which do not confer rights on the members of minorities but impose obligations on states. Very often such obligations cannot be framed in a very binding way, so that it is difficult to deduce from them what the corresponding subjective rights of individuals are.

The Commission therefore persists in its belief that flexible, diplomatic solutions applied by a non-judicial body may prove more effective in this tricky field.

III

5. The Commission notes that several of the clauses in its draft have not been incorporated in the protocol proposed by the Committee on Legal Affairs and Human Rights, on the grounds that an additional protocol to the ECHR could merely set out rights to be conferred on minorities, but not general obligations of the state towards minorities or obligations of minorities themselves or of their members (doc. AS/Jur (44) 23, p.4).

6. The Commission is not persuaded by this argument. It observes in the first place that in certain - admittedly rare - cases the convention law in force employs forms of words which, rather tha creating rights for individuals, lay down obligations on states (eg. Article 3 of the first Protocol to the ECHR).

7. The Commission regrets especially the fact that the preference given a priori to one type of international instrument (the additional protocol) over another (the self-contained convention) should produce the effect of limiting the rights and freedoms which minorities deserve to enjoy.

Some of the clauses in our own draft, consisting either of general obligations on the state or of duties on the part of minorities (see especially Articles 1 paras 2 and 3, 14, 15 and 16), are, it is true, not easily amenable to a judicial sanction such as the draft protocol recommends. However, we do not regard this as sufficient reason not to include them in an international

instrument for the protection of minorities - particularly as they can easily be implemented through a more flexible supervision mechanism such as that envisaged in the draft convention.

8. The Commission therefore insists that those provisions of its draft that have not been incorporated in the draft protocol are important ones which either give minorities additional rights or create a balance between their rights and their obligations.

9. The Commission furthermore observes that the draft additional protocol does not secure the right of minorities to exist (Art. 3 of its own draft convention), the right to be treated as such (Art. 2 para. 2 of the draft) or the right of minorities to leave their country and return to it (Art. 5, last sentence). These rights are fundamental to minorities and should be included.

IV

10. Unlike our draft convention (Art. 2), the proposed protocol does not offer any real definition of the concept of minority, though in Art. 1 it does attempt to list the component features. The Commission wishes to make the following comments with regard to this article.

a) Sub-paragraphs a) to e) mention a number of criteria to be taken into account. Among these are residence, birth and nationality (see especially Art. 1 b. of the proposed additional protocol). In the Commission's opinion, the sole decisive criterion is that of nationality. Only a state's nationals can claim special protection under the law governing minorities. Members of minority groups who do not have the nationality of the state are protected by other rules of public law in each state: the law on aliens, and where appropriate the law on refugees. The concept of minority should therefore be limited to nationals, otherwise the definition becomes too broad and thus unacceptable.

b) Art. 1 b. mentions the three criteria of residence, birth and nationality as alternatives and/or as having to be met simultaneously. However, the results are diametrically opposed depending on the hypothesis applied. In the first case, taking the three criteria as alternatives, the result is an extremely broad definition of the concept of minority which embraces a very large number of persons; in the second case, by contrast, the definition may be excessively narrow. For example, it is hard to see why a person must have been born on the territory of a state in order to claim membership of a minority in that state. As for residence, this is a virtually automatic condition. It is hard to imagine how a dispute could arise between a person belonging to a minority and a state if that person is not resident in the territory of that state.

c) Art. 1 of the proposed additional protocol does not mention the wish of the members of a minority group to live together and preserve their cultural heritage. In the Commission's view, this subjective element is fundamental to the definition of the concept of minority and cannot be allowed to go unmentioned.

d) Art. 1 c. brings a quantitative element into the very definition of the concept of minority ("are sufficiently representative"). The Commission regards this criterion as extremely dangerous and difficult to apply. A state could claim that a group is not sufficiently representative to be recognised as a minority and thus deny it the rights set out in the protocol. It would therefore be better to eschew any quantitative criterion in the actual definition of minority, and perhaps resort to it again when considering the securing of certain specific rights

to minorities. For example, a minority must make up a given percentage of the total population if the state is to be required to open state schools providing tuition in its language, or for the latter to be given the status of an official language (see, for example, Articles 8 and 9 of our draft convention).

11. With regard to the other articles of the draft protocol, the Commission notes - as already observed at the beginning of this opinion - that the text of the Committee on Legal Affairs and Human Rights substantially incorporates the corresponding provisions of its own draft convention. Consequently, it has no particular comments to make on them.

13. The Commission notes, however, that Art. 8 para 1 of the draft protocol gives minorities rights which go beyond those secured in the corresponding provision of its own draft convention, which is more qualified and takes greater account of the material possibilities open to the state.

Geneva, 10 December 1992