

OPINION OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

on the interpretation of Article 11 of the draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 of the Parliamentary Assembly

Introduction

By letter dated 24 November 1995 the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly requested the assistance of the European Commission for Democracy through Law in the preparation of an opinion on the interpretation of the draft Protocol to the European Convention on Human Rights appended to Recommendation 1201 (1993), with particular reference to Article 11 of the draft.

The Sub-Commission on the Protection of Minorities examined this question at its meeting in Venice 29 February 1996 on the basis of a report prepared by Mr MALINVERNI and Mr MATSCHER.

The present opinion, which is limited at this stage to the question of Article 11, was adopted by the Plenary Commission at its 26th meeting (1 and 2 March 1996).

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1. The object of the request

By its Recommendation 1201 (1993), the Parliamentary Assembly requested the Committee of Ministers of the Council of Europe to adopt an additional protocol to the European Convention on Human Rights, drawing on a proposed text appended to the Recommendation and forming an integral part thereof. The proposed text was one of the reference documents used in the work of the Committee of Experts for the Protection of National Minorities (CAHMIN), which was entrusted with the task of drafting an additional protocol to the European Convention on Human Rights, aimed at guaranteeing individual rights in the cultural field, particularly for national minorities. Moreover, it was and is still used as a reference document by the Assembly whenever it examines applications by States for membership of the Council of Europe (see Recommendation 1285(1996) of the Assembly). Above all, allusions to the proposed text have been included in several bilateral treaties regulating neighbourhood relations between member States of the Council of Europe.

The letter in which the Commission's assistance was sought by the Committee on Legal Affairs and Human Rights refers to this particular fact as well as to the difficulties in interpreting, in this context, the draft protocol both as a whole and as regards Article 11 thereof, which reads as follows:

"In the regions where they are a majority, the persons belonging to a national minority shall have the right to have at their disposal appropriate local or autonomous authorities or to have a special status, matching this specific historical and territorial situation and in accordance with the domestic legislation of the State."

The fact that this provision is not an operative rule of international law but a mere proposal to which reference is nevertheless made in other international treaties creates a special situation that makes the task of interpreting this text a difficult one. The Commission feels that in this instance account should be taken not only of the ordinary meaning of the terms used but also of the relevant *travaux préparatoires*, the other work carried out within the Council of Europe with regard to the protection of national minorities, the practices of member States as regards the right of the minorities to have at their disposal local or autonomous authorities, and the attitudes adopted by Council of Europe member States towards this provision (see, *mutatis mutandis* Articles 30 and 31 of the Vienna Convention on the Law of Treaties of 1969).

All these elements capable of revealing the substance of the right of minorities to have at their disposal local or autonomous authorities as it may be understood and applied by European States.

2. Elements to be taken into consideration for the purpose of interpreting Article 11 in general

a. The *travaux préparatoires*: the report proposing the adoption of Recommendation 1201 (1993) (WORMS report)

The introductory report by Mr WORMS is not very helpful for the purpose of interpreting Article 11. It simply indicates that "Articles 10 and 11 deal with rights which may have political consequences. They have been drafted having in mind the need to preserve in any case the integrity of the State. Contacts with citizens of another country shall take place while duly "respecting the territorial integrity of the State". As regards the status of appropriate local authorities to allow a certain degree of administrative autonomy of the regions where minorities are in a majority, these authorities can only be established in accordance with the domestic legislation of the State".

b. Work carried out in the Council of Europe with regard to the protection of the rights of minorities

The Venice Commission's proposal for a European Convention for Protection of Minorities does not contain any right for persons belonging to minorities to have at their disposal local or autonomous authorities. Article 14 paragraph 1 of the Commission's proposal provides that "States shall favour the effective participation of minorities in public affairs, in particular decisions affecting the regions where they live or the matters affecting them".

In the Vienna Declaration of Heads of State and Government of the member States of the Council of Europe, of 9 October 1993, it is recognised that the creation of a climate of tolerance and dialogue is necessary for participation by everyone in public life. An important contribution to this can be made by local and regional authorities.

The Framework Convention for the Protection of National Minorities did not borrow from Article 11 of the Parliamentary Assembly's proposal the idea of granting to persons belonging to national minorities in the regions where they are a majority "the right to have at their disposal appropriate local or autonomous authorities or to have a special status". In this Convention the right to have a special status is in fact replaced by a provision based partly on the Venice Commission's proposal: Article 15 of the Framework Convention guarantees *the right to effective participation of persons belonging to national minorities in public affairs* affecting them. However, no reference is made to local authorities. From the stand point of the Framework Convention, participation in public affairs is above all a question of personal autonomy, not of local autonomy.

Nor has the case-law of the European Convention on Human Rights implied that some provisions of this Convention could be used for the purpose of claiming a right to a special status. The European Commission of Human Rights has twice declared that the Convention does not include any right for national minorities to self-determination (No. 6742/75, DR/3 p. 98, concerning Germans who formerly lived in Czechoslovakia; No. 7230/75, DR/7 p. 109, concerning the population of Surinam). Article 3 of Protocol No. 1 (guaranteeing electoral rights) does not apply to elections to non-legislative bodies such as municipal councils (No. 10650/83, DR/42, p. 212), nor does it guarantee any right of national minorities to separate political representation (Nos. 9278/81 and 9415/81, decision of 3 October 1983, DR/35 p. 30)^[1].

It follows from the foregoing that international law cannot in principle impose on States any territorial solutions to the problem of minorities and that States are not in principle required to introduce any forms of decentralisation for minorities (see also Article 35 paragraph 2 of the Copenhagen Declaration).

c. The attitude of States towards Article 11

The treaty of 5 April 1995 between Hungary and Croatia refers to Recommendation 1201, and contracting parties did not make any declaration when ratifying it.

The treaty of 19 March 1995 between Slovakia and Hungary on good neighbourly relations and friendly cooperation [Article 15 paragraph 4(b)] refers to Recommendation 1201, but the Government of Slovakia made the following declaration when ratifying it: "The Government of the Republic of Slovakia declares that at no time did it accept or enshrine in the treaty any formulation founded on recognition of the principle of collective rights for minorities or allowing of the creation of autonomous structures on an ethnic basis."

It seems, lastly, that the inclusion of a reference to Recommendation 1201, in particular to Article 11, is at the centre of the negotiations concerning a bilateral treaty between Hungary and Rumania.

States seem in fact to be afraid that the right to have appropriate local or autonomous administrations, combined with the right to transfrontier contacts (Article 10 of the draft protocol), may promote secessionist tendencies. Even those States which, while adhering to the principle of unitarity have granted a large degree of regional autonomy hesitate to accept binding international instruments on the right of minorities to a certain autonomy. As pointed out by H. KLEBES^[2], sensitivity towards any autonomy of national minorities is still too great in many States: there is a fear of cultural autonomy leading to administrative autonomy, followed by secession.

d. The practices of European States in respect of the rights of minorities to have at their disposal local or autonomous authorities

In the course of its work, the Commission has already observed the diversity of legal models of protection of minorities in Europe, a diversity which reflects the complexity of situations and, hence, the variety of solutions adopted by the different States to deal with the problem concerned^[3]. The Commission's work and a study of national systems for protecting minorities do not reveal the existence of any common practice in the matter of territorial autonomy, even in general terms.

In the Commission's view, the above-mentioned elements indicate:

- B that any attempt to interpret Article 11 of Recommendation 1201 (1993) should be very cautious; and
- B that, having regard to the present state of international law, a broad approach to the right of minorities to have local or autonomous authorities at their disposal is possible only in the presence of a binding instrument of international law, which is not the case in this instance.

3. Interpretation of Article 11 of Recommendation 1201 (1993)

a. "... the persons belonging to a national minority ..."

Holders of the right provided for in Article 11 are "the persons belonging to a national minority", not the minorities as such, although, in the Commission's view, despite this formulation, the right to autonomy is conceivable only as a right exercised in association with others. Therefore, the right in question does not imply for States either its acceptance of an organised ethnic entity within their territories, or adherence to the concept of ethnic pluralism as a component of the people or the nation, a concept which might affect any unitarity of the State. The presentation of the minority phenomenon in Article 11 is no different from that in the other provisions of the text proposed in Recommendation 1201: it is indirect and based on recognition of individual rights, albeit exercised in association with others (ie. collectively), a point merely mentioned in the Slovak declaration accompanying the ratification of the neighbourhood treaty with Hungary. This element should nevertheless be taken into consideration for the purpose of interpreting the substance of the right provided for in Article 11.

Article 1 gives a definition of the term "national minority". This denotes a group of persons in a State who: reside in the territory of a State and are citizens thereof; maintain long-standing firm and lasting ties with that State; display distinctive ethnic, cultural, religious or linguistic characteristics; are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State; and are motivated by a concern to preserve together what constitutes their common identity.

It follows from this definition that the persons to whom the rights included in Recommendation 1201 are guaranteed are nationals (citizens), of the State, not foreign migrants. This is further underlined by the fact that only persons belonging to "historical" minorities (having "long-standing, firm and lasting ties" with the State) can enjoy them.

The expression "long-standing, firm and lasting ties with that State" should be so interpreted as to include ties with the territory of a State as a component of the latter. In this way persons belonging to a minority will not lose minority status as a result of the transfer of the territory to another State or to a new State, and Recommendation 1201 will retain its relevance in the event of such territorial transfer or of State succession - assuming, of course, that the persons concerned continue to be in a minority.

b. "... in the regions where they are a majority ..."

A minority must constitute a majority in a "region" for Article 11 to be applicable. However, it is very difficult to define the term "region" in the context of this provision.

In principle, the term should be construed in its geographical, not administrative or political, sense. But it also has an historical dimension which is not unconnected with the settlement of various groups in a particular territory.

In fact, States have a large margin of appreciation in defining what they regard as a "region". However, the designation of a particular territory as a "region" for the purposes of the application of Article 11 must be done in good faith. In particular, it should not be aimed at rendering Article 11 inapplicable, nor be arbitrary (see, in this context, Article 16 of the Framework Convention). On the contrary, it should be based on objective criteria and have regard to the minority phenomenon. In the course of its own work, the Commission explicitly stated that it was necessary for States to take into account the presence of one or more minorities on their soil when dividing the territory into political or administrative sub-divisions as well as into electoral constituencies (explanatory report to the Venice Commission's proposal for a European Convention for the Protection of Minorities, paragraph 42).

The phrase "in a majority" should also be interpreted in the light of the aim pursued by Article 11. Being allowed to have local or autonomous authorities represents the most consummate fulfilment of the demands of concentrated minorities within unitary States; a federal state may in fact go further in this field (see on this point the Venice Commission Report on the Protection of Minorities in Federal and Regional States)^[4].

Moreover, the phrase should be understood not as denoting a mere numerical relationship but as implying that the minority has settled and is concentrated in the region concerned.

c. "... have the right to have at their disposal appropriate local or autonomous authorities or to have a special status ..."

Article 11 foresees the right to enjoy a certain autonomy by three means (local authorities, autonomous authorities and special status), which it does not define.

It can be stated in general terms that the right guaranteed in Article 11 cannot be interpreted as requiring measures that would fundamentally affect the structure of the State, even though a federal or regional structure allows minorities residing in the territory of the State to be accorded a degree of autonomy through the grant of a territorial basis of their own where they can pursue a policy via autonomous institutions. Nor does Article 11 impose a specific model of local autonomy institutions: the variety of models in Europe is such that none can be advocated as the one to be adopted by all States.

The State will therefore have a wide choice of options for discharging its obligations under Article 11.

! Appropriate local or autonomous administrations

Some important indications of the substance of the right to enjoy a certain autonomy can be obtained from the European Charter of Local Self-Government. Under this instrument, local authorities must be capable "of regulating and managing a substantial share of public affairs under their own responsibility and in the interest of the local population" (Article 3.1 of the Charter). Moreover, the Charter provides a set of elements concerning the implications of this "right to regulate and manage a substantial share of public affairs". Thus:

- B this right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct equal universal suffrage, and which may possess executive organs responsible to them (Article 3.2 of the Charter);
- B local authorities must be able to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority, since public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen (Articles 4.2 and 4.3 of the Charter);
- B local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management (Article 6 of the Charter);
- B any administrative supervision of local authorities may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute; this supervision shall aim only at ensuring compliance with the law and with constitutional principles; it may be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities (Article 8 of the Charter);
- B local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government, as are enshrined in the constitution or domestic legislation (Article 11 of the Charter).

These are simply guidelines which should inspire the practice of States when discharging their obligations under Article 11; they are not actual requirements deriving from Article 11.

! Special status

The meaning of the term "special status" is, admittedly, somewhat vague; but it does reflect the desire of the authors of Article 11 to allow States to depart from the traditional patterns of local government. In this respect the State remains free to determine what will be the scope of this special status. In the absence of any common practice capable of specifying the minimum requirements of such status, the scope of the right to have a special status should be determined by reference to the aims of Article 11 in general and the presumed will of the Council of Europe member States. Some examples can be found in the special statuses existing in Italy or Spain, without this precluding the solution of personal autonomy.

In the Commission's opinion, any "special status" should be founded on the will to enable persons belonging to a minority to participate effectively in decision-making concerning the regions in which they live or in matters affecting them. The institutions which make up this special status should be capable of representing the minorities and ensuring that persons belonging to the minorities:

- B will be consulted whenever the Parties are contemplating legislative or administrative measures liable to affect them directly;
- B will be involved in the preparation, evaluation and implementation of national and regional development plans and programmes liable to affect them directly;
- B will effectively participate in the decision-making process and elected bodies at both national and local level, particularly in the fields of culture, education, religion, information and social affairs.

These are only minimum requirements. A special status can, of course, go much further by endowing a region where a minority is in the majority with legislative and executive power of its own in respect of regional affairs, thus introducing a system akin to partial federalisation of the State.

d. "... matching the specific historical and territorial situation ..."

The phrase "matching the specific historical and territorial situation" serves a twofold function:

First, it demands from States to take into account the traditions of the minorities concerned and their specific needs. In this respect it supplements the adjective "appropriate" in the same provision.

Secondly, it introduces the possibility of modulating the application of this right between one State and another and even between one minority and another within the same State. The application of Article 11 will not, therefore, be uniform but will be adapted to allow for the great diversity of situations of national minorities. The case-law of the institutions of the European Convention on Human Rights has succeeded in striking a balance between the State's discretionary power to evaluate the individual circumstances of each specific case and the European monitoring required by the Convention, and it is reasonable to suppose that a similar balance will also be maintained within the framework of Article 11.

e. "... in accordance with the domestic legislation of the State ..."

First of all, the fact that the local or autonomous authorities and the special status which minorities should have must be in accordance with the national legislation of the State sets the limits of this right. It is the State that prescribes the legal framework within which the right may be exercised, and international protection will be accorded only as long as the right is exercised legally.

At the same time, however, the above phrase contains a guarantee that a legal framework will exist for the exercise of the right.

Moreover, according to the established case-law of the institutions of the European Convention on Human Rights, the discretionary power which the State has in laying down the legal system concerned is limited by the fact that the system must itself be compatible with the Convention and its Protocols. In particular, it must not have the effect of robbing Article 11 of its substance.

4. Article 11 of Recommendation 1201 (1993) in conjunction with Articles 13 and 14 of the same Recommendation

Articles 13 and 14 read as follows:

Article 13

"The exercise of the rights of freedoms listed in this protocol fully applies to the persons belonging to the majority in the whole of the State but who constitute a minority in one or several of its regions."

Article 14

"The exercise of the rights and freedoms listed in this protocol are not meant to restrict the duties and responsibilities of the citizens of the State. However, this exercise may only be made subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

The possibility of Article 13 being applied in combination with Article 11 of Recommendation 1201 cannot be precluded.

As for Article 14, it allows the exercise of the rights guaranteed, including the one referred to in Article 11, to be restricted by measures prescribed by law which are necessary in a democratic society for aims recognised as legitimate by the Convention, among which appear national security and territorial integrity. The case-law of the European Convention on Human Rights concerning the interpretation of paragraphs 2 of Articles 8-11, in particular the principle of proportionality, comes into the reckoning here.

[1] In the same context the U.N. Human Rights Committee found that no complaint concerning self-determination can be brought under the Optional Protocol to the United Nations Covenant on Human Rights (*AB and others against Italy*, Decision of 2 November 1990, concerning the South Tyrol). General comment No. (23) 50, adopted by the Human Rights Committee on 26 April 1994 concerning Article 27 of the Covenant, is silent on this subject.

[2] Introduction to the Draft Additional Protocol to the ECHR on the Rights of Minorities, *Revue universelle des droits de l'homme*, 1993, pages 184 et seq.

[3] See Venice Commission, *Conspectus of replies to the questionnaire on the rights of minorities*, "The Protection of Minorities", *Collected Texts of the European Commission for Democracy through Law, Council of Europe*, "Science and Technique of Democracy" Series No. 9, 1994, pp. 49 et seq.

[4] "The Protection of Minorities, *Collected Texts of the European Commission of Democracy through Law, Council of Europe*, "Science and Technique of Democracy" series, No. 9, 1994, pp. 326 et seq.).