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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**D R A F T**

**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  
annexed to Recommendation 1201 of the Parliamentary Assembly**

## **Introduction**

By letter dated 24 November 1995 the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe 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 annexed to Recommendation 1201 (1993) and in particular Article 11 of this draft.

The Sub-Commission on the Protection of Minorities examined this question at its meeting held 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 Plenary Commission at its 26th meeting (1-2 March 1996).

### **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 the text reproduced in the recommendation and forming an integral part of this recommendation. The text of the proposal has been one of the reference points 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 guaranteeing individual rights in the cultural field in particular with regard to national minorities. Moreover this proposal was and is still used as a reference text by the assembly when it deals with requests for accession to the Council of Europe by new member states (see Recommendation 1285(1996) of the Assembly). Above all, reference to the text of the proposal has been made in several bilateral treaties between member states of the Council of Europe.

The letter by which the Commission's assistance was sought by the Committee on Legal Affairs and Human Rights refers to this particular circumstance and to the difficulties of interpretation of the draft protocol as a whole and in particular of Article 11 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 territorial situation and in accordance with domestic legislation of the State."*

The fact that this provision is not a rule of international law in force but a mere proposal to which reference is nevertheless made in other international treaties is a peculiar situation which makes the approach to the question of the interpretation of this text difficult. The Commission feels that account should not only be taken of the ordinary meaning of the terms used but also the "*travaux préparatoires*" which led to its adoption, the other work carried out within the Council of Europe with regard to the protection of national minorities, the practice of member States as regards the right of the minorities to have at their disposal local or autonomous authorities and the attitude of member States of the Council of Europe with regard to the provision concerned.

All these elements are liable to reveal the content of the right of minorities to have at their disposal appropriate local or autonomous authorities as it can be understood and applied by European states.

## **2. Elements to be taken into consideration for the interpretation of Article 11 in general**

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

The introductory report by Mr WORMS is not indeed very helpful for the interpretation of 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 protection of the rights of minorities

The Venice Commission 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 it is recognised that the creation of a climate of tolerance and dialogue is necessary for the participation of everyone in public life. An important contribution to this effect can be made by local and regional authorities.

The framework Convention for the Protection of National Minorities did not follow the idea of Article 11 of the Parliamentary Assembly's proposal to grant 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 actually replaced by a provision drawn in part from the Venice Commission proposal: Article 15 of the framework guarantees *the right to effective participation of persons belonging to national minorities in public affairs* affecting them. However no reference is made to the question of local authorities. For the framework Convention the participation of the persons belonging to minorities in public affairs is above all the question of personal autonomy and not of local autonomy.

Moreover, it cannot be understood from the interpretation of the European Convention on Human Rights that some provisions of these conventions can be conceived as safeguarding their right to a special status. On two occasions the European Commission on Human Rights found that the convention does not guarantee any right for national minorities to self determination (No. 6742-75DR3 page 98, concerning ethnic Germans leaving Czechoslovakia; No. 7230-75DR7 page 109, concerning the population of Suriname). Article 3 of protocol No. 1

(guaranteeing electoral rights) does not apply to elections to non-legislative bodies such as the communal councils (No. 10650-83DR42, page 212) and does not guarantee any right to a separate political representation of national minorities (No. 9278-81 and 9415-81 Decision of 3 October 1983, DR35 page 30)<sup>1</sup>

It follows from the above developments that the general international law cannot in principle impose in states territorial solutions to the problem of minorities and that states are in principle not bound to establish any forms of decent realised authorities in favour of minorities (see also Article 35 paragraph 2 of the Copenhagen Declaration).

c)The attitude of States vis-à-vis Article 11

It seems that the provision of Article 11 was the main obstacle in the negotiations concerning the bilateral treaty between Hungary and Romania; the Hungarian government insisted on having a reference to recommendation 1201 included in the treaty, while the Romanian government did not feel ready to accept this condition mainly because of Article 11.

The treaty between Slovakia and Hungary on good neighbourly relations and friendly cooperation of 19 March 1995 [paragraph Article 15 paragraph 4(b)] refers to Recommendation 1201, but the government of Slovakia made the following declaration upon ratification of the treaty: "the government of the Republic of Slovakia declares that it never accepted or enshrined in the treaty a formulation based on the recognition of collective rights for minorities or a formulation which would consent to the creation of autonomous structures on an ethnic basis."

The treaty between Hungary and Croatia of 5 April 1995 also refers to Recommendation 1201. The contracting parties did not make any declaration at the moment of ratification.

It seems that states are indeed concerned that the right to have local or autonomous administrations combined with the right to have transfrontier contacts (Article 10 of the draft protocol) may promote successionist tendencies. Even though States which, albeit bound to the principle of unitarian state, have in reality granted a large part of regional autonomy hesitate to accept obligatory international instruments on the right of minorities to a certain autonomy. As indicated by the Clerk of the Assembly, Mr H. KLEBES<sup>2</sup>, the attitude towards autonomy of national minorities is still a too sensitive question in several states: one fears this scheme of cultural-autonomy-administrative autonomy succession.

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<sup>1</sup>*In the same line the Committee on Human Rights of the United Nations found that no complaint concerning self-determination can be brought under the optional protocol of the United Nations pact on Human Rights (AB and others against Italy Decision of 2 November 1990, concerning the South Tyrol). The general comment number (23) 50 of 26 April 1994 concerning Article 27 of the covenant does not refer to any right of self-determination.*

<sup>2</sup>*Introduction to the draft additional protocol to the European Convention on Human Rights on the rights of minorities, revue universelle des droits de l'homme, 1993, page 184 et s.*

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

The Commission has already found in its work that there exists a diversity of legal models of protection of minorities on the European continent, diversity which reflects the complexity of the situation in practice and, consequently, the variety of solutions adopted by different states to deal with the problem of minorities (see Venice Commission, Report on the 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, Collection "Science and Technique of Democracy" No. 9, 1994, page 49). The Commission's work and the examination of nationalist systems of protection of minorities do not show the existence of a common practice in the field of territorial autonomy, not even as regards the mainlines of this practice.

The Commission finds that the above mentioned elements indicate that

any attempt of interpretation of Article 11 of Recommendation 1201 (1993) must be particularly cautious;

and that,

having regard to the present status of general international law, an extensive interpretation of the rights of minorities to have at their disposal local or autonomous authorities is only possible in the presence of the compelling instrument of international law, which is not the case here.

**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" and not the minorities as such, although, in the Commission's view and despite its formulation the right to autonomy is only conceivable as a collective right. Therefore the right in question does not imply for contracting parties either the recognition of the organised ethnic entity within the State or the recognition of ethnic pluralism as a component of the people or of the nation, a concept which might affect the "unicity" of the state. The understanding of the minority phenomenon in the framework of Article 11 is the same as in the other provisions of the proposal contained in Recommendation 1201: it is an indirect understanding based on the recognition of individual rights although exercised together with others (collectively). This is also recalled in the Slovak declaration of the treaty of good neighbourly relations with Hungary. This element must be taken into consideration for the interpretation of the right guaranteed in Article 11.

Article 1 gives the definition of the term national minority. It refers to a group of persons in a state who reside on the territory of that state and are citizens thereof; maintain longstanding 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; are motivated by a concern to preserve together their common identity.

It follows from the above definition that persons for whom the rights included in Recommendation 1201 are guaranteed are nationals of the state and not immigrants. This is further underlined by the fact that only persons belonging to historical minorities (having longstanding firm and lasting ties with that state) benefit from these provisions.

The terms longstanding firm and lasting ties with that state must be interpreted in such a way as to include also ties with the territory of the state as a component of the latter. In this way persons belonging to a minority will not lose the status of minority in case of transfer of this territory to another state or to a new state and Recommendation 1201 will maintain its significance in cases of such territorial transfer or state succession to the extent, of course, that the persons concerned will continue to belong to a minority.

b) "In the regions where they are a majority"

The fact that a minority is majoritarian in one "region" is a necessary condition for the application of Article 11 nonetheless it is particularly difficult to give a clear definition of the term region within the framework of this provision.

In principle this term must be construed in its geographical and not administrative or political sense. But it also has an historical dimension which has some relation to the implantation of various groups on a certain territory.

Actually, states have a large margin of appreciation to define what they regard as a region. However, qualifying a region for the purposes of the implementation of Article 11 must be done bona fide. In particular, this provision should not aim at rendering Article 11 inapplicable nor be arbitrary (see also in this respect Article 16 of the framework convention). On the contrary the qualifications must take place on the basis of objective criteria and must take into account the minoritarian phenomenon. The Commission had in its own work explicitly stated that it is necessary for States to take into account the presence of one or more minorities on the territory when dividing the territory into political and administrative subdivisions as well as into constituencies (explanatory report to the proposal of the Venice Commission for a European Convention for the Protection of Minorities, paragraph 42).

The term "in a majority" must on the other hand be interpreted in the light of the aims pursued by Article 11. The right to have appropriate local or autonomous authorities appears to be the most complete realisation of the claims of concentrated minorities within unitarian 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, the Protection of Minorities, Collected texts of the European Commission of Democracy through Law, Council of Europe, Collection "Science and technique of Democracy" No. 9, 1994, pages 326 et seq.).

The term "in a majority" must therefore be understood as referring not only to numerical relations but also as implying that the majority is established and 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 guarantees the right to have a certain autonomy by three means (local authorities, autonomous authorities and special status) which it does not define.

One can state in general that the right guaranteed in Article 11 cannot be interpreted as requiring measures which would essentially affect the structure of the state although a federal or regional structure undoubtedly allows an autonomy to be recognised to minorities residing on the territory of the state by granting these minorities a territorial basis where they would be able to exercise their policy by the means of autonomous institutions. Neither does Article 11 impose a specific model of institutions of local autonomy and the variety of those models on the continent is such that one could hardly suggest one of those models as the one to be followed.

The state will then have a large choice of options as regards respect of its obligations under Article 11.

- Appropriate local or autonomous administrations

Some important indications as to the content of the right to have some autonomy can be drawn from the European Charter of Local Self-Government. In accordance with 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 of Local Self-Government gives a full series of elements concerning the content of this "right to regulate and manage a substantial share of public affairs". Thus,

- 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)
- local authorities must be able to exercise their initiative with regard to any matter which is neither 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)
- 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)
- any administrative supervision of local authorities may only be exercised according to such procedures 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 constitutional principles. Supervision 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)

–local authorities shall have the right of recourse to the judicial remedy in order to secure free exercise of their powers and respect of such principles of local self-government (Article 11 of the Charter).

These are guidelines which should inspire the practice of states when conforming with the requirements under Article 11. They are not requirements directly following from that provision.

•Special status

The meaning of the term special status is not very clear, but it shows the willingness of the drafters of Article 11 to allow the states to depart from the traditional solutions of local administration. 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 minimal requirements of such a status the points of preference for the determination of the scope of the right to have special status will be the aims of Article 11 in general and the presumed will of the member states of the Council of Europe. Some examples can be found in the special status in Italy or in Spain, without excluding the solution of personal autonomy.

In the Commission's opinion at the basis of every special status the will must be found to guarantee to persons belonging to a minority an effective participation in the decision concerning the regions in which they live or in the affairs concerning them. The institutions which make up the special status must be capable of representing the minorities and safeguarding that persons belonging to these minorities

–will be consulted when parties are contemplating legislation or administrative measures likely to affect them directly,

–will be involved in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly,

–will effectively participate in the decision-making process and elected parties both at national and local levels in particular in the field of culture, education, religion, information and social affairs.

These are of course minimum requirements. A special status can of course go much further by granting to a region where the minority is the majority legislative and executive power in respect of regional affairs, thus approaching the partial federalisation of the state.

d)Matching the specific historical and territorial situation

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

On the one hand it obliges contracting parties to take into account the traditions of the minorities in question and their specific needs. In this respect it supplements the requirement of an appropriate status put in the same provision.



On the other hand it introduces the possibility to implement the same right in a different way from state to state and even from minority to minority within the same state. The implementation of Article 11 will not, therefore, be uniform but will be adapted to the extreme diversity of situations of national minorities. The case law of the organs of the European Convention on Human Rights has been able to strike a fair balance between the discretionary power of the State to evaluate the particular circumstances of each particular case on the one hand and the European control required by the Convention and it is reasonable to believe that similar balance will be maintained within the framework of Article 11.

e) In accordance with the domestic legislation of the state

The fact that the local or autonomous authorities and the special status that minorities should have must be in accordance with national legislation of the state shows the limits of this right. It is the state that sets the frame within which the right to have local or autonomous authorities should be exercised and international protection will only be awarded as long as this right is legally exercised.

At the same time this phrase contains the safeguard that a legal framework will exist for the exercise of this right.

Moreover in accordance with the constant case-law of the organs of the European Convention on Human Rights the discretionary power of the state to establish the legal regime concerned is limited by the fact that this regime must itself be compatible with the convention and the proposed protocol in Recommendation 1201.

**4. Article 11 of Recommendation 1201 (1993) in conjunction with Articles 13 and 14 of this 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 states. However the 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 a combined application of Article 13 and Article 11 of Recommendation 1201 should not be excluded.

As regards Article 14, it provides the possibility of restricting the exercise of the rights guaranteed including that of Article 11, by measures provided for by law which are necessary in democratic society for one of the aims recognised as legitimate in the Convention among which figures 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 and in particular the principle of proportionality come here into play.