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COMMITTEE OF EXPERTS ON HUMAN RIGHTS

RIGHTS OF NATIONAL MINORITIES

Report of the Committee of Experts on Human Rights
to the Committee of Ministers,
adopted on 9 November 1973

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PART I: SUMMARY AND CONCLUSIONS

INTRODUCTION

1. The situation of national minorities has been examined within the Council of Europe on a number of occasions over a period of more than twenty years.
2. The question was first raised in a report of the Committee on Legal and Administrative Questions of the Consultative Assembly on "the establishment of a collective guarantee of essential freedoms and fundamental rights" presented by Mr Teitgen on 5 September 1949. In this report, the Committee unanimously recognised the importance of the "problem of the wider protection of the rights of national minorities" (cf. Doc. 77 of 5 September 1949, paragraph 11).
3. A year later, in its report on the draft Convention for the Protection of Human Rights and Fundamental Freedoms prepared by the Committee of Senior Officials, the Assembly Committee again drew the attention of the Committee of Ministers "to the need for an examination of the problem of the wider protection of the rights of national minorities ..." (cf. Doc. 6 of 7 August 1950, Appendix 5). Subsequently, the matter was raised on several occasions, notably in the reports of Mr Struye (Doc. 1002 of 30 April 1959) and of Mr Lannung (Doc 1299 of 26 April 1961).
4. On 28 April 1961, the Assembly adopted, on the basis of Mr Lannung's report, Recommendation 285 (1961) on the rights of national minorities, in which it recommended the

Committee of Ministers:

"to instruct the Committee of Government Experts which has already been given the task of studying problems relating to the European Convention on Human Rights to include in the Second Protocol to the Convention an article based on the attached draft, or some similar text, designed to guarantee to national minorities certain rights not covered by the Convention and its First Protocol."

5. The wording of the draft article on the protection of national minorities proposed in Recommendation 285 (1961) was the following:

"Persons belonging to a national minority shall not be denied the right, in community with the other members of their group, and as far as compatible with public order, to enjoy their own culture, to use their own language, to establish their own schools and receive teaching in the language of their choice or to profess and practise their own religion."

TERMS OF REFERENCE GIVEN TO THE COMMITTEE OF EXPERTS ON HUMAN RIGHTS

6. During its 99th meeting from 24 - 31 May 1961, the Committee of Ministers discussed the action to be taken on this recommendation. The result of this discussion was the adoption of Resolution (61) 15, which instructed the Committee of Experts to consider whether it would be possible or opportune to include in the Second Protocol to the Convention an article based on the draft appended to Assembly Recommendation 285 or some similar text designed to safeguard for national minorities certain rights not covered by the Convention or its First Protocol.

7. During the general discussion held at the 9th meeting, in November 1963, the Committee of Experts noted that four applications relating to Belgium (the "Linguistic Case") had been declared partly admissible on 26 July 1963. Although strictly speaking these applications did not concern a "national minority", they nevertheless raised questions concerning the protection of such minorities. The Committee considered that the decisions on these applications were likely to throw light on the matter which it was considering.

8. Accordingly, on the proposal of a number of experts, the Committee considered that its study of the question should be adjourned until a final decision had been taken on the four applications, and any similar applications, by the Court or the Committee of Ministers. In taking this decision, the Committee

emphasised that it was in no way prejudging the opinion of its members on the question under consideration, and, in particular, that the adjournment should not be interpreted as indicating a definite attitude - either negative or positive - towards the Consultative Assembly's proposal.

9. Subsequently, the Committee of Ministers decided to resume consideration of the question by including in the Work Programme for 1971/72 under Article 2211/3 the following item:

"The Rights of National Minorities : study of the possibility and advisability of preparing a further Protocol to the European Convention on Human Rights."

10. During its 31st meeting, from 30 November to 4 December 1970, the Committee of Experts on Human Rights instructed its Sub-Committee No. II to proceed with the examination of this problem. The Sub-Committee did so at its 3rd meeting from 30 May to 1 June 1972. It submitted its views to the plenary Committee of Experts in August 1972 (doc. DH/Exp (72) 10). After discussing these views, the plenary Committee approved this report at its 37th meeting from 25 - 29 June 1973.

11. In submitting this report, the Committee noted that its terms of reference were not to propose new measures to be adopted under domestic law or by means of further bilateral or multilateral treaties, but to ascertain whether specific rights of national minorities should be set forth in a protocol to the European Convention on Human Rights.

CONCLUSIONS OF THE COMMITTEE OF EXPERTS ON HUMAN RIGHTS

12. The Committee has come to the conclusion, for the reasons set out below that, from a legal point of view there is no special need to make the rights of minorities the subject of a further protocol to the European Convention. If, however, for other reasons, protection of minorities by a special protocol to the European Convention was considered advisable, there appears to be no overriding obstacle of a legal character to prevent this from being done.

13. Part II of this Report contains a summary of the reasons which have led the Committee of Experts to this conclusion. The Appendices contain lists of the experts who attended the meetings and of the working documents which they examined.

PART II : STATEMENT OF REASONSA. General considerations

14. As instructed by the Committee of Ministers, the Committee of Experts examined whether preparation of a further protocol to the European Convention on Human Rights concerning the rights of national minorities was :

- (a) possible, and
- (b) advisable.

15. That preparation of such a protocol is possible is proved by Article 27 of the U.N. International Covenant on Civil and Political Rights (cf. paragraph 23 below), which is largely of the same tenor as the Article proposed in Recommendation 285 (1961) of the Consultative Assembly.

16. The question whether it is advisable to include the rights of minorities among the rights protected by the European Convention and to subject them to the system of control established by that Convention has obvious political implications. The Committee of Experts, however, considered that its principal function was to consider whether, from the legal point of view, it was advisable to include the specific rights of minorities expressly in a protocol to the Convention.

17. In the first place, the Committee noted that, historically speaking, the problem of national minorities had become of concern to international law principally as a result of territorial adjustments after the First World War, which sometimes had the result that a certain group lost its previous nationality and acquired that of the successor State. Various international arrangements were instituted to protect the rights of such minorities, notably under the procedures of the League of Nations, and certain matters were referred to the Permanent Court of International Justice during the inter-war period.

18. The Committee noted that the adoption of multilateral treaties after the Second World War, designed to secure the protection of human rights for all individuals, put the matter in a new light.

19. The Committee observed that the matter of rights of national minorities had two sides: a negative one, namely the need to prohibit any discrimination against members of national minorities as a result of belonging to such minorities; and a positive one, namely the need to recognise additional rights for members of national minorities with the aim of achieving as far as possible equality in fact between members of minorities and members of the majority.

20. In this context, the Committee referred to two advisory opinions of the Permanent Court of International Justice, its opinion of 10 September 1923 on German settlers in Poland, and its opinion of 6 April 1935 on minority schools in Albania. In the former, the Court had said: "There must be equality in fact as well as ostensible legal equality in the sense of absence of discrimination in the words of the law". In the latter, it had said: "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact ... The equality between members of the majority and of the minority must be an effective, genuine equality ..."

21. As regards the negative side, it was recalled that, in respect of the rights guaranteed under the European Convention on Human Rights, the matter was settled by Article 14 of the Convention, which expressly prohibits any discrimination in the enjoyment of the rights set forth in the Convention on the ground of "association with a national minority" (a phrase which is not found in the corresponding article of the Universal Declaration and of the U.N. Covenants, which on the other hand, contain specific provisions for the protection of minorities). Similarly, reference might be made to certain decisions of the European Commission of Human Rights relating to Article 3 of the Convention, which prohibits any degrading treatment. (1)

22. Against this background, the Committee agreed to concentrate on the positive aspects as indeed the Assembly had proposed. In order to consider the problem whether specific rights should be included in a further additional protocol to the Convention, the Committee had to take into account

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(1) Cf. the East African Asian Cases against the United Kingdom: 25 applications (Nos. 4403/70 - 4419/70; 4422/70; 4423/70; 4434/70; 4443/70; 4476/70; 4478/70; 4486/70) declared admissible on 10 October 1970; 6 applications (Nos. 4501/70; 4526/70 - 4530/70) declared admissible on 18 December 1970. The Commission said, inter alia: "Whereas, however, the Commission is of the opinion that, quite apart from any consideration of Article 14, discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Art. 3 of the Convention." (Yearbook Vol. XIII, p. 994).

the general pattern of the Convention. The Convention guaranteed a number of rights and freedoms to individuals who could, in most cases, assert these rights at international level by means of individual applications to the European Commission of Human Rights. In this connection, some experts expressed their opinion that the European Convention on Human Rights should not guarantee collective rights, but should concentrate on the safeguards of individual rights; in their view, even the possibility of applications lodged by a non-governmental organisation or group of individuals provided for in Article 25 could be regarded only as permitting collective enjoyment of individual rights, as indicated in the case-law of the European Commission of Human Rights. Indeed, the Assembly itself had expressed this view in the text which it proposed in its Recommendation 285.

23. The experts also compared the text proposed by the Consultative Assembly (see paragraph 5 above) with Article 27 of the International Covenant on Civil and Political Rights.

Article 27 of the Covenant read:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

24. As regards the similarities between the two texts, there seemed to be five:

- (i) both texts were framed in the negative ("shall not be denied the right");
- (ii) both texts contained a reference to enjoyment by persons belonging to minorities of their own culture;
- (iii) both referred to the use of their own language, and
- (iv) the right to profess and practise their own religion;
- (v) and, finally, both texts applied to individuals belonging to the minority group, and not to the group as such.

25. There were, however, several differences. The most important of these were:

- (i) the Assembly text spoke of "national minorities", whilst the U.N. Covenant used the expression "ethnic, religious or linguistic minorities";
- (ii) the Assembly text included expressly the right "to establish their own schools and to receive teaching in the language of their choice";
- (iii) the rights set forth in the Assembly text were made subject to compatibility with public order.

26. The experts decided to consider the points raised by the Assembly's text in the following order:

- (a) the problem of the definition of minorities;
- (b) each of the four rights set forth in the Assembly text.

B. Definition of national minorities

27. The Committee noted that whilst Article 14 of the European Convention on Human Rights referred to national minorities, Article 27 of the Covenant referred to ethnic, religious or linguistic minorities. The first question, therefore, was whether these two terms covered the same thing; some of the experts felt that they did, whilst others did not. This difficulty of interpretation led the Committee to consider the definition of national minorities, since its terms of reference were concerned with the rights of national minorities.

28. This question had already been examined by the Consultative Assembly in the explanatory memorandum to Recommendation 285 (1961) drawn up by Mr. Hermod Lannung. According to this report:

"The Committee took note of the following resolution adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations at its Third Session (9 - 27 January 1950).

'The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations,

.....

Resolves that, from the standpoint of such measures of protection of minorities as the United Nations may wish to take, and in the light of the exceptions and complexities set out above:

- (a) The term "minority" includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
- (b) Such minorities should properly include a number of persons sufficient by themselves to develop such characteristics; and
- (c) The members of such minorities must be loyal to the State of which they are nationals.'

The Committee wishes, however, to add with particular reference to the situation of national minorities in member States that the existence of these minorities is in some cases due to their 'national sympathies' (nationale Gesinnung) or affinities rather than to markedly different ethnic or linguistic traditions and/or characteristics. Such is, for instance, the case with the minorities in Schleswig, where the greater part of the population can be said to be of the same ethnic origin, but where the minority character is brought out by the fact that the Danish minority in South Schleswig is "Danish-minded" and the German minority in North Schleswig "German-minded".

The Assembly's position was thus that there was a category of minorities which, although it did not constitute an ethnic, religious or linguistic minority, nevertheless constituted a national minority.

29. In an attempt to throw further light on this problem of definition, the experts studied a document containing a report on the origin and meaning of the term "national minority", which had been prepared in 1960 by the Secretariat (Office of the Clerk of the Assembly) for Sub-Committee No. 8 (Minorities) of the Legal Committee (AS/Jur VIII (12) 4). From this document, it appears that the term "national minority" does not appear in the minority treaties concluded after the First World War, nor in any United Nations human rights text. The experts noted, however, that the term "national minority" had subsequently been used in the Convention against Discrimination in Education, adopted by the General Conference of UNESCO on 14 December 1960, Article 5 1 (c) of which reads (in part): "It is essential to recognise the rights of members of national minorities to carry on their own educational activities...". The term has been used by writers on international law, but no clear agreement as to its significance emerges therefrom.

30. Consideration of the possible bases for a definition of national minorities that might be deduced from a comparison between Article 14 of the European Convention on Human Rights

and Article 27 of the Covenant on Civil and Political Rights, as well as from the various international instruments and national laws, clearly did not yield any unequivocal answer.

31. It then became relevant to consider if there were any ethnic, religious or linguistic minorities which did not constitute national minorities, as this term is used in the Assembly's proposal. In most cases a "national minority" would also constitute an ethnic, linguistic or religious minority. On the other hand, there are clearly certain ethnic, linguistic or religious minorities which do not constitute "national minorities". An additional consideration is that there are also certain linguistic minorities whose languages are recognised as national languages. These different factors illustrate further the difficulty of finding any generally-accepted definition of the term "national minority". For this reason, indeed, the experts found it difficult to provide any satisfactory definition of "national minorities".

32. Some experts considered that if the term "national minority" were to be used in an additional protocol, it should be interpreted as broadly as possible so as to include all ethnic, religious and linguistic minorities, as well as specifically "national" minorities.

C. Rights which might be protected

(a) Enjoyment of one's own culture

33. So far as concerns the right to the enjoyment by minorities of their own culture, the article proposed by the Assembly in Recommendation 285 (1961) had the same formulation as Article 27 of the International Covenant on Civil and Political Rights.

34. According to the Commission's case-law, the right to the enjoyment of a culture was not expressly guaranteed as such by the Convention (Applications 215/56, 548/59, 661/69, 773/60, mentioned in the document "Jurisprudence of the European Commission and Court of Human Rights relating directly or indirectly to national minorities", DH/Exp (71)1). However, in the opinion of the Committee, the right to the enjoyment of a culture may be said to be constituted to a large extent by the sum of a series of rights which are already guaranteed by the Convention and one can consider that the right to enjoy one's own culture is guaranteed by the existing provisions of the Convention and the First Protocol, in particular concerning the freedom of conscience, religion, association, expression, language and the right to education.

(b) Use of one's own language

35. The right to the use of one's own language is provided for in the international instruments adopted after the First World War for the protection of minorities in Europe. It is also provided for by Article 27 of the United Nations Covenant on Civil and Political Rights. The draft article proposed by the Assembly includes it in terms identical with those used in Article 27.

36. It is, however, not guaranteed, as such, either by the European Convention or by its Protocols, except in certain limited circumstances mentioned below. The European Commission of Human Rights has had occasion to take note of this in its decision on the Application No. 4137/69 (Collection of Decisions, Vol. 35, page 137 ff.)

37. The exercise of this right to the use of one's own language was examined from three points of view:

- general use;
- use in court proceedings;
- use in dealings with the public authorities.

38. Examining the use of a language in general, the experts considered that in practice the use of one's own language was freely permitted in the member countries of the Council of Europe and that there appeared to be no problem in this respect.

39. As regards the use of one's own language in court proceedings, the experts noted that this right was recognised in various international treaties. So far as the European Convention was concerned, two articles refer to it.

According to Article 5, paragraph 2:

"Everyone who is arrested shall be informed promptly in a language which he understands, of the reasons for his arrest and of any charge against him."

Article 6, paragraph 3, sub-paragraphs (a) and (e) give every accused person the right:

"to be informed promptly in a language which he understands and in detail of the nature and cause of the accusation against him" and

"to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

40. It appears from these two articles that the interests of an accused person in criminal proceedings are largely safeguarded by the above-mentioned provisions. The experts con-

sidered whether similar rights should not be extended to persons involved in civil proceedings. An application before the Commission already suggests a reply to this question (Application No. 808/60, Vol. 5 of the Yearbook, p. 108). In considering the question whether there was a violation of the applicant's right to a fair hearing (in this case as regards the use of a minority language in view of the provisions of Article 14), the Commission indicated that the Convention does not guarantee the right to the use of a minority language in judicial proceedings if the applicant understands the official language used in court. Therefore it seems that the use of a language which the parties understand could be included within the context of the right to a fair hearing in civil proceedings.

41. The most complex question is no doubt the question of the use of language in dealings with the public authorities. A person belonging to a minority might find himself confronted with two sorts of situation:

- either he takes the initiative himself to approach the administration, in which case the question arises whether he may do so in his own language;
- or it is the authorities which approach the individual (a questionnaire relating to social security, for example), in which case the question is raised whether the document must be in the minority language.

The experts were of the opinion that these questions, though often complex, were generally resolved in practice in a liberal manner, either by international texts or by national provisions or practice. Moreover, the experts considered that any attempt to accord more extensive rights than those already recognised in existing practice would require to be accompanied by a series of restrictions. Consequently, they considered it inappropriate to recommend such a measure.

(c) Establishment of schools and teaching in the language of choice

42. Unlike Article 27 of the U.N. Covenant on Civil and Political Rights, the draft article suggested by the Consultative Assembly provides for the right of minorities to establish their own schools and receive teaching in the language of their choice. With respect to the right to receive teaching in the language of their choice, an important case decided by the European Court of Human Rights - the "Belgian Linguistic Case" - raised the question whether the Convention and its Protocols already guaranteed such a right.

43. In its judgment of 23 July 1968, the Court noted, in this respect, that "the Convention lays down no specific obligations concerning the extent of the means of instruction

and the manner of their organisation or subsidisation. In particular, the first sentence of Article 2 of the First Protocol does not specify the language in which education must be conducted in order that the right to education should be respected ... However, the right to education would be meaningless if it did not imply in favour of its beneficiaries the right to be educated in the national language or in one of the national languages, as the case may be". ("Belgian Linguistic Case", Judgment of 23 July 1968, p. 31).

44. With respect to the right of national minorities to their own educational facilities, the experts noted that Article 5 of the UNESCO Convention against Discrimination in Education already recognised this right, which was stated in the following terms:

"It is essential to recognise the rights of members of national minorities to carry on their own educational activities, including the maintenance of schools ... provided, however,

- (i) that this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities ...;
- (ii) that the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) that attendance at such schools is optional."

45. This Convention is already in force and eleven member States of the Council of Europe have ratified it (Cyprus, Denmark, France, Federal Republic of Germany, Italy, Luxembourg, Malta, Netherlands, Norway, Sweden and the United Kingdom).

46. The experts thus decided to study the right of national minorities to have their own schools from two points of view:

- (i) the right to establish private schools;
- (ii) the obligation of States to establish public schools.

47. The right of national minorities to establish their own private schools is already guaranteed by the UNESCO Convention, subject, however, to three conditions among which the third is important in this context - that is to say, that attendance at such schools should be optional.

48. With respect, however, to the obligation of States to establish public schools, especially designed for national minorities, the experts considered that this could not be recommended as a general obligation. The experts recognised, however, that there might be special cases where the education of a national minority required the State to take special measures.

49. The experts considered the question of State subsidies to schools, whether private or public. They recognised that the Convention on Human Rights does not, in Article 2 of the First Protocol, oblige States to give such subsidies.

50. In examining this problem, the majority of the experts considered that it would be going too far to try to oblige States to organise teaching in the languages of national minorities. It was recalled, in this respect, that Article 5 of the Convention against Discrimination in Education contained in paragraph 1(c) an important restriction on the right to the "use or the teaching of their own language" because this was made subject to "the educational policy of each State".

51. In conclusion, the experts considered that in the light of the existing international texts and of current practice, no sufficient case had been made out for the creation of additional rights for national minorities to establish their own schools and receive teaching in the language of their choice in the framework of the European Convention.

(d) The right of persons belonging to minorities to profess and practise their own religion

52. The right of minorities to profess and practise their own religion is included in Article 27 of the U.N. Covenant on Civil and Political Rights, and in the Assembly text in identical terms.

53. It was pointed out that individual members of minorities were already fully protected in relation to these rights through the combined application of Article 9 and Article 14 of the European Convention on Human Rights. Consequently, the experts did not consider necessary any new measures in this field.

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APPENDIX II

List of working documents

- DH/Exp (60) 22 Article 25 of the draft Inter-national Covenant on Civil and Political Rights (prepared by the Commission on Human Rights of the Economic and Social Council of the United Nations) (1 July 1955)
- Doc. 1002 Report of the Consultative Assembly of the Council of Europe on the position of national minorities in Europe (30 April 1959)
- AS/Jur VIII (12) 4 The term "national minority". Information document prepared by the Secretariat General (Office of the Clerk of the Assembly) (18 November 1960)
- DH/Exp (61) 20 Rights of national minorities. Article 5 (1)(c) of the Convention against discrimination in education (Explanatory Note prepared by the Human Rights Directorate)
- DH/Exp (71) 16 Study of the possibility and advisability of preparing a further protocol to the European Convention on Human Rights Work Programme 1971/72, No. 2211/37. Information document prepared by the Secretariat (27 May 1971)
- DH/Exp II Discr. (71) 1 International guarantees for national minorities. List of possible questions for discussion, prepared by the Directorate of Human Rights (21 May 1971)
- DH/Exp (71) 12 A neglected field: the protection of minorities by J.W. Bruegel (26 April 1971)
- DH/Exp (71) 18 Jurisprudence of the European Commission and the European Court of Human Rights relating directly or indirectly to national minorities (31 August 1971)

- DH/Exp (71) 13 The rights of minorities by Hermod
Lannung (Extract from the "Mélanges
Modinos", pp. 181-195) (7 May 1971)
- DH/Exp (72) 10 Report of Sub-Committee No. II to
the Committee of Experts on Human
Rights on National Minorities
(drawn up at its 3rd meeting from
30 May to 1 June 1972) (30 August
1972)
- DH/Exp II (73) 3 Draft report of the Committee of
Experts on Human Rights to the
Committee of Ministers relating
to the Rights of National
Minorities (1 February 1973)
- DH/Exp (73) 7 Draft report of the Committee of
Experts on Human Rights to the
Committee of Ministers relating
to the Rights of National
Minorities (27 February 1973)
- DH/Exp (73) 24 Appendix II : Report of the Committee
of Experts on Human Rights to
the Committee of Ministers relating
to the Rights of National
Minorities (28 June 1973)