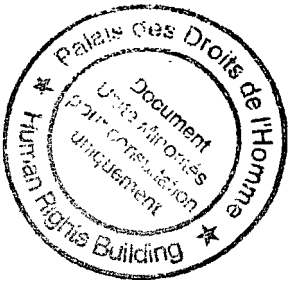
Council of Europe
Conseil de l'Europe



Strasbourg, 29 March 1995
[ecahm95.11]

Restricted
CAHMIN (95) 11

COE056888

AD HOC COMMITTEE FOR THE PROTECTION OF NATIONAL MINORITIES

(CAHMIN)

European Court and Commission of Human Rights
Case-law on cultural rights

Survey
prepared by
the Secretariat of the European Commission of Human Rights

European Court and Commission of Human Rights
Case-law on cultural rights

Survey

It is difficult to select the case-law of the Convention organs which might be relevant for "cultural rights", having regard to the lack of precision of this term. It may be suggested to distinguish the following broad areas: I. cultural identity, II. use of language, III. education, IV. creative activity, and V. creation of institutions.

I. Cultural identity

There are some cases concerning a particular cultural identity which applicants claimed to be as such protected by the Convention. The Commission has considered this problem under different provisions:

- In a Swedish case (No 12740/87, Muotka and Perä v Sweden, dec 7.8.1988) the Commission made it clear that under Art 25 of the Convention members of a particular minority can only complain of measures affecting themselves, but not of measures affecting other members of the same minority.

- No 1474/62, Inhabitants of Alsemberg and Beersel v Belgium, YB 6, 332, and No.1769/62 v Belgium, YB 6, 444: linguistic cultural-identity, claimed to be protected by Art 9 and 10; the Commission found that the applicants were not prevented from expressing their thoughts freely in the language of their choice (=no interference) and that their desire to let the imprint of their culture prevail in the education of their children was outside the scope of A Arts 9 and 10.

- The complaints of the same applicants under Art 8 of the Convention, Art 2 of the Protocol and Art 14 of the Convention concerning the regulation of access to schools in Belgium according to the prevailing language in each region were, however declared admissible (= Belgian Linguistic case). In this respect the Commission, in para 431 of its report, considered that measures specifically designed to assimilate minorities were discriminatory. However, this view was not confirmed by the Court (judgment A/6 of 23 July 1968) which denied discrimination by recognizing as legitimate the purpose of the contested legislation to achieve linguistic unity within the regions of Belgium in which the large majority of the population speaks only one of the national languages (= unilingual regions). Discrimination was established only in respect of a linguistically mixed region where there was a clear and disproportionate disadvantage for children of one linguistic group.

- Identification with a particular group: In a case concerning a linguistic census in Austria (No 8142/78, D.R.18 p 88) the Commission stated that the Convention does not provide for any rights of a linguistic minority as such, and that the protection of individual members of such minority is limited to the right not to be discriminated in the enjoyment of the Convention rights on the ground of their belonging to the minority. It was not found to be degrading treatment (Art 3) that the applicant, who claimed to belong to the Slovene minority

although her mother tongue was German, could not express her allegiance to the minority in the specific context of the linguistic census. The Commission considered it as relevant that she was not otherwise prevented from stating that she considered herself as a member of the Slovene minority.

- A case (No 18877/91, Ahmet Sadik v Greece, dec. 1.7.1994) was recently declared admissible by the Commission (under Articles 9, 10, 11 and 14 of the Convention) in which a member of the Muslim community in Western Thrace had been convicted for disrupting the public peace because he had referred to members of this community as "Turks". The Commission has not yet adopted its Report on this case.

- In the case of the Kalderas gypsies (No 7824/77, dec 6.7.1977, D.R. 11 p 221) the Commission considered that the refusal to deliver identification papers to members of a nomadic group may raise issues under Arts 3 and 14 and, concerning birth certificates, also Art 8 of the Convention. The case was however rejected for non-exhaustion of the domestic remedies in the two States concerned (Germany and Netherlands).

- In a number of cases concerning nomads the Commission recognized that a particular life-style of a minority is protected by Art 8 as part of "private life", "family life" or "home" (No 9278 and 9415/81, D.R.35, 30 concerning Lapps in Norway: alleged interference with their life as fishermen and reindeer breeders by the construction of a hydroelectric power station found to be justified for the economic well-being of the country).

- The same principle was subsequently repeatedly confirmed in cases concerning caravan sites for gypsies: eg No 14751/89, Powell v UK, dec. 12.12.1990, D.R.67, 264; No 14455/88, Smith v UK, dec. 4.9.1991; No 18401/91, Smith v UK, dec. 6.5.93; No. 13628/88 Van de Vin v Netherlands, dec. 8.4.1992). Interferences must accordingly be justified under Art 8 para 2. In most cases the contested measures were found to be in conformity with this provision. A breach was for the first time established by the Commission in its report of 11 January 1995 on case No 20348/92, Buckley v UK. This case has recently been referred to the Court.

- In cases where a cultural identity is derived from the fact of the applicant belonging to a particular religious group, the Commission's approach seems to have been casuistic. Restrictions were each time considered under Art 9 para 2 (cf cases of Sikh wanting to ride motor-bike without a crash-helmet, orthodox jews asking for cosher food in prison or for respecting a jewish holiday when fixing a court hearing, muslim teacher wishing to have time free for Friday prayer, Muslim women insisting on wearing headscarfs contrary to university regulations, druids who wanted to celebrate summer sulstice at Stonehenge, etc).

- An important distinction which is being made in this respect is whether a particular practice is an essential part of the manifestation of religion. Not every act influenced by a religion or belief is recognized as a "practice" within the meaning of Art 9, and accordingly the protection of Art 14 cannot be invoked either (eg No 17439/90, Choudhury v U.K., dec of 5.3.1991: no protection of muslims against blasphemy of their religion by a publication: the applicant had sought to bring criminal charges against the author and publisher of the "Satanic verses"; the Commission found Art 9 and consequently also Art 14 inapplicable).

- By contrast, religious discrimination contrary to Art 14 can be invoked where another Convention right is at issue: in the case of Hoffmann v Austria (judgment A/255 of 23.June 1993) the Court considered it as discriminatory (Art 14 in conjunction with Art 8) in a child custody case to make a distinction between the parents on the ground of their religion, ie the possible effects on the social life of the children concerned of their being associated with a particular religious minority (Jehovah's Witnesses). The Commission in its report on this case (para 102) stated more specifically that is is incompatible with the concept of a pluralistic democratic society to assume that members of a minority group will automatically be socially marginalised.

II. Use of language

- The prohibition against discrimination in Art 14 concerns inter alia discrimination on the ground of language. In this area the accessory nature of Art 14 is also relevant, ie it can only be invoked concerning the enjoyment of rights guaranteed in the Convention. Apart from the Belgian Linguistic case (where Art 14 was combined with Art 8 of the Convention and Art 2 of Prot No 1, see above) the Convention organs have never established linguistic discrimination.

- The Convention contains several special provisions on the use of language: Art 5 para 2 and Art 6 para 3 (a) provide for a right to be informed in a language which one understands of the grounds of detention and of any criminal charges, and Art 6 para 3 (e) guarantees the right of everyone charged with a criminal offence to the free assistance of an interpreter if he cannot understand or speak the language used in court. The principle of fair hearing (Art 6 para 1) may require to make available translations or interpreters also in civil cases (No 9099/80, X v Austria, D.R.27 p 209).

- The above special provisions are limited to guaranteeing for certain proceedings information in a language "which one understands". They do not ensure to persons who understand the language of the court (including members of a linguistic minority) the use of the language of their choice ("linguistic freedom") or the use of their own mother tongue. The persons in question cannot invoke Art 14 in this respect (discrimination vis à vis persons who can in fact use their mother tongue), the special provisions being considered as leges speciales in relation to Article 14 (cf No 808/60, Isop v Austria, dec 8.3.1962, YB 5 p 108 concerning a defamation case against the applicant, a member of the Slovene minority in Austria; No 2332/64, X and Y v Belgium, dec 7.10.1966, concerning the use of the Flemish language in a civil court procedure; No 11261/84, Bideault v France, dec 6.10.1986, D.R. 48 p 232 concerning the refusal of a criminal court to hear witnesses in Breton language; No 13054/87, Arnau v Spain, dec 13.7.1989).

- In areas not covered by the special provisions the Convention organs have concluded e contrario that no right to the use of a particular language is guaranteed by the Convention to citizens in their contacts with the authorities (No 2333/64, Inhabitants of Leeuw-St-Pierre v Belgium, YB 8 p 338 for administrative proceedings in geneneral; No 10650/83, Clerfayt, Legros ao v Belgium, dec 17.5.1985, D.R.42 p 212 concerning the use of language in municipal councils and social service assistance centres; No 11100/84, Fryske Nasjonale Partij ao v Netherlands, dec 12.12.1985, D.R.45 p 240 concerning the language used for the registration of a minority party wishing to take part in elections).

- Similarly it was concluded in the Belgian Linguistic case that Art 2 of Protocol No 1 did not guarantee any right to education in a particular language, nor that such a right could be derived from Art 8 of the Convention. It was only admitted that the right to education would be meaningless if it did not imply the "right to be educated in the national language or one of the national languages".

III. Education

- The right to education is enshrined in Art 2 of Protocol No 1. It has two aspects: prohibition to deny the right to education, and respect of the parents' right to ensure education and teaching in conformity with their own religious and philosophical convictions.

- Concerning the first aspect is has been held that, although positive obligations of the State cannot be excluded, their primary obligation is to ensure that persons under their jurisdiction can avail themselves, in principle, of the means of instruction existing at a given time and obtain official recognition of the studies which they have completed (Belgian Linguistic case). The provision is applicable both to State and private teaching (Kjeldsen, Busk Madsen and Pedersen judgment A/23 of 7.12.1976).

- States must allow private schools, but can regulate their establishment in order to ensure in particular the quality of the education (No 11533/85, Jordebo Foundation of Christian Schools v Sweden, dec 6.3.1987, D.R.51 p 125). However, an obligation of States to subsidize private educational establishments has been denied (ibid and No 6853/74 v Sweden, dec 9.3.1977, D.R.9 p 27 and No 10476/74 v Sweden, dec 11.12.1985, D.R.45 p 143). Nor can an obligation for the State to create or subsidize schools which are in conformity with particular religious or philophical convictions be derived from the second sentence of Art 2 of the Protocol (No 9461/81 v UK, dec 7.12.1982, D.R. 31 p 210). However, when providing subsidies, the State may not discriminate between different types of schools (No 7782/77 v UK, dec 2.5.1978, D.R. 14, 179 concerning non-denominational private schools in Northern Ireland).

- The duty to respect parents' religious and philosophical convictions does not extend to linguistic preferences of the parents (Belgian Linguistic case); opposition to corporal punishment is however recognized as a philosophical conviction (Campbell and Cosans judgment and a number of further cases decided by the Commission).

- The duty to respect parents' convictions also implies a prohibition of attempts at indoctrination of pupils (Kjeldsen, Busk Madsen and Pedersen judgment, loc cit., with regard to sex education in Denmark). With regard to religious education, States are required to provide for exemptions for children who do not belong to the majority religion (No 4733/71, Karnell and Hardt v Sweden, Comm Report 28.5.1973; No 10554/83, Aminoff v Sweden, dec 15.5.1985, D.R. 43, p 120 and No 10491/83, Angelini v Sweden, dec 3.12.1986, D.R. 51 p 41).

IV. Creative activity

- Freedom of expression in Art 10 of the Convention has been interpreted by the Convention organs in a very broad way. In particular, Article 10 also covers artistic expression in various forms (music: No 10317/83 v UK, dec 6.10.10983, D.R.34 p 218; graffiti: No 9870/82 v Switzerland, dec 13.10.1983, D.R.34 p 208; paintings: No 10737/84, Müller ao v Switzerland, dec 6.12.1985, D.R.45 p 166 and Court judgment A/133 of 24.5.1988; film: Otto Preminger Institut v Austria judgment, A/295-A, of 20.9.1994).

- Freedom of expression is also guaranteed to those who wish to express specific moral or religious beliefs (eg pacifist views: No 7050/75, Arrowsmith v UK, dec 16.5.1977, D.R.8 p 123; expression of religious views by a teacher: No 8010/77 v UK, dec 1.3.1979, D.R.16 p 101; buddhist publication by a prisoner, No 5442/72, dec 20.12.1974, D.R.1 p 41).

- Freedom of expression can be invoked not only by authors, but also by publishers (eg Sunday Times case) and other interested persons (eg the organisers of an exhibition in the Müller case, the owner of a cinema in the Otto Preminger case, members of the directing board of an association whose publicatin was seized in application No 6782-84/74 v Belgium, dec. 1.3.1977, D.R.9 p 14).

- The question of interference with the expression of a particular culture has hardly ever arisen in the Strasbourg case-law. As for linguistic cultural identity see above, the admissibility decisions in the Belgian Linguistic case. The case of Informationsverein Lentia v Austria involved an element of alleged discrimination against the Slovene minority in Austria by virtue of non-admission of a private radio-station and allegedly insufficient programs in the public broadcasting system ("access to broadcasting"); the Commission (para 93 of its report of 9.9.1992) could not find elements of discrimination, the Court (judgment A/276 of 24.11.1993) did not express an opinion.

V. Creation of institutions

- Freedom of association is guaranteed by Art 11 of the Convention; it allows all persons to join with others without interference by the State in order to attain a particular end; it does not imply a right to attain the end sought nor protection to associations having the characteristics of public institutions (No 6094/73 v Sweden, dec 6.7.1977, D.R.9 p 5). The case-law on freedom of association is not abundant, but it is clear enough that this freedom guarantees the setting up of organisations of all kinds, including cultural organisations.

- Public law organisations with compulsory membership are not associations in the sense of Art 11: they can be set up by the State if at the same time the right of individuals to create private associations is not excluded (LeCompte, Van Leuven and deMeyere case, Barthold case etc). This also applies to public law institutions set up for the benefit of particular cultural groups.

- Thus, in a Swedish case concerning the Sami community (No 13572/88, Östergren ao v Sweden, dec 1.3.1991) the Commission held that the Sami villages established under the Reindeer Herding Act as institutions of public law were not (private) associations within the

meaning of Art 11; therefore the applicants' complaints that they were not accepted as members of a particular village and punished for illegal grazing and hunting in the territory of that village (in which they claimed to have rights by virtue of immemorial usage) were rejected by the Commission.

- The Commission denied on two occasions that the Convention includes a right to self-determination for national minorities (No 6742/74, D.R.3, p 98 concerning Germans formerly living in Czechoslovakia and No. 7230/75, D.R.7 p 109 concerning the autochthon population of Surinam).

- The Commission also denied a right to separate political representation of national minorities (Nos 9278 and 9415/81, dec 3.10.1983, D.R.35 p 30 concerning representation of Lapps in the Norwegian Parliament). Art 3 of Protocol No 1 concerns only the election of the "legislature" and therefore does not cover elections to non-legislative bodies such as municipal councils where consequently no question of discrimination can arise (No 10650/83, Clerfayt, Legros ao v Belgium, dec 17.5.1985, D.R. 42 p 212). Concerning elections to legislative bodies established according to linguistic criteria, the Commission considered that non-representation of the minority constitutes a breach of Art 3 of Protocol No 1, but the Court did not confirm this view. It held that the compulsion to vote for candidates who belong to either one or the other language groups in the national parliamentary institutions and to the corresponding community council was not a disproportionate limitation on the free expression of the opinion of the people in the choice of the legislature (No 9267/81, Mathieu-Mohin and Clerfayt v Belgium, Comm Report 15.3.1985, paras 106 ff and Court judgment A/113 of 2.3.1987, paras 57-59).