

general of the competent chamber that is to rule on the case has already indicated that the circular letter was not only law-interpreting, but also law-creating. The latter practise obviously falls beyond the scope of the authority of a regional government minister and, therefore, it seems likely that the Council of State will annul the ministerial letter.

The comparative and normative analysis has offered arguments as to why the Flemish MPs should or should not support ratification. The reader may decide for him or herself what he or she believes is the appropriate attitude. However, one reason why the Flemish MPs may not ratify, relates to what I have identified as the 'weak spot' of Belgian federalism. Since the petition, on the basis of which the resolution was made, was initiated by a prominent FDF politician, ratifying, in the short term, equals conceding defeat. Given the absence of federal political parties, doing so in the midst of a 'federal' election campaign is politically unwise. Perhaps Georges Clerfayt, the moral victor, could express in front of the Flemish press, why all Belgian regional parliaments should ratify. All the better, if he would do so in Dutch.

Simona Granata-Menghini*

The Application of the Framework Convention for the Protection of National Minorities in Belgium: The Opinion of the European Commission for Democracy through Law

The most significant work carried out by the European Commission for Democracy through Law (Venice Commission) in the field of minority protection in the period under consideration is undoubtedly its opinion on 'Possible groups of persons to which the Framework Convention for the Protection of National Minorities (hereinafter the Framework Convention) could be applied in Belgium'.¹ When, in October 2001, the Venice Commission was asked by the Committee on legal affairs and human rights of the Parliamentary Assembly of the Council of Europe (PACE) to give an opinion on this matter, the first thing which appeared necessary for it to determine with exactitude was what would be the object of the opinion. The Commission would then have to decide what kind of approach to take to this matter.

As regards the object, the question, though seemingly presented in purely legal terms, was clearly intertwined with political arguments and had to be understood in the context of the debate raging in Belgium about whether the Walloons (French-speaking Belgians) deserved any protection under the Framework Convention in addition to the one attached to their status as one of the three communities under the Belgian Constitution and relevant legislation.²

The Commission considered that its task was to say whether, in its view, persons belonging to the three Belgian communities – Flemish-speakers, French-speakers and German-speakers – could be considered as minorities within the meaning of the Framework Convention.

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¹ Adopted by the Venice Commission at its 50th Plenary Meeting (Venice, 8-9 March 2002), CDL-AD (2002) 1.

² Upon signing the Framework Convention on 31 July 2001, Belgium declared that 'the notion of national minority will be defined by the inter-ministerial conference of foreign policy'. To date, it has not ratified the Framework Convention.

work Convention.³ In order to do so, the Commission would first address the abstract question of how to determine the scope of application *ratione personae* of the Framework Convention. The Commission decided not to address the question of whether in Belgium there were other groups of persons eligible to fall within the scope of application of the Framework Convention, this question not pertaining to Belgium specifically.⁴

As regards the method, the Commission could choose among a variety of options, ranging from an academic, abstract approach, aimed at setting out guidelines based on European common standards in a particular area – the Commission's typical approach in its studies – to a very pragmatic one, oriented at finding workable solutions adapted to the relevant country's specific context – typically followed by the Commission when it is called to give a legal opinion on constitutional provisions or draft legislation or regulations on a given subject in one or more European states. Several combinations of these approaches were, of course, possible.

This choice, to the extent that it was bound to determine the degree of the Commission's implication in the actual Belgian political context, was of particular importance for a number of reasons. In the first place, the request for the Commission's opinion had come from a political body which had become deeply involved in the virulent Belgian national debate over whether or not to ratify the Framework Convention, and with what sort of 'reservation'. Indeed, one of the most recurrent objections raised by the Flemish in the course of the debates within the PACE was why an international body of political character should intervene in such a direct manner in a purely domestic expediency decision on whether or not, and to what extent, to ratify an international instrument (furthermore, other member states of the Council of Europe (CoE), such as France or Greece, have not ratified the Framework Convention but are merely the object of exhortations or reminders at regular intervals).

In addition, since the Framework Convention has not been ratified by Belgium, the Advisory Committee on the Framework Convention (ACFC), the naturally competent organ for determining whether a possible limitation of the scope of application *ratione personae* of that Convention is acceptable or not,⁵ could not provide its wisdom.

The Commission is not a political body, and did not wish (nor had it been requested) to be involved in a political debate. Furthermore, the Commission was of course well cognizant – unlike, it seemed, many of the people involved in the debate – that the impact of the Framework Convention on the actual level of protection afforded to a given minority group in a given country is not a matter which can be evaluated *a priori* and *in abstracto*. It is the result of complex and delicate processes as well as interactions between national authorities, the minority groups concerned, observers and the Committee of Ministers

(with the ACFC).⁶

The Commission consequently decided to take an academic approach to the matter: It would indicate in the first place what was, in its view, the correct methodology for determining the scope of application *ratione personae* of the Framework Convention, and subsequently it would apply this line of reasoning to the Belgian constitutional structure in order to conclude to which of its three communities, if any, the Framework Convention could be deemed to be applicable.

The first substantial question that the Commission was faced with was to what extent the numerical inferiority of a group could be regarded as sufficient – in the presence of course of the other constitutive elements of a national minority⁷ – for this group to constitute a 'minority'. In fact, while it was undisputed that the German-speakers are a minority group, the question arose whether the French-speaking Belgian community is not too substantial in numbers, despite being less numerous than the Flemish-speaking group,⁸ to be regarded as a minority group.

As is well-known, in the Framework Convention (as in the other relevant instruments of minority protection) there is no reference to a fixed – minimum or maximum – quantitative threshold for a group to qualify as a 'minority'. There only exists a criterion of 'substantial numbers', which is designed to introduce a notion of reasonable *minimum* quantitative element.

And yet, at least in countries made up, like Belgium, of more 'constituent' groups of persons, a mere numerical inferiority of one in respect to another of these groups (in an extreme case, 49% against 51%) cannot be sufficient, of itself, for the need for protection of this group to arise.⁹

⁶ For an exhaustive explanation of the working methods of the Advisory Committee on the Framework Convention, see Rainer Hofmann, 'Preferential Treatment of Kin Minorities and Monitoring of the Implementation of the Framework Convention for the Protection of National Minorities', in Council of Europe, *The Protection of National Minorities by their kin-states*, Collection Science and Technique of Democracy, No. 32 (Strasbourg, 2002), 235–60.

⁷ Notably in the light of Article 5(1) of the Framework Convention.

⁸ In Belgium, there are three communities, which are characterized by common language and culture: the Flemish, representing 58% of a population made up of approximately 10,200,000 people, the Wallons, representing 40% of the population, and the German-speaking group, who are approximately 65,000, or less than 1% of the population. For an explanation of the Belgian constitutional structure, see Jean-Claude Scholten, 'Federalism and Protection of Minorities in Belgium', in Council of Europe, *The Protection of De Bruycker et al.*, 'Mécanismes Institutionnels et Droits Individuels dans la Protection des Minorités de la Belgique Fédérale', in Nicolas Levrat (ed.), *Minorités et Organisation de l'Etat* (Bruxelles, 1998), 189–230; Alexander Murphy, 'Belgium's Regional Divergence: along the Road to Federation', in Graham Smith (ed.), *Federalism: The Multithetic Challenge* (London, 1995), 73–100.

⁹ Whether a 'constituent' group would wish to be regarded as a minority in order to benefit from the protection of the Framework Convention is a matter which largely depends on complex factors, including the relevant historical background. In Bosnia and Herzegovina, for example, none of the three constituent peoples appears to intend to prevail itself of the guarantee of Article 20 of the Framework Convention (see CDL (2002) 32, 'Meeting of the Venice Commission rapporteurs with representatives of the Bosnian authorities and of the international community on the rights of persons belonging to national minorities in Bosnia and Herzegovina', para. 16).

In the Commission's opinion, in such a situation of multiple 'constituent' communities, the numerical inferiority had to be evaluated in conjunction with a possible situation of dominance or codominance.¹⁰ This is because a teleological interpretation of the Framework Convention leads to the belief that minority groups need to be protected on the ground and to the extent that their numerical inferiority exposes them to the risk of succumbing to the majority by operation of the ordinary democratic mechanisms. When, conversely, more groups run the state institutions on an equal footing, there is, at least in principle, no need to afford protection under the Framework Convention to the one amongst them which is numerically inferior.

The Commission decided therefore to consider that those minority groups which are in a dominant or codominant position are not, in principle, entitled to claim the protection of the Framework Convention. As a consequence, in the Commission's opinion it would be necessary to assess whether the Belgian communities found themselves in such a situation of codominance.

Another substantial matter was subsequently to be addressed: To what extent does the federal structure of a state have an impact on the determination of the existence of minority groups.¹¹ The Commission had run into the controversial question of the 'minorities within minorities'. The Commission moved from the premise that logically, and consistently with the object and aim of the Framework Convention, the need to provide a numerically inferior group with 'defence tools', i.e. mechanisms correcting the functioning of the democratic processes, arises at whatever level these processes take place; that is to say whenever and wherever any decisions significantly and directly affecting the rights of this group are taken. In a situation where powers are decentralized, territorial subdivisions must be taken into account when determining if a group is exposed to the pressures of the majority. Accordingly, in a federal state the existence of a minority group – and insofar as relevant in this context, the possible situation of dominance or codominance of such a minority group – must be determined both at state and at substate levels.

The Commission was comforted in this reasoning by the fact that the possibility for persons belonging to a national minority to form a majority within one area of a state is explicitly contemplated in Article 20 of the Framework Convention, which sets out the obligation for them to respect the rights of this 'local' minority.¹² The Commission

was of course aware of the fact that the UN Human Rights Committee, in the famous case of *Ballantyne, Davidson and McIntyre v. Canada*¹³ had excluded that Article 27 of the International Covenant on Civil and Political Rights (CCPR) could be applicable to minority groups at a substate level. However, the Commission was not persuaded that this interpretation of Article 27 CCPR prevented a different – and in its view more progressive – application *ratione personae* of the Framework Convention.¹⁴

The Commission decided therefore that the existence of 'minorities within minorities' at the local level was to be taken into account. Accordingly, it needed to determine whether any of the Belgian communities constituted a 'minority' locally, i.e. whether any of them was locally numerically inferior without being in a codominant position. The Commission thus moved to examine the Belgian constitutional structure with a view to determining whether the French-, the Flemish- and the German-speaking communities constitute, at the state or at a lower level, a group less significant in number than the others, and whether they find themselves, at any level, in a dominant or codominant position. It concluded that *at the level of the central state*, French-speakers, despite being less numerous than Flemish-speakers, participate, unlike German-speakers, in the management of the institutions on an equal footing with the Flemish. Accordingly, French-speakers do not, while German-speakers do constitute a 'minority'.

On the other hand, each of the three communities finds itself in a minority position *at the regional and local levels*, i.e. in the regions where they are numerically inferior but are not granted sufficient corrective mechanisms similar to those existing at the state level (French-speakers in the Dutch-language and in the German-language regions, Dutch-speakers and German-speakers in the French-language region¹⁵). This does not apply, however, to the Flemish in the Brussels region, who benefit from substantive guarantees of equality with respect to the Walloons. The conclusions of the Venice Commission¹⁶ were of course not accepted by the Flemish-speaking community, who saw in the recognition of the French-speakers as a minority at the local level a risk that they would claim a change in their status, notably in the Brussels periphery.

It is not the purpose of this brief article to enter into or analyze the political debate which surrounded the adoption of this opinion. Yet, it is difficult to share such concerns about the impact of the Commission's opinion or the PACE's resolution. The mere fact that the French-speaking community may be entitled to claim protection under the Framework Convention is not going to have direct repercussions on its status under the Belgian constitutional and legal framework. Ratification of the Framework Convention,

¹⁰ The Commission held that a numerically inferior group of persons which finds itself in a dominant or codominant position is not to be considered as a minority (para. 40 of the opinion) as opposed to saying that a group needs to find itself in a subdominant position in order to be considered as a minority. It is to be noted that in its Proposal for a European Convention for the Protection of National Minorities, the Commission did not include, amongst the constitutive elements of a national minority, the position of the subdominance (see Article 2(1) of the Venice Commission's Proposal for a European Convention for the Protection of Minorities, CDL(1991)7).

¹¹ For the purposes of this opinion, the Commission took for granted that the three Belgian communities were, in principle, capable of falling within the ambit of application of the Framework Convention pursuant to Article 5(1). It thus confined itself to assessing whether and where they were in a position of dominance or codominance.

¹² For an explicit reference to the scope of this provision in the relevant preparatory works, see in particular CAHMIN(94)19, 7-8. See also Article 15(2) of the Venice Commission's Proposal for a European Convention for the Protection of Minorities.

¹³ 5 RUDH (1993), 156-64.

¹⁴ See paras. 18-19 of the Commission's opinion.

¹⁵ There are no German-speakers in the Dutch-language region and no Dutch-speakers in the German-language region.

¹⁶ This opinion extensively served as a basis for the report of the PACE's Rapporteur, Ms. Lili Nahlholz Haidegger (see Doc. 9536, Report of the Committee on Legal Affairs and Human Rights). The PACE subsequently adopted its Resolution 1301(2002)1, 'Protection of Minorities in Belgium' on 26 September 2002 (30th Sitting).

even in the absence of any reservation or declaration excluding French-speakers from its ambit of application, would therefore not, in itself, threaten constitutional or legal changes. Such changes might eventually indeed appear necessary. But the relevant debate and decision may not be shifted from the national to the international forum.

As regards the opportunity of granting at a local level a status of 'minority within a minority' – hence protection under the Framework Convention – to a group which belongs to the majority at the national level, it is the opinion of the Venice Commission that no historical past, as unjust as it may have been, may justify the deprivation of protection to a vulnerable minority group. Obviously, such protection may be granted only to the extent that the relevant claim is not abusive or manipulative. Moreover, it is highly unlikely that similar attempts would not be spotted under the monitoring of the CoE's Committee of Ministers with the ACFC.

In sum, it is up to the Kingdom of Belgium to decide whether or not to ratify the Framework Convention. By ratifying it, Belgium would certainly show that it shares the belief of the other CoE's member states that respect for minority rights forms an integral part of respect for human rights, a cornerstone of our common democratic values. After ratification, Belgium would remain primarily responsible for ensuring the compatibility of its Constitution and legislation, including and most importantly their practical application, with the principles enshrined in the Framework Convention, and would benefit from the flexible interpretation of the provisions of the latter. Nevertheless, Belgium has been warned, by the Venice Commission *in primis*, that a limitation of the application *ratione personae* of the Framework Convention by way of an arbitrary – or even too strict – definition of what it means by 'national minorities' – i.e. of the exclusion of French-speakers in Flanders – would likely cause the censure of the ACFC and the Committee of Ministers: something which would collide with a full and genuine commitment by Belgium to the respect for human rights.

A concluding remark: The question may be raised whether the Venice Commission's findings in this opinion are of a general nature or are only applicable to the Belgian situation. The Commission cautiously pointed to the latter possibility.¹⁷ It would however seem difficult to justify (and indeed not entirely consistent with the structure of the opinion itself) that the two principles highlighted in this context – first, that minority groups enjoying a dominant or codominant position are, in principle, not entitled to additional protection under the Framework Convention and second, that 'minorities within minorities' may legitimately claim protection under the Framework Convention – are not of a general application. After all, a pragmatic approach to the determination of the existence of a minority group within the meaning of the Framework Convention, coupled with the relevant monitoring mechanism, should suffice to reduce – significantly if not entirely – the risks of arbitrary and unjustified limiting or conversely, broadening of its scope of application.

Part C

SPECIAL FOCUS: NEW MINORITIES

¹⁷ See para. 4 *in fine*.