

## **EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

### **The protection of minorities in federal and regional States: consolidated report based upon studies carried out in relation to Austria, Belgium, Canada, Germany, Italy, Spain and Switzerland**

#### **I. Introduction**

The notion of a minority (whether it be linguistic, ethnic, religious, cultural or otherwise) can refer to very diverse situations. In particular, concentrated minorities, for which territorial solutions are possible, should be clearly distinguished from dispersed minorities, for which such solutions are evidently excluded. It is therefore understandable that national law, and consequently that national reports, should be concerned with a very extensive range of circumstances.

The purpose of this consolidated report is to attempt to define certain types of rules on the protection of minorities which are found to exist in federal or regional States. It is based on reports relating to Council of Europe member States with a federal or regional structure, as well as on a report relating to Canada. The following countries are considered: Austria, Belgium, Canada, Germany and Switzerland (federal States); and Spain and Italy (regional States).

Federal or regional States in other parts of the world, and the specific case of Russia in particular, are not dealt with in this report.

Two types of rules may form the basis for the protection of minorities in a federal or regional State: rules concerning fundamental rights, which are not distinctly characteristic of federal or regional States and which apply to concentrated minorities as well as to dispersed minorities, and rules specific to such States, relating to concentrated minorities. Each of these two categories of rules will be examined in turn.

## **II. Guarantees of fundamental rights, particularly linguistic freedoms**

Fundamental rights are of course guaranteed to members of a minority, as to everybody, in federal and regional States as they are in any State<sup>1</sup>. The principle of equality, for example, stands opposed to any discrimination against members of a minority.

Certain rules set out to protect minorities, or a particular minority, more directly. Thus, the Canadian Constitution provides special protection for autochthonous peoples in paragraph 91(24) of the Constitutional Law of 1867, in Article 25 of the Canadian Charter of Rights and Freedoms and in Articles 35 and 35(1) of the Constitutional Law of 1982. In addition, electoral laws take account of the presence, throughout Canada, of autochthonous peoples. The electoral law of Canada allows for certain exceptions, notably in respect of the conduct of the count, in autochthonous reservations.

Certain features specific to federal and regional States must be emphasised in the context of confessional and linguistic rights. Thus, in Canada, the rights of Catholic and of Protestant groups are protected as such, notably in matters of teaching and of taxation. Thus, a right is recognised, subject to certain conditions, of access to confessional State-funded schools.

There is no need here to dwell on fundamental rights of an individual nature guaranteed to everyone. It may be recalled, first, that the principle of equality stands opposed to discrimination against the members of a minority, and that there are also relevant individual freedoms, such as religious freedom.

In Canada still, the right to have one's children educated in the minority language of a province is recognised fairly widely. However, the right to have such instruction financed from the public purse or to have children receive instruction in minority language educational facilities provided out of public funds is subject to the condition that there is a sufficient number of children of citizens enjoying the above-mentioned right.

At the parliamentary, legislative and judicial levels, the federal Constitution provides for equality between English and French as regards the federal system of government and the provinces of Quebec, New Brunswick and Manitoba, but not the other provinces.

Swiss language rules are different in nature. The Federal Constitution implicitly recognises the principle of territoriality as a general rule. The individual right to linguistic freedom is therefore restricted in scope in relations with cantonal authorities. However, it also follows implicitly from the Constitution that it is possible to communicate with the political, administrative and judicial authorities at federal level in the three official languages, irrespective of their majority (German) or minority (French or Italian) status. In addition, a federal law of 24 June 1983 on subsidies for the cantons of Grisons and Tessin for the safeguarding of their culture and their languages aims to support the two least-spoken national languages, rheto-romanche and Italian.

---

<sup>1</sup>For further information on the question of fundamental rights enjoyed by persons belonging to national minorities, see the Report on the Replies to the Questionnaire on the Rights of Minorities (CDL-MIN (94) 5 revised, point IV.C).

Broader individual rights - including the choice of the language of communication with the authorities - are provided for in the bilingual and trilingual cantons (Fribourg, Valais, Bern and Graubünden).

The Belgian system is fairly similar as it is also based on the principle of territoriality. For example, education is organised only in the language of the region, except in certain fringe communes where nursery and primary education may be organised in the language of the minority, on certain conditions. The Brussels-capital region is bilingual.

The use of languages in administrative matters is subject to the rule of unilingualism in the three single-language regions and to the rule of bilingualism in the Brussels-capital region. Here again, the linguistic minorities of certain fringe communes are granted special status.

The situation in Italy is unusual: although Italian is the language of the immense majority of the population, the German-speaking minority represents the bulk of the inhabitants of Bolzano (a province in the region of Trentino-Alto Adige). The autonomous statute of this region provides for proportional representation of the linguistic communities within provincial bodies and minor local authorities, as well as for certain rights in the educational field; some of these rules are also applicable to the Ladinian-speaking minority.

As regards relations with the public authorities, German and Italian have the same constitutional status at regional level and in the province of Bolzano. It has to be observed, therefore, that what we see here are essentially organisational principles rather than individual rights. French, in the Valle d'Aosta, and Slovenian, in Friuli-Venezia Giulia, are protected by similar rights.

In the case of Spain, minority languages are widely spoken in five autonomous communities (Catalonia, the Basque country, Galicia, Valencia and the Balearic Islands). Under Article 3 of the Constitution (Castilian is the official language of the State and the other Spanish languages are also official in the respective autonomous Communities, in accordance with their statutes), the statutes of autonomy of those nationalities and regions enshrine the concept of equal official status of the languages. Autonomy statutes are of a dual nature since, although the peoples concerned participated directly in their preparation through their political representatives, the resulting legal text is in every case a rule having the status of State law and embodied in the legal order of the State. In effect, these texts provide that the regional language, along with Castilian, is the official language in the community and that any citizen is entitled to use either that language or Castilian in his relations with those public authorities whose jurisdiction is limited to the territory of the community concerned, whether they be regional or state bodies. This constitutional corpus has been elaborated upon in the various Autonomous Communities through laws prepared by their respective assemblies, in most cases for the purpose of promoting regional languages.

The situation in Germany and Austria is different, in as much as these countries have no minorities which constitute the bulk of the population in any particular region. In Austria, the Constitutional Court has recognised that the right to instruction in the Slovenian language for persons belonging to that minority in Carinthia is guaranteed by the Federal Constitution. Certain other rights are recognised at the legislative level.

In the case of Germany, the Unification Treaty provides for a rule in favour of the Sorbian minority, specifically in respect of language: the Sorbian language may be used before the district courts in regions of the land of Saxony where the Sorbian minority is present.

The other rules on behalf of minorities are enshrined in the legislation of the Länder and provide for certain entitlements for minorities to receive education in their own language, and also for measures of affirmative action.

It is also of interest to note that Articles 8 and 9 of the draft European Convention for the Protection of Minorities prepared by the European Commission for Democracy through Law<sup>2</sup> deal with the question of linguistic rights in a manner fairly similar to some of the above-mentioned rules. It should be noted in particular that the right to communicate with the authorities or to receive public instruction in the language of the minority is subject to the condition that the number of members of the minority be sufficient.

### **III. The rules proper to federal or regional states**

Unlike the rules concerning fundamental rights (including language rights), which may also be found in a unitary State, certain rules for the protection of concentrated minorities are peculiar to federal or regional States. Indeed, they are bound up with the powers of federated (or regional) entities or their representation within central government. This carries the obvious implication that the minority, nationally speaking, should form a majority within certain federated States or regions, so that States like Germany or Austria cannot be concerned by such measures. If federated authorities or regions have extended legislative and executive competences, a minority can participate directly in political life.

This report does not aim at describing the powers of the entities comprising the State, which would require a study in itself, but at determining what these entities are. For most of the States studied, they are federated States or regions having a specified territorial area.

The situation in Belgium is different, however. There the Regions (territorial) are superimposed on the Communities (language). There are three Regions: the Flemish Region (monolingual), the Walloon Region, to which the French-speaking area and the small German-speaking area belong, and the Brussels-capital Region (bilingual). There are also three language Communities: Flemish, French and German. The powers of the Flemish-speaking and French-speaking

---

<sup>2</sup>Article 8: Whenever a minority reaches a substantial percentage of the population of a region or of the total population, its members shall have the right, as far as possible, to speak and write in their own language to the political, administrative and judicial authorities of this region or, where appropriate, of the State. These authorities shall have a corresponding obligation.

Article 9: Whenever the conditions of Article 8 are fulfilled, in State schools, obligatory schooling shall include, for pupils belonging to the minority, study of their mother tongue. As far as possible, all or part of the schooling shall be given in the mother tongue of pupils belonging to the minority. However, should the State not be in a position to provide such schooling, it must permit children who so wish to attend private schools. In such a case, the State shall have the right to prescribe that the official language or languages also be taught in such schools.

Communities extend not only to the Flemish and Walloon regions respectively (apart from the small German-speaking region) but also the Brussels-capital Region. In the absence of Flemish or French-speaking sub-nationality, however, the principle of personality holds no more sway than that of territoriality, and the situation is of a mixed type where, in a certain portion of the territory, two political bodies have a relationship with the institutions which "represent" their culture or their language.

In Belgium still, the Council of Ministers must comprise an equal number of French-speaking and Dutch-speaking Ministers, if necessary without counting the Prime Minister: parity between language groups, and not between regions, is guaranteed. The two Federal Chambers (Chamber of Representatives and Senate) are divided into two language groups. Certain laws which are essential for the balance of the country or for the protection of minorities, known as special laws can be adopted only by a two-thirds' majority, and are subject to the presence of a quorum known as special laws, and of a majority in each language group in both federal assemblies. In addition, a language group may declare, by a three-quarters' majority, that a particular bill or draft law is of a nature to cause serious prejudice to relations between the communities. In this case, the procedure is suspended and the text submitted to the Council of Ministers, in which the languages have equal representation and which must take a decision.

Language parity applies to the judicial branch also (Arbitration Court, Court of Cassation and Council of State) as well as, in the political domain, to the Conciliation Committee, a body designed to prevent and, if possible, to settle conflicts of interest between State bodies.

In Switzerland, the House representing the cantons, the Council of States, of which almost all members are elected under the majority system, comprises two members for each canton and one for each half-canton. This means that the small cantons are as well represented as the large ones. In addition, in the bilingual cantons and the trilingual one, one of the Councillors to the States frequently represents the minority language of that canton.

The members of the House representing the people, the National Council, are also elected at cantonal level, under the proportional system: the same party will sometimes put forward separate linguistic lists within the same canton. Minorities, especially linguistic minorities, are thus assured of adequate representation in both Houses.

The Federal Constitution provides that it is not possible for more than one member of the Federal Council (Government) to be chosen from the same canton. Moreover, there is an unwritten rule to the effect that two or sometimes three federal councillors out of seven should represent the Latin minorities, although the latter account for less than 25% of the population.

The Constitution also provides for the use of the three official languages of the Confederation in the Federal Court. In practice, they are represented on a proportional basis. This situation in no way calls into question the federal structure of the state.

In Canada, the system of representation according to population in the House of Commons, from constituencies in which first-past-the-post voting rules apply, guarantees a degree of representation for the French-speaking minority in Quebec. In addition, Quebec is assigned 24 senators out of a total of 104.

The representation of minorities in the central governmental organs of a regional State is more rarely governed by rules of positive law. In Spain, with few exceptions, the provinces are entitled to have four representatives elected directly to the Senate, whereas the legislative assemblies of the Autonomous Communities appoint a number of Senators varying in accordance with the population of the Community, the result being in practice that the number of Senators elected in the context of the province predominates over those strictly representing the Autonomous Community. Nonetheless, this composition of the Spanish Senate can be seen to give some guarantee of minimum representation for the regions where a minority has majority status.

There are also more direct means of participation in the State decision-making process by federated States or regions, especially those in which a national minority has majority status. For example, both the Swiss cantons and the Spanish Autonomous Communities enjoy the right to propose legislation or constitutional amendments. The Swiss cantons are also frequently consulted before decisions are taken at central government level, while the Spanish Autonomous Communities participate in the work of joint bodies which are involved in the process of taking decisions of a general nature.

Generally speaking, a federal or regional structure obviously enables a minority - in cases where it has majority status - to exercise important powers. However, the precise definition of such powers stands outside the scope of this report. Consideration should nevertheless be given to certain particular features of the Italian legal system. A special autonomous status is enjoyed by regions with recognised minorities, namely Valle d'Aosta, Trentino-Alto Adige and Friuli-Venezia Giulia. In addition, the province of Bolzano, which has a German-speaking majority, enjoys a special form of autonomy very similar to the autonomy of the regions. In the other Italian regions, the special competences of the regional legislature in the field of culture and local tradition allow the adoption of special measures in favour of the other minor linguistic groups.

In Spain, the Autonomous Communities of Catalonia, the Basque country and Galicia, where minority languages are most widely spoken, were set up, like the Autonomous Community of Andalusia, under a more complex procedure, and were called upon more quickly than the others to exercise responsibilities similar to those of the federated entities of a federal State. Today, however, these distinctions have been reduced due to an expansion of the powers of the other Autonomous Communities. Nevertheless, the special language situations of Catalonia, the Basque country and Galicia have continued to be used by nationalist factions within the Autonomous Communities with a view to obtaining wider powers (referred to as the "differential factor").

Federalism - or indeed regionalism - is undoubtedly a system which enables minorities to obtain a degree of autonomy within the framework of the existing State structure. The question of a territory's accession to federated or regional status, so as to enable a minority to form a territorial majority, is a problem of a different kind but one which can also provide the solution to a situation of conflict. This was the case with the establishment of the canton of Jura in Switzerland; the francophone Districts which wished to separate from the canton of Berne, were empowered, by means of an ad hoc constitutional provision at cantonal level and following a series of plebiscites, to form a distinct canton, and this did away in large measure with "the problem of Jura".

#### IV. Conclusion

The preceding pages have shown the difficulty of identifying common principal elements in national rules on the protection of minorities in federal and regional States. On the contrary, this is a field where each national situation is specific and has been dealt with in an original manner in a given historical context.

In general terms, however, the following may be noted in addition to the overall guarantee of conventional individual rights (such as freedom of association, freedom of thought, conscience and religion or linguistic freedoms):

1. Certain rules are specific to federal or even regional States, and these may be described as falling into two categories:

a) On the one hand, federated States and regions have extended competences and, in some cases, are organs of the central State (as in Switzerland in respect of cantons in the matter of constitutional referenda), or play a specific role in the establishment of the organs of the central State (notably the Swiss Council of States and the Spanish Senate). When a minority is itself in the majority in a federated State or region, it indirectly benefits from such competences and from such participation in central government.

b) On the other hand (more often in cases of concentrated minorities), the legislation of federated States can provide for certain minority rights in addition to those guaranteed by central government, for example by means of:

-a more precise regulation of linguistic questions at the federated State level than at the level of central government (in Switzerland, in Canada, as well as in Germany where, apart from the reference to the Sorabe minority in Article 35 of the Treaty of Unification, the protection of linguistic minorities falls exclusively within the laws of Länder);

-the granting of political rights in cantonal or communal matters, by two Swiss cantons, to certain foreigners;

-special electoral provisions for the election of organs of federated States (for example, in the Länder of Schleswig-Holstein and of Saxony the 5% quorum does not apply to minorities).

2. Some rules are more commonly encountered in a federal or regional State than in a unitary State and can apply equally to dispersed minorities as to concentrated minorities, such as:

-the representation of linguistic minorities in the organs of central government, Switzerland and Belgium being examples of countries in which this principle is of general application;

-rights specific to religious or linguistic minorities, in the field of education in particular (notably in Canada).