



Strasbourg, 27 February 2002

Restricted  
CDL (2002) 21  
Or. Eng.

**Opinion 180/2001**

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

(VENICE COMMISSION)

**DRAFT OPINION**

**ON POSSIBLE GROUPS OF PERSONS  
TO WHICH  
THE FRAMEWORK CONVENTION FOR THE PROTECTION OF  
NATIONAL MINORITIES  
COULD BE APPLIED  
IN BELGIUM**

**on the basis of comments by  
Mr Franz MATSCHER [Austria], Member,  
Mr Giorgio MALINVERNI [Switzerland], Member,  
Mr Pieter VAN DIJK [the Netherlands], Member,  
Mr Sergio BARTOLE [Italy], Substitute Member**

## **Introduction**

*By a letter dated 4 October 2001, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Mr Gunnar Jansson, informed the Venice Commission that his committee had decided to ask for the Commission's opinion on possible groups of persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium.*

*A Working Group, composed of Messrs. Franz Matscher, Giorgio Malinverni, Pieter Van Dijk and Sergio Bartole, was set up to study the question. After meeting in Venice on 13 December 2001 and in Brussels on 19 January 2002, the Working Group prepared the following opinion, which was adopted by the Venice Commission at its ... Plenary Meeting (Venice, 2002).*

### **A. The scope of application of the Framework Convention for the protection of National Minorities**

1. No definition of *national minorities* is contained in the Framework Convention for the Protection of National Minorities (hereinafter referred to as "the Framework Convention"). Accordingly, Parties to it must examine the personal scope of application to be given to it within their country. They dispose of a certain margin of appreciation in this respect, in order to take the specific circumstances prevailing in their country into account. This margin of appreciation, however, must be exercised in accordance with the general principles of international law and the fundamental principles set out in Article 3 of the Framework Convention. International practice in this field should also be taken into consideration. In particular, the implementation of the Framework Convention should not be a source of arbitrary or unjustified distinctions. With a view to preventing any such distinctions from being made, the Committee of Ministers of the Council of Europe, with the assistance of the Advisory Committee on the Framework Convention<sup>1</sup>, exercises a supervisory role on the personal scope given by each country to the implementation of the Framework Convention.

2. Several States have formulated declarations<sup>2</sup> regarding the notion of *national minorities* upon ratification of the Framework Convention<sup>3</sup>. Austria, Estonia, Luxembourg, Poland, Switzerland and the "former Yugoslav Republic of Macedonia" have made declarations giving their interpretation of the notion of *national minorities*. Other States<sup>4</sup>, such as

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<sup>1</sup> *The Advisory Committee assists the Committee of Ministers in monitoring implementation of the Framework Convention by States Parties (see article 26 of the Framework Convention).*

<sup>2</sup> *It may be useful to point out the difference between a reservation and a declaration. "Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (see Article 2 of the 1969 Vienna Convention on the Law of Treaties). An interpretative declaration instead is "a declaration or statement, however phrased or named" made by a State "with a view inter alia to the harmonization of its laws and regulations with the provisions of th[e] treaty]", whereby the State in question does "not purport to exclude or to modify the legal effect of certain provisions of the treaty in their application" to its territory (see Article 310 of the 1982 United Nations Convention on the Law of the Sea). Through such declaration, in practice, a State explains what particular interpretation it intends to give to certain provisions of the treaty. However, as to the relativity of the distinction between "reservations" and "interpretative declarations", see European Court HR, *Belilos v. Switzerland* judgment of 29 April 1988, Series A no. 132, §§ 40 ss.*

<sup>3</sup> *For full reference, see the website of the Council of Europe's Legal Affairs/Treaty Office, at: [convention.coe.int](http://convention.coe.int).*

<sup>4</sup> *Certain States (such as "the former Yugoslav Republic of Macedonia") have made more than one declaration.*

Denmark, Germany, Slovenia, Sweden and the “former Yugoslav Republic of Macedonia”, have made declarations listing the groups of people to which the Framework Convention applies within their territory. Liechtenstein and Malta have declared that no national minorities in the sense of the Framework Convention exist in their territory.

3. Belgium signed the Framework Convention on 31 July 2001. Upon signature, it formulated the following reservation:

“The Kingdom of Belgium declares that the Framework Convention applies without prejudice to the constitutional provisions, guarantees or principles, and without prejudice to the legislative rules which currently govern the use of languages. *The Kingdom of Belgium declares that the notion of national minority will be defined by the inter-ministerial conference of foreign policy* [italics added].”

4. Belgium thus intends and is entitled, within the aforementioned (see para 1 above) limits, to determine the personal scope of application to be given to the Framework Convention in Belgium. The Venice Commission is willing to provide its opinion on how Belgium should proceed with this task.

#### **B. Determination of the personal scope of application of the Framework Convention: methodology**

5. It is the opinion of the Commission that in order to examine the scope of application of the Framework Convention in a given country, regard must be had in the first place to the object and purpose of the Convention, that is to achieve respect for and afford protection to the ethnic, cultural, linguistic and religious identity of persons belonging to a national minority as well as appropriate conditions enabling them to express, preserve and develop this identity<sup>5</sup>. The protection afforded by the Framework Convention is designed to avoid that a group of persons, numerically inferior to the rest of the population, should be obliged to yield under pressure of the majority of the population – by virtue of the operation of the democratic institutions themselves - and to surrender its religious, linguistic, cultural and historical characteristics.

6. A teleological interpretation<sup>6</sup> of the Framework Convention suggests that only those groups of persons that are actually exposed to the risk of being dominated by the majority deserve protection. Numerical inferiority may thus not be a sufficient element, even though a necessary one, for a group of persons to qualify as a “minority” within the meaning of the Framework Convention.

7. In the Commission’s view, it is necessary to exclude from the scope of application of the Framework Convention those groups of persons that, although inferior in number to the rest or to other groups of the population, find themselves, *de iure* or *de facto*, in a dominant or co-dominant position.

8. A *co-dominant position* is typically found in States that are made up of more ethnic groups - one of which will likely be superior in number, if only slightly, to the others - jointly running, on an equal footing, the essential structural elements of the State. In these situations,

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<sup>5</sup> See the preamble to the Framework Convention.

<sup>6</sup> See article 31 of the 1969 Vienna Convention on the Law of treaties

mechanisms - such as the provision for an equal number of seats for each group in State bodies or institutions - may be provided in the Constitution, whereby the operation of the majority principle is corrected and neutralized in favour of the less numerous group or groups: accordingly, none of the co-dominant groups may be outnumbered within the institutions of the State. No need for protection thus exists for these groups.

9. The legal status of a co-dominant group is essentially different from that of a protected minority: the latter in fact enjoys certain guarantees against the ordinary operation of the majority rule, but is not put on an equal footing with the majority as regards the running of the State institutions.

10. A further question arises in the context of decentralization of powers: whether the existence of a “minority” within the meaning of the Framework Convention, including the possible situation of co-dominance of a given group, must be assessed at the State level only, or also at the level of the sub-State units.

11. In this respect, it must be recalled that the Framework Convention sets out undertakings on the part of States. States Parties commit themselves to ensuring that an adequate protection of minorities be achieved on their territory; they are thus responsible for ensuring that the various domestic institutions or bodies that are competent in the pertinent fields respect the obligations set forth in the Framework Convention.

12. In a context of downward transfer of political powers, an increasing number of laws and decisions affecting the rights of persons belonging to national minorities are taken at the regional or local level, not at the State level. In case of territorial sub-divisions, the State might even lose competence in those fields of interest for minorities. While it remains internationally accountable for the respect of its commitments, it must take this decentralization of powers into consideration when deciding the scope of application of the Framework Convention.

13. Territorial sub-divisions may result in compactly settled minority groups having greater influence over decisions affecting their members through bringing the institutions of power and the service of state closer to them<sup>7</sup>. In Belgium, for example, the establishment of decentralised organisational structures was mainly aimed at defusing the language disputes in the country<sup>8</sup>.

14. In decentralized environments there may be situations where a group that is not a minority as defined in paragraph 6 above at the State level may become such a minority at a sub-State level and, by operation of the decentralized democratic mechanisms, become subject to the dominant position of another group (that could be a minority at the State level). It must be stressed in particular that the mechanisms correcting the functioning of the majority rule in favour of a co-dominant group (see above, para. 8) do not necessarily exist also at sub-State levels.

15. In view of the above, the Commission considers that it is necessary to determine whether a group of persons constitutes a minority as defined in paragraph 6 above at all levels where

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<sup>7</sup> See A. Eide, « Minorities in a decentralized environment », *background paper for the UNDP International Conference on Human Rights, Yalta, September 1998*.

<sup>8</sup> See *Eur. Court HR, Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A no. 113, § 56*.

this group may actually need protection (in view of the nature of the decentralised functions): at the State, regional and local levels. Indeed, as underlined above (see para. 12), it is normally the sub-State entities that are competent in respect of the fields of interest to minorities: to exclude the applicability of the Framework Convention at the sub-State level would thus be contrary to the object and aim of the Convention itself.

16. In the Commission's opinion, this approach is in line with the spirit of the Framework Convention, which itself foresees cases in which a minority becomes locally a majority, and stipulates that this local majority will have to "respect the rights of others, in particular those of persons belonging to the majority"<sup>9</sup>.

17. Furthermore, the Commission has noted the opinion of the Advisory Committee on the Framework Convention in respect of the Finnish-speaking population living in the province of Åland<sup>10</sup>, that the latter, being a *minority-in-a-minority* "could also be given the possibility to rely on the protection provided by the Framework Convention as far as the issues concerned are within the competence of the Province of Åland", "taking into account the level of autonomy enjoyed and/or the nature of the powers exercised" by the said Province. It is also worth noticing the declaration made by Switzerland upon ratification of the Framework Convention, according to which "in Switzerland national minorities in the sense of the Framework Convention are groups of individuals numerically inferior to the rest of the population of the country *or of a canton* [emphasis added]"

18. The Commission is cognizant of the decision of the United Nations' Human Rights Committee in the case of *MacIntyre and others v. Canada*, in which the Committee held that *minorities* within the meaning of Article 27 of the United Nations' International Covenant on Civil and Political Rights are groups of people that represent a minority at the State level and not at the sub-State level<sup>11</sup>. The Committee observed that Article 27<sup>12</sup> of the Covenant concerns minorities within *States* and argued principally that the term *State* or *States* is always used in the Covenant as referring to States Parties to it.

19. The Commission points out, however, that the Framework Convention, contrary to the interpretation of Article 27 of the Covenant given by the Human Rights Committee in the aforementioned case, does not set out any territorial delimitation of the notion of minority and, to the contrary, expressly provides for protection of sub-minorities (see para. 16 above). Furthermore, if one applied to the Framework Convention the same literal interpretation that was given by the Human Rights Committee to Article 27 of the Covenant, this might lead to the conclusion that a State is not bound to ensure the protection of a minority within a sub-State entity, when this minority is not such at the State level<sup>13</sup>: a conclusion that is manifestly incompatible with the object and aim of the Framework Convention.

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<sup>9</sup> See Article 20 of the Framework Convention.

<sup>10</sup> Report concerning Finland, adopted on 22 September 2000. See Doc CM (2000) 17 of 23 November 2000

<sup>11</sup> See the decision of the United Nations Human Rights Committee of 31 March 1993 in the case of *MacIntyre and others versus Canada*, § 11.2 *Revue universelle des droits de l'homme*, 28 September 1993, vol. 5. pp. 156-164.

<sup>12</sup> Article 27 of the Covenant reads: "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 practice their own religion, or to use their own language."

<sup>13</sup> See the separate opinion of Ms Elizabeth Evatt and of Messrs Nisuke Ando, Marco Tullio Bruni Celli and Vojin Dimitrijevic in respect of the decision of the Human Rights Committee in the aforementioned case of *MacIntyre and others v. Canada*.

### C. Outline of the Belgian constitutional structure<sup>14</sup>

20. Belgium (whose population is approximately 10,200,000 people) is a federal State made up of three Communities<sup>15</sup> (a concept which refers to the persons which make them up and to the bond which unites them, in this case language and culture) - the Flemish Community, the French Community and the German-Speaking Community; three Regions<sup>16</sup> (based on economic criteria) - the Walloon Region (to which the French-speaking area and the small German-speaking area belong), the Flemish Region (monolingual) and the Brussels Region (bilingual), and four linguistic Regions<sup>17</sup> - the French-language Region, the Dutch-language Region, the bilingual Region of Brussels-Capital and the German-language Region<sup>18</sup>.

21. French-speakers represent approximately 40% of the population, Dutch-speakers approximately 58% and German-speakers approximately 0,7%<sup>19</sup>.

22. The three Regions, that are exclusively territorial, are superimposed on the Communities. The Walloon Region includes the French- and the German-language Regions. The Flemish Region corresponds to the Dutch-language Region; the Brussels Region to the bilingual Region of Brussels-Capital. The German-language Region is both a part of the Walloon Region (economically speaking) and an autonomous community - the German-Speaking Community (culturally speaking). The three Regions are in charge of matters concerning the environment, transportation, the economy etc.; Communities are competent for linguistic, cultural, educational and some social matters.

23. The competence of the communities is not entirely territorial: the powers of the Dutch-speaking and French-speaking Communities extend not only to the Flemish and Walloon Regions respectively (apart from the small German-speaking Region) but also, concurrently, to the Brussels-capital Region. In the absence of Flemish or French-speaking sub-nationality (legally, there are no Walloon, Brussels, French-speaking, German-speaking or Flemish citizens), the competences of the communities cannot concern categories of individuals and instead derive from the language used in theatres, libraries, schools or even hospitals. Accordingly, Brussels is subject to the competences of the Brussels Region as regards economic matters, and to the concurrent competences of the French-speaking and the Dutch-speaking Communities as regards cultural and some social matters.

24. The Belgian federalism is thus neither entirely territorial (because of this special competence of communities) nor personal (because no sub-nationality is recognised).

25. The use of languages in administrative matters is subject to the rule of unilinguism in the three single-language regions and to the rule of bilinguism in the Brussels-capital region (where Dutch-speakers represent approx. 15% of the population of the nineteen communes<sup>20</sup>).

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<sup>14</sup> For fuller reference, see J-C Scholsem, "The situation in Belgium", in: *Local self-government, territorial integrity and protection of minorities, Collection Science and Technique of democracy No. 16, 1997, pp. 68-76, CoE*

<sup>15</sup> See Article 2 of the Belgian Constitution.

<sup>16</sup> See Article 3 of the Constitution.

<sup>17</sup> See Article 4 of the Constitution.

<sup>18</sup> A number of dialects (Gaumais, Champenois, Walloon, Picard, Letzebuergesch, Ripuarish, Rhine-Maas Frankish, Brabantish, West Flemish, Marollien) are spoken in Belgium.

<sup>19</sup> There is no official census in Belgium; accordingly, these figures are just estimates.

<sup>20</sup> In the absence of any official census, this figure represents only an estimate. It is based on the circumstance

26. As of 1962-1963, people belonging to a different linguistic group than that of the relevant Region of certain fringe communes (those contiguous to a different linguistic region) are granted special status (linguistic facilities), i.e. they have the right to request that in their dealing with the authorities a language other than that of the region be used. As of 1988, these linguistic facilities can only be changed by a federal law with a special majority.

27. The communes with linguistic facilities are:

- all nine communes of the German-speaking Community (linguistic facilities are granted to French-speakers);
- six communes situated in the periphery of Brussels, i.e. in the Flemish Region (linguistic facilities are granted to French-speakers, who are very numerous and in some cases represent the majority of the population);
- some communes on the border between the Walloon and the Flemish Regions (facilities are granted to the Dutch-speaking and the French-speaking respectively); and
- two borderline communes in the Walloon Region (linguistic facilities are granted to the German-speaking).

28. In Belgium there are also Italians (approx. 280,000, 75% of which are in the Walloon Region), Moroccans (approx. 105,000, 55% in Brussels), Turks (approx. 63,000, 50% in Flanders) and Spaniards (approx. 58,000, 50% in Brussels), as well as Algerian, Portuguese and Congolese communities.

29. At the level of the central State, Belgium has a dualist structure. The Council of Ministers must be made up of the same number of Dutch-speaking and French-speaking ministers<sup>21</sup>. For an increasing number of laws, the Constitution requires a “special majority” (two-thirds of the vote in both Chambers (Chamber and Senate) subject to a quorum of the two language groups and a majority of each language group in each Chamber). By requiring a majority of each language group, the Constitution enshrines the idea of joint management, on an equal footing, of the essential structural elements of the Belgian State by the French-speaking and the Dutch-speaking communities.

30. This dualism is also visible through a special procedure, called the “alarm bell”, whereby every law, with the exception of special and budgetary laws, may be challenged. Three-quarters of the members of a language group, either in the Chamber or the Senate, may pass a motion declaring that a bill or proposal threatens to cause serious damage to relations between the communities<sup>22</sup>. In such a case, the procedure is suspended and the text is submitted to Cabinet (in which the languages are equally represented) that must exercise a kind of political arbitration.

31. Finally, the Belgian Constitutional Court, called the Arbitragehof/Cour d’arbitrage - whose jurisdiction was extended in 1989 from settlement of conflicts of competences between the State, the communities and the regions to all questions relating to compliance with the principle of equality by the various legislatures - is composed of 6 Dutch-speaking

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*that at the last Regional Council elections, 14,19% of the electors voted for Dutch-speaking candidates, who obtained 19 out of 75 seats (i.e. 14, 67%)*

<sup>21</sup> *with the possible exception of the Prime Minister: see article 99 of the Constitution*

<sup>22</sup> *See article 54 of the Constitution*

and 6 French-speaking judges. One Dutch-speaking and one French-speaking preside over the Court on an alternate basis.

32. As regards the German-speakers, they are afforded certain guarantees. In the Senate, for instance, the 70 senators are divided into two language groups (41 Dutch-speakers and 29 French-speakers), while one senator is elected by the Council of the German-speaking community to represent the German-speakers of Belgium. German-speakers, accordingly, appear to be more of a protected minority than a party having to say in determining the policies of the federal State.

33. Brussels is a sort of “inverted mirror image” of Belgium. Where in Belgium the French-speaking group is protected, the Dutch-speaking group is protected in Brussels. The mechanisms of protection are rather similar. For example, in a five-member government of the Brussels Region, Dutch-speakers must have two mandates and one of three positions of State secretary. They are consequently over-represented in the Brussels executive, as are the French-speakers at the federal level, thanks to parity in the Cabinet.

#### **D. Determination of what groups of people represent a minority within the meaning of the Framework Convention in Belgium**

34. The Commission has been requested in particular to give its opinion as to whether Belgian Dutch-speakers, French-speakers and German-speakers may be considered as minorities within the meaning of the Framework Convention. The Commission has not been asked to address the question of the applicability of the Framework Convention to the other groups living in Belgium (see para. 29 above) independently of the citizenship of their members, a question that is not specific to the Belgian situation only.

35. As Belgium is a federation made up of three linguistic groups (“communities”), the Commission needs to apply the criteria outlined above (paras. 9 and 17 respectively). Accordingly, it will establish:

- a) whether French-speakers and German-speakers are to be considered minorities (and in particular whether the first one is co-dominant) at the State level and
- b) whether any of the three linguistic groups can be regarded as a minority at the regional and local level.

36. French-speakers are numerically inferior to Dutch-speakers (40% as opposed to 58%). Nevertheless, they participate in the management of the State institutions, on an equal footing with the Dutch-speaking (see above, paras. 29-31). Accordingly, in the Commission’s opinion, at the State level they do not constitute a minority within the meaning of the Framework Convention.

37. The German-speaking community, on the other hand, whilst enjoying the same internal autonomy, was not put on an equal footing with the French-speaking and Dutch-speaking communities when the rules were set up governing the composition and functioning of the central State bodies (see para 32 above). German-speakers, accordingly, are to be considered a minority at the State level<sup>23</sup>.

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<sup>23</sup> *If and to the extent that they so wish: see Article 3 of the Framework Convention*



38. As regards the regional and local level, regard must be had to the distribution of competences between the various regions and communities as well as to the territorial division of the country. In the Commission's opinion, French-speakers may be considered as a minority in the sense of the Framework Convention in the Dutch-language Region and in the German-language Region, as may Dutch-speakers and German-speakers in the French-language Region, if and to the extent that they so wish.

39. As regards the Brussels Region, the Commission notes that the Dutch-speaking, although representing only 15% of the population, are granted substantial guarantees and in many respects put on the same level as the French-speaking (see para. 33 above). Accordingly, they seem to be in a co-dominant position and are not to be considered as a minority within the meaning of the Framework Convention.

## **E. Conclusion**

40. A group of persons that is numerically inferior to the rest of the population, shares common ethnic, cultural, linguistic and religious features and wishes to preserve them is not to be considered as a minority in the sense of the Framework Convention if it finds itself in a dominant or co-dominant position.

41. In contexts of decentralization of powers, the existence of a "minority" within the meaning of the Framework Convention and in particular the question of whether a group is dominant or co-dominant must be assessed both at the State and at the sub-State levels.

42. Accordingly, when defining the notion of minorities within the meaning of the Framework Convention, the Belgian authorities should take into account the possible position of dominance or co-dominance of each linguistic group and assess it both at the State and the sub-State levels.

43. The Commission is of the opinion that in Belgium, in the light of the existing equilibrium of powers between the Dutch-speaking and the French-speaking at the State level, French-speakers do not constitute a minority within the meaning of the Framework Convention at this level, despite being numerically inferior to Dutch-speakers.

44. German-Speakers, instead, are to be considered as a minority in the sense of the Framework Convention at the State level.

45. At the regional level, having regard to the distribution of competences between the various regions and communities and of the territorial division of the country, the Commission considers that French-speakers in the Dutch-language Region and in the German-language Region may be considered as a minority in the sense of the Framework Convention, as may Dutch-speakers and German-speakers in the French-language Region.