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**ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION
FOR THE PROTECTION OF NATIONAL MINORITIES**

**COMMENTS OF THE GOVERNMENT OF
SWITZERLAND ON THE OPINION OF THE
ADVISORY COMMITTEE ON THE
IMPLEMENTATION OF THE FRAMEWORK
CONVENTION FOR THE PROTECTION OF
NATIONAL MINORITIES IN SWITZERLAND**

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INTRODUCTION

The Advisory Committee on the Framework Convention for the Protection of National Minorities adopted its opinion on Switzerland on 20 February 2003 and forwarded it to the Committee of Ministers on the same day. It was delivered by mail to Switzerland on 14 March 2003 for comment.

In ratifying the Framework Convention for the Protection of National Minorities (hereafter termed the "Framework Convention"), Switzerland reaffirmed its conviction that respect for minorities forms part and parcel of the protection of individual rights and is therefore not solely a matter of States' internal affairs. Switzerland accordingly considers it very important to pursue an open and constructive dialogue with the bodies monitoring the Framework Convention's implementation, namely the Council of Europe's Advisory Committee and Committee of Ministers.

Switzerland welcomes with great interest the adoption of the Advisory Committee's opinion on Switzerland. It notes that the committee's findings and comments demonstrate the seriousness with which the committee has examined the situation of minorities in Switzerland and appreciates the opportunity afforded it of submitting observations.

These observations by the Swiss Government concerning the Advisory Committee's opinion were drawn up by the Public International Law Directorate of the Federal Department of Foreign Affairs, working closely with all the relevant services of the federal administration, namely:

- the Political Directorate of the Department of Foreign Affairs
- the Federal Commission against Racism
- the Service for Combating Racism
- the Federal Bureau for Equality between Women and Men
- the Federal Office of Culture
- the Federal Statistics Office
- the Federal Justice Office
- the Federal Office for Immigration, Integration and Emigration
- the Federal Refugees Office
- the Federal Commission for Foreigners
- the Federal Personnel Office
- the Federal Communication Office
- the State Secretariat for the Economy.

The cantons of Bern, Fribourg, Graubünden and Valais, together with the Conference of Cantonal Directors of Education, were also invited to submit their comments.

The observations that follow, as also the Swiss Government's initial report on the implementation of the Framework Convention and the information supplementing that report, have been drafted in the three main official languages of the Swiss Confederation (French, German and Italian). The Advisory Committee's opinion, which was issued in English and French, has also been translated into German and Italian by the Swiss administration. All these documents are published in the three main official languages on the official website of the Public International Law Directorate of the Federal Department of Foreign Affairs and can thus be consulted by a wide public.

GENERAL OBSERVATIONS AND SUPPLEMENTARY INFORMATION

Re Chapter II: general remarks

Date of adoption of the new Federal Constitution

In paragraph 11 of its opinion, the Advisory Committee mentions that the new Federal Constitution was "*adopted in December 1998*".

In fact, while the federal order updating the Federal Constitution dates from 18 December 1998, it was put to the popular vote four months later. The Federal Constitution was thus adopted by the people and the cantons on 18 April 1999. It came into force on 1 January 2000.

Re Chapter III: specific comments on Articles 1-19

Re Article 1

Relevant international instruments

In paragraph 14 of its opinion, the Advisory Committee notes that "*Switzerland has ratified a wide range of relevant international instruments*".

In a letter dated 2 June 2003 to the United Nations Secretary-General, Switzerland stated that it recognised the competence of the Committee for the Elimination of Racial Discrimination (CERD) to receive and examine communications within the meaning of Article 14(1) of the International Convention on the Elimination of All Forms of Racial Discrimination concluded in New York on 21 December 1965.

Re Article 5

Switzerland, a pluralist community

In paragraphs 29 and 30 of its opinion, the Advisory Committee notes that "*the Swiss Confederation is made up of different communities from the point of view of their language, culture and religion. Switzerland is therefore a pluralist community in which it is difficult to identify minorities unambiguously [...] Having regard to this pluralist reality, the Federal Constitution does not contain any specific provision which protects minorities as such.*"

Here we must make the following clear: in Switzerland every cultural and linguistic community is regarded as a constituent element of the Swiss people and State on a footing of complete equality with the other cultural and linguistic communities. Switzerland thus adopts a dynamic viewpoint which, over and beyond the dialectic between majority and minority, aims not only at maintaining balance but also at promoting understanding and dialogue between these diverse communities.

This idea is expressed in the Preamble to the Constitution (hereafter abbreviated to Cst), which states "*The Swiss people and cantons [...], determined to experience their diversity together in respect for others and in equity [...], decide on the following Constitution [...]*." Likewise, under Article 2(2) Cst, the Confederation's objective is, inter alia, to encourage "*the country's internal cohesion and cultural diversity*". We should also mention Article 4 Cst, which stipulates that "*The national languages are French, German, Italian and Romanche.*" As the Federal Council stressed in its Message concerning a new Federal Constitution, "*The country's four languages are an important element of the Swiss Confederation. The mention of languages as principal*

*vehicles for culture indicates the general conditions of national culture. In their capacity as national languages they are equal."*¹

Provisions applicable in linguistic matters

In paragraph 30 of its opinion, the Advisory Committee notes that "*...the Federal Constitution does however contain important provisions in the linguistic field*", mentioning in a footnote "*In particular Article 18 on freedom of language and Article 70 on the rules on the use of the official languages.*"

Article 4 Cst. mentioned above should be added to this list.

Re Article 9

Airtime for radio programmes in Romanche

In paragraph 48 of its opinion, the Advisory Committee notes that "*...the public radio broadcasting service broadcasts approximately two hours of programmes in Romanche every day in Graubünden.*"

In fact, the daily airtime devoted to broadcasts of radio programmes in Romanche amounts to over 14 hours. Radio Rumantsch (RR) is thus available to Romanche-speakers throughout the day from 6am to 9pm Monday to Friday and from 8am to 9pm at the weekend.

Re Article 12

Second language taught in school

In paragraph 61 of its opinion, the Advisory Committee notes that "*In several cantons, obligatory teaching of English now begins earlier than the teaching of a second national language.*"

In fact, Appenzell Inner Rhoden is currently the only Swiss canton to have actually introduced the early teaching of English in schools. The second language taught in all the other cantons is currently still a national language.

OBSERVATIONS ON THE MAIN FINDINGS AND COMMENTS OF THE ADVISORY COMMITTEE

Re Article 3

Personal scope of the Framework Convention

In paragraph 83 of its opinion, the Advisory Committee finds "*that it would be possible to consider the inclusion of persons belonging to other groups in the application of the Framework Convention on an article-by-article basis*" and considers that "*Switzerland should consider this issue in consultation with those concerned.*"

The Framework Convention contains no definition of the idea of "national minority". In accordance with the explanatory report on the convention, it was decided to adopt a pragmatic approach because it was not possible to find a definition that could be endorsed by all Council of

¹ Federal Council Message of 20 November 1996 concerning a new Federal Constitution, FF 1997 II, 138.

Europe member States. It is therefore for States to define the groups which they wish to describe as national minorities within the meaning of the Framework Convention. On this point, the Advisory Committee itself indicates in paragraph 17 of its opinion that *"in the absence of a definition in the Framework Convention itself, the parties must examine the personal scope of application to be given to the Framework Convention within their country."*

Accordingly, when it ratified the Framework Convention, Switzerland made the following declaration: *"Switzerland declares that 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, whose members are Swiss nationals, have long-standing, firm and lasting ties with Switzerland and are guided by the will to safeguard together what constitutes their common identity, in particular their culture, their traditions, their religion or their language."*

This declaration reproduces elements of the definition of the concept of "national minority" given in Article 1 of the draft Additional Protocol to the European Convention on Human Rights proposed on 1 February 1993 by the Council of Europe's Parliamentary Assembly. It is also patterned on Article 2(1) of the draft European Convention for the Protection of Minorities adopted on 4 March 1991 by the European Commission for Democracy through Law. The definition adopted by Switzerland therefore corresponds to the concept of "national minority" used in most other European countries. It lies fully within the limits of the margin of appreciation recognised by the Advisory Committee in paragraph 18 of its opinion.

It should also be noted that persons or groups not constituting national minorities within the meaning of the Swiss declaration nevertheless enjoy the fundamental rights and individual freedoms guaranteed by the Federal Constitution (particularly Article 8: general principle of equality; Article 15: freedom of conscience and religion; Article 18: freedom of language) and the federal acts resulting therefrom, by the European Convention for the Protection of Human Rights and Fundamental Freedoms (particularly Article 9: freedom of thought, conscience and religion; Article 14: prohibition of discrimination), by the International Covenant on Civil and Political Rights (Articles 2 and 26: non-discrimination in the enjoyment of the rights recognised in the Convention; Article 27: right of minorities) and by the International Convention on the Elimination of All Forms of Racial Discrimination. Guarantees are also enshrined in the cantonal constitutions. Unlike Swiss nationals, however, foreigners do not enjoy the right to settle anywhere in the country (Article 24(1) Cst), to leave Switzerland and return whenever they so desire or to receive protection against expulsion or extradition (Article 25(1) Cst). Foreigners enjoy civil rights on the same footing as Swiss nationals (Article 11 of the Swiss Civil Code). As for political rights, while these are not accorded to foreigners at the federal level, certain cantons grant them for elections and votes at canton and municipality level.

Re Article 4

Safeguards against discrimination

In paragraph 85 of its opinion, the Advisory Committee finds that *"the Swiss authorities might envisage the adoption of fuller legislation covering discrimination."*

In Switzerland, equality before the law and the prohibition of discrimination stem primarily from Article 8 Cst. The first paragraph of this provision enshrines the principle that all human beings are equal in the eyes of the law. The second paragraph prohibits discrimination on grounds of origin, race, sex, language, social situation, way of life, religious, philosophical or political beliefs and bodily, mental or psychical deficiency. The ban on discrimination is general and covers all fields. The third paragraph explicitly embodies the principle of sexual equality.

Equality before the law and the prohibition of discrimination are also incorporated in various international legal instruments to which Switzerland is a signatory. These include the European Convention on the Protection of Human Rights (ECHR), the United Nations Covenant on Civil and Political Rights (Convention II), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and ILO Convention No 111 concerning Discrimination in respect of Employment and Occupation. As Switzerland has a monist tradition, a treaty ratified by the Federal Council becomes an integral part of the Swiss legal system as soon as it enters into force in Switzerland (immediate validity). Contrary to what happens in other countries, it is therefore unnecessary to pass a special law in order to transpose the rules of international law into the national legal system. Article 5(4) Cst requires the Confederation and the cantons to respect international law. This obligation applies to all State bodies and follows from the principle that international law takes precedence over domestic law². Article 191 Cst provides that "*The Federal Court and other authorities are required to apply federal laws and international law.*" In practice, protection of the rights guaranteed by these international conventions is ensured by Swiss constitutional case law.

At the domestic level, the appropriate services have examined the question of the concept of overall cross-sectoral legislation to combat discrimination. Because of the complex subject matter and in order to achieve the most thorough and flexible ban possible on all forms of discrimination, the best course seemed to be to introduce special legislation. In order to apply the ban on discrimination set out in Article 8 Cst, it was decided to adopt a sectoral approach. An example is the Federal Act on Equality between Women and Men of 24 March 1995³. A Federal Act on the Elimination of Inequalities affecting Handicapped Persons was likewise passed by Parliament on 13 December 2002⁴ and will come into force on 1 January 2004.

Bans on discrimination specific to certain fields have also been introduced in some types of federal legislation. The federal Bill on Human Genetic Analysis⁵, for example, states in Article 4 that "*No one shall suffer discrimination by reason of his genetic inheritance.*" The Federal Council stated in its Message concerning the Bill of 11 September 2002 that "*The ban on all discrimination based on an individual's genetic inheritance is addressed both to State bodies and to private individuals. However, the Bill does not provide for any special penalty - whether civil or criminal - on behalf of any person who considers he has been discriminated against by reason of his genetic inheritance. Article 4 of the Bill is of practical value only in conjunction with other legal provisions. For example, a contract which excludes the carriers of genetic abnormalities from access to certain services or benefits, if such difference in treatment cannot be objectively justified, would be contrary to Article 4 and hence to Article 20 of the Code of Obligations (CO); it would then be wholly or partly void. Furthermore, a decision by a social-insurance scheme considered discriminatory could also be challenged by an administrative-law or public-law appeal based, inter alia, on Article 4 of the Bill and Article 8 of the Federal Constitution. Article 4 may also be applicable for the interpretation of civil-law provisions on protection of the personality (Articles 27 and 28 et seq CC). Communication to a third party of genetic data concerning an individual solely in order to harm that individual could come under the Criminal Code provisions on honourable behaviour and on confidentiality and privacy (Article 173 et seq of the Criminal Code)*"⁶.

² Federal Council Message of 20 November 1996 concerning a new Federal Constitution, FF 1997 L136

³ RS 151.1

⁴ Federal Act on the Elimination of Inequalities affecting Handicapped Persons, FF 2002 7640. See also Federal Council Message of 11 December 2000, FF 2001 1605

⁵ Federal Bill on Human Genetic Analysis, FF 2002 6957

⁶ Federal Council Message of 11 September 2002 concerning the Federal Act on Human Genetic Analysis, FF 2002 6841, 6876

Mention should also be made of Article 16 of the Federal Bill on the Transplantation of Organs, Tissues and Cells⁷, which states, "*No one may be subject to discrimination in the allocation of an organ. Foreigners must be treated equally with Swiss nationals as regards the allocation of organs. A foreigner not domiciled in Switzerland may be refused an organ only if transplantation is not absolutely necessary for his survival.*" The Federal Council also issued a Message concerning the Convention on Human Rights and Biomedicine⁸, which also contains an express ban on all discrimination.

A number of cantons, moreover, have recently revised their constitutions and taken the opportunity of including anti-discrimination provisions. Examples are Article 10(1) of Bern canton's Constitution of 6 June 1993⁹, Article 5(2) of the Constitution of the canton of Appenzell Inner Rhoden of 30 April 1995¹⁰, Article 7 of the Constitution of the Republic and canton of Tessin of 14 December 1997¹¹ and Article 8 of the Constitution of the Republic and canton of Neuchâtel of 24 September 2000¹².

Statistics concerning prosecutions and convictions for discrimination

In paragraph 85 of its opinion, the Advisory Committee considers that "*the Swiss authorities should contemplate collecting statistical data on discrimination more systematically, in particular as regards judicial decisions.*"

Since the entry into force in 1995 of Article 261*bis* of the Criminal Code (hereafter termed the CCd), the Swiss Attorney-General's Department and, since January 2000, the Federal Police Office have been listing acts that have been the subject of official complaints arising from this provision. Proceedings leading to an acquittal or on which no further action was taken are also included.

Summary of enforceable judgments issued

Jugements	1995-1997	1998	1999	2000	2001	2002 (provisional figures)	Total since
Anti-semitism	3	5	7	4	0	1	20
Revisionism	4	2	3	6	2	1	18
Racist writing/talk	6	3	11	11	12	11	54

⁷ Federal Bill on the Transplantation of Organs, Tissues and Cells, FF 2002 247

⁸ Federal Council Message of 12 September 2001 concerning the European Convention of 4 April 1997 for the Protection of Human Rights and the Dignity of the Human Person with regard to the applications of biology and medicine (Convention on Human Rights and Biomedicine) and the Additional Protocol of 12 January 1998 prohibiting human cloning, FF 2002 271

⁹ Rs 131.212

¹⁰ RS 131.224.1

¹¹ RS 131.229

¹² RS 131.233

Other	1	0	0	2	1	0	4
Suspensions (acquittals no further action)	18	18	23	22	19	19	119
Total judgements issued	32	28	44	45	34	32	215

Since 1995, 215 rulings (all categories) arising out of Article 261*bis* CCd have been listed.

The Federal Commission against Racism is also drawing up a data base on judgments relating to Article 261*bis* CCd which it plans to publish shortly.

The Society for Minorities in Switzerland (SMS) and the Foundation against Racism and Anti-Semitism (FRA) record cases and incidents with racist or anti-Semitic overtones in Switzerland, even when they do not fall within the scope of Article 261*bis* CCd, and publish a chronological list of cases of racism in Switzerland. This chronology is based on police announcements, press releases and reports by the Attorney-General's Department or the Federal Police Office. It is updated every month and may be consulted on the FRA's website¹³. Though not exhaustive, it gives detailed accounts of cases of discrimination.

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Racist Remarks	5	5	6	10	16	8	25	3	12	18	20
Circulation of racist material or recordings	1	3	5	11	20	16	9	4	6	10	6
Holocaust denial	1	6	3	2	2	4	2	0	3	1	0
Far Right marches or activism	1	1	2	1	5	6	13	3	26	15	15
Threats, harassment	1	5	13	13	6	3	6	5	12	2	6
Damage, graffiti	23	4	9	10	7	10	7	12	7	8	10

¹³ Chronologie sur les cas de racisme en Suisse: <http://www.gra.ch> This website also provides an up-to-date summary of convictions (with reasons) for offences against Article 261*bis* CCd.

Bodily harm	9	6	19	15	6	3	17	7	18	19	12
Arson, shootings	20	13	15	0	5	2	1	5	5	2	3
Discrimination	1	4	6	6	6	5	4	2	3	5	4
Rejection of naturalisation applications	0	0	0	4	1	7	25	17	16	30	24
Racism on the part of public authorities	1	1	7	8	6	8	2	0	3	2	7
Miscellaneous	4	5	8	14	6	8	4	4	8	8	9
Total	67	53	93	102	86	80	115	62	119	120	116

The FRA website also offers additional documentation covering a selection of cantonal decisions relating to Article 261*bis* CCd. This documentation deals with a number of cases categorised according to distinguishing feature, object of protection and legally protected interest.

Re Article 5

Protection and development of the culture and identity of the Travelling community

In paragraph 88 of its opinion, the Advisory Committee finds that *"the main problems facing Travellers today relate essentially to the lack of stopping places and transit sites, administrative obstacles making it difficult to exercise itinerant trades, and children's schooling."*

Stopping places and transit sites

Regarding the *"lack of stopping places and transit sites"*, the Advisory Committee considers in paragraph 88 of its opinion that *"the cantons concerned should review their legislation on land-use planning and building in order to remedy any shortcomings such as the absence of a provision concerning the possibility of creating transit sites both in the relevant legislation and land-use plans."*

In fact, as shown in the study on Travellers and land-use planning done at the request of the Foundation "Assurer l'avenir des gens du voyage suisses", the existing legal instruments covering land-use planning are adequate to meet Travellers' needs and allow all cantons to set up stopping places and transit sites. The competent Swiss authorities and the above-mentioned Foundation are trying to combat the negative stereotypes that impede the creation of stopping places and transit sites (see below the comments on Article 6 of the Framework Convention, particularly paragraph 80 of the Advisory Committee opinion).

Itinerant trade

With regard to the "*administrative obstacles making it difficult to exercise itinerant trades*", these were removed by the entry into force of the Federal Act on Itinerant Trading¹⁴ and its implementing ordinance on 1 January 2003.¹⁵ This new legislation ensures that persons who practise itinerant trade shall be able to do so throughout national territory and lays down the minimum requirements for such trade. It harmonises the different cantonal laws which had applied up to that time, including those concerning licences and fees. As pointed out by the Advisory Committee in paragraph 89 of its opinion, the recent entry into force of this legislation "*should significantly simplify the administrative procedures with which Travellers have to comply in order to exercise their trade in more than one canton.*"

The initial reactions of Travellers to this new legislation have been very positive, as explicitly confirmed by the Foundation "Assurer l'avenir des gens du voyage suisses". It is particularly appreciated that the authorisation issued by the competent cantonal authority allows its holder to practise itinerant trading throughout the national territory and is valid for five years.

The Swiss authorities take note of the Advisory Committee's suggestion in paragraph 89 of its opinion that "*...the authorities should evaluate in the years to come the implementation of this Act together with Travellers' representatives in order to ensure that it is effective.*"

Schooling of Traveller children

Regarding "*children's schooling*", it should be pointed out that Travellers do not have a uniform position. The central Travellers' association, "Radgenossenschaft der Landstrasse", is in the main content with the present situation whereby children can accompany their parents on their travels during the summer period, whilst being monitored and supervised at a distance by teachers. However, other Travellers, like teachers, regret that many Traveller children are educationally rather backward.

Proposals meeting the needs of Travellers are hard to formulate because the latter do not all have the same expectations of school. Some of them only want their children to be able to read, write and count. Travellers often distrust school as an instrument of assimilation. Dialogue rather than new legislation is needed if progress is to be made in this field. Travellers must be shown that if their children attend school, and possibly become apprentices, this will enable them to organise their lives better as Travellers, as well as to use and exploit new gaps in the market.

Re Article 6

Measures to promote tolerance towards Travellers

In paragraph 90 of its opinion, the Advisory Committee considers that "*the persistence of stereotypes and other clichés when municipal referenda are held on the establishment of stopping places should be vigorously fought against by the authorities.*"

The competent Swiss authorities and the Foundation "Assurer l'avenir des gens du voyage suisses" consider the struggle against prejudice and the promotion of improved understanding between Travellers and the settled population to be an ongoing task. The Foundation takes part in various public-relations projects and often acts as go-between when specific problems have to be solved.

¹⁴ RS 943.1

¹⁵ RS 943.11

It is particularly active when local referenda are held on the creation of stopping places and transit sites.

Ballots on applications for naturalisation

In paragraph 91 of its opinion, the Advisory Committee finds that "*generalised refusals to grant naturalisation to applicants from certain countries have been reported in recent years at the time of ballots held in certain municipalities. It considers that such instances can but seriously affect the spirit of tolerance, intercultural dialogue and mutual respect and understanding. It also considers that they are problematic from the point of view of the prohibition of discrimination, especially in the absence of a legal remedy.*"

On 9 July 2003, the 1st Public-Law Division of the Federal Tribunal delivered its judgment in a public hearing concerning the validity of the local popular initiative "Einbürgeringen vors Volk" ("Naturalisation - Let the People Decide") lodged on 5 October 1999 by the Zurich branch of the Union Démocratique du Centre (UDC)(Case 1P.1/2003). The Zurich local council had ruled the initiative invalid and the State Council of Zurich canton, the cantonal appeal authority, had delivered a similar ruling. The persons responsible for the initiative lodged a public-law appeal against the decision (appeal on grounds of violation of political rights). It was therefore the Federal Tribunal's task to examine whether the initiative, which called for a popular vote (compulsory referendum) on the granting of civic rights to foreigners born abroad, complied with the Federal Constitution.

As was the case with the Zurich authorities, the Federal Tribunal considered that the initiative ran counter to the Constitution and rejected the appeal unanimously. The federal judges stressed that the naturalisation procedure was not exempt from the application of legal principles. Although a right to naturalisation could not be relied on, the competent authority must observe procedural safeguards and ensure that the applicant's personal rights were protected, particularly as regards data protection; it could not take a decision in an arbitrary or discriminatory fashion. As a party to an administrative procedure, the applicant had the right to a hearing and in particular, if his application were rejected, to obtain a reasoned decision (Article 29(2) Cst); this was in line with the Federal Tribunal's case law whereby the more extensive the authority's discretion, as in the case of the naturalisation procedure, the stricter must be the requirements to state the reasons for a decision. Moreover, the stating of reasons is a pre-condition for monitoring naturalisation decisions from the viewpoint of the prohibition of discrimination (Article 8(2) Cst). Given these principles, it was considered that, in the case at issue, the system of popular vote (by a poll) did not enable the public authority to take a decision accompanied by a statement of reasons and thus meet constitutional-law requirements; this shortcoming could not be rectified by a subsequent statement of reasons drawn up by an elected body of the authority. Regarding the duty to state reasons, the Federal Tribunal left open the question whether, and to what extent, naturalisation decisions taken by local assemblies accorded with the Constitution. Examining the initiative from another viewpoint, the federal judges also considered it unconstitutional on the grounds that implementation of the right of citizens to be informed (Article 34(2) Cst) about the personal situation of the applicant (as part of the examination of his eligibility for naturalisation), which could not be avoided in a local authority of the size of Zurich, was disproportionately harmful to the applicant's right to protection of his privacy (Article 13 Cst).

On the same day, the 1st Public-Law Division of the Federal Tribunal delivered in public session its judgment in Case 1P.228/2002 on the local vote (by means of a poll) organised in Emmen (Luzern) on 12 March 2000. The citizens of that municipality had approved the naturalisation of eight applicants of Italian origin but had rejected all the other applications, most of them submitted by persons from the former Yugoslavia. Certain rejected applicants had

appealed in vain to the State Council of Luzern canton. They subsequently filed a public-law appeal to the Federal Tribunal against the cantonal government's decision.

The Federal Tribunal unanimously allowed the appeal. On the basis of the result and the context of the vote, it considered that the applicants for naturalisation from the former Yugoslavia had been penalised by reason of their origin. As this difference in treatment could not be justified on objective grounds, they had been the victims of discrimination prohibited by Article 8(2) Cst. Referring to the grounds adduced in judgment 1P.1/2003 of the same date, the federal judges also considered that the cantonal authority had been wrong to rule that a statement of reasons could not be required for a naturalisation decision resulting from a poll, thus infringing Article 29(2) Cst. The decision of the Luzern State Council was therefore set aside; the federal judges left it to the competent authorities of the municipality and canton to continue the naturalisation procedure relating to the applicants and to arrange for the local-vote system employed at Emmen to be replaced by a system complying with the Federal Constitution.

On 21 November 2001 the Federal Council submitted to Parliament its Message concerning the nationality right of young foreigners and revision of the Nationality Act¹⁶. The Federal Council's bill provides for changes in the following areas:

- Easier naturalisation for 1st and 2nd generation foreigners
- Reduction of the required residence period
- Simplification of procedures
- Harmonisation of naturalisation fees
- Introduction of a right of appeal.

The Federal Assembly's Chambers agreed with little difficulty on several of the Federal Council's proposals. However, the question of a right of appeal against arbitrary treatment gave rise to a more lively debate. The National Council came out in favour of introducing such a right of appeal¹⁷, but the Council of the States refused to follow suit¹⁸. It is now therefore for the former to assert its will.

Re Article 9

Support for written media in Romanche

In paragraph 92 of its opinion, the Advisory Committee finds that "*there are reports according to which the only Romanche daily is in a difficult financial situation.*" It therefore considers that "*the authorities should examine, in consultation with the Romanche minority, the various possibilities for securing sufficient funding for this daily newspaper.*"

The Confederation and Graubünden canton indirectly support the Romanche written media by paying a total annual contribution of 1 million Swiss Francs to *Agentura da Novitads Rumantscha* (ANR). Since the ANR was founded in 1997, however, Graubünden publications have ceased to receive any direct financial support. Under Section 2(2) of the Federal Act of 6 October on Financial Aid for Safeguarding and Promoting Romanche and Italian languages and culture¹⁹, support for the Romanche press is possible only in order to protect and promote the

¹⁶ Federal Council Message of 21 November 2001 concerning the nationality right of young foreigners and revision of the Nationality Act, FF 2002 1815

¹⁷ BO 2002 N 1173 et seq

¹⁸ BO 2003 E 629 et seq

¹⁹ RS 441.3

Romanche language. Centralising support through the ANR also means that all Romanche-language journals, not only the daily *La Quotidiana* but also *La Posta Ladina* and *La Pagina da Surmeir*, are treated fairly. Payment of direct additional support to *La Quotidiana* would be incompatible with freedom of the press and unacceptable to the Swiss association of newspaper and magazine publishers.

The predicament of the press in general (collapse of the advertising market) has not spared the Romanche press. It must also be recognised that *La Quotidiana* is not very popular in certain areas, which remain loyal to the two other Romanche organs, *La Posta Ladina* and *La Pagina da Sumeir*. It would be a mistake if the State tried to intervene to regulate this market.

Re Article 10

Use of Italian in relations between individuals and the federal administrative authorities

In paragraph 94 of its opinion, the Advisory Committee finds that "*there are reports suggesting that written applications made in Italian to certain federal offices are sometimes replied to in German*" and considers that "*the federal authorities should further raise the awareness of federal administration staff to the need to reply systematically in Italian to requests submitted in that language.*"

The Swiss authorities deplore the facts noted by the Advisory Committee and believe they represent very isolated cases.

According to Article 70(1) Cst, "*The official languages of the Confederation are French, German and Italian. Romanche is also an official language for the purpose of relations between the Confederation and Romanche-speakers.*" A direct result of this provision is that requests addressed to the central federal government may be drafted in any of the official languages. Decisions by the federal authorities are made known, forms drawn up and entries in registers made in the official language of their recipient.

In order to ensure that this principle was respected in practice and Italian thus treated fully as an official language in the same way as French and German, the Federal Council decided as far back as 1991 to develop Italian translation services, in four stages. In the first stage (1991), 13 new posts were established, inter alia for the preparation of texts required for the legislative process, particularly during parliamentary debates. In the second stage (1996), 10 additional posts were established for the purpose of communication in Italian within governmental departments and offices. In the third and fourth stages (2002), 18 further posts were created, enabling material to be supplied in Italian not only inside the government but also to the public. These measures thus meet the needs of Parliament, the public and the government. With their 93 current posts, the Italian translation services are not yet at full strength compared with the French services, which have 129 posts. It is therefore planned to develop the Italian translation services further.

Reference should also be made to the recent "Federal Council Instructions concerning the promotion of plurilingualism in the federal administration" of 22 January 2003, whose purpose is to "*promote plurilingualism at the workplace and exploit pluricultural properties*". In accordance with paragraph 21 of these Instructions, "*Departments will ensure that the linguistic communities are fairly represented in all areas of administration and at all hierarchical levels according to their proportion of the resident population of Swiss nationality. Variations in favour of the Latin languages are possible. The situation of the decentralised services shall be taken into account in an appropriate fashion.*" The Instructions also deal with working languages, translation and drafting, and with the linguistic requirements which must be observed

by employees. In addition, they stipulate certain measures regarding staff recruitment, selection, evaluation and development. Finally, they require that "*The federal administration shall be presented in the four national languages (French, German, Italian and Romanche) on publicity or information material, inscriptions, forms, headings, Internet publications, answering machines etc.*"

In practice, co-ordinators are responsible for seeing that the minority languages are respected in their respective departments and subordinate administrative units. The Federal Personnel Office regularly arranges meetings between co-ordinators at which progress in promoting plurilingualism is assessed. Furthermore, offices over a certain size appoint certain persons to be responsible for promoting plurilingualism. These persons intervene when cases of non-respect can be identified.

Finally, the draft federal Bill on National Languages and Understanding between Linguistic Communities expressly provides that anyone dealing with the federal authorities may do so in the language of his choice and must be able to receive a reply in that language. Similarly, a Romanche-speaker may deal with the Confederation in a Romanche dialect or in 'rumantsch grischun' and expect a reply in the latter language from the Confederation. The Federal Council is due to approve the draft bill this year before submitting it to Parliament.

Use of a minority language in relations between individuals and infra-cantonal authorities

In paragraph 95 of its opinion, the Advisory Committee finds that "*in practice, certain difficulties arise in the context of relationships between persons belonging to linguistic minorities and administrative authorities at infra-cantonal level.*" It considers that "*in such a situation, the authorities concerned should be encouraged to take account of the Framework Convention when they have to rule on the linguistic affiliation of such municipalities and, in particular, to consider whether there is sufficient demand within the meaning of*

Article 10(2) to authorise the use of the minority language in official relations."

Under Article 70(2) Cst, "*The cantons shall determine their official languages. In order to preserve harmony between the linguistic communities, they shall bear in mind the traditional distribution of languages and make allowance for indigenous linguistic minorities.*" The linguistic autonomy enjoyed by the cantons is therefore not absolute. The cantons have to bear in mind the traditional distribution of languages and their freedom to alter the linguistic frontiers is therefore limited. While these frontiers cannot be completely fixed, they must possess a degree of stability. Any occasional change in the proportions of the different linguistic communities may consequently not be a reason for an immediate modification of the linguistic frontiers. Furthermore, the cantons must take account of indigenous linguistic minorities. This is implicit in freedom of language (Article 18 Cst) and the prohibition of discrimination (Article 8 Cst), under which linguistic minorities in a particular region must be able to employ their language in relations with the authorities or at school. Measures taken by the cantons in the exercise of their linguistic autonomy may restrict freedom of language only if they have a legal basis, are justified on public-interest grounds, respect the proportionality principle and do not prejudice the principle of freedom of language (Article 36 Cst).

Re Article 11

Wording of signs, inscriptions and other information of a private nature visible to the public

In paragraph 96 of its opinion, the Advisory Committee finds that "*certain limitations of an exceptional nature to the right to display in a minority language signs, inscriptions and other information of a private nature visible to the public exist in a few municipalities in Graubünden with a view to preserving the Romanche language, whose survival is under threat in some regions.*" It considers that "*Romanche could be protected just as well by an obligation to put up bilingual private signs, and encourages the competent authorities to look into this possibility.*"

The right to present in a minority language signs, inscriptions and other information of a private nature visible to the public stems from the principle of freedom of language in Switzerland (Article 18 Cst). Under Article 36 Cst, however, this right may be subject to restrictions provided they have a legal basis, are justified by the public interest, respect the proportionality principle and do not prejudice the principle of freedom of language. Regarding the case to which the Advisory Committee refers, the Federal Court has already had the opportunity to check whether the conditions mentioned above were respected on that occasion. The matter concerned a building regulation in a mainly Romanche-speaking municipality where luminous signs are permitted in Romanche only. The Federal Tribunal considered that, given the perilous situation of Romanche, the measures concerned, which were designed to safeguard both the extent and the homogeneity of the mainly Romanche areas, could be said to involve a major public interest and that in the case concerned, a painstaking assessment of the various interests at stake had led to the conclusion that there was an overwhelming case for prohibiting signs in a language other than Romanche²⁰.

Re Article 12

Promotion of a knowledge of the history and concerns of the Jewish community and of phenomena connected with anti-Semitism

In paragraph 97 of its opinion, the Advisory Committee considers that "*the competent authorities should make efforts to have teaching programmes reflect more the history and concerns of the Jewish community in Switzerland and take account of the phenomena connected with anti-Semitism.*"

The Swiss Conference of Cantonal Directors of Public Instruction (CDIP) has made it clear that schools have a duty, at all levels, to educate their pupils in respect for their neighbour, tolerance between religious, ethnic, social and other groups, and peace between peoples.

In particular, at its plenary meeting on 17 June 2003, the CDIP decided to launch a "Holocaust Remembrance Day" in the schools of all Swiss cantons as of 1 January 2004. The date chosen is 27 January, when the Auschwitz concentration camp was liberated by the Red Army. The day of remembrance will be devoted to teaching pupils about the Holocaust and other crimes against humanity, and to the promotion of human rights, tolerance and inter-religious and intercultural dialogue.

²⁰ ATF 116 Ia 345

Promotion of a knowledge of the language and culture of Travellers

In paragraph 98 of its opinion, the Advisory Committee finds that "*the federal authorities have initiated discussions with representatives of the community of Travellers with a view to securing better knowledge of their linguistic and cultural needs.*" It considers that "*the authorities should step up their efforts in this area.*"

The first dictionary of the Jenish language was recently published in Switzerland. It summarises the state of knowledge of the language and includes an annotated glossary, an etymology and a bibliography. The dictionary represents the pioneering work of Hansjörg Roth: *Jenisches Wörterbuch: Aus dem Sprachschatz Jenischer in der Schweiz*, Verlag Huber, Frauenfeld/Stuttgart/Vienna 2001. Priority is currently being given to the preparation of teaching materials - if possible, based on play - in order to make it easier for Traveller children to learn Jenish.

Re Article 13

Language of instruction in private schools

In paragraph 99 of its opinion, the Advisory Committee finds that "*the legislation of certain cantons sets out limits as to the language of instruction in private schools.*" It considers that "*such limitations are problematic from the point of view of Article 13 of the Framework Convention insofar as they seem to prevent the establishment of private schools providing instruction in a minority language outside its area of traditional establishment.*" It considers, furthermore, that "*the competent authorities should ensure that the legal provisions of the cantons concerned do not constitute a barrier to satisfying any needs in this respect, in particular for Italian-speakers living in large cities such as Bern.*"

It should be pointed out, first of all, that while the Federal Constitution does not explicitly guarantee the right to set up, direct or attend a private school, it does not rule it out either. Personal freedom, freedom of conscience and religion, freedom of opinion and information, and freedom of science and economic freedom furthermore protect certain aspects of the right to set up, direct or attend a private school²¹.

Moreover, education is the responsibility of the cantons. These are entitled to decide, for example, to what extent and on what conditions they will accept minority-language schools on their territory. It must be made clear that only private schools which provide compulsory schooling or which request official recognition of their instruction are subject in appropriate cases to authorisation and possibly to restrictions regarding the language of instruction.

Section 66(1) of Bern canton's Act on Compulsory Schooling to which the Advisory Committee refers in paragraph 65 of its opinion makes the choice of language of instruction in schools that provide compulsory schooling dependent on the principle of language territoriality and is aimed essentially at preventing the Germanisation of the French-speaking part of Bern canton through the creation of German-language private schools. It should be noted that Bern canton and city not only tolerate a French-language school but have also been giving it financial support for several years.

In practice, private schools play a significant role in Switzerland. Around 100,000 schoolchildren a year do their compulsory schooling in private schools. The latter have played a

²¹ In this connection, see the Message concerning the guarantee in the Constitution of St.Gall canton, FF 2002 1778-1779

pioneering role in introducing bilingual-teaching methods, particularly in French-speaking Switzerland.

Private schools offering instruction in a language other than the official language of the place concerned are usually set up for economic reasons. Some of these schools, particularly in Bern and Geneva, also meet a need on the part of diplomats, whose stay in Switzerland is usually short. The setting up of private schools

providing instruction in Italian and Romanche outside those languages' areas of traditional establishment is perfectly feasible from a legal viewpoint. However, we are unaware of any initiative to set up such schools, for example in Bern or Zurich.

Re Article 14

Possibility of receiving instruction in a minority language outside its area of traditional establishment

In paragraph 100 of its opinion, the Advisory Committee finds that "*the possibility for persons belonging to a minority to receive full primary education in their language is limited in practice by the principle of territoriality.*" It considers that "*the authorities concerned should be encouraged, when they have to rule on the enrolment of pupils in schools with instruction in the minority language offered by a neighbouring municipality, to take account of the Framework Convention and, in particular, to consider whether there is sufficient demand within the meaning of the aforementioned provision.*"

As the Advisory Committee itself points out in paragraph 69 of its opinion, "*...there are in Switzerland subtle equilibria as between freedom of language and the principle of territoriality and [...] the cantons continue to have a wide autonomy in this field, which enables them to come up with subtle responses to specific situations.*" The freedom of language enshrined in Article 18 Cst guarantees everyone's right to express himself in the language of his choice, in particular in his mother tongue. However, it does not guarantee the right to receive instruction in one's mother tongue in all circumstances. By virtue of their linguistic autonomy, the cantons may organise education according to a territorial breakdown of languages. The principle of language territoriality is embodied in Article 70(2) Cst, under which, when they determine their official languages, the cantons must take account of the territorial distribution of languages and of indigenous linguistic minorities. This principle is qualified to some extent by Article 70(3) Cst under which the Confederation and cantons must promote understanding and exchanges between linguistic communities.

According to the Federal Tribunal's case law, constitutional law does not require public authorities to offer private individuals settling in their territory education in a language other than used officially in that area. However, the private interest of parents in being able to educate their children in their mother tongue, provided they bear the costs of their choice, may take precedence over an authority's interest in preserving its linguistic homogeneity and facilitating its educational planning. While maintaining the validity of the territoriality principle, the Federal Tribunal accordingly considered that, provided another authority agreed to admit a child to a French-language school and the parents were willing to bear the costs, requiring that child to attend a German-language school constituted a disproportionate restriction on freedom of language²². Similarly, the Federal Tribunal recently considered that a refusal to allow a child of German mother tongue residing in a French-speaking municipality to attend German-language classes at a school in a neighbouring municipality represented a disproportionate attack on the

²² ATF 122 I 236, 247 (recital 4e ee)

constitutional freedom to be educated in one's mother tongue. It was ruled that, from the viewpoint of the proportionality principle, the parents' private interest in being able to educate their child in their mother tongue, provided they bore the costs of their choice, took precedence over the public interest of the French-speaking municipality in preserving its linguistic homogeneity and facilitating its educational planning²³.

The possibility for children to attend school in a neighbouring municipality offering education in the minority language is explicitly provided for by the Graubünden Education Act. Under Section 16(2) of the Act, a child may, on request, attend school in a neighbouring municipality. The municipalities concerned agree on the education costs, which are generally borne by the municipality of residence. In the event of dispute, decisions about who should pay for the schooling, and how, much are made by the Education Department. It has to be said that very little use is made of the possibility of schooling in a neighbouring municipality offering education in a minority language (ie Romanche or Italian). In a few rare cases, an application is made in the reverse sense for the provision of education in a neighbouring German-language school in order to escape Romanche. Some municipalities offer bilingual education, which is very successful. Graubünden educational legislation requires a second cantonal language to be taught in all the canton's State schools, normally from the fourth school year onwards. Romanche or Italian can thus be chosen as the second language of instruction in German-language municipalities.

Determination of the language of instruction in public primary schools in the Graubünden municipalities

In paragraph 101 of its opinion, the Advisory Committee finds that "*the freedom accorded to Graubünden municipalities to decide on the language of instruction used in public primary schools may present some risks owing to the lack of clear criteria as to the language of instruction.*" It considers that "*the greatest possible caution should be exercised in examining any change in the language of instruction at the municipal level, particularly along the linguistic border.*"

A total revision of the constitution of Graubünden canton was agreed by popular vote on 18 May 2003. The new Article 3 relates to languages: its first paragraph restates that German, Italian and Romanche are the canton's national and official languages. The second paragraph provides that the canton and municipalities shall take and support the necessary measures to preserve and promote Romanche and Italian. They shall encourage understanding and exchanges between the linguistic communities. Finally, paragraph 3 provides that the municipalities and districts shall define the language(s) they wish to use for official purposes and for instruction within the limits of their powers and in co-operation with the canton. In so doing, they shall keep in mind the traditional territorial distribution of languages and take account of indigenous linguistic minorities. The canton now therefore has some say in deciding on the official languages and languages of instruction of the municipalities.

It is very unusual for a municipality to decide to change a language of instruction. The last such example dates back 20 years, when the municipality of Bergün/Bravuogn changed to German in 1983. Of the other municipalities which have chosen German, some had never had a primary school before, so that the change was more apparent than real (eg Ilanz, Domat/Ems), or made this choice long ago (eg St Moritz 1910).

²³ Federal Tribunal Judgment of 2 November 2001, 2P.112/2001 (recitals 4-5)

In extremely mixed regions such as Haute Engadine where nearly all municipalities now have a majority of German-speakers, basic schooling (from kindergarten to school year 6) is always provided in Romanche. This is striking and shows considerable attachment to the Romanche language. However, the situation is precarious in some municipalities because of the large majority of German-speakers compared with inhabitants speaking other languages. The municipalities of Samedan and Pontresina have therefore ended up introducing bilingual education. The municipality of Trin (Surselva) plans to do the same.

Re Article 15

Measures to ensure balanced participation by the different linguistic regions in economic life

In paragraph 103 of its opinion, the Advisory Committee finds that "*the unemployment rates in French-speaking Switzerland and Ticino are higher on average than those in the German-speaking cantons and that enterprises are increasingly tending to re-deploy their decision-making centres to large cities, most often in German-speaking Switzerland.*" While recognising that there are limits to the action that a State can take in this matter, the Advisory Committee considers that "*the authorities should pay more attention to this phenomenon and endeavour to develop further measures capable of limiting its effects.*"

The Confederation has already taken measures in the area of regional policy, particularly through the federal order assisting the economic zones undergoing redeployment²⁴. The regions mentioned by the Advisory Committee are being aided by supporting the development of new economic activities through direct assistance to businesses.

Participation mechanisms for Travellers

In paragraph 104 of its opinion, the Advisory Committee finds that "*participation mechanisms for Travellers are still inadequate and that dialogue and co-operation with the Federal authorities were developed only fairly recently.*" It considers that "*the Federal authorities should consider the possibility of reinforcing the competences of the Foundation "Assurer l'avenir des gens du voyage suisses" with regard to co-ordination, as well as the composition of its constituent organs*".

The Council of the Foundation "Assurer l'avenir des gens du voyage suisses" is composed of five representatives from the Traveller community, two from the Confederation, two from the cantons and two from the municipalities. Through this body, the workings of which are completely open, Travellers are involved right from the start in discussions of matters or the preparation of measures concerning them. The Foundation is also a forum where Travellers can make known their wishes and concerns. The Foundation's activity was, among other things, a considerable factor in Parliament's adoption of the new Federal Act on Itinerant Trading.

²⁴ RS 951.93