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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE DRAFT LAW ON AMENDMENTS
TO THE LAW ON NATIONAL MINORITIES
IN LITHUANIA**

on the basis of comments by

Mr Sergio BARTOLE (Substitute member, Italy)
Mr Pieter VAN DIJK (Member, The Netherlands)

Introduction

1. By letter dated 24 February 2003, Mr. Darius Arbaciauskas, Deputy Permanent Representative of Lithuania to the Council of Europe, requested the Venice Commission to give an opinion on the Draft Law on Amendments to the Lithuanian Law on National Minorities (CDL (2003) 13).

2. The Venice Commission invited Mr S. Bartole to act as a rapporteur on this issue. At its 54th plenary session (Venise, 14-15 March 2003), the Commission invited the Secretariat to circulate the opinion of Mr Bartole to its members with a view to its adoption through a written procedure. Mr P. Van Dijk made some additional comments, which have been taken into account in the present opinion. In the preparation of this opinion, the Venice Commission also co-operated with the Secretariat of the Framework Convention on National Minorities.

I. General remarks

3. Lithuania was among the first states in Central and Eastern Europe, which adopted, as early as 1989, a Law on National Minorities, amended and supplemented in 1991. On 23 March 2000, it ratified the Framework Convention for the Protection of National Minorities (hereinafter: the Framework Convention), which became binding for Lithuania on 1 July 2000. According to Article 138.2 of the Lithuanian Constitution, the provisions of the Framework Convention are a "*constituent part of the legal system of the Republic of Lithuania*".

4. The present draft Law on Amendments to the Lithuanian Law on National Minorities (hereinafter: the Draft Law) aims at replacing the existing law of 1989.

The Draft Law establishes general principles and guidelines implementation of which requires the adoption of special normative acts. However, taking account of the status of the Framework Convention in the Lithuanian legal system, and considering that the majority of the Convention's provisions are not self-executing provisions, substituting new *framework* legislation for the existing one might not be the most appropriate means to implement the obligations stemming from the Framework Convention and ultimately, to ensure the effective exercise of the rights of the national minorities in Lithuania.

II. Remarks with regard to specific articles

Article 2 - Scope of application

5. In Article 2, the Draft Law provides for a definition of "national minority" and "person belonging to national minority", which is to be welcomed as the Framework Convention does not give a similar definition. Two important aspects of these definitions are to be pointed out firstly, they give full weight to the right of a free choice of a group and of an individual to constitute or join, or to belong to "a nation or an ethnic group other than Lithuanian".

However, the use of the word “nation” in that respect might not be the most appropriate one¹, since there is no internationally agreed definition of that concept.

Secondly, the given definitions do not expressly mention the requirement of citizenship. In other words, they do not limit the protection of the rights of minorities only to persons belonging to minorities who are citizens of the Republic of Lithuania. Such an approach is in line with the general position of the Advisory Committee on the Framework Convention, which encourages its extensive interpretation by the contracting parties, with a view to ensuring its application also to non-citizens.

6. However, under Article 3.1 on the basic principles of the protection of the rights of persons belonging to national minorities, Lithuania reiterates its obligation to respect and protect “equal political, economic and social rights and freedoms to all its *citizens irrespective of their nationality*”. This provision seems to indicate the preference for restrictive protection, i.e. protection only for those persons belonging to national minorities who are Lithuanian citizens.

Furthermore, Articles 37 and 45 of the Constitution limit the protection of the rights of national minorities to Lithuanian citizens only. The effect of these constitutional provisions is that the guarantees laid down therein have constitutional status only for Lithuanian citizens. As Constitutions do not in general preclude stronger legal protection, the Commission is of the opinion that the provisions of the Draft Law should not be considered unconstitutional. Indeed, if Article 2 of the Draft Law may be held to implement the Framework Convention, then by virtue of Article 138 of the Constitution, the constitutional guarantees would apply also to persons belonging to national minorities who are not (or not yet) citizens of Lithuania.

In order to ensure the effective protection of the rights of minorities, the Commission recommends including necessary clarifications allowing to clearly determining the persons entitled to enjoy full protection of the rights guaranteed by the Draft Law. The Lithuanian authorities could also envisage reconsidering Articles 37 and 45 of the Constitution, in order to harmonise the Draft Law and the Constitution.

Article 3 - Specific rights of national minorities

7. Article 3 of the Draft Law establishes very important principles concerning the rights and legal status of persons belonging to national minorities. It addresses not only the legislature but also the administration, and the judiciary. The first three paragraphs are examples of provisions in the Draft Law, which require the adoption of specific laws or regulations. Paragraphs 4 to 6 provide for guidelines and criteria for the interpretation of the previous paragraphs (pars. 1 to 3).

8. Most of the rights guaranteed in the Draft Law shall be exercised in accordance with specific implementing laws. The Commission understands that these laws must be compatible with the general provisions in the Draft Law. In this respect, Article 3 raises the problem of the hierarchy of norms; the Draft Law has not been given a special status as a “Constitutional Law”. Consequently, other related laws in particular, the draft Law on Education, the Law on citizenship and the Law on the State Language, as well as posterior laws, may derogate from

¹ *In this regard, see also infra, III.11.*

the Draft Law. Under Article 102 of the Constitution, the Constitutional Court may review laws only for their conformity with the Constitution. The situation is different for the legal acts of the administration: they have to comply with the Draft Law and, if they originate from the President or the Government, may be reviewed by the Constitutional Court for their conformity with the Draft Law.

9. Several principles stated by Article 3 of the Draft Law are taken from the Law on National Minorities, presently in force, as for instance, Article 3.2 (development and preservation of national identity) and Article 3.3 (principle of non discrimination). The Commission notes with approval that Article 3.5 of the Draft Law clearly states that the implementation of the minority rights guaranteed by the Constitution, the Framework Convention, other international treaties, the Law on National Minorities and other laws, shall not be considered discriminatory. This means that, even if these rights constitute a “positive discrimination”, their exercise is allowed notwithstanding the international and domestic legal prohibition of discrimination. In this respect, it should be stressed that “positive discrimination” is legitimate only if, and to the extent that the positive action concerned is necessary in order to bring about substantive equality. The principle of proportionality should therefore be embodied here as a guiding principle for the legislature and the administration in determining necessary positive measures.

Article 4 - The right to freely choose one’s own nationality

10. Article 4 of the Draft Law establishes the right to freely choose one’s nationality. Having regard to the difference existing between the terms “nationality” and “citizenship” in Lithuanian language, it is assumed that the “right to freely choose his/her nationality” signifies the right to choose to *belong* to a “nation” different from Lithuania, or to a different ethnic (non-Lithuanian) group, in the sense of Article 2.1². In this case, Article 4 may be considered as a self-executing right, in full conformity with the Framework Convention.

11. The second and third paragraphs of Article 4 have as an important consequence that a person who wishes to belong to a national minority and, consequently, to enjoy his/her minority rights, needs effective protection if this requires his/her identification as a person belonging to a certain national minority in cases where such identification might create a risk of a discriminatory treatment.

Article 5 - The right to use a minority language

12. The Commission notes with approval that the right to use the language of the national minority is now clearly stated, as well as the right to use surname and first names in the minority language (Article 5, paragraphs 2 and 5). Furthermore, the right of the national minority to use the minority symbols and celebrate minority holidays is also explicitly affirmed (Article 5.7).

13. Some of these rights can be enforced without further legislation, as they do not imply the adoption of positive measures by the state but essentially protect an area of activity free from

² *In the field of national minorities, in some languages the term “nationality” is used in its geographical/historical and not political/legal meaning (see J.F. Allain, Some thoughts on language, in “The Protection of national minorities by their kin-state”, Science and technique of democracy, n°32, Venice Commission, Council of Europe Publishing, 2002, pp. 7-9).*

the state's interferences. Nevertheless, specific rules should be adopted when the exercise of the mentioned rights concerns general public interests: an example is the regulation providing for the writing of names and family names in passports of Lithuanian citizens of non-Lithuanian origin, which would be in conformity with the Constitution, and with the Lithuanian Constitutional Court's jurisprudence³. In this respect, the Commission welcomes the decision not to include specific provisions concerning passports, which is the case in the Law presently in force.

14. In accordance with Article 6 of the Draft Law, persons belonging to national minorities shall have the right to use, freely and without interference, his/her minority language, in private and in public, orally and in writing. While this right as such does not require the adoption of specific legislation, the criteria allowing the person belonging to a minority to exercise this right in its relations with the public administration are not clearly laid down. Furthermore, paragraph 1 introduces an important restriction of the right to use the minority language by stating that it shall be granted "without prejudice to the provisions of the laws governing the use of the state language in the public life of Lithuania". A comparable restriction ("within the rule of laws") can also be found in the third paragraph concerning the right to display public signs and inscriptions in the minority language, as well as in Article 8.1 in relation to the setting up and management of schools ("within the rule of law").

15. Persons belonging to national minorities shall also have the right to receive information from the public administration, in the minority language or in a language "acceptable to both parties". Considering the importance of the right of persons belonging to national minorities to use their mother tongue in their relations with administrative authorities, this provision raises concerns as to the willingness of the state to ensure the presence of officials able to provide information in the minority language. Furthermore, the effective exercise of the right to receive information is within the discretion of civil servants who shall give the information asked for "as far as possible" in the minority language or in a language "acceptable to both parties" (Article 6.2).

16. With a view of ensuring the effective exercise of the right to use a minority language, the Commission recommends that the Draft Law and the legislation regulating the use of a minority language, in particular in relations with public administration, include provisions providing for:

- a) the precise criteria and guidelines allowing to determine "the areas inhabited by persons belonging to a national minority in *substantial numbers*" where these persons may address the public administration in their mother tongue, or display public signs or inscriptions in the minority language;
- b) an administrative procedure to be followed by persons wishing to submit applications written in the minority language; and
- c) the precise conditions for displaying public signs or inscriptions in the minority language.

³ The Constitutional Court of the Republic of Lithuania ruling "On the compliance of the 31/1/1991 Supreme Council of the Republic of Lithuania Resolution "On Writing of Names and Family Names in Passports of Citizens of the Republic of Lithuania" with the Constitution of the Republic of Lithuania, of 21 October 1999.

17. The Commission also notes the lack of the right to display names of places in minority language in areas traditionally inhabited by minorities in substantial numbers. Indeed, Article 6.3 states the obligation for names of places to be displayed in their official form, “which in all cases shall mean the state language”. It may be questioned whether this restriction is really justified.

Article 7 - Protection of cultural heritage

18. The Commission welcomes the decision not to reaffirm Articles 7 and 9 of the Law presently in force, which submit the functioning of cultural organizations of national minorities to special *ad hoc* rules, which could discriminate against them. It is the Commission’s understanding that the establishment and the functioning of such organisations have to comply with the general rules on the organisation of private associations.

19. The implementation of the right to the protection of the cultural heritage of national minorities (Article 7) that does not substantially differ from the one guaranteed by the existing law, requires the adoption of the specific legislation.

Article 8 - Right to education in the minority language

20. The explicit recognition of the state obligation to take the necessary measures to ensure the effective exercise of the right to education in the minority language, through institutions of formal education is to be welcomed. Article 8 provides for two different systems of education affecting persons belonging to national minorities:

- in areas inhabited by a *substantial number* of persons belonging to a national minority, there shall be the possibility to set up and manage “state or non-state pre-school institutions and general education schools at all levels”, when the establishment of the school is requested by the minority, and when the request corresponds to a real need. In such institutions the mother tongue of the minority concerned shall be the language of instruction;
- in areas inhabited by a *small number* of persons belonging to a national minority, it shall be possible to establish, within the framework of public schools of general education, classes or optional courses as well as Sunday schools for the purpose of learning or improving the knowledge of minority language.

Here again, these provisions cannot be implemented without the adoption of specific legislation providing for precise criteria necessary to determine the areas concerned, setting up the necessary procedures for the establishment of the institutions or the courses envisaged, and for the submission of the necessary requests.

21. In this regard, the Commission notes the importance of the draft Law on Education. In accordance with Articles 2 and 29 of that draft Law, the conduct of the education process, and the teaching of several subjects in minority languages seem to be within the competence of institutions, which are not part of the public education system. Studying the minority language in governmental and municipal preschool education and general education schools is possible only additionally, and provided that there is a real need, a teacher of that language available, and that the education process is carried out in another teaching language (Article 29.3). In this case, it will be extremely difficult for those public schools, which teach and give

instruction in a minority language to operate on an equal footing with those, which teach and give instruction in the state language.

The Commission would therefore favour including necessary clarifications in both draft laws, in order to ensure the effective implementation of the right to education in a minority language.

22. While most of the provisions guaranteeing specific minority rights speak in terms of “shall”, there are certain provisions which use the term “may” (second and third paragraphs of Article 8), thus leaving a broad discretion for the competent authorities and consequently weakening the guarantees of minority rights.

IV. Representation of national minorities

23. The involvement of persons belonging to minorities in the various aspects of life in society is an important factor in their integration; this applies in particular, to what is commonly called public life, i.e. participation in state bodies. Although in most cases the representation of minorities in a state’s elected bodies is achieved through the application of the general rules of electoral law, a certain number of countries dispose of specific rules of electoral law providing for special representation of minorities in state bodies⁴. Article 55 of the Lithuanian Constitution provides that members of the Seimas shall be elected on the basis of “universal, equal and direct suffrage”. It further provides that the electoral procedure shall be established by law.

24. The Commission regrets that the Draft Law does not contain specific provision on the representation of national minorities in state bodies (national parliament and local councils, governmental bodies and judiciary). A specific guarantee of proportional representation is of the utmost importance, also for an effective enjoyment of other minority rights. The Draft Law should therefore at least include the reference to this important issue.

CONCLUSION

25. The Commission welcomes the initiative to amend the Law on National Minorities presently in force. However, limiting itself to providing only the legal framework, the submitted Draft Law seems neither to be an appropriate alternative to the existing legislation nor a satisfactory means of implementation of the Framework Convention into the Lithuanian domestic legal system. Moreover, the adoption of new framework legislation will further delay the implementation of the Framework Convention while in principle full respect of the obligations embodied in, or resulting from, a treaty should be guaranteed at the moment of its ratification.

26. In order to ensure the effective protection of the rights of national minorities in Lithuania, the legislation on national minorities should be more specific in relation to the scope of the minority rights embodied and the guarantees of their effective exercise. It should contain the essential elements of the rights whose regulation is delegated to special laws, in particular the right of the persons belonging to the national minorities to receive information in their mother

⁴ See the Venice Commission Summary report on participation of members of minorities in public life (CDL-MIN (1998) 001 rev., and the report on “Electoral law and national minorities”, CDL-INF (2000).

tongue in their relations with administrative authorities, and the right to receive instruction in minority languages in public schools. There is also a strong need to improve the coherence between different constitutional and legal provisions that regulate citizenship, education, and participation in public life.

27. The Venice Commission remains at the disposal of the Lithuanian authorities for further co-operation in the field of this Draft Law.