

The Republic of Lithuania

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I. Constitutional history, territory, people

I. THE GRAND DUCHY OF LITHUANIA AND THE COMMONWEALTH OF TWO NATIONS

The state of Lithuania was formed by the unification of several duchies in the Baltic Sea region by Mindaugas, the first King of Lithuania, in the first half of the thirteenth century. Mindaugas also brought Christianity to Lithuania, which was the last country in Europe to convert to Christianity. After several failed attempts by missionaries, it was 1387 before Lithuania finally converted, and in *Samogitia*, the north-western region of the country, as late as the early fifteenth century. The refusal of other Lithuanian dukes to accept King Mindaugas' conversion to Christianity in the second half of the thirteenth century led to a certain "weakening" of the country's international status from a kingdom to a grand duchy. In 1569 Lithuania and Poland formed a confederation with a common bicameral parliament and an elected king, who was given the title King of Poland and Grand Duke of Lithuania. This state was called a "Commonwealth (*Rzeczpospolita* in Polish) of Two Nations" since it comprised the Kingdom of Poland and Grand Duchy of Lithuania. The king was elected head of state without hereditary rights. He presided over the parliament, which held the principal legislative powers. The Grand Duchy of Lithuania had its own legal system, which was codified in the Lithuanian Statutes (*Lietuvos Statutai*) of 1529, 1566 and 1588. The Commonwealth of Two Nations existed for more than two centuries until 1795, when it was partitioned by Russia, Prussia and Austria.

2. THE FIRST WRITTEN CONSTITUTION

Towards the end of the Commonwealth's existence, the parliament, inspired by the French Revolution and the *Déclaration des droits de l'homme et du citoyen*, adopted Europe's first written constitution on 3 May 1791. The document's official title was the Law on Government, while in the text it was called a "constitution". The constitution did not proclaim a republican form of government but provided for a hereditary rather than an elected monarchy. Montesquieu's idea of the separation of powers found expression in the text of the constitution of 3 May 1791. The constitution abolished the principle of *liberum veto*¹ in the parliament, the existence of which had played a major role in the fall of the commonwealth. The constitution remained in force for only two years. The Commonwealth of Two Nations finally disappeared from the map of Europe in 1795. After the end of the World War I, the ideas of national sovereignty and the nation state inspired the creation of two separate republics, Poland and Lithuania.

1. In the parliament of the Commonwealth of Two Nations every single noble (who represented the council of nobles of a particular administrative unit in the parliament) had a right to veto any decision of the parliament, which meant that a single person could destroy the proceedings of the parliament. Historians regard *liberum veto* as an "abuse of democracy" and one of the main reasons for the country's decadence at the end of the eighteenth century.

3. BIRTH OF THE MODERN STATE

The modern state of Lithuania was created on 16 February 1918 by the Act of Independence, which proclaimed Lithuania an independent state and the successor to the Grand Duchy of Lithuania. After some hesitation about the country's form of government, in 1920 the Constituent Assembly (*Steigiamasis Seimas*) proclaimed Lithuania a democratic republic.² The First Lithuanian Republic³ lasted until 1940, when the Soviet army occupied the country following a secret agreement between Hitler and Stalin. The first Lithuanian democratic constitution was adopted in 1922, declaring Lithuania a republic with a parliamentary form of government. According to the 1922 Constitution, the unicameral parliament (*Seimas*) was the main actor in the political arena. Members of parliament would be elected for a period of three years by a system of proportional representation. Parliament had the right to elect and dismiss the president (by a two-thirds majority). The cabinet of ministers had to receive a vote of confidence from parliament. The president had the power of veto, which could only be overruled by an absolute majority of the members of parliament. The parliament had sole legislative powers, while governmental decrees had the status of subordinate legislation and could only embellish laws passed by parliament. Two later constitutions, which were adopted in 1928 and 1938 by the First Lithuanian Republic after a *coup d'état* in December 1926, strengthened presidential powers and left the country subject to an authoritarian regime.⁴

4. THE SOVIET OCCUPATION

The secret protocols of the Molotov-Ribbentrop Pact (August-September 1939) ultimately led to World War II. After Germany had occupied Poland and France, Soviet troops entered and occupied Lithuania, Latvia and Estonia in June 1940. Lithuania's president, Antanas Smetona, left the country the very next day. In August 1940 Lithuania and the two other Baltic countries were incorporated into the Soviet Union. On 23 June 1941, before German troops entered the country's territory, a provisional government was formed in Kaunas and proclaimed the restoration of independence. This declaration was never recognized by Hitler, and the provisional government was forced to go underground in August 1941. The Soviet re-occupation (the first Soviet occupation took place in 1940-1941) began in 1944 and was to last until 1990. When the Soviet army entered the country in 1944, an armed resistance movement was formed. It existed for almost ten years until 1953, when the head of the resistance movement, General Jonas Žemaitis-Vytautas (who some historians call the fourth Lithuanian president), was captured and

2. Attempts to make Lithuania a monarchy at the end of World War I, with Duke Wilhelm Karl von Urach as King Mindaugas II, failed after Germany's defeat. In 1918 the Lithuanian Council (*Lietuvos Taryba*), which was dominated by the political right-wing, invited Wilhelm Karl von Urach to become king and the latter agreed to accept the position. This invitation was made when Lithuania was still occupied by German troops. But after Germany's defeat at the end of 1918, any political links with Germany became unpopular. Moreover, the major political forces (Christian Democrats and Social Democrats) elected to the Constituent Assembly in 1920 were pro-republican.

3. There is some discussion in contemporary Lithuanian political and legal circles as to whether the republican tradition in Lithuania should be regarded as dating from the Commonwealth of Two Nations or from the inter-war republic (1920-1940).

4. The presidents of the First Lithuanian Republic were Aleksandras Stulginskis, Christian Democrat (1920-1926); Kazys Grinius, Lithuanian Peasant Popular Union (1926); Antanas Smetona, National Party (1926-1940). The latter came to power after a *coup d'état* on 17 December 1926.

executed. The Declaration of 16 February 1949,⁵ signed by the Council of the Resistance Movement for Freedom (*Lietuvos Laisvės Kovų Sąjūdžio Taryba*), was made part of the current Lithuanian legal system by a law of 12 January 1999.⁶

5. THE 1992 CONSTITUTION

Inspired by signs of the impending collapse of the Soviet empire and a certain political desire to reform the communist party, underground political, social and religious groups began to surface between 1988 and 1990 and new political groups and movements emerged in the country. On 24 February 1990, with their “independence” programme, the main social-political movement, the *Sąjūdis*, won the first free elections after the Soviet occupation, gaining more than two-thirds of the seats in parliament. The first session of the parliament was held on 10 March 1990. The very next day, 11 March 1990, the parliament proclaimed the Act of Restoration of the Independence of the Lithuanian State. This act was followed by passing the symbolic *Law on the Reinforcement of the 12 May 1938 Lithuanian Constitution*⁷ and by adoption of the *Provisional Basic Law*, which served as a transitional constitution. The validity of the 1938 Constitution was suspended on the same day. This Constituent Assembly (*Atkuriamasis Seimas*) completed its task by adopting the 1992 Constitution, after it had been approved in a popular referendum.

Article 150 of the 1992 Constitution also provides that two Constitutional Acts, which were adopted before the constitution itself and which represent the main constitutional foundations of the constitution, are constituent parts of the constitution.

On 11 February 1991, the parliament adopted the Constitutional Law “On the State of Lithuania”, which provided that “the state of Lithuania is a democratic and independent republic”, basing itself on the results of a plebiscite. The positive outcome of this

5. 16 February 1949 Declaration of the Council of Lithuanian Resistance Movement for Freedom (extract): “The Council of Lithuanian Resistance Movement, representing all of the military groups headed by an unanimous leadership within the territory of Lithuania declares: 1. The Council of Resistance Movement [...] shall be the supreme political body of the nation during the occupation period, in charge of the political and military struggle for liberation of the Nation. 3. Lithuania shall be a democratic republic. 4. The sovereign authority of Lithuania shall belong to the Nation. 6. Provisional National Council shall have legislative power from the end of occupation until democratic parliament will be elected [...] 14. New Constitution shall be adopted with regard to principles of democracy and human rights and the restoration of the State of Lithuania shall be implemented in accordance with the spirit of the 1922 Lithuanian Constitution [...] 16. The Communist Party, as dictatorial and being contrary to independence of the Lithuanian state and to fundamental principles of the Constitution, shall be declared illegal [...] 22. The Council, joining the efforts of other countries to create a permanent peace founded upon justice and freedom, drawing support from full implementation of the principles of democracy grounded in Christian morality and declared by the Atlantic Charter, President Truman’s 12 Points, The Universal Declaration of Human Rights and other declarations of justice and freedom, appeals to all democratic world for assistance in implementing its goals [...]”

6. The Resistance Movement for Freedom was an armed anti-Soviet organization that existed from 1944 to 1953. About 100,000 partisans joined the armed anti-Soviet resistance movement in the three Baltic states. The small teams of partisans hid themselves in forests and were known to the population as “the forest brothers”. Until 1949, all militias in Lithuania were divided into regional groups (*apygarda*) with different district military leaders (each regional group of partisans consisted of two to five corps, which were split up into smaller detachments and squads). For reasons of security, the partisans lived in underground bunkers in small groups of four or five persons. In 1949, nine regional districts finally unified and formed the Council of the Resistance Movement for Freedom. The chairman of the council (Jonas Žemaitis) was elected from among the leaders of the regional resistance districts. Organized anti-Soviet resistance in the country was finally smothered by the Soviet army and KGB agents in the 1950s. During the anti-Soviet struggle, about 20,000 “forest brothers” were killed in Lithuania alone. Another 140,000 people were sent to concentration camps and 118,000 were deported (see The anti-Soviet Resistance in the Baltic States. Genocide and Resistance Research Center of Lithuania. Vilnius. Akreta, 2002).

7. On 11 March 1990, the parliament symbolically restored the validity of the 1938 Constitution in the country in order to show that the Lithuanian state had *de jure* never ceased to exist. On 11 March 1990, the 1938 Constitution was valid for just one hour until the Provisional Basic Law was passed.

referendum was very important since the Soviet authorities accused the parliament of usurping public power in Lithuania".⁸

On 8 June 1992, in response to external attempts to incorporate Lithuania into the Commonwealth of Independent States (a form of political union of former Soviet republics dominated by Russia), the parliament adopted the Constitutional Act "On Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Alliances". This Constitutional Act was later approved in a plebiscite. The act provides that (i) Lithuania intends to maintain good mutual relations with all countries that were part of the Soviet Union, (ii) any activities designed to incorporate Lithuania into new alliances formed on the basis of the former Soviet Union are illegal and (iii) troops of the Russian army should not remain in the territory of Lithuania. This latter provision was very important from the perspective of constitutional law since it gave constitutional status to the unlawfulness of the presence of the Russian army in the territory of Lithuania.⁹

6. THE TERRITORY AND POPULATION

Lithuania is situated on the eastern shore of the Baltic Sea. In the fifteenth century, the Lithuanian Grand Duchy was the largest country in Europe, comprising a territory from the Baltic to the Black sea, including modern Belarus, Ukraine and some parts of (present) Poland. Modern Lithuania's boundaries have changed several times since 1918, but they have been stable since 1990. Currently, Lithuania covers an area of about 65,200 square kilometres. It is larger than Belgium, Denmark or the Netherlands. Lithuania's northern neighbour is Latvia. The two countries share a border that extends 453 kilometres. Lithuania's eastern border with Belarus is even longer, stretching 502 kilometres. The border with Poland on the south is relatively short, only ninety-one kilometres, but is very busy because of international traffic. Lithuania also has a 227 kilometre border with Russia. The Russian territory adjacent to Lithuania is Kaliningrad Oblast, which is the northern part of the former German East Prussia. Finally, Lithuania has 108 kilometres of Baltic seashore with an ice-free harbour at Klaipėda. The largest and most populous of the Baltic states, Lithuania has 97 km of coastline facing the open Baltic Sea, between Latvia and Russia's Kaliningrad region.

According to Article 10 of the Constitution, "the territory of the State shall be integral and shall not be divided into any state-like formations. The State boundaries may be altered only by an international treaty of the Republic of Lithuania after it has been ratified by four-fifths of all the Members of the *Seimas*." The text of the Constitution contains no provisions concerning the territories that form the Lithuanian State. It should be noted that the Republic of Lithuania has inherited its present territorial borders not only from the First Republic of Lithuania, but more especially from the so-called Lithuanian Soviet Socialistic Republic, whose borders were established by Stalin after the second Soviet occupation. Lithuania has never asserted any claims concerning its state boundaries since the Act "On the Restoration of Independence" of 11 March 1990. The state boundaries of the Republic of Lithuania are regulated by international treaties between Lithuania on the one hand and Belarus, Latvia, Poland and Russia on the other.

8. The Soviet Union started an economic blockade of Lithuania after the proclamation of the restoration of independence on 11 March 1990.

9. The last Russian troops did not withdraw from Lithuanian territory until 31 August 1993.

There are around 3 million inhabitants permanently living in Lithuania. Almost all of them are Lithuanian citizens. Double citizenship was greatly restricted for Lithuanian nationals after the 2006 judgment of the Lithuanian Constitutional Court.¹⁰ Lithuania is ethnically a rather homogeneous country: Lithuanians comprise 84% of all inhabitants, Poles 6% and Russians 5%. The overall urban population rate is about 67%. The dominant religious confession is Roman Catholicism (80%).¹¹

10. See 13-II-2006 ruling; <http://www.lrkt.lt/dokumentai/2006/1061113.htm>.

11. Department of Statistics, 2012 rate. See: <http://www.stat.gov.lt/en/>.

II. The 1992 Constitution and the sources of constitutional law

I. INTRODUCTION

A distinction can be made between historical and actual legal sources of constitutional law. The main historical sources of Lithuanian constitutional law, which do not have legal effect, are the Lithuanian Statutes (*Lietuvos Statutai*) of the sixteenth century, the Commonwealth's Constitution of 3 May 1791, the Declaration of Independence of 16 February 1918 and the Constitutions of the First Lithuanian Republic (in particular the Constitution of 1922). The actual legal sources of Lithuanian constitutional law are the Declaration of the Council of the Resistance Movement of 16 February 1949, the Act of Independence of 11 March 1990 and the Constitution of 1992, including the Constitutional Acts of 1991 and 1992 (the Preamble to the Constitution also has a normative character and is used by the Constitutional Court as a source in developing constitutional principles), constitutional principles (especially those developed by the Constitutional Court), the case law of the Constitutional Court, international treaties and agreements that have been ratified by the *Seimas* and organic and ordinary legislation.

Another important source of constitutional law in Lithuania is European law, in particular the European Convention on Human Rights and the case law of the European Court of Human Rights on the one hand and the founding treaties of the EC and EU (one could also include the EU's Charter of Fundamental Rights), secondary European legislation and the case law of the European Court of Justice on the other.

Legal doctrine can also be regarded as a source of Lithuanian constitutional law, but the Constitutional Court is fairly reluctant to quote scholarly opinion in its judgments. Decrees of the president and the government are not regarded as sources of constitutional law.

According to Article 138 of the Constitution, only international treaties that have been ratified by the parliament become a part of the Lithuanian legal system. In ratifying international treaties or agreements, the parliament has to pass a statute (an act of parliament). From this we can see that the relationship between the Lithuanian national legal system and international law contains elements of both the monist and dualist models.

According to the Law "On international treaties", international treaties and agreements that have been ratified take precedence over ordinary and organic legislation. Any international treaty that impinges on the sphere of parliamentary legislation has to be ratified. According to the case law of the Constitutional Court, international treaties that have not been ratified by the parliament must conform not only to the Constitution but also to parliamentary legislation.

The final text of the 1992 Constitution was predominantly influenced by three separate drafts. The first was a draft prepared by the *Sąjūdis* coalition, the second was produced by the Liberals, both of which included a model with a semi-presidential form of government, and the third was the draft constitution prepared by the Constitution drafting parliamentary commission, which suggested a parliamentary model of government. The

authors of the Liberal Party's draft constitution were of the opinion that the new constitution should be a modified version of the 1938 Constitution, while the other two groups prepared completely new documents. It was ultimately decided to adopt a new Constitution, but the final text of the 1992 Constitution could be described as a compromise between these three draft versions.¹²

According to Article 150, as amended, the 1992 Constitution formally consists not only of the fourteen sections in the main text of the constitution itself but also of four other constitutional acts: (i) the Constitutional Act "On the State of Lithuania" (1991), (ii) the Constitutional Act on the Non-Alignment of the Republic of Lithuania to Post-Soviet Eastern Unions (1992), (iii) the Law "On the Procedure for the Entry into Force of the Constitution" (1992)¹³ and (iv) the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" (2004).¹⁴

During the twenty years of its existence up to 2012, the 1992 Constitution has been amended nine times. The main text of the Constitution consists of a short preamble¹⁵ and fourteen chapters.

The main constitutional principles laid down in the Lithuanian constitution include democracy (Art. 1), equity and justice (Arts. 29, 31 and 109), the subservience of state institutions to the people (Art. 5), the sovereignty of the Nation (Arts. 2, 3, 4 and 9), representative democracy (Arts. 4 and 33), separation of state powers (Art. 5), constitutionalism (Arts. 6, 7 and 110), the protection of human rights as natural rights (Art. 18), the right of association (Art. 35), the principle of free elections (Arts. 34 and 55) and the independence of the judiciary (Art. 109). In its case law, the Constitutional Court has also developed other constitutional principles, which include adherence to the rule of law and the principles of proportionality, legal certainty, defence of legitimate interests, etc.

One of the main features of the Constitution is that it takes precedence over any other national legal act. This is provided for in Article 7, which states that any statute or other legal act is invalid if it conflicts with the Constitution. It is the task of the Constitutional Court to review the constitutionality of parliamentary legislation and decrees of the government and of the president (Art. 102). Judicial review of the constitutionality of "lower" executive decrees (e.g., those of ministers) is assigned by ordinary law to the administrative courts. Although the *ratio* of Article 7 of the Constitution implies that international treaties and agreements must also conform to the Constitution, it is debatable whether the Lithuanian Constitution always takes precedence over ratified international treaties, for example the Treaty on European Union. The answer to this question depends on which bench is considering it. If we consider it from the perspective of national law (especially that of the Constitutional Court), we can say that the Constitution prevails over any legal act, including international treaties. But from the perspective of European law, the judges of the European Court of Justice, in particular,

12. For example, the idea of direct presidential elections came from the Sajūdis; the provisions concerning the relations between the state and the church were taken from the Liberals' draft and the idea of organic legislation was taken from the Constitution drafting parliamentary commission draft.

13. This law was adopted at the same time as the Constitution.

14. The Constitutional Act "On Membership of the European Union" was adopted by parliament as a separate Constitutional Act on 13 July 2004 (after approval in a plebiscite), using the procedure for amending the constitution.

15. "The Lithuanian Nation, having established the State of Lithuania many centuries ago, having based its legal foundations on the Lithuanian Statutes and the Constitutions of the Republic of Lithuania, having for centuries staunchly defended its freedom and independence, having preserved its spirit, native language, writing and customs, embodying the natural right of the human being and the Nation to live and create freely in the land of their fathers, and forefathers – in the independent State of Lithuania, fostering national concord in the land of Lithuania, striving for an open, just and harmonious civil society and State under the rule of law, by the will of the citizens of the reborn State of Lithuania, adopts and proclaims this Constitution."

might arrive at a different conclusion, for example on the basis of the international principle *pacta sunt servanda*.

Another very important feature and principle of the Constitution is its *direct effect*. According to Article 6, the Constitution is directly applicable law. This means that every person may protect their rights in a court of law simply by invoking the provisions of the Constitution without having to wait for an appropriate act of parliament or governmental decree to be passed.

However, this raises another question. Is the principle of direct application of the Constitution only relevant for the Constitutional Court or does it also extend to other courts and legal subjects? I would adopt the latter view, although recent case law of the Constitutional Court refers to “centralized” application and interpretation of the Constitution. In my view, the constitutional principle of the direct effect of the Constitution could be severely weakened if the ordinary courts in Lithuania cannot directly apply the Constitution if, for example, the issue of the constitutionality of legislation has not been raised or when a statute is evidently unconstitutional.

A special legal status is accorded to organic legislation, which according to Article 69 of the Constitution should be adopted with a qualified parliamentary majority. The list of organic laws (*konstitucinių įstatymų sąrašas*), which was adopted by the parliament only in 2012, includes nine organic laws:¹⁶ National language organic law, National emblem organic law, National flag organic law, National anthem organic law, Referendum organic law, Electoral code adoption organic law, Popular legislation initiative organic law, Petition organic law and Emergency powers organic law. According to the hierarchy of legal instruments, based on case law of the Lithuanian Constitutional Court, organic legislation (*konstituciniai įstatymai*) should occupy an intermediate position between ordinary laws and the Constitution itself.

Lithuania has a long codification tradition, starting from the Lithuanian Statutes of the sixteenth century. Modern codification includes: Civil Code, Civil Procedure Code, Penal Code, Penal Procedure Code and Labour Code. Codes are adopted by ordinary law with the exception of Electoral Code, which is still to be drafted as organic law, codifying all existing ordinary electoral legislation.

2. AMENDMENT OF THE CONSTITUTION

The Lithuanian Constitution of 1992 could be described as a rather rigid document in terms of the ability to amend it. The Constitution was first adopted by the Constituent Assembly (*Atkuriamasis Seimas*) and later approved in a popular referendum. Two bodies have the power to amend the Constitution: the Nation and the parliament. The most significant provisions of the Constitution – those of Chapter I “The State of Lithuania” and Chapter XIV “Alteration of the Constitution” – can only be changed by the Nation in a referendum. All other provisions of the Constitution can be changed either by popular referendum (Art. 9) or by a double vote of the *Seimas*, with no less than three months elapsing between the two votes, if at least two-thirds of the deputies vote in favour of the amendment each time (Art. 148). However, the political reality is that in twenty years all eight constitutional amendments have been adopted by a vote in parliament. Only the 2004 Constitutional Act “On Membership of the Republic of Lithuania in the EU” (which was adopted using procedure of Amendment of the Constitution) was drafted and

16. 15-03-2012 Nr. XI-1932. Organic law On the list of organic legislation. Official gazette, 2012, Nr. 36-1772.

adopted by parliament after the people of Lithuania voted in favour of EU membership in a referendum.

An initiative to amend the Constitution requires the support of no less than a quarter of the members of parliament or no fewer than 300,000 members of the electorate (Art. 147). Once it is adopted, the president cannot veto a constitutional amendment and must sign and promulgate it. The amendment then enters into force not earlier than one month after its adoption (Art. 149).

The 1992 Constitution has been amended eight times in twenty years. The first amendment of the Constitution in 1996 changed Article 47. The original idea behind this article was to ensure that land in Lithuania could be owned either by private persons – Lithuanian nationals – or by the State. But in 1996 this provision was changed to allow companies to own land, but only land that is not used for agriculture (for instance, the land under their buildings). In 2003 this provision was altered again by removing all constitutional restrictions on the ownership of land.¹⁷

Another constitutional provision that has been amended twice is Article 119. According to the original provision, members of a municipal council were to be elected every two years. Under an amendment in 1996, their tenure was extended to three years, and in 2002 the term of office was extended to four years. Their term of office is now the same as that of members of parliament.

Two articles (Arts. 84 and 118) were amended on 20 March 2003, strengthening the powers of the President of the Republic by giving him the power to appoint the Prosecutor General with the assent of the parliament. Before the amendment, ordinary legislation assigned the power to appoint the Procurator General to the *Seimas*. Another amendment of 13 July 2004 fixed the date of parliamentary elections, which are now held on the second Sunday of October (Art. 57). The separate Constitutional Act “On Membership of the Republic of Lithuania in the European Union” was also adopted in 2004 using the procedure for alteration of the Constitution (Art. 148) and is now a part of the Constitution. Finally, on 25 April 2006, Article 125 concerning the competence of Lithuania’s central bank was amended to bring it into line with EU law.

3. THE 2004 CONSTITUTIONAL ACT ON THE MEMBERSHIP TO THE EU

On 1 May 2004, Lithuania and nine other countries joined the European Union. The country’s journey to accession to the EU was a long one. The government had already declared its adherence to internationally recognized principles of law and the protection of human rights in the Act of Restoration of Independence on 11 March 1990 after almost 50 years of Soviet occupation. In 1993 Lithuania became a member of the Council of Europe. In 1995 the president of the republic officially applied for accession to the EU and in 1996 the *Seimas* ratified the treaty of association with the EU. Finally, on 11 May 2003, the Lithuanian people approved accession to the EU in a popular referendum, and on 16 September 2003, the *Seimas* ratified the Athens Treaty on accession to the EU, by virtue of which Lithuania joined the EU on 1 May 2004.

In other words, it took nine years from the official application for membership before Lithuania finally joined the EU. During those nine years Lithuania implemented

17. Since the amendment of 23 October 2003, Article 47 (3) reads: “In the Republic of Lithuania foreign entities may acquire ownership of land, internal waters and forests according to an organic law.” A constitutional law adopted on 20 March 2003 stipulates a transitional period of seven years for ownership of agricultural land and forests by foreign subjects, including subjects of EU member states. No legislation concerning ownership of land by national legal persons had been passed up to 2006.

thousands of legal measures in order to comply with the *acquis communautaire*. From a constitutional law perspective, one of the most important legal instruments relating to Lithuania's accession to the EU is the amendment of the Constitution by the Constitutional Act "On the Membership of the Republic of Lithuania in the European Union" (13 June 2004), which was adopted two and half months after Lithuania joined the EU.¹⁸

During the accession process there were legal and political debates about whether it was necessary to adopt an amendment to the Constitution, and if so what the terms of the amendment should be. The answer was not clear since the Act on International Treaties (1999) already guaranteed the precedence of ratified treaties over national law in the Lithuanian legal system. On the other hand, however, it was not so clear whether this precedence also extended to the national Constitution. In order to get around this ambiguity, it was decided to incorporate some principles of European law into the Constitution, thus raising their status to constitutional law. In 2004, therefore, instead of amending a particular article of the constitution, a separate Constitutional Act was adopted, in accordance with the procedure for amending the Constitution (Art. 148), and became part of the Constitution. This method of amending the Constitution (in adopting separate constitutional act) was upheld in a ruling of the Constitutional Court on 13 December 2004.

As in other Central and Eastern European countries, any reference to the curtailment or delegation of sovereignty is a very sensitive matter in Lithuania. This can probably be explained by the fact that the sovereignty these countries lost after World War II was only restored in the 1990s after the withdrawal of Soviet troops. But the issue of sovereignty is even more sensitive in the Baltic countries, which had been largely erased from the European political map after World War II. The Constitutional Act on Membership of the EU, therefore, does not mention delegation of sovereignty but provides for "delegation of some competences of the Republic of Lithuania" (Art. 1 of the Constitutional Act), which sounds less dramatic to Lithuanian ears.

By virtue of ordinary legislation, international treaties that have been ratified by the *Seimas* take precedence over national legislation. Nevertheless, it was decided that the precedence and direct effect of European legislation had to be embodied in the Constitution, and a provision to that effect was included in Article 2 of the Constitutional Act. Of course, this provision does not completely solve the problem of the relationship between EU law, and first and foremost the provisions of the founding treaties, and the national Constitution. On the other hand, the wording of Article 2 may be used in the future to justify the precedence of EU law over the national Constitution: "The norms of the European Union law shall be applied directly and ... shall have supremacy over the laws

18. "1. The Republic of Lithuania as a Member State of the EU shall share with or confer on the EU the competences of its State institutions in the areas provided for in the founding Treaties of the EU and to the extent it would, together with the other Member States of the EU, jointly meet its membership commitments in those areas as well as enjoy the membership rights. 2. The norms of the EU law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the EU, the norms of the EU law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania. 3. The Government shall inform the Seimas about the proposals to adopt acts of EU law. As regards the proposals to adopt the acts of EU law regulating the areas which, under the Constitution of the Republic of Lithuania, are related to the competences of the Seimas, the Government shall consult the Seimas. The Seimas may recommend to the Government a position of the Republic of Lithuania in respect of these proposals. The Seimas Committee on European Affairs and the Seimas Committee on Foreign Affairs may, according to the procedure established by the Statute of the Seimas, submit to the Government the opinion of the Seimas concerning the proposals to adopt the acts of the EU law. The Government shall assess the recommendations or opinions submitted by the Seimas or its Committees and shall inform the Seimas about their execution following the procedure established by legal acts. 4. The Government shall consider the proposals to adopt the acts of EU law following the procedure established by legal acts. As regards these proposals, the Government may adopt decisions or resolutions for the adoption of which the provisions of Article 95 of the Constitution are not applicable".

and other legal acts of the Republic of Lithuania.” But according to case law of the Constitutional Court (see judgment of 14 March 2006), it is of the opinion that the words “other legal acts” do not encompass the national Constitution.

The executive branch of government has the right of initiative and principal powers on European issues. The government does not even have to issue a decree concerning a proposal to adopt EU legislation (Article 4 of the Constitutional Act). The Lithuanian parliament, learning from the experience of other member states, therefore included in the text of the Constitutional Act an obligation on the government to inform parliament of any proposals to adopt EU legislation. Moreover, if these proposals on EU legislation affect the competence of the parliament, the government has an obligation to consult parliament, which may even issue a recommendation on this matter. Article 3 of the Constitutional Act also stipulates that the government is obliged to cooperate with the parliamentary committees for European Affairs and Foreign Affairs on EU matters. Also important is the fact that these parliamentary committees can submit to the government the recommendations of the *Seimas* concerning the government’s proposals to adopt EU legislation, while the government has to inform the *Seimas* about its execution of the recommendations.

In 11 November 2004 Lithuania was the first EU Member State to ratify the Treaty establishing the Constitution for Europe. In 2008, without any substantial discussion in society, the Lisbon Treaty was also ratified by the Lithuanian Parliament as ordinary law (83 – pro, 5 – against and 23 – abstained).

III. System and form of government

I. THE SOVEREIGN POWER

Sovereignty is a modern legal and political concept to legitimate a supreme source of public power. The concept of sovereign state and external sovereignty is also used in international law, but in the context of constitutional law of a particular legal system it is internal sovereignty which is at issue here. The concept of “people” or “nation” as a source of sovereign power became popular in modern democracies by the end of the eighteenth century. For a better understanding, a distinction is made between *constituent* and *constitutional* sovereignty. “Constituent sovereign” means the completely free and autonomous actor or body establishing the state and – in a sense – pre-existing it. When the state and its constitution are established, the latter nominates the sovereign, which may be called the “constitutional sovereign”, for it has to function according to the rules in the constitution. According to the Preamble of the 1992 Constitution, the *constituent sovereign*, establishing the Lithuanian state, is the *Lithuanian nation (lietuvių tauta)* as a certain historical continuous *natio*. the idea of the *Lithuanian nation* as the founder of the state of Lithuania is enshrined in all Lithuanian contemporary basic legal documents, from the Act of Independence of 1918, the Constitutions of the First Lithuanian Republic, the Declaration of 16 February 1949, the Act of Restoration of the Lithuanian State of 11 March 1990 and the Constitutional Act of 1991, up to and including the 1992 Constitution. This historical ethnic concept is also found in the text of the 1992 Constitution itself, e.g. in Article 14 (the establishment of the Lithuanian language as the official state language) and Article 32 (“everyone who is Lithuanian may settle in Lithuania”).

Notwithstanding the fact that the Constitution *expressis verbis* mentions only one sovereign – a Nation – in its text some other autonomous phenomena are to be found, like social and political bodies, which are not only independent from the state, but also in a certain sense pre-exist it or in other ways play a constituent role. In this context, constitutional sovereignty might be vested also in citizens or even human beings,¹⁹ in municipalities and local government (Art. 120),²⁰ the European Union,²¹ the rule of law²² and even the Seimas, which according to the Constitution has some constituent

19. See e.g. Preamble of the Constitution: “...embodying the innate right of the human being to live and create freely in the land of their fathers...”; Art. 3: “...each citizen shall have the right to resist anyone who encroaches on the independence”; Art. 18: “human rights shall be natural (innate)” etc.

20. “Municipalities shall act freely and independently within their competence defined by the Constitution and laws”.

21. “1. The Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union.... 2. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania”. 2004 Constitutional Act “On membership of the Republic of Lithuania in the European Union”. Official Gazette. 2004, Nr. 111-4123.

22. Preamble of the Constitution: “striving for... harmonious civil society and State under the *rule of law*”; Art 5: “The scope of power shall be limited by the Constitution”; Art. 6: “Everyone may defend his rights by invoking the Constitution”; Art. 7: “Any law or other act, which is contrary to the Constitution, shall be invalid”; Art. 109: “While administering justice, the judge and courts shall be independent. When considering cases, judges shall obey only the law” Art. 110: “A judge may not apply a law, which is in conflict with the Constitution”.

features.²³ Of course, as well as playing a sovereign role, municipalities and national parliament might be considered as established “functional” institutions. Therefore, one may speak of a certain pluralism of constitutional sovereignty, which advocates the idea of decentralization of public power in the contemporary Lithuanian legal and political system.

Besides sovereign bodies and phenomena, the Constitution also provides for so-called “functional” public bodies (institutions with certain established functions), through which the Nation exercises its powers. According to Article 5 of the Constitution, public powers are divided amongst the parliament (*Seimas*), the president, the government and the judiciary. But a contemporary democratic state should not be seen only in the context of the traditional concept of the “tripartite” functional separation of state powers. Under other provisions in the Constitution, public powers are also exercised by other autonomous institutions: the National Audit Agency (Art. 133), the Bank of Lithuania (Art. 125), the ombudsman (Art. 73), local authorities (Art. 119) and the European Union. In other words, in contemporary Lithuania the separation of functional public powers is much more decentralized and even multi-layered.

2. POLITICAL REGIME AND FORM OF GOVERNMENT

Since regaining independence from the totalitarian Soviet Union in 1990, the Lithuanian State has been very sensitive about the issue of the political regime.²⁴ In acts passed on 11 March 1990, the new government announced its commitment to establishing a democratic state. A Constitutional Act of 1991, which was approved in a popular referendum, stipulates that the statement that “Lithuania is an independent and democratic Republic” is a constitutional rule and a fundamental principle of the state, which may be amended only by a majority of no less than three-quarters of the Lithuanian electorate. This principle of democracy was enshrined in Articles 1 and 148 of the 1992 Constitution and has been endorsed in the case law of the Constitutional Court on numerous occasions.

Form of government is not a strictly legal matter but rather a political issue. Nevertheless, legal science has something to say about it. The text of the 1992 Constitution is something of a compromise between the different models of a parliamentary regime and a semi-presidential regime. The final text of the Constitution includes elements of both models. On the one hand, the government must have the confidence of parliament and has to resign after parliamentary elections (Arts. 92 and 101), but on the other hand, the President of the Republic is elected directly by the people. The president’s tenure in office does not correspond with that of the parliament. The president appoints the prime minister and ministers, and the government has to “return its powers” upon the election of the president (Art. 78, 84 and 92). In other words, the fact that the President of the Republic of Lithuania is directly elected, together with the existence of a “strong” Constitutional Court with competence to review parliamentary legislation, allow us to refer to Lithuania’s form of government as what in French legal and political literature is called *parlementarisme rationalisé*.

Of course, in practice the form of government in Lithuania depends very much on the actual political actors, in particular the president’s ability to play a passive or active role in

23. Art. 4: “The Nation shall execute its supreme sovereign power either directly or through its democratically elected representatives”; Art. 148: “Amendments of the Constitution concerning other chapters of the Constitution must be considered and voted at the Seimas ...”.

24. This sensitivity was also influenced by the experiences with the First Lithuanian Republic, which turned into an authoritarian regime after a *coup d’état* in 1926.

political life and his relationship with the parliamentary majority. The political regime of the Second Lithuanian Republic can generally be described with the French term *cohabitation*, except for the period from 1993 to 1996 when President Algirdas Brazauskas and the parliamentary majority were from the same Labour Democratic Party (former communists). The interpretation of the form of government by the left-wing president can be said to have corresponded with the draft parliamentary-model constitution of the former communists. This interpretation meant that between 1993 and 1996, Algirdas Brazauskas, as President of the Republic and formal leader of the parliamentary majority party, played a fairly passive role in political life, leaving power mainly in the hands of the prime minister. It is too early in the political life of the country to say whether conservatives or liberals (or other centre-right political parties) would adopt a semi-presidential interpretation of the Constitution if they held the post of president and enjoyed a majority in the parliament.

There was a political crisis relating to the interpretation of the country's form of government in 1998 when the independent, liberal candidate Valdas Adamkus was elected to the office of president. President Adamkus was of the opinion that the government had to resign once the new President of the Republic had been elected. Conservatives and Christian Democrats, which together formed a majority in the parliament at that time, took a more parliamentarian approach to the Constitution and argued that the government had to resign only after parliamentary elections and asked the Constitutional Court to resolve the issue. In a ruling on 10 January 1998, the Constitutional Court supported this parliamentarian approach, reasoning that the 1992 Constitution had established a "parliamentarian form of government with some semi-presidential features" and that the government does not have to resign after presidential elections if it receives a new vote of confidence from the parliament. After some academic attempts to criticize the Court's reasoning that the country had a parliamentarian form of government²⁵ and an unsuccessful experiment when President Rolandas Paksas (2003-2004) tried to concentrate political power in his own hands without the support of a majority in the parliament, it has now been settled that the constitutional form of government in the country is a "rationalized parliamentary regime" and it is difficult to imagine any new change in thinking on this subject in the near future.

3. SEPARATION BETWEEN THE STATE AND CHURCH

Lithuania was the very last country in Europe to convert to Christianity. After some unsuccessful attempts, the country was finally converted in 1387, and in Samogitia in the north-west of the country only at the beginning of the fifteenth century. After the Treaty of Krėva in 1387, Lithuania's Grand Duke Jogaila became King of Poland and, together with other Lithuanian nobles, finally accepted *Roman Catholicism* and symbolically baptized the entire country. At the beginning of the sixteenth century, after the spread of the Reformation, most of the powerful noble families in Lithuania joined Calvinist movements. But after the Union of Lublin in 1569, when Lithuania and Poland formed the so-called Commonwealth of Two Nations, the educational and other counter-Reformation policies of the Catholic church converted the country back to Catholicism.

Roman Catholicism is still the dominant religion in Lithuania. According to a recent census, about 80% of the population regard themselves as Roman Catholics, although the

25. For example, see Egidijus Kūris, "Politinių klausimų jurisprudencija ir Konstitucinio teismo obiter dicta", *POLITOLOGIJĄ*, 1998. No.1. pp. 3-94.

significance of the religion in social life was greatly diminished after 50 years of Soviet occupation. Other large Christian denominations in the country are members of the Russian Orthodox Church, Lutherans and Evangelicals (*Evangelikai reformatai*).

Despite various restrictions on freedom of religion and conscience during the Soviet occupation,²⁶ the Roman Catholic Church and other traditional religious communities played an important role in the resistance movement during that time. The church was probably the one quasi-legal social entity in the country that was not dominated by the Communist Party.

After the restoration of independence in 1990, one of the first acts of restitution for injustices was the adoption of the *Law on the Restitution of the Status of the Catholic Church* (12 June 1990). However, under the law only the buildings that had been confiscated from the church were returned, not its expropriated land. This act of parliament is still in force but the church's property has not all been returned yet. Under the current legislation, non-governmental organizations other than the church are not entitled to the restoration of their rights to land or any other expropriated property, including buildings.

As mentioned earlier, the final text of the 1992 Lithuanian Constitution was a compromise between three drafts produced by the parliamentary commission, the *Sajūdis* and the Liberal Party. In the drafts of the centre-right *Sajūdis* and Liberal Party, the Roman Catholic Church was to have been restored to the prominent constitutional status it had enjoyed for centuries, right up to the Soviet occupation. For instance, the Liberal Party included provisions of the 1938 Lithuanian Constitution concerning the status of the church almost verbatim in its draft text of the Constitution. On the other hand, the draft of the parliamentary commission was more restrained in terms of the status accorded to religious communities and advocated more rigid separation of state and church. The final text of the 1992 Constitution ultimately contained the centre-right concept of the status of the church, reproducing the provisions of the 1938 Constitution with some modifications.

The founders of the Constitution agreed first of all that Lithuania had to be a democratic secular state. The Constitution therefore provides that Lithuania has no state religion (Art. 43) and that public schools in Lithuania are secular (Art. 40). Without elaborating on it, the Constitutional Court has adopted the principle of the secular state in a couple of its rulings, including the separation of State and church and the state's neutrality concerning the individual's freedom of conscience and religion (for example, see the ruling of 13 June 2000).

But the Lithuanian concept of the secular state and the separation of State and church is a rather weak one.²⁷ It is taken to mean that the State treats the church as a partner in cultural, family and educational matters and respects its role and influence in those areas. For instance, at the request of parents, religious classes in public schools in Lithuania are taught by traditional churches, usually the Roman Catholic Church (Art. 40). Also important is the fact that the State recognizes marriages registered in the church (Art. 38), which means that a marriage celebrated in a traditional church or religious community does not need to be repeated in a civil service. It is enough for the municipality to receive the official marriage certificate from the church. The state also

26. During the Soviet occupation, ordinary religious practice was suppressed since it did not fit in with official Soviet atheist ideology. Religious practitioners were persecuted throughout society, from school to workplace. Non-conformist bishops and priests were killed or deported to Siberia. Many seminaries and churches were closed and their property was expropriated. The teaching of Marxist-Leninist ideology as a pseudo-religion was mandatory in Soviet primary, secondary and higher education in order to re-educate the population and form a new type of Homo Sovieticus.

27. In some French legal literature one may find two different concepts of the separation of State and Church. Strong separation is usually called "laïcité" and weak separation is called "sécularité".

recognizes chaplains in the military, the police, prisons, universities and other public services.

Churches and religious communities carry out their activities according to their canons and statutes and independently of State power (Art. 43). This means that the state recognizes a quasi-dual legal system in the country since churches establish their own seminaries, determine the programmes for religious education in public schools and use their canons to conclude marriages and divorces, while the State does not have the competence to intervene in these areas. In this regard, it has to be mentioned that in 2000 the Lithuanian parliament ratified three treaties with the Holy See (the Vatican) on cooperation between the State and the Catholic Church, on cooperation in educational and cultural matters and on spiritual assistance for Catholics in the armed forces.

The Constitutional Court has not yet fully defined the principle of the secular state. In practically the only ruling on the question, on 13 June 2000, the Court adopted a rather incoherent point of view. On the one hand, it recognized the idea of cooperation between the State and the Church in public education (the concept of *sécularité*), but on the other the ruling tended to limit the constitutional right of parents to ensure that their children were educated according to their moral or religious convictions in public schools (Art. 26) (the concept of *laïcité*).

The provisions of Article 43 of the Constitution, which were taken from the 1938 Constitution, tend to legitimize the prominent status of the Roman Catholic Church and other major religious communities in the country by granting the traditional churches and religious communities privileged constitutional status. The notion is that the traditional religious communities are part of the cultural heritage of the country, which has to be preserved and maintained by the State. Another idea behind this provision is to protect society from the influence of new pseudo-religious movements. According to the *Law on Religious Communities* (1995), six Christian denominations have the status of a traditional church. They are the Roman Catholic Church, the Greek Catholic Church (*Uniate* church), the Evangelical Lutheran Church, the Evangelical Reformed Church (Calvinist), the Orthodox Church and the Old Believers Orthodox Church (*sentikiai*). This status was also awarded to three non-Christian communities: the Jewish religious community, the Sunni Muslim religious community and the Karaite religious community (*karaimai*).²⁸ According to jurisprudence of the Constitutional Court, this list of nine traditional religious communities, founded in Lithuania from the 13th to the 16th centuries, may not be extended.²⁹ In 2001 the similar status of “state-recognized” (but not traditional) church was granted by act of parliament to the Baptist Church (*Lietuvos evangelikų baptistų bendruomenių sąjunga*). According to the legislation, this list of state-recognized churches and religious communities may be extended if a particular religious community operates legally in the country for at least 25 years and enjoys support in society. A special department of the ministry of justice is responsible for enforcing this act.

Compared with “state-recognized” and other religious communities, traditional ones enjoy certain privileges with respect to their participation in the social life of the country. For instance, they have the right to teach religion in public schools at the request of parents and a sufficient number of pupils (Art. 40); the State recognizes marriages registered in these churches and religious communities (Art. 38); they can broadcast programmes on national television and radio stations; they may have chaplains in the armed forces and police and at public universities. They may also receive financial support

28. The Karaites were brought to Lithuania from the Crimea by Grand Duke Vytautas in the fourteen century.

29. 6 December 2007 ruling of the Constitutional Court.

from the State or from a municipal budget (this support is usually linked to restitution of expropriated property).

4. THE HEAD OF STATE

Between 1990 and 1992, before the adoption of the new Constitution, the Speaker of the Parliament (*Aukščiausiasios Tarybos Pirmininkas*) was the country's most senior official and assumed the role of head of state in the national and international arena. The 1992 Constitution restored the office of the President of the Republic but, by contrast with the parliamentary Constitution of 1922, it created a distinction between the government and the President of the Republic by providing that the latter is elected directly by the people.

4.1. Eligibility

The Constitution provides that the head of state is the President of the Republic. To participate in presidential elections, candidates may not be younger than 40 years of age, must have lived in Lithuania for at least the last three years³⁰ and must be a Lithuanian citizen "by origin" (*pagal kilmę*). What precisely is meant by the formulation "Lithuanian citizen by origin" in Article 78 is not clear but may possibly be explained by the concept of *ius sanguinis*. One interpretation may be that the candidate has to be a descendant of Lithuanian citizens of the First (inter-war) Republic of Lithuania. For instance, Soviet emigrants, to whom Lithuanian citizenship was granted after the restoration of independence in 1990, may not stand for presidential elections under the Constitution.

Legislation further provides that former KGB officers and agents must inform the Central Electoral Commission of their former status and include the information in all their election campaign publicity.

Another requirement is that candidates must not be bound by an oath or pledge to a foreign state (Art. 56). This provision can be seen as erecting a barrier against persons who used to work for a foreign secret service during the Soviet occupation. In practice, this restriction can be used against persons who have obtained foreign citizenship through naturalization, i.e., by swearing an oath of allegiance to the state concerned. For instance, Valdas Adamkus had to renounce his American citizenship (acquired through the naturalization procedure) when he was elected to the office of President of the Republic of Lithuania.

4.2. Presidential elections

Article 81 of the Constitution states that the candidate who, during the first round of voting in which at least half of the voters participated, received more than half of the votes of all the voters who participated in the election, shall be deemed elected. If less than half of all the registered voters participated in the election, the candidate who receives the greatest number of votes, but not less than one-third of the votes of all voters, shall be

30. In 1998 Valdas Adamkus (USA resident at that time) was admitted as a candidate for presidential elections by court decision, because he had real estate in Lithuania, and in 2009 Dalia Grybauskaitė was admitted as a candidate by the Supreme Electoral Commission although she was a European Commissioner from 2004 to 2009.

deemed elected. If during the first round, no single candidate gets the requisite number of votes, a repeat election has to be organized two weeks later between the two candidates that received the largest number of votes. The candidate who receives more votes thereafter shall be deemed elected.

There were five elections for the office of the President of the Republic between 1993 and 2009.³¹ The term of office of the president is five years, while members of parliament are elected for four years. The President of the Republic may be re-elected for a second term.

Upon election, the President of the Republic swears an oath to the Lithuanian Nation and to the Constitution in the parliament before the Chief Justice of the Constitutional Court.

4.3. *Immunity and privileges*

The President of the Republic enjoys immunity from criminal liability, i.e., the president may not be detained or have his freedom otherwise curtailed while in office (Art. 86). As President Paksas' impeachment shows, this constitutional immunity is a fairly effective tool, which can play a very important role in times of political struggle.

While in office, the president must suspend his activities in a political party.³² According to ordinary legislation, a person who has been elected to the office of president retains the title of "President of the Republic" for life. The legislation provides that even after leaving office, the president retains the right to a residence, a car and driver and a security guard. A person who has been removed from the office of president is stripped of these privileges.

4.4. *Powers of the president*

The principal powers of the president under the Constitution lie in the sphere of foreign affairs and national defence. The president decides basic issues of foreign policy, represents the country in foreign relations, signs international treaties and agreements, appoints ambassadors, awards diplomatic ranks and titles and receives letters of credential from diplomatic representatives of foreign states. The president is the commander-in-chief of the armed forces (Art. 140). With the assent of parliament, the president appoints the commander-in-chief of the army and the head of the security service, confers the highest military ranks, presides over the State Defence Council³³ and, in the event of an armed attack, can impose martial law and declare a mobilization of forces (Art. 142). In practice, however, the president does not have sufficient power to compete with the ministries of foreign affairs and national defence in the sphere of external relations and national security. The ministries have large numbers of staff and various departments to deal with the relevant matters. In the sphere of foreign affairs, for instance, the President of the Republic is (with some exceptions) the actor of last resort, while the initiative for taking action is left entirely in the hands of the government and the minister of foreign

31. In 1993 (Algirdas Brazauskas), 1998 (Valdas Adamkus), 2003 (Rolandas Paksas), 2004 (Valdas Adamkus, after President Rolandas Paksas was removed from office in impeachment proceedings), 2009 (Dalia Grybauskaitė).

32. Valdas Adamkus and Dalia Grybauskaitė were so-called "politically neutral" candidates, as they did not belong to any political party.

33. According to Art. 140 of the Constitution, the main issues of national defence are considered and coordinated by the State Defence Council, which consists of the President of the Republic, the prime minister, the Speaker of the parliament, the Minister of National Defence and the Commander of the Armed Forces.

affairs. The same can be said in the context of national defence. The minister of national defence has all the levers in hand as far as military matters are concerned. In Lithuania, therefore, the President of the Republic is the primary source of national policy in the sphere of foreign affairs and national defence but acts in concert with the government.

As head of state, the President of the Republic has the power to grant citizenship,³⁴ to confer state awards and to grant pardons to convicted criminals. According to Article 85 of the Constitution and ordinary legislation, there are only four instances when presidential decrees have to be countersigned by the appropriate minister. The minister of foreign affairs has to sign decrees for the appointment and recall of diplomatic representatives of the Republic of Lithuania, the acceptance of letters of credential and the recall of diplomatic representatives of foreign states, and the conferral of the highest diplomatic ranks and titles. The minister of national defence must countersign decrees conferring the highest military ranks. Decrees granting Lithuanian citizenship must be countersigned by the minister of interior affairs, and the prime minister has to countersign a decree declaring a state of emergency. In all other cases listed in Article 84 of the Constitution, the president has complete discretion and may act alone.

A. Formation of the government and the appointment of senior officials

In practice, the main powers of the president centre on the formation of the national government and the nomination of senior public officials, including members of the judiciary. After parliamentary elections, the president appoints the prime minister, with the consent of parliament, and the members of the cabinet on the prime minister's recommendation. Nevertheless, the President of the Republic is not a "formal" head of state as in the case of pure parliamentary regimes. Because she/he is directly elected and enjoys popular support the president provides a certain balance between different public institutions and political actors. For instance, the president has considerable powers in the selection of a particular minister. As a rule, in choosing the candidate, the president must naturally confine his selection to candidates that have been nominated by a majority in parliament, but she/he has the discretion to reject a particular candidate for ethical reasons, on grounds of political transparency or because of a possible conflict between the candidate's public and private interests.³⁵ As has been shown in practice, a president who enjoys wide popular support may even convince the prime minister to resign, although she/he does not have *de jure* legal instruments to force him to do so.³⁶ Subject to the approval of the parliament, the president appoints the Procurator General, the Commander of the Army and the Head of the Security Service. The president (after receiving the advice of the independent Judicial Council) appoints judges of local, district and specialised courts and nominates candidates for appointment by parliament as justices of the Supreme Court and the Constitutional Court.

The President of the Republic also has a very important role in the parliamentary legislative process. Firstly, the president has the right to initiate legislation, although practice has shown that the president rarely initiates bills and few bills initiated by the

34. The President may only grant citizenship to foreign nationals who have special merits for the Lithuanian state. After the 13 Nov. 2006 ruling of the Constitutional Court, which drastically diminished the cases of double citizenship in Lithuania, this presidential discretion was practically abolished.

35. For instance, after the parliamentary elections in 2004, the president rejected one candidate for the post of minister of education when it emerged that he had earlier signed a certain spurious document when he was a senior official.

36. In 1998 after a public speech by President Valdas Adamkus in which he declared a lack of confidence in the prime minister, Gediminas Vagnorius, the latter decided to resign even though he had received a vote of confidence from parliament a couple of days before.

president become law. The main actors in the legislative process are the government and the committees in parliament.

Secondly, the president has a right of suspensive veto over bills that have been passed by the parliament, which can only be overruled by an absolute majority of the members of parliament.³⁷ The terms of the presidential veto in the Lithuanian Constitution allow the president (i) to refer the law back to the parliament for reconsideration, accompanied by relevant reasons but with no specific legislative proposals, or (ii) to present his own amendments with regard to the law. It should be noted, however, that the presidential veto is fairly weak and the parliament can usually overrule it quite easily. Accordingly, presidents have not used this instrument very often. On the other hand, in the case of weak majority or minority government, president's veto is rather efficient instrument to stop certain kind of legislation.

Thirdly, until a ruling of the Constitutional Court on 19 June 2002, the President of the Republic sometimes used what is known as a "pocket veto". This involved expressing disagreement with a particular bill by refusing to sign it within the ten-day period prescribed by the Constitution without giving any reason. In that case, according to the Constitution, the bill can be signed into law by the Speaker of the *Seimas* without the president's signature (Art. 71). In its ruling, the Constitutional Court virtually abolished the president's power of "pocket veto" by saying that a veto must always be accompanied by openly expressed reasons and legal arguments.

Finally, as head of state the President of the Republic always concludes the legislative process by promulgating legislation adopted by the parliament. It ought to be mentioned here that the President of the Republic has no right to refer a statute that she/he considers to be unconstitutional to the Constitutional Court before or after its promulgation. The president may only challenge the constitutionality of government decrees before the Constitutional Court.

B. The president's discretion to dissolve parliament

In the case of a conflict between the parliament and the government (the Cabinet of Ministers) the president has the power to dissolve parliament. Article 58 of the Constitution specifies two cases of conflict where the president has such discretionary power:

- i) if the parliament fails to pass a vote of confidence in the government for a second time within sixty days;
- ii) on the government's proposal, after a vote of no confidence in the government.

During the twenty years in which the 1992 Constitution has been in force, this provision has never been used. It has sometimes been "recalled" by candidates during an election campaign. The Lithuanian president's discretionary power to dissolve parliament could also be described as fairly weak, since the newly elected parliament can decide, with a majority of three-fifths of its members, to call new presidential elections (Art. 87). Of course, it is conceivable that in practice the president could use his discretion in the event of a political stalemate.

37. The Lithuanian parliament has 141 MPs, so 71 votes are enough to overturn the president's veto for ordinary legislation, while 85 votes (three-fifths of the total) are required to overturn the president's veto for organic laws.

C. *The president's relations with the government (the Cabinet of Ministers)*

The wording of Article 5 of the Constitution describes the President of the Republic and the government as the executive branch. In contrast with the 1922 Constitution, however, the 1992 Constitution distinguishes between the government and the president. The government here means only the Cabinet of Ministers and is formed by the will of a majority of the members of parliament, while the directly elected President of the Republic is a separate institution, and as head of state has not only executive but also other competences and powers.³⁸ The president enjoys discretion in choosing the prime minister and other ministers, but constitutional tradition dictates that the prime minister is chosen from the parliamentary majority since the government has to receive a vote of confidence from the parliament. As a rule, the president does not participate at meetings of the government or in its activities, but instead assumes a position of moral authority and maintains a balance between the different State authorities. In matters relating to foreign affairs, the president's is a coordinating role for she/he generally acts in consultation with the prime minister and the minister of foreign affairs in this domain.

4.5. *Legal acts of the president*

The President of the Republic has only one form of legal instrument for exercising presidential powers. This is the presidential decree (*Prezidento dekretas*). As a rule, decrees of the Lithuanian president have no legislative or normative character. Some, but not all, presidential decrees have to be countersigned by a minister (Art. 85). By virtue of the Constitution and ordinary legislation, presidential decrees granting Lithuanian citizenship have to be countersigned by the minister of interior affairs; decrees conferring high diplomatic rank, by the minister of foreign affairs; decrees granting high military rank, by the minister of national defence; and a declaration of a state of emergency has to be countersigned by the prime minister. For all other decrees – concerning the appointment and dismissal of various national officials, including the prime minister and ministers, the signing of international treaties, mobilization, the date of parliamentary elections, the conferral of State awards, the granting of a pardon to convicted offenders, the establishment of public commissions and even for the dissolution of parliament – the president enjoys total discretion and they do not have to be countersigned by a member of the government. In the four cases mentioned above, where a minister has to countersign decrees issued by the president, the appropriate ministers are fully responsible for the decrees they have signed (Art. 85). However, according to a ruling by the Constitutional Court on 30 December 2003, even if a decree is later signed by a minister, the president is not released from personal constitutional responsibility if the decree constitutes a gross violation of the Constitution.

4.6. *The office of the president*

The 1992 Constitution does not contain any provisions concerning the office of vice-president. The president instead has six or seven principal advisors (the heads of various

38. The competence of the president is sometimes described by Lithuanian legal scholars as "mixed", because it includes some signs of legislative (e.g., veto) and even judicial competence (e.g., right of pardon). See, e.g., Egidijus Šileikis, *Alternatyvi konstitucinė teisė*. TIC. 2003. p. 447.

departments) who are sometimes referred to as the president's "team". The president is free to appoint around forty civil servants in whom he has "personal confidence". While "career personnel" are appointed and managed by the Chancellor of the President's office. The president's office is in the country's capital, Vilnius. In the event of the president's death, resignation or removal from office by impeachment, the Speaker of the *Seimas* assumes the president's duties *pro tempore*. In these cases, new presidential elections must be organized within two months. The Speaker of the *Seimas* also assumes the office if the president is temporarily unable to perform the duties of the office, for example, due to illness (Art. 89). Under the Lithuanian Constitution, therefore, the second-highest state official after the President of the Republic is the Speaker of the *Seimas* and not the prime minister, as is the case in some other countries with a similar form of government.

4.7. *Impeachment of the president*

The constitutional concept of impeachment of the president can best be understood in light of the actual impeachment of President Rolandas Paksas in 2004.

According to the Constitution, the Rules of Parliamentary Procedure and the ruling of the Constitutional Court on 31 March 2004, there are six stages in the process of impeachment of the president:

- i) the formation of a parliamentary impeachment committee, which examines the president's actions and formulates impeachment charges;
- ii) the preliminary stage of the impeachment process, when the parliament approves the impeachment charges, appoints parliamentary prosecutors and sends the impeachment charges to the Constitutional Court for legal and constitutional evaluation;
- iii) the conclusion of the Constitutional Court on whether the president's actions as formulated in the impeachment charges actually violated the Constitution;³⁹
- iv) the legal submissions by the parties;
- v) the closing statement by the President of the Republic in the parliament;
- vi) a vote in parliament on whether to remove the president from office.

A. *Wrongdoings that can form the legal basis for impeachment of the president*

Prior to the impeachment process of President Rolandas Paksas, legal doctrine in Lithuania made no distinction between impeachment charges concerning any particular public official, be it the president, a member of parliament or justices of higher courts (judges of the Court of Appeal and the Supreme Court and justices of the Constitutional Court). The Lithuanian Constitution provides for three formal impeachment charges:

- (i) gross violation of the Constitution,
- (ii) breach of the oath of office, and
- (iii) commission of a criminal offence.

A formal reading of the text of Article 74 therefore suggests that any of these three impeachment charges may be used with equal effect for an impeachment procedure against any public official. The impeachment of President Rolandas Paksas showed that in practice the third impeachment charge cannot be used against the President of the

39. According to the Constitution (Arts. 86 and 105), Parliament may only vote to remove the president from office if the Constitutional Court concludes that the latter's violation of the Constitution is gross. According to a decision of the Constitutional Court on 31 March 2004, if it concludes that the president did not violate the Constitution or that there was no gross violation, the impeachment process must be terminated.

Republic since he enjoys constitutional immunity (Art. 86). Accordingly, the only entity competent to make a legal assessment of impeachment charges against the President of the Republic is the Constitutional Court. Pre-judicial investigation institutions have no constitutional competence to institute criminal proceedings against the President of the Republic. Thus it appears that if the Lithuanian president is suspected of committing a serious crime (e.g., high treason), the Constitutional Court should not treat the charge as a criminal offence but could interpret it as a gross violation of the Constitution and as a breach of the oath of office.

Another point to note here is a certain peculiarity of the list of grounds for impeachment in Lithuania. Violation of the Constitution and high treason are often specified as grounds for impeachment in the constitutions of other countries. However, there are very few countries in the world where a breach of the oath of office is grounds for impeachment, first and foremost because an oath is primarily a moral concept. In order to avoid this moral dimension and other difficulties in determining whether president Paksas had breached the oath of office, the Constitutional Court decided to look at the specific wording of the oath and link it with the other impeachment charge, i.e., a gross violation of the Constitution. In its ruling of 31 March 2004, the Court found that a breach of the oath of office is always a gross violation of the Constitution and *vice versa*.

A final peculiarity of the grounds for impeachment in Lithuania is that in order to remove a person from office, it is not enough to find a violation of the Constitution; the violation must be gross. According to the case-law of the Constitutional Court, not all violations of the Constitution should be regarded as gross violations, and to decide whether a violation of the Constitution is to be regarded as a gross violation, the actual content and circumstances of the president's actions must be evaluated. It should be pointed out here that in the case of President Paksas, the Constitutional Court interpreted the gross violation of the Constitution (and breach of the oath of office) first and foremost from the perspective of President Paksas' vulnerability to and dependence on his former sponsor of the Presidential campaign Mr. Borisov, which the ad hoc parliamentary committee deemed to constitute a threat to Lithuania's national security. In the absence of any such threat to national security, it appears that the Constitutional Court might not have concluded that president Paksas had committed a gross violation of the Constitution or breached the oath of the office. In other words, it seems likely that the Constitutional Court affirmed the charges against the president on the grounds that Mr. Borisov, who was informed by the president that he was under investigation by the security service and to whom Lithuanian citizenship was unlawfully granted, was suspected of having links with foreign secret agencies. Therefore, even though the authors of the Lithuanian Constitution agreed on broader grounds for impeachment than in France, for instance, where the only ground for impeachment of the president is high treason, and did not include high treason as a ground for impeachment in the text of the Constitution, we nevertheless see shades of high treason in the Court's ruling in its interpretation of the very idea of impeachment of the president.

B. The institution with power to impeach the president: the parliament or the Constitutional Court?

First of all, it should be noted that the *Seimas* has the competence to initiate impeachment proceedings and has the power to make the final decision on whether to remove the president from office. Only the *Seimas* is competent to formulate impeachment charges and to appoint the *Seimas'* prosecutors, and only members of parliament may vote to remove the president from office. Accordingly, the institution with power to impeach the president in Lithuania is the *Seimas*.

But another important actor in impeachment proceedings against the president is the Constitutional Court. This is the only court with competence to determine whether there are constitutional and legal grounds for the impeachment. In other words, parliament may not remove the president from office if the Constitutional Court is of the opinion that the president acted within the boundaries of his discretion and did not violate the Constitution. In this case, the role of the Constitutional Court is somewhat similar to that of a grand jury, because the Court has the power to pronounce a verdict of “guilty” or “not guilty” on the charges brought against the president. Nevertheless, the parliament has the constitutional discretion to allow a president who has been found guilty to remain in office, for instance, if it feels that the president enjoys sufficient public support.

So here we see that in the case of impeachment, the founders of the Lithuanian Constitution did not follow the Austro-German model, which gives the constitutional court the power to remove the president from office. The procedure for impeachment of the president in the 1992 Constitution could be said to be a compromise between the American parliamentary model on the one hand and the Austro-German judicial model on the other.

C. Parliamentary majority required for removing the president from office

The drafters of the 1992 Constitution established a form of government which can generally be characterized as a “rationalized parliamentary regime” or “a parliamentary regime with some features of semi-presidentialism”. The provisions concerning the impeachment of the president were, however, taken from the parliamentarian commission draft constitution. Consequently, the parliamentary majority (three-fifths of all members of parliament) required to remove the president from office is the same as for other senior officials, such as members of parliament and judges. The Constitution does not follow the standard approach where a majority of two-thirds of the members of parliament is required to remove the president from office; indeed, if the majority required to impeach the president had been two-thirds, President Paksas could not have been removed from office since the decision to remove him from office was taken by a margin of just five votes.

D. Legal and political consequences of impeachment

According to the Constitution, the constitutional powers and immunity of the president are not affected even when impeachment charges have been laid and approved by the Constitutional Court. This means that throughout the impeachment process, the president continues to hold office in the same way as before the procedure was initiated. During the impeachment proceedings, the president can defend himself with all the legal, political and other powers and means at his disposal, thereby limiting the ability of other legal and political actors (primarily the parliament and the Constitutional Court) to remove him from office.

Until the impeachment of President Paksas, the Lithuanian legal and political environment had no idea what restrictions would be placed on a president who had been removed from office. The Constitution says nothing on this subject. The question is whether a president who has been removed from office for gross violation of the Constitution and breach of the oath of office may run for office in future presidential elections? The political elite in Lithuania made it clear that an affirmative answer to this question would be contrary to the very idea of civil society, the rule of law and other constitutional principles and therefore decided to amend the Law on Presidential

Elections and the Constitution to prevent a president who was removed from office from running in presidential elections for the next five years. The Constitutional Court, however, rejected the rationale of this temporary disqualification from the passive electoral right and decided that the spirit of the Constitution requires not just a temporary but a permanent and complete disqualification of such a person from the political arena.⁴⁰ The Court's rationale was that a person who has breached the oath to the Nation and been removed from office could never again occupy public office that is connected with an oath of office by virtue of the Constitution. The Court stated that such a person should never "take an oath to the Nation again, for there would always exist a reasonable doubt, which would never disappear [...], as to whether this person will really perform his duties as President of the Republic, or, in other words, whether an oath repeatedly taken by this person to the Nation would not be fictitious" (ruling of 25 May 2004 [see section III.6]).

In this ruling, the Court indirectly referred to the "permanent political disqualification" clause in the US Constitution and said that the president, once removed from office, may not stand in either future presidential elections or parliamentary elections. Nevertheless, in a judgment of 6 January 2011, the European Court of Human Rights held that application of this "permanent political disqualification" rule in the Lithuanian legal system violated the requirements of Article 3 of the 1st Protocol of the European Convention on Human Rights ("The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.").⁴¹

5. THE GOVERNMENT (VYRIAUSYBĖ)

5.1. *Composition of the government and appointment of its members*

According to the Constitution (Art. 91), the government consists of the prime minister and ministers. The President of the Republic is not a member of the government. According to Article 60 of the Constitution and case-law of the Constitutional Court, the prime minister and ministers may be selected from amongst the members of parliament but may not hold any other office than that of member of parliament, i.e., they may not be a member of a municipal council. The Constitution does not impose any residential, citizenship or age requirements on candidates for the post of prime minister or minister (in contrast with the office of the President of the Republic and members of parliament). There is no office of deputy prime minister or minister without portfolio in Lithuania since, according to Article 98 of the Constitution, a minister is the head of a particular ministry.⁴² Therefore, if the prime minister is temporarily unable to exercise the powers of the office, another minister deputizes for him (Art. 98). Although the Constitution says that ministers are directly subordinate to the prime minister (Art. 96.), in reality this subordination depends on whether the government is made up of ministers from political parties different from that of the prime minister or of members of the same party. We can

40. According to the Court, such a person may not stand for any public office, which by virtue of the Constitution, is linked with an oath of office (the President of the Republic, a member of the national parliament and the office of minister). For more information about this impeachment see Vaidotas A. Vaičaitis, 'Impeachment of the President of the Lithuanian Republic: the procedure and its peculiarities', *The Uppsala Yearbook of East European Law* 2004, Uppsala University, 2005, pp. 248-282.

41. 6 Jan. 2011 judgment of the ECtHR. Application No 34932/04.

42. The number of ministries in Lithuania ranges from thirteen to sixteen. In 2012 there were fourteen ministries: Foreign Affairs, Interior Affairs, Finance, National Defence, Education, Culture, Justice, Economy, Energy, Social Security & Labour, Health, Agriculture, Ecology and Transport.

only speak of genuine subordination of ministers to the prime minister in the Lithuanian legal system in the latter situation. According to Article 101 (4), a minister must resign if more than half of all members of parliament express no confidence in him. This indicates that members of the government have individual responsibility. On the other hand, all the cabinet members have to resign if parliament expresses no confidence in the prime minister or if the latter resigns (Art. 101(3)), which suggests solidarity or joint responsibility of the government. Joint government responsibility is also implied by Article 101, second sentence, which reads that if more than half of the ministers change, the government has to be re-invested with authority by the parliament (although this provision has been never applied in practice in twenty years of existence of the Constitution).

The Constitution specifically refers to the Minister of National Defence (Art. 140). Other ministries can be established or abolished at the discretion of parliament. It should be noted that, because of multi-party political system, there is no tradition of forming a so-called shadow cabinet in Lithuania.

The prime minister is appointed (generally after parliamentary elections) by the President of the Republic with the approval of the *Seimas*. The president therefore takes the initiative for the appointment of the prime minister but the president's discretion is limited and constitutional convention dictates that he accepts the results of the parliamentary elections. A new government must always receive a vote of confidence from a majority of the members of parliament.

Ministers are appointed by the president on the nomination of the prime minister. The prime minister presents the list of members of the government and the government's programme to the *Seimas* for consideration within fifteen days of being appointed. The new government then assumes all its constitutional powers after the *Seimas* has approved its programme by a majority of the votes of the members of parliament participating in the session (Art. 92).

5.2. Competence of the government

The government is the executive branch of central authority. But *executive* in this sense does not mean that the only task of the government is *execution* of parliamentary legislation. As a rule, the legal basis of the government's competence lies in an act of parliament, but according to the case-law of the Constitutional Court, e.g., a ruling of 18 December 2001, the government may also issue decrees in the absence of empowering legislation, relying directly on the provisions of the Constitution and on the constitutional principle of separation of public powers (Arts. 5 and 94). In principle, the only limitations in this case are that the government should not regulate human rights without an appropriate statute, governmental decrees should not interfere with the competence of the parliament (as set out in Article 67 of the Constitution) and should not be contrary to parliament's legislation. Naturally, the government will rarely act without an appropriate statute to legitimize its actions.

The Constitution assigns principal responsibility for administering the affairs of the State and maintaining national security and public order to the government. In reality the government exercises its powers through different ministries and other public agencies. The government is headed by the prime minister, who represents the government and coordinates the work of the different ministries and agencies. Government decrees (*Vyriausybės nutarimas*) are adopted by a majority of all the members of the cabinet and are signed by the prime minister and the sponsoring minister. If the government is formed by a single party, the prime minister enjoys powers equivalent to those of his

counterpart in the Westminster model. If the government is a coalition of several parties (most probable case in Lithuania), however, the prime minister's powers are less substantial. In June 2006 a so called "minority government" was formed the first time after restoration of independence and was running the country only for a year.

As a rule, the legal basis of the government's activities is parliamentary legislation. A formal reading of Article 94 (2) of the Constitution implies that the government is a secondary authority that must await appropriate legislation before issuing decrees implementing that legislation. In practice the government initiates all political and legal reforms and possesses the most important legal and political instruments for implementing its programme. It drafts a large majority of legislative bills, administers public property, prepares the draft of the State budget and collects and distributes the taxes (through the national tax agency (*Valstybinė mokesčių inspekcija*) and other public agencies). Moreover, through the ministry of foreign affairs, the government establishes and maintains diplomatic relations with other countries and, together with the president, is the main actor in external relations.

5.3. *Responsibility and accountability of the government*

The government has to have the confidence of parliament and must resign if it loses that confidence or if parliament passes a vote of no-confidence in the prime minister. This has happened only once in twenty years since the adoption of the 1992 Constitution. This vote of no-confidence can also take the form of parliament's refusal to approve an annual State budget. The government must also resign if the prime minister resigns, which reflects the principle of solidarity of the cabinet (Art. 96). An absolute majority of members of parliament may remove any minister from office (Art. 101). Ministers are politically accountable to the *Seimas*. However, notwithstanding the lack of any provision to this effect in the Constitution, convention provides that the president has the discretion (see also Article 96) to declare his loss of confidence in a particular minister if there is an apparent conflict between the latter's private and public interests. Accordingly, if parliament wants to remove a minister from office, it does not need to pursue a complicated impeachment procedure.

Like members of parliament, members of the government enjoy legal immunity while they are in office. According to the Constitution, the prime minister and other ministers may not be prosecuted or detained without the consent of parliament (Art. 100).

6. THE PARLIAMENT (SEIMAS)

Section V of the 1992 Constitution concerning the parliament (*Seimas*) follows the section on human rights and is the first section devoted to State powers. This position in the order of the sections of the Constitution illustrates the special status that Lithuania's parliament enjoys in relation to other state institutions.

6.1. *The election of members of parliament*

The right of citizens to stand for election and to vote in parliamentary elections is guaranteed in Articles 4 and 34 of the Constitution. However, a person's right to be elected as a member

of parliament (passive suffrage) is subject to criteria. He or she has to be a Lithuanian citizen who is permanently resident in the country, who is not bound by an oath or a pledge to a foreign state and is at least 25 years old. Judges in office, soldiers engaged in compulsory national service and persons who have not completed a court-imposed sentence, as well as persons declared legally incapable by a court, may not stand for parliamentary elections (Art. 56 and 141). According to the case law of the Constitutional Court, a member of parliament may not hold a dual mandate (for instance, he or she may not also be a member of a municipal council).

6.2. *Parliamentary elections and the composition of parliament*

According to the Constitution, Lithuania's unicameral parliament, the *Seimas*, has 141 members. Parliamentary elections are held every four years on the second Sunday of October (Art. 57) on the basis of universal, equal and direct suffrage by secret ballot (Art. 55). Universal suffrage means that every adult Lithuanian citizen aged 18 or older is entitled to vote in parliamentary elections (with the exception of those who are mentally incapable). Equal suffrage means that all voters have one vote, and direct suffrage means that every voter must vote directly and may not transfer or delegate their vote to anyone else.

Legislation provides that half of the members of parliament (71) are elected by a majority system and the other half (70) by a proportional representation electoral system. This mixed electoral system has already been used five times, starting with the elections in 1992. Accordingly, the country is divided into 71 electoral districts for parliamentary elections. Voters receive two ballots and have to elect one representative in each of the districts and also cast a vote for a political party or coalition. They also have the right to indicate five priority candidates in the list. Although the intention in adopting the mixed electoral system was to enjoy the advantages of both systems, in practice the effect of this system is that votes are distributed according to the proportional system, while the majority system does not play an important role at the end of the day.

The Central Electoral Commission (*Vyriausioji rinkimų komisija*), together with district and local electoral commissions, organizes and monitors the process of parliamentary elections.⁴³ Legislation provides that the High Administrative Court will, within two days, hear appeals against decisions of the Central Electoral Commission or its failure to act before the end of voting. The Constitutional Court is competent to examine alleged violations of electoral laws within 24 hours of the announcement of the official results. A political party or a candidate that wishes to bring a complaint to the Constitutional Court must do so through the President of the Republic, who according to constitutional practice is obliged to forward this complaint to the Constitutional Court. Following the 1996, 2004 and 2008 parliamentary elections, in response to requests from the relevant political parties and candidates, the president requested a conclusion of the Constitutional Court concerning the election of a particular member of parliament in a particular electoral district. The Constitutional Court, found that although there had been minor infringements, the electoral laws had not been violated in the relevant electoral districts.⁴⁴

43. Under this legislation the Central Electoral Commission has, besides the power to organize four types of elections (parliamentary, presidential, municipal and European), also the competence to monitor the financing of political parties and their political advertising during the political campaign.

44. See the conclusions of the Constitutional Court on 23 November 1996, 5 November 2004 and 7 November 2008.

6.3. *Parliamentary immunity and the impeachment procedure*

Article 62 of the Constitution states that members of parliament, as representatives of the Nation, have immunity from prosecution for criminal offences and may not be detained without the consent of the parliament. Nor may members of parliament be prosecuted for their votes or speeches in parliament. They may, however, be declared liable for administrative wrongdoings, acts of personal insult or slander.

Parliamentary immunity is also connected with the constitutional provision that members of parliament may only be removed from office by means of an impeachment procedure supported by no less than three-fifths of all the members of parliament (Art. 74). Lithuania has a mixed judicial and parliamentary impeachment system, which means that even though a member of parliament may have been found guilty of a criminal offence by a criminal court, parliament still has the discretion not to remove him or her from office. According to recent case law of the Constitutional Court, the *Seimas* may not remove anyone from office if the Constitutional Court decides that the offence does not constitute a breach of the Constitution. This mixed impeachment system produced an unsatisfactory outcome in 1998 when a member of parliament, Audrius Butkevičius, was convicted of taking bribes and given a prison sentence by a criminal court but the motion for his impeachment in parliament did not secure the three-fifths majority required for his removal from office. A similar problem arose during the impeachment of two members of parliament in 2010. After a similar negative conclusion of the Constitutional Court in the case of both the accused parliamentarians, one of them (Linus Karalius) was removed from the Parliament, but the vote on the removal of the other one (Alexander Sacharuk) did not obtain the required three-fifths majority in the *Seimas*.⁴⁵

6.4. *Powers of parliament*

A. *Legislation*

Legislation is, of course, the most important instrument the *Seimas* possesses to exercise its powers, which are set out in Article 67 of the Constitution. The *Seimas* has “general competence” in the legislative process (by contrast, for example, with the French parliament under the 1958 constitution). This means that the *Seimas* may enact laws regarding any matters in the social, economic and private sphere. Following the (continental) European constitutional tradition, the Lithuanian Constitution does not contain a clause similar to the First Amendment of the US Constitution forbidding parliament from passing certain kinds of legislation. Naturally, this does not mean that the Lithuanian legislature has *carte blanche* in the legislative process. Legislation adopted by the *Seimas* must be consistent with the Constitution, including the case law of the Constitutional Court, the case law of the European Court of Human Rights and, since

45. In a conclusion of the Constitutional Court of 27 October 2010, the Court stated that the action of one member of parliament (Alexander Sacharuk) at the plenary sittings whereby on 8 occasions he voted instead of another MP (Linus Karalius), because the latter was travelling in some Asian states, constitutes a gross violation of the Constitution and a breach of the oath of office. The same conclusion was drawn with regard to the parliamentarian Linus Karalius who, for reasons of travel in Asia, failed to attend the plenary sittings of the *Seimas* on 13, 14, 19, 20 and 21 January 2010, and the sittings of the Committee on Health Affairs, without good reason. Here it is important to mention that this impeachment procedure does not apply for the removal of the prime minister or a minister. According to Article 101 of the Constitution, a minister must resign if more than half of all the members of parliament support a vote of no confidence in him or her.

Lithuania's accession to the EU, with European legislation, including the case law of the European Court of Justice.

Legislative procedure. Every member of parliament has the right to initiate legislation in Lithuania, as have the government and the president. Citizens also have the right of legislative initiative, and the *Seimas* must consider a draft law submitted to it by at least 50,000 Lithuanian citizens (Art. 68). The government, through its various authorities, prepares a large majority of bills and presents them to parliament. There are three steps in the procedure for the enactment of laws in the *Seimas* but they do not follow the traditional practice of *three readings*. The first step is the presentation of the bill and its acceptance in principle in a plenary session. The second stage involves hearings and deliberations on the bill in a parliamentary committee. The third step is the final adoption of the bill in a plenary session of the parliament. The *Seimas'* Standing Orders also provide for an accelerated procedure for the adoption of legislation. Legislation in Lithuania is divided into two types of statutes: ordinary laws (*įstatymai*) and organic laws (*konstituciniai įstatymai*). This distinction is based on the number of members of parliament required to vote in favour for the law to be passed. Ordinary laws are enacted by a simple majority of the votes of deputies participating in the session. As far as organic legislation is concerned, according to Article 69 of the Constitution, firstly, the list of organic laws should be enacted by a majority constituting no less than three-fifths of the votes of all members of parliament and, secondly, a particular organic law from this list should be passed by a majority of at least half of all members of parliament. According to the Rules of Parliamentary Procedure (the Standing Orders), a quorum of no fewer than half of all members of parliament is required to pass legislation.

Organic legislation involves laws intended to flesh out the provisions of the Constitution. An original feature of Article 69 of the Constitution is that it provided that one of the first legislative tasks of the *Seimas* was to adopt "the list of organic laws". But the adoption of a list of organic laws would have imposed certain legislative restrictions on the parliament, since a qualified majority would be required for the adoption of the laws included in the list. The *Seimas* therefore decided not to constrain its future legislative competence until 2012, when the list of organic laws was finally adopted.⁴⁶ Before that, the only way to adopt an organic law used to be an Amendment to the Constitution with reference to certain organic laws. Up to 2012, only two organic laws have been adopted in Lithuania after consequent constitutional amendment, and one of them was declared void by the Constitutional Court (ruling of 24 December 2002).⁴⁷

Once a statute has been adopted, it has to be signed and promulgated by the President of the Republic. The president has no right to refer a question concerning the constitutionality of a statute to the Constitutional Court either before or after it has been promulgated. Instead, the president has the power to veto the statute. The parliament may overrule the president's veto by an absolute majority of votes of all the members of parliament in the case of ordinary legislation and by a three-fifths majority of the votes of all deputies in the case of organic legislation. A statute enters into force after its promulgation by the President of the Republic and its publication in the official gazette, *Valstybės žinios*

46. The list includes organic laws: the National language organic law, the National emblem organic law, the National flag organic law, the National anthem organic law, the Referendum organic law, the Electoral code adoption organic law, the Popular legislation initiative organic law, the Petition organic law and the Emergency powers organic law.

47. According to the amendment of Article 47 of the Constitution of 23 Jan. 2003, foreigners in Lithuania may purchase land, interior waters and forest under a procedure prescribed by organic law. On 20 March 2003, the *Seimas* adopted a corresponding organic Law "On the implementation of amendment of Article 47 paragraph 3 of the Constitution" with a three-fifths majority (Art. 69(3) of the Constitution).

B. *Parliamentary scrutiny*

One of the main traditional functions of the parliament is to control the government's activities. In Lithuania, the parliament's powers of scrutiny extend to the cabinet of ministers (the government) and other executive agencies but not to the President of the Republic (who is not a member of the government). Government scrutiny is, of course, not always effective since the government is formed by the parties that constitute a majority in parliament and, as a rule, enjoys their confidence. If it wishes, however, there are a number of ways in which the parliament can show that the government has lost this confidence. It can pass a vote of no confidence in the government or it can refuse to approve the annual State budget presented by the government. Although the parliament can use these legal instruments in its scrutiny of the government, the principal means by which the parliament (in fact, opposition parties) exercises control over the government is through parliamentary committees and at what are known as "the government's hours" during the parliament's plenary sittings.

Parliamentary committees in Lithuania correspond to the appropriate ministries, and the relevant committee is entitled to receive all information from the ministry and to invite the minister concerned to the sittings of the committee. The Audit Committee deserves special mention here. The remit of the Audit Committee is not only to control how the government and its agencies administer public property but also to scrutinize the National Audit Agency (*Valstybės kontrolė*), which is itself responsible for supervising the legality and efficiency of the administration of public property and the implementation of the State budget. As a rule, the chairman of the Audit Committee is a member of an opposition party.

The "government's hours" is an instrument for scrutinizing the executive and gives members of parliament, especially those in the opposition, the opportunity to submit questions publicly to the prime minister or other ministers about the government's actions or omissions. The fact that the government's hours are usually held every week during plenary sessions of parliament and are fairly well covered in the national media makes it a fairly popular instrument of control.

C. *Other powers of the parliament*

Other traditional areas of competence of the parliament in Lithuania are the power to set taxes and to approve the annual state budget. The *Seimas* also has the discretionary power to call elections for the President of the Republic and municipal elections. Only the *Seimas* can establish administrative units in the country and ministries of the central government. The *Seimas* also has the power to ratify and renounce international treaties and agreements. An international treaty that has the effect of changing the state's boundaries must be ratified by a four-fifths majority of the members of parliament (Art. 10). As a rule, the parliament organizes plebiscites. The *Seimas* exercises almost all of its powers through legislation, i.e. by enacting an appropriate statute (*įstatymas*).⁴⁸

The parliament, acting alone or in collaboration with the president, nominates senior State officials. It has the power to approve or reject the candidate nominated by the president for the post of prime minister. It also appoints justices of the Constitutional and Supreme Courts and other senior public officers from candidates submitted to it by the

48. Parliamentary scrutiny, the appointment of officials, the impeachment procedure and some other parliamentary procedures do not require the enactment of a Statute (*įstatymas*) but another kind of legal act (e.g. *Seimo nutarimas*).

president. The parliament has sole power to appoint the head of the National Audit Agency, the President of the Bank of Lithuania, ombudsmen and members of the Central Electoral Commission. The parliament may also remove persons (appointed by it to an office) by a majority vote of all its members, with the exception of those officials who may only be removed from office by an impeachment procedure (Art. 75).

Only the parliament has the power to remove senior public officials from office through the impeachment procedure. These senior officials are listed in Article 74 of the Constitution and they are the President of the Republic, members of parliament, the justices of the Supreme Court and the Constitutional Court and the judges of the Court of Appeal. The article also lists the grounds for impeachment, which are gross violations of the Constitution, breaches of the oath of office and commission of a criminal offence. The latter ground may be not invoked against the President of the Republic, in view of his immunity.⁴⁹

6.5. *Dissolution of parliament*

The President of the Republic has the power to dissolve parliament, but this power has never been used in the thirteen years since the adoption of the 1992 Constitution. The president's discretionary power is actually fairly weak since it can only be used in two cases: (i) if the *Seimas* fails to approve the government's programme within 60 days of its presentation or (ii) on a proposal by the government, if the *Seimas* expresses no confidence in the government (Art. 58.). However, the president's power is limited not only by the fact that it is confined to these two instances and that it actually depends on the will of the government, but also by the fact that after dissolution, a newly elected parliament may declare new elections for the office of President of the Republic (Art. 87). The president is therefore only likely to use this discretionary power in the event of a serious political conflict between the government and the *Seimas* and if there is the assurance of sufficient public support for this risky political act.

6.6. *Political parties in parliament*

According to Article 35 of the Constitution, no one may be compelled to belong to any political party or association. This constitutional provision was drawn up as a preventive measure to avoid the re-occurrence of experiences under the soviet occupation. At that time, the soviet state was promoting the monopoly of the communist party and the communist youth organization. In 1989-1990 most of the political parties of the First Lithuanian Republic were re-established. Nowadays two major parties dominate the country's political arena: Conservatives⁵⁰ on the centre-right and Social-democrats on the centre-left. In 2012, there were about 40 registered political parties in Lithuania, but

49. The impeachment procedure in parliament has been used during 1992-2012 period: in 1999, 2004 and 2010. The first and the third case involved the impeachment of members of parliament and the second case involved the President of the Republic. In 1999, despite being convicted of a crime (bribery) in a criminal court, the MP (Audrius Butkevičius) was not dismissed from office for purely political reasons. However, in 2004 the President of the Republic, Rolandas Paksas, was removed from office in impeachment proceedings after a conclusion of the Constitutional Court. And in 2010, one MP (Linas Karalius) was removed from parliament, but another one (Alexander Sacharuk) succeeded in keeping his parliamentary mandate because of the lack of a three-fifths majority vote, although the impeachment procedure was started for investigation of mutual offence.

50. The official name of the party is "Homeland Union – Lithuanian Christian Democrats" (Tėvynės Sąjunga – Lietuvos Krikščionys Demokratai).

only half of them reached the threshold of one thousand members, the minimum requirement to participate in parliamentary and other general elections, according to the *Act On Political Parties*. During the 2008 parliamentary elections only 7 political parties reached the required 5% voting-threshold and were able to form parliamentary groups in parliament.⁵¹ There is a symbolic “leader of the opposition” post in Seimas, which is occupied alternately by the leader of a different opposition party, in accordance with the Rules of Parliamentary Procedure. In 2004, the *Law on funding of, and control over funding of, political parties and political campaigns* was adopted, according to which all political parties reaching 3% votes in parliamentary, municipal or European elections may receive State budget appropriations, which every year are redistributed according to the results of the last elections.

7. AGENCIES OF STATE CONTROL

7.1. Ombudsmen

Article 73 of the Constitution provides for the office of Seimas ombudsmen (*Seimo kontrolieriai*). This article is included in the section of the Constitution dealing with the parliament although the institution of the Seimas ombudsman is an independent public entity. The explanation for this lies not only in the title of the institution but also in the fact that the institution of the ombudsman has historically evolved from an agency of the parliament. According to the Law “*On the Seimas Ombudsmen*”, the Seimas must appoint two Seimas ombudsmen for a term of five years. The ombudsmen may not be reappointed and may only be removed from office following a vote of no confidence adopted by a majority of all the members of the *Seimas* (Art. 75). Although members of parliament can ask the ombudsmen to investigate a specific matter on the basis of information they have received, the ombudsmen receive the majority of complaints directly from citizens.

The Seimas ombudsmen could be called “maladministration ombudsmen” since, according to Article 73, their task is to examine complaints from citizens about bureaucratic intransigence and abuse of authority by public officials. According to the Law “*On the Seimas Ombudsmen*”, one Seimas ombudsman have the power to examine complaints concerning state officials (with the exception of the President of the Republic, members of parliament, the prime minister or judges) and another one has a competence regarding officials of local government. The institution of ombudsman is regarded as a non-judicial agency (as opposed to a “pre-judicial institution”), since decisions of the ombudsmen may not be appealed to the courts. Although decisions of an ombudsman concerning a particular public official formally are recommendations, public bodies tend to follow them. According to the Constitution, the Seimas ombudsmen may not initiate a review of the constitutionality of legal acts they are reviewing. Since the powers of the Seimas ombudsmen are limited to controlling bureaucracy and abuses of power, according to ordinary legislation, the offices of the ombudsman for Equal Opportunities and for Child Rights Protection were established as separate institutions in 1998 and 2000, respectively.

51. In 2008, a ruling majority was formed of 4 political parties: Conservatives (holding the post of prime minister), populist “Resurrection” party and two liberal parties (Liberal and Centre Union and Liberal Movement).

7.2. *National Audit Agency (Valstybės kontrolė)*

The legal status of the National Audit Agency is regulated by section XII of the Constitution, which guarantees the independence of this institution. According to Article 134, the National Audit Agency supervises the lawfulness of use of state property and the state budget. The *National Audit Agency Act (Valstybės kontrolės įstatymas)* specifies two main goals of the institution: 1) to supervise the lawfulness and effectiveness of the management and use of state property and execution of the state budget and 2) to promote positive and effective public audit impact on the management and control of public finance, and public management oriented towards results and public needs. In order to achieve these goals it uses two types of public audit: financial and performance (competence) public audit. The National Audit Agency has a competence to carry out the public audit of: 1) State budget implementation; 2) use of state funds; 3) management, use and disposal of state property; 4) implementation of the budget of the State Social Insurance Fund; 5) implementation of the budget of the Compulsory Health Insurance Fund; 6) use by respective fund management institutions and beneficiaries of funds of the European Union allocated to the Republic of Lithuania and implementation of programmes in which Lithuania participates; 7) The State Control carries out audits of the use of state budget funds allocated to municipal budgets.

7.3. *Lithuanian Central Bank (Lietuvos Bankas)*

Another constitutionally protected autonomous control institution is the Lithuanian Central Bank. Originally Article 125 provided that the Lithuanian Central Bank has a currency emission competence, but this provision has been removed by the 2006 Constitutional Amendment in order to be prepared to join the Euro zone, if needed. According to ordinary legislation, the main task of the Central Bank is to guarantee stability of prices. Other functions of this institution so far are: 1) to issue the currency of the Republic of Lithuania (Litas); 2) to formulate and implement monetary policy; 3) to determine the Litas exchange rate regulation system and announce the official exchange rate of the Litas; 4) to manage, use and dispose of foreign reserves of the Bank of Lithuania; 5) to act as a State Treasury agent; 6) to issue and revoke licences for credit institutions in the manner and cases established by law; 7) to establish principles and procedures for financial accounting and reporting of credit institutions; 8) to encourage stable and efficient operation of payment and securities settlement systems; 9) to collect monetary, banking and balance of payments statistics, as well as data on Lithuanian financial and related statistics, to implement standards on the collection, reporting and dissemination of the said statistics, and to compile the balance of payments of the Republic of Lithuania.

IV. The Constitutional Court (*Konstitucinis teismas*)

It is difficult to exaggerate the role of the Constitutional Court in the Lithuanian political and legal system. As is the case in almost all the new democracies of Central and Eastern Europe, the 1992 Lithuanian Constitution established a strong Constitutional Court (according to the Austro-German model) in order to guarantee constitutionalism, the rule of law and the protection of human rights.

I. SELECTION AND APPOINTMENT OF THE JUSTICES

The method of selection of justices of the Constitutional Court has already proved its effectiveness, which might explain the Court's success in assuming a prominent role and gaining authority among other legal and political actors, along with popular public support. Ordinary legislation provides that as a rule, prospective justices will be selected from among university professors. This is one of the crucial factors in explaining how the Court has been able to change the entire legal system and even the legal mentality of political and legal actors in Lithuania through its case law. Judges of ordinary courts who had been trained and practised in the narrow-minded Soviet judicial system would not have been able to adapt to the new legal concepts of civil society, the rule of law and the democratic state in the immediate aftermath of the Soviet occupation in the 1990s. The Lithuanian Constitutional Court was established in 1993, the same year in which the first justices were appointed to it.

The nine justices of the Constitutional Court are appointed for nine years and may not be reappointed. Every three years the Court is reconstituted with the appointment of three new justices. The justices are appointed by the *Seimas*. One candidate is proposed by the President of the Republic, a second by the Speaker of the *Seimas*, and a third by the Chief Justice of the Supreme Court. The *Seimas* may reject a candidate but has never done so. The *Seimas* also appoints the Chief Justice of the Constitutional Court on the President's nomination.

The justices have immunity and may not be detained or prosecuted for criminal offences without the consent of parliament. They can only be removed from office through impeachment proceedings in parliament. Justices of the Court (like ordinary judges) may not occupy any other public office, but according to Article 113 of the Constitution, they may continue their academic career.

2. THE RIGHT TO ADDRESS THE CONSTITUTIONAL COURT

The Constitution of Lithuania does not provide for a system similar to that of constitutional complaint in Germany or *amparo* in Spain, which allows individuals to address the Constitutional Court. Questions are submitted to the Constitutional Court by political

actors (the president, the *Seimas*, or a group representing one-fifth of the members of the *Seimas*, and the government) or by judges of the ordinary and administrative courts.

According to Article 110 of the Constitution, ordinary and specialized courts do not have to apply an act of parliament that is in conflict with the Constitution. If the judge of the court examining the case is uncertain about the constitutionality of a statute or governmental decree, he or she has to suspend the case and refer the matter to the Constitutional Court to review the constitutionality of the specific legal instrument. The effect of this provision is that the majority of cases reaching the Constitutional Court are referred to it by judicial authorities. It also means that ordinary courts have to interpret legislation in the light of the Constitution and of the case law of the Constitutional Court. Although the Constitutional Court often expresses the opinion that it is the only authority entitled to interpret the Constitution, ordinary and administrative courts also have a duty to interpret the Constitution before referring cases to the Constitutional Court. The judiciary in Lithuania therefore has the discretion not to apply an act of parliament if it is obviously contrary to the Constitution or to the case law of the Constitutional Court in accordance with the concept of *acte clair* or *acte éclairé*, as it is accepted in the case-law of the European Court of Justice. Naturally, the ordinary courts may not declare a statute of the parliament or any other legal instrument void. It would therefore be fair to say that the 1992 Constitution established a decentralized system of interpretation and application of the Constitution in Lithuania. On the other hand, it has to be admitted that ordinary courts in Lithuania still lack the courage to interpret and apply the Constitution independently.

According to the Constitution, the three main public authorities can control each other by challenging the constitutionality of each other's legal instruments, but the president and the government rarely use their discretion to challenge the Constitutional Court.⁵² The opposition in parliament, by contrast, is second to the judiciary in terms of initiating constitutional review.

3. COMPETENCE OF THE LITHUANIAN CONSTITUTIONAL COURT

The first thing that needs to be said is that the Constitutional Court in Lithuania does not have the sole prerogative to review the constitutionality of legal instruments. The Constitutional Court has the power to review parliamentary legislation (ordinary and organic laws and other acts of parliament), presidential and governmental decrees and international treaties (before or after ratification). Judicial review of the constitutionality and legality of other legal instruments, such as legal acts of ministers and other public bodies, is the task of administrative courts. The Constitutional Court is also not competent to overrule judicial rulings of other courts. It is also important to note that as a rule the Constitutional Court exercises *a posteriori* or *ex nunc* constitutional control.

3.1. *Abstract constitutional review*

Abstract review of constitutionality refers to cases where the Constitutional Court is asked by a political authority to answer an abstract or formal question concerning the constitutionality of a legal act outside the context of litigation. In this type of judicial

52. The President of the Republic may only contest the legality and constitutionality of governmental decrees, while the Government may only challenge the constitutionality of an act of parliament.

review, the Constitutional Court is in fact being asked to resolve a legal dispute between political actors, for example, between the opposition in parliament and the government, represented by a majority in parliament.

In the case of abstract judicial review of constitutionality, the Constitutional Court has primarily a political function and the task of settling a political dispute or even a political crisis. The political elite sometimes uses abstract constitutional review to secure the adoption of an unpopular political decision, as was the case in 1998 when capital punishment was abolished not by an act of parliament (an amendment of the Criminal Code) but by a ruling of the Constitutional Court on the constitutionality of this form of punishment. A relevant example of a case where the Constitutional Court resolved a political crisis was the impeachment process involving President Rolandas Paksas in 2003-2004.

3.2. *Concrete constitutional review*

The judicial authorities (ordinary and administrative courts) may refer a matter to the Constitutional Court if they are uncertain about the constitutionality of a statute or governmental decree which it has to consider in a particular case. In this case, the court addresses the Constitutional Court and suspends the litigation until the latter delivers its ruling. In reality, of course, the parties in the case request this suspension, but the court has the discretion not to grant it if it feels there are no legal grounds for the party's motion.

Concrete constitutional review constitutes the bulk of the workload of the Constitutional Court. This kind of judicial review of constitutionality makes the Lithuanian Constitutional Court an integral part of the judicial system, for it directly links the judiciary with the Constitutional Court and obliges the judiciary to apply the reasoning of the Constitutional Court in specific cases. Moreover, the Constitutional Court itself needs to link its reasoning to the facts of the case, as its reasoning becomes a precedent for the ordinary courts; nevertheless, it must be said that the Constitutional Court is still fairly reluctant to refer to the facts of a case in its rulings.

3.3. *Judicial review of constitutionality of acts of parliament, government decrees and presidential decrees*

The Constitutional Court may examine not only the content of an act of parliament (or other legal instrument) but also its form or the procedure of its enactment. According to Article 69 of the Constitution, the adoption of legislation in parliament has to follow the Rules of Parliamentary Procedure (*Seimo Statutas*). Consequently, the opposition in parliament may refer legislation to the Constitutional Court if they feel that parliament did not follow established Rules of Parliamentary Procedure. It is not clear how detailed this formal review of the enactment procedure should be, but as a rule the Court applies the concept of *substantial violation* of the rules of parliamentary procedure. For instance, it may consider not only the number of votes in favour of the statute but may even regard the adoption of an act of parliament without the opinion of the judicial committee concerning the constitutionality of the bill (which is required as a form of preventive control of legislation) as a substantial violation of the rules of parliamentary procedure and therefore of the Constitution (see, e.g., 19 January 2005, ruling [II.18]).

The Constitutional Court may review the constitutionality of the statute not only against specific provisions of the Constitution but also in light of the Preamble (e.g., the principle of the rule of law) and even constitutional principles not directly mentioned in the text of the Constitution or the Preamble but developed in the case law of the Constitutional Court itself (e.g., principles of legal certainty and legal expectations).

The majority of cases of constitutional review probably relate to the constitutionality of statutes. According to the Constitution, challenges to the constitutionality of an act of parliament can be brought by a group consisting of no less than one-fifth of the members of parliament (or by the *Seimas* itself⁵³), the government or the courts. The president cannot challenge the constitutionality of legislation.

Government decrees must be in conformity not only with the Constitution but also with parliamentary legislation and ratified international treaties. The Constitutional Court therefore reviews not only the constitutionality of legislation but also the legality of government decrees.

As a rule, a presidential decree has no general normative value and its review by the Constitutional Court is therefore fairly unusual. During the first twenty years of its existence the court has examined the constitutionality of presidential decrees only ten times (in the majority of cases, presidential decrees on appointments or removal of judges were contested). Decrees of the president (like the decrees of the government) have to comply not only with the Constitution but also with parliamentary legislation.

3.4. *Judicial review of the constitutionality of international treaties and agreements*

The Constitutional Court has the power to review whether an international treaty is in conflict with the Constitution (Art. 105). According to the Constitution, only ratified international treaties and agreements become part of the Lithuanian legal system (Art. 138). The president or the *Seimas* can ask for a treaty's constitutionality to be reviewed before it is ratified. This has only happened once, when the president challenged the constitutionality of the European Convention on Human Rights before it was ratified in the *Seimas*. The Constitutional Court ruled affirmatively on the matter on 24 January 1995. The review of international treaties before their ratification is the only example of *a priori* constitutional review by the Court. The Court is not precluded from verifying the constitutionality of an international treaty after its ratification by parliament but has never done so up to now.

3.5. *Role of the Constitutional Court in impeachment proceedings*

The Constitutional Court's powers in the impeachment process were not clear until the impeachment of President Rolandas Paksas in 2004. As this impeachment process showed, the Constitutional Court has a very significant, not to say crucial, role in the process. Notwithstanding the fact that the Court does not have the power to remove the president, a member of parliament or judges of higher courts from office – since this is at the discretion of the parliament (Art. 74) – the conclusion of the Court that the actions of a particular official have violated the Constitution is final and decisive and cannot be overruled by any other public body or court of justice. It is theoretically possible, however,

53. According to Article 106 of the Constitution, if the *Seimas* as such (and not a group of MPs) challenges an act of parliament before the Constitutional Court, the applicability of the contested act is automatically suspended.

that a public official who has been found by the Constitutional Court to have violated the Constitution may remain in office for political reasons.⁵⁴

Impeachment charges brought against the president, a member of parliament or a judge have to be formulated by the Parliamentary Impeachment Committee and, if confirmed by parliament, presented to the Constitutional Court for examination. The Court has to evaluate the charges and present its conclusion as to whether the offences formulated by the impeachment committee actually constitute a violation of the Constitution.

In effect, therefore, if the Constitutional Court is asked to evaluate the constitutionality of the actions of an official in an impeachment procedure, it plays the role of Constitutional Grand Jury and is competent to say whether the public official is guilty or not guilty of violating the Constitution. In its conclusion of 31 March 2004, the Court considered the question of whether the president had breached the oath of office and in its conclusion of 27 October 2010 the same question was considered concerning two members of parliament. In this sense, one can also speak of the Constitutional Court as being akin to a High Court of Honour, with the competence to review a breach of oath, which is traditionally understood to be primarily a political and moral concept.

3.6. *The Constitutional Court as electoral court*

There is no specific electoral court in Lithuania. However, the Constitutional Court and the High Administrative Court can hear claims regarding the legality of decisions taken by the Supreme Electoral Commission (*Vyriausioji rinkimų komisija*), which is responsible for organizing and supervising national elections. Legislation provides that decisions of the Commission or a failure to act on its part may be appealed to the High Administrative Court before the end of voting. The latter has to pronounce its decision within 48 hours. However, even within three days of the official results a candidate or a political party may ask the President to address the Constitutional Court to deliver a conclusion, if they disagree with a decision of the Supreme Electoral Commission on official results of parliamentary elections (see also Art. 105). This conclusion, according to the legislation, must be delivered in 72 hours. The Constitutional Court has received such a request three times: in 1996, 2004 and 2008 when it examined the election of a candidate in a particular electoral district after the parliamentary elections. The Court, employing the concept of a substantial breach of electoral laws, ruled that notwithstanding some minor infringements during the campaign, the electoral laws had not been violated.

4. STYLE AND METHOD OF REASONING OF THE CONSTITUTIONAL COURT

The first point to be made is that there is rather modest experience of using dissenting opinions in the practice of the Lithuanian Constitutional Court.⁵⁵

54. This happened during the aforementioned 2010 impeachment procedure of two MPs, when one of them was removed from office by Seimas, but the vote on the removal of the other was blocked by the opposition and consequently did not obtain three-fifths majority.

55. Dissenting opinions in the Lithuanian Constitutional Court became possible only after 11 November 2008 pursuant to the amendment of the Law on Constitutional Court. Since then, they have become more and more popular among the justices.

According to the Constitution, the Constitutional Court is not limited to the provisions of the Constitution cited in the petition when it is examining the constitutionality of a legal instrument. Nor is the Court restricted to the actual articles of the Constitution, since it can review the document's compatibility with constitutional principles derived from the Preamble of the Constitution or from the spirit of the Constitution in a broader sense. This influences the methodology of the Court's reasoning. The Constitutional Court uses various methods of reasoning and interpretation.

The principal method is that of systematic and coherent interpretation. According to the Court, there are no legal gaps in the Constitution since it consists not only of the actual text but also its spirit, which can be used to rectify any imperfections in the text. This hermeneutic approach is also linked to historical and teleological methods of interpretation, which take into account first and foremost the purpose or intention of a certain rule or set of rules. The Court also often employs a comparative method of interpretation, interpreting various constitutional concepts of human rights in the light of the case law of the European Court of Human Rights and national legislation in the light of EU law, including the case law of the European Court of Justice. The Court also uses the method of weighing and balancing different constitutional principles, since different principles and human rights are often in opposition in a particular case. But this method is far from fully developed in the Court's reasoning.

The Court has also developed the idea that legislation has to be interpreted first and foremost in light of the Constitution and not the other way around. The post-Soviet legal mentality tended to interpret certain provisions of the Constitution in light of existing legislation. But the Constitutional Court has tried to change this attitude to the Constitution through its case law.

It also has to be said that the Constitutional Court is still of the opinion that only it has the power to interpret the Constitution (see, for example, its ruling of 13 December 2004). This centralized approach to the interpretation of the Constitution is sometimes criticized by Lithuanian legal scholars, who refer to Article 6 of the Constitution, which provides that the Constitution is directly applicable law.

5. EFFECT OF A RULING OF THE CONSTITUTIONAL COURT DECLARING ALL OR PART OF A LEGAL ACT UNCONSTITUTIONAL

If the Constitutional Court declares that all or part of a legal document is in conflict with the Constitution, that instrument or the part of it declared unconstitutional may not be applied by the courts or by any other public or private entity (Art. 107). The Constitutional Court cannot annul the document in the strict sense of the word, but it can make it legally void. It is the duty of the entity that adopted the instrument to withdraw the entire instrument or the part of it that has been declared unconstitutional from the national legal system. For instance, the Rules of Parliamentary Procedure regulate what the *Seimas* has to do if the Constitutional Court declares an act of parliament to be unconstitutional.

Problems sometimes arise, however, if the *Seimas* is slow to change the unconstitutional piece of legislation. For instance, on 21 December 1999, the Constitutional Court declared that the new *Law on Reimbursement of State Officials* was in conflict with the Constitution in so far as it reduced the salaries of members of the judiciary, including the salaries of justices of the Constitutional Court. Since this ruling, the salaries of members of the judiciary have been paid on the basis of an earlier government decree. This was

formally illegal because, according to legislation, the salaries of members of the judiciary have to be regulated by an act of parliament and not by the executive.

Another question that can arise is what happens if the Constitutional Court mentions some imperfections or gaps in legislation in its considerations but not in its final ruling, in *obiter dicta* for instance? While the answer is not clear, practice shows that as a rule, parliament and other public bodies tend to follow the Court's reasoning and change their legal instrument accordingly.

6. DECISIONS OF THE CONSTITUTIONAL COURT

According to the Constitution and ordinary legislation, the Constitutional Court may deliver two types of decisions: rulings and conclusions. Until 2004 the distinction was assumed to be that *rulings* were final judgments of the Court on the constitutionality of a legal instrument, whereupon the unconstitutional legal act would be legally void and may not be applied, while a *conclusion* was regarded as official legal expertise and a non-binding recommendation for the *Seimas* on issues over which it has the final decision.⁵⁶ In a conclusion dating from 31 March 2004, however, the Court completely changed the notion that conclusions of the Constitutional Court are non-binding.

A. *Rulings of the Constitutional Court*

A ruling (*nutarimas*) is the main legal instrument by which the Constitutional Court forms its case law. The Constitutional Court delivers up to twenty rulings a year. The courts and political actors (the president, the *Seimas* and one-fifth of members of parliament and the government) can seek a ruling of the Constitutional Court if they are uncertain about the constitutionality of a legal document.

B. *Conclusions of the Constitutional Court*

Only the *Seimas* and the president can request a conclusion. According to the Constitution, the Constitutional Court delivers a conclusion (*išvada*) on questions submitted to it relating to the following (Art. 105):

1. whether electoral laws have been violated during presidential and parliamentary elections;
2. whether international treaties of the Republic of Lithuania are in conflict with the Constitution;
3. whether the actions of state officials facing impeachment proceedings are in conflict with the Constitution;
4. whether the health of the President of the Republic allows him to hold office.

During the twenty years of its existence, the Constitutional Court has only presented a conclusion on six occasions: in 1995, concerning the constitutionality of the European Convention on Human Rights (it concluded that there was no conflict); in 2004 and 2010, on impeachment procedure and in 1996, 2004, 2008 concerning violations of electoral laws during parliamentary elections (it found no violations of electoral laws).

With its conclusion of 31 March 2004 during the impeachment proceedings against President Paksas, the Constitutional Court reversed the premise that a conclusion was

56. See also Caroline Tauber, *Constitutionalism in Estonia, Latvia and Lithuania*. Iustus Förlag, 2001, p. 183.

only a non-binding recommendation for the parliament. The Court stated that its conclusion concerning the constitutionality of an official's actions is final and cannot be overruled by the parliament or any other public entity. The Court ruled that the parliament is only competent to decide whether the official should be removed from office. Following this *ratio*, we can say that the Court's conclusions in other cases must have the same definitive effect.

V. The judiciary (*Teismas*)

The powers of the judicial branch are set out in Chapter IX of the Constitution, which follows immediately after the chapter on the Constitutional Court. The Constitutional Court is part of the judicial branch in the broader sense of the term, but it has special status under the Constitution, whose authors, as has been shown, regarded it as a special judicial body with competence beyond traditional judicial powers. Some provisions of the Constitution concern both the Constitutional Court and the judiciary in the broader sense,⁵⁷ but this chapter reviews the judicial branch excluding the Constitutional Court.

The Lithuanian legal and judicial system follows the Continental European model as opposed to the common-law system. In this context, the Constitution provides that “justice shall be administered only by courts” (Art. 109). The Constitution does not give a definition of *justice*, but from other constitutional provisions we can infer both – substantial and procedural justice, i.e. that judgments must be administered impartially; judges must be independent of other public authorities, political parties and private bodies (Arts. 109, 113, 114); court proceedings must be open to the public (Art. 117); the decisions of the courts must be reasonable, grounded in law and in conformity with the Constitution and values expressed in the Constitution (Arts. 7 and 110). The Constitution naturally gives the judiciary wide discretion to decide what constitutes justice in a particular legal dispute. While the Constitutional Court regards justice as one of the principal moral values on which a modern democracy under the rule of law is founded (e.g., a ruling of 22 December 1995), ordinary courts, and particularly the courts of lower instance, still maintain a much more formal understanding of the concept of justice.

Lithuania has a dual judicial system, with ordinary and administrative courts having different jurisdictions in the administration of justice (see Art. 111). Courts of general jurisdiction deal with civil, criminal cases and minor misdemeanours (e.g. exceeding the speed limit etc.), while administrative courts deal with cases involving civil service, taxation and other cases concerning public administration.

According to Article 112 of the Constitution, the president is principally responsible for appointing members of the judiciary. The president appoints judges of ordinary and district courts and of specialized administrative courts, including the High Administrative Court. Judges of the Court of Appeal are appointed by the president with the consent of the parliament, and justices of the Supreme Court are appointed by parliament on nomination by the president. But according to a judgment of the Constitutional Court on 9 May 2006, the president may appoint, promote or remove a judge from office only after receiving advice from the independent Judicial Council, which is made up entirely of judges. As a rule, judges are appointed until the age of 65. Justices of the Supreme Court and Constitutional Court and judges of the Court of Appeal can only be removed from office by impeachment proceedings in the *Seimas*.

57. For instance, the provisions of Article 5 (“public power in Lithuania is vested in the Seimas, the President of the Republic and the Government and the judiciary”); the provisions of Article 113 (“Judges may not hold any other public office and may not be employed in any business, commercial or other private company. They may not receive any other remuneration than the salary as a judge, as well as remuneration for academic activities and royalties from creative work [...]” together with the constitutional principle of independence of the judiciary).

The independence of the judiciary is guaranteed by the constitutional principle of the separation of public powers (Art. 5), by the immunity afforded to members of the judiciary and the prohibition of interference with the activities of judges or courts on pain of legal liability (Art. 114), by the fact that judges are appointed for life and their removal from office is constitutionally restricted (Arts. 115 and 116) and by the requirement that all decisions of the president concerning the appointment and removal from office of members of the judiciary must be made on the advice of the Judicial Council. The remuneration of the judiciary is also constitutionally protected (Art. 113). The Constitutional Court ruled on 12 July 2001 that the *Law on the Remuneration of State Officials*, which purported to reduce the salaries of judges, contravened the constitutionally guaranteed independence of the judiciary (Art. 109) and other constitutional principles and declared this piece of legislation void.

I. THE ORDINARY COURTS

Article 111 (1) of the Constitution establishes a system of courts of general jurisdiction (or ordinary courts) to deal with civil and criminal cases. In accordance with the continental European tradition, this provision anchors a judicial system of three instances, courts of first instance, appeal and cassation, in the Constitution. Up to 2012 there was no jury system in Lithuania, nor were there lay judges. All judges, including those of the local courts, are professional jurists who, again according to European tradition, are appointed and not elected.⁵⁸ The competence of the local courts is laid down in the *Law on Courts (Teismų įstatymas)* and extends to minor civil and criminal cases. Cases in local courts are heard by a single judge. There are 54 local courts (*apylinkės teismas*) with 480 judges, i.e. they are established in practically each of the 60 municipalities. The local court is the court of first instance, which has jurisdiction to establish the facts of the case and, as a rule, has a heavier workload than the higher courts.

The district court (*apygardos teismas*) can serve as a court of appeal or as a court of first instance, depending on the amount of money (and some other circumstances) involved in a claim in civil proceedings and on the seriousness of the crime in criminal proceedings. For instance, it is an appeal instance for administrative sanctions (e.g. fines for motoring offences) inflicted by local courts. There are five district courts, one in each of the five largest towns and cities of Lithuania. There are 194 district judges. District courts have separate divisions for civil and criminal cases. The jurisdiction of the district courts more or less coincides with the administrative boundaries of the country. The district court sits in a *collegium* of three judges. District courts, when acting as courts of first instance, have the competence to establish the facts of the case.

Lithuania has only one Court of Appeal (*Lietuvos Apeliacinis teismas*), which, together with the Supreme Court (*Lietuvos Aukščiausiasis teismas*), is located in the capital, Vilnius. The competence of the Court of Appeal to review the facts of a case as established by the court of first instance is restricted. The Court of Appeal has civil and criminal divisions (*skyriai*) and 33 judges; it sits in a *collegium* of three judges.

⁵⁸ Legislation provides that a Master of Law degree from a university and five years of legal practice is required in order to apply for the office of judge. In Lithuania there is no special school for magistrates as there is in France, for example, but a candidate is required to have a 5 years practical experience in the court. The candidate is also required to pass a special examination, which is set by the Ministry of Justice and covers all the major subjects of law.

The Supreme Court is the highest court of general competence and acts as a court of cassation, the court of final instance in civil and penal cases, and is competent only to review the application of the law by lower courts. As a rule, the Supreme Court accepts all legitimate appeals from the appeal instance and does not use a filter system, as is the case in common-law countries. There are 41 Supreme Court justices and the Supreme Court has divisions for civil and criminal law. The Supreme Court sits in a *collegium* of three or seven judges or in plenary session. Legislation provides that the Supreme Court should publish a journal of judicial practice (*Teismų praktika*) containing the most important cases and may deliver recommendations to ordinary courts regarding the application of law. The cases to be published in the journal of judicial practice are selected by the Senate of the Supreme Court, which is made up of seventeen most experienced justices from both divisions, including the Chief Justice himself. According to the *Law on Courts*, lower courts of general competence must take into consideration the case law of the Supreme Court in analogous cases. Despite the legislature's intention to introduce the concept of *stare decisis* in the judicial system, this common-law transplant does not work very effectively in Lithuania. In general not all Lithuanian judges are familiar with the idea of *stare decisis* and its application in analogous cases. It has to be said that rules of precedent in rulings of the Supreme Court published in the journal of judicial practice are sometimes formulated as an abstract interpretation of a statutory rule detached from the facts of the case. The judges of lower courts therefore often regard the precedent as an application of an abstract interpretation of a legislative rule but not as a pretext for finding a link between the facts on which the Supreme Court issued a ruling and the facts of the case under consideration.

It has to be said that public confidence in the judicial branch in Lithuania is quite low. This may be explained in part by the fact that the majority of the corps of Soviet-era judges remained in office after 1990. Consequently, more than twenty years after the reestablishment of the independent state and democracy, the situation remains that the majority of sitting judges were trained during the totalitarian period of Soviet occupation. The formalistic application of law (according to prevailing concepts of legal positivism) without taking into account the provisions and principles of the Constitution is a common practice adopted in the ordinary courts (especially those of the lower instances). The absence of a tradition of dissenting opinions in courts of general competence in Lithuania does not help to improve the rather formalistic reasoning employed by ordinary and administrative courts.

The proceedings in the ordinary courts differ according to whether it is a civil or criminal case, although both types of proceedings are based mainly on written pleadings by the parties. Civil proceedings could be described as adversarial, according to the Continental legal tradition, in that the parties are usually represented by professional lawyers and have an opportunity to question each other. In the Lithuanian judicial system, this adversarial component of the proceedings is outweighed by (a) the predominant role of the written proceedings, (b) the fact that the judge has usually already formed an opinion on the facts of the case, and sometimes even on the question of guilt or liability, before coming to the courtroom, and (c) the fairly active role played by the judge, who can ask questions about facts or points of law and interrupt or even comment on the legal arguments of the parties during the proceedings.

2. ADMINISTRATIVE COURTS (*ADMINISTRACINIAI TEISMAI*)

Until the judicial reforms of 1999, Lithuania had a unitary judicial system, composed only of courts of general competence, with the Supreme Court at the top of the system. The decision was taken in 1999 to establish separate specialized courts with competence to adjudicate in administrative cases. The legal basis for this reform was Article 111 of the Constitution.⁵⁹ It was initially decided to establish only lower specialized courts and integrate them into the existing judicial system with the existing Court of Appeal and Supreme Court. One year into the reform process, in 2000, however, a separate High Administrative Court was established as the court of final resort in administrative proceedings. Accordingly, there are now two separate judicial systems and two separate highest courts with competence to develop judicial practice.

There are now five district administrative courts (sing. *apygardos administracinis teismas*) and one High Administrative Court (*Vyriausiasis administracinis teismas*), which together form the system of administrative courts in Lithuania. As a rule, district administrative courts sit in a *collegium* of three judges as a court of first instance; the High Administrative Court is the court of appeal and court of final instance in administrative proceedings. The High Administrative Court, which has eighteen judges, sits in a *collegium* of three or five judges or in plenary session. There is no cassation in the system of administrative courts, which can be explained by the desire to guarantee more rapid administration of justice than in civil or criminal procedures.

A special ad hoc judicial body (*speciali teisėju kolegija*), whose members are the justices of the Supreme Court and the High Administrative Court, has been created to resolve disputes over jurisdiction between ordinary and administrative courts.

2.1. Competence of administrative courts

One of the main ideas behind the establishment of separate administrative courts was to have specialist judges who could administer justice better and more quickly in disputes between citizens and the government, with the exception of criminal cases. As a rule, the competence of the administrative courts extends to settling disputes between private (individuals or legal entities) and public entities. It would be fair to say that the purpose of establishing the administrative courts was to address bureaucracy and maladministration in public bodies. In theory at least, the separate system of administrative courts is intended to provide better protection for individuals against infringement of their rights by public authorities.

Whether the judicial reforms establishing specialized administrative courts and allocating disputes with public agencies to these courts has yielded positive results is open to question. The fact is that, unlike the justices of the Constitutional Court, the judges of the administrative courts were appointed in 1999 and 2000 from the ordinary courts. This resulted in the majority of administrative judges regarding the administrative courts as *courts of administration* rather than *courts of human rights*.

As mentioned earlier, administrative courts are generally competent to resolve legal disputes between private parties and public authorities. Most administrative proceedings involve a dispute between an individual and a public agency (for instance, a taxpayer versus the tax agency). But the administrative courts in Lithuania also have competence to

59. Art. 111, par. 2, reads: "For the investigation of administrative, labour, family and cases of other categories, specialized courts may be established according to law."

resolve legal disputes between civil servants and their employers, for instance, in labour disputes in the civil service. According to legislation, in Lithuania it is even possible to bring an action against the parliament, for instance, if an official is dismissed by an act of parliament (see, for example, the ruling of the High Administrative Court of 3 July 2003). The administrative courts are also competent in cases involving a dispute between two public agencies, e.g., a municipality and central government.

The High Administrative Court and the district administrative courts also have the power to review the constitutionality and legality of some legal instruments, for example, ministerial decrees or acts of municipality. During a case, an ordinary court can ask the administrative court to review a document's constitutionality or legality. If the ordinary court is uncertain about the executive instrument's constitutionality (compatibility with the Constitution) or legality (compatibility with an act of parliament), it has to suspend the proceedings and apply for a ruling on the matter by the administrative court.⁶⁰ Ombudsmen, officers of the National Audit institution and procurators may also address the administrative court to examine the legality and constitutionality of lower executive legal instruments. A finding by the administrative court that the instrument in question is in conflict with the Constitution or legislation renders it void, as is the case with a similar ruling by the Constitutional Court, and it may not be applied by any private or public entity. In other words, besides *concrete review* of maladministration, public agencies can also ask the administrative courts for an *abstract review* of the legality of a particular executive legal instrument.

The High Administrative Court also functions as the high electoral court when dealing with claims regarding decisions of the Supreme Electoral Commission or of possible violations of electoral laws before the end of voting. The High Administrative Court publishes a journal of the practice of the administrative courts (*Administracinių teismų praktika*) containing the most important cases in the preceding year, grouped according to subject, e.g., cases on the civil service tax law, public procurement etc. The High Administrative Court uses this journal *inter alia* to issue its recommendations regarding the application of legislation to the district administrative courts.

2.2. Administrative procedure

Although they are courts of first instance, the district administrative courts often sit with a *collegium* of three judges. The chairman of the district administrative court appoints a *juge rapporteur*, who is responsible for delivering a draft ruling. In practice, the *juge rapporteur* is often the only judge in the *collegium* who actually follows the proceedings. This procedure in fact means that the final ruling in the case is formulated by the *juge rapporteur* without much input from the other two judges and often makes the use of a *collegium* a pointless formality.

Administrative proceedings in Lithuanian administrative courts have features of both civil and criminal proceedings. The parties to the proceedings submit their written arguments to the court and have an opportunity to put questions to each other during the hearing. Much like in criminal law proceedings, judges play a rather active role in administrative proceedings. The ruling and the reasons for the decision *may be* delivered within seven

60. The High Administrative Court is competent to review the legality of documents of any central executive agency (for instance, a ministerial decree), while district administrative courts may review the legality of legal instruments issued by regional and local authorities.

days of the proceedings. If either party is dissatisfied with the ruling, it can appeal to the High Administrative Court. Although there is no cassation in administrative proceedings, it is still possible to appeal again to the High Administrative Court on the grounds of errors in the application of the law. The court must then form another *collegium* with different judges, which examines the application of law by their colleagues and delivers its ruling after considering the case behind closed doors (without the participation of the parties).

VI. The state and its subdivisions

I. ADMINISTRATIVE DIVISION OF THE COUNTRY AND DEVOLUTION

There are sixty municipalities (*savivaldybės*) and ten counties (*apskritis*) in Lithuania. Residents of municipalities are represented by directly elected members of the municipal council, while the county after 2010 administrative reform is mere an administrative unit without any administration. There are also ten Agents of the Government (*Vyriausybės atstovas*) in each county, whose task is to ensure that municipal decisions do not conflict with the decisions of the central government. Their decisions may be appealed to the administrative courts.

As far as devolution is concerned, it must be noted that the Lithuanian state has no tradition of federalization, or even decentralization. The Kingdom of Lithuania in the thirteenth century, the Grand Duchy, and the First Republic were unitary and fairly centralized states. Only the Commonwealth of Two Nations (which existed from the sixteenth to the eighteenth centuries) was something of a cross between a federation and a confederation. According to the 1992 Constitution, Lithuania is a unitary state.

One may still ask, however, whether it is a centralized or decentralized country. The text of the Constitution does not provide a clear answer to that question, but the weight of evidence suggests it is more of a centralized state. Decentralized public power in Lithuania is exercised only by municipalities or local government (*savivaldybės*), which have directly elected representatives. Ten counties (*apskritis*) were established in 1995, according to Article 123 of the Constitution. Until the administrative reform of 2010, the county governor was appointed by the central government (Art. 123). For reasons of efficiency in public administration, administrations at the level of county were abolished by the conservative government in 2010. Although municipalities have the constitutional right to their own separate budget, autonomous from central government, under ordinary legislation they have no right to collect taxes. Almost all financial resources for the municipal budget therefore come from the central government, which redistributes all national income. In that sense it is difficult to speak of real autonomy of local government and decentralization of state power in Lithuania up to now. Summing up: to date the Republic of Lithuania has been a unitary and fairly centralized state with rather weak local government and almost non-existing regional tradition.

2. LOCAL GOVERNMENT (*VIETOS SAVIVALDA*)

The municipalities (*savivaldybės*) in Lithuania, which are administrative units having directly elected representation, are probably the largest in Europe, with an average population of sixty thousand. There are smaller local administrative branches (*seniūnijos*), mainly comprising a village, which do not have directly elected representatives but are instead administered by a public official (*seniūnas*) appointed by the director of the municipal administration. A *seniūnas* performs some public services in villages, such as

notarial services, regulation of small trading activities and even examination of certain smaller administrative cases.

As was already mentioned, Lithuania is a fairly centralized country. According to the original idea of the Lithuanian Constitution, all public power comes from the Nation and is exercised by the central government and, through it, is devolved to local government (not the other way around). This centralized attitude of the founders of the 1992 Constitution can be explained by the fact that there is no tradition of devolution in Lithuania. Although some provisions of the Constitution suggest that municipalities have their own budget (Art. 121), nevertheless, the case law of the Constitutional Court and the national political and legal elite still advocate the country's centralized form of government.⁶¹

2.1. *Election of municipal council and mayors*

According to the Constitution (Art. 119) and the *Law on Municipal Council Elections*, members of the municipal council are directly elected for four years, in principle according to the system of proportional representation of political parties participating in elections. Although during the 2011 municipal elections, independent candidates were admitted for the first time, they got no more than 8% of seats in all 60 municipal councils. The active electoral right, i.e. the right to vote, in municipal elections is enjoyed not only by Lithuanian and EU nationals, but all permanent residents of the municipality in question. The mayor (*meras*) of a municipality is elected by a majority of the municipal council. The mayor, a politician, shares his or her administrative competence with the director of municipal administration, who is a civil servant.

The passive electoral right, i.e. the right to stand for election, in municipal elections extends to Lithuanian nationals (citizens) and all permanent residents of the municipality who are aged twenty or older. The Migration Agency can issue permits for permanent residence to foreigners who have lived legally in Lithuania for five years or have obtained refugee status. The same restrictions on eligibility to stand in parliamentary elections also apply for municipal elections.

2.2. *Competence of local government*

The Constitution provides the basis for the competence of local government. Article 121, for instance, states that a municipality may establish local levies and may provide for the levying of taxes at the expense of its own budget. The municipal council can fix the local tax rates at its own discretion. Local government's principal power, however, comes from the constitutional provision that municipalities can adopt their own budget, independently of the central government (Art. 121 and 127). The independence of the municipal budget is therefore constitutionally protected and a municipality must have the necessary means to form and adopt its own budget. Nevertheless, the parliamentary legislation implementing these constitutional provisions does not give municipalities the possibility to collect taxes directly or even to adopt their budget independently, since by an act of Parliament, the *Seimas* adopts what is known as an annual consolidated budget, including

61. For example, the Constitutional Court ruled on 13 December 2004 that the constitutional provision that "municipalities shall draft and approve their own budget" does not mean "an independent (from central government) budget" and means that Lithuania has a "unified budgetary system". In the same ruling, the Constitutional Court defended the quite centralized "Weberian" model of the Lithuanian civil service.

the budgets for the sixty municipalities. In a fairly controversial decision on 13 December 2004, the Constitutional Court decided to approve the existing legislative practice that allows the central public power (the *Seimas*) to determine the wages of civil servants working in a municipality. All of these points illustrate the centralized nature of local government in Lithuania. In effect, practically all financial resources for the municipal budget come from the national treasury, i.e., from central government. Municipalities themselves are only able to establish parking fees, the fares for local transport, land rent and some other smaller levies.

Other areas of competence of local authorities are laid down in the *Law on Local Government*. Although secondary education is unified and centralized in the country, primary and secondary schools and hospitals are governed by municipalities. Municipalities have traditionally been competent to deliver all kinds of communal services, such as pre-school care, housing, town cleaning, local transport, parking, funeral services, etc. The municipalities' competence also includes primary and informal education, administration of health and some other social services, employment policies and training services, the organization of cultural events, tourism and leisure (especially for juvenile, disabled and socially disadvantaged persons). Municipalities share other powers with central government. In this context, "shared competence" means, for instance, that central government can legislate on secondary education while local authorities can act in this area but only within the limits prescribed by that legislation.

The mayor represents the municipality, convenes and presides over sessions of the municipal council, signs decrees issued by the municipality and coordinates the functions of the different committees of the municipal council. Although not directly elected and required to share some powers with the director of municipal administration, the mayor of a municipality does possess the main levers of municipal power. The mayor is politically accountable to the municipal council and can be removed from office if he or she loses the confidence of a majority of the members of the council.

The Agents of the Government (*Vyriausybės atstovas*) exercise administrative supervision in all ten counties, which are generally made up of approximately six municipalities. The Agent of the Government, who resides in the region's capital, can appeal to the administrative court if he or she feels a municipality has exceeded its competence.

VII. Fundamental rights

I. THE CONCEPT OF HUMAN RIGHTS

The contemporary Western concept of human rights is a fairly recent development, having evolved since World War II when the theory of “pure legal positivism” was discredited by its association with the rise and justification of totalitarian regimes. Since the adoption of the Universal Declaration of Human Rights (1948), and more especially the European Convention on Human Rights (1950), some European jurisdictions have gradually expanded the concept of fundamental rights, culminating in the Charter of Fundamental Rights of the European Union (2000). But, as stated above, the contemporary concept of human rights should be seen in the light of the idea of constitutionalism and the rule of law, as separate (from popular sovereignty and majority rule) and autonomous sources of the justification of public power.

The first thing that must be said is that there is no coherent and decisive concept of fundamental rights in Lithuanian legal science and case law. Instead, the 1992 Constitution established a more general concept of human rights, which was nevertheless influenced by the European Convention on Human Rights. Chapters II to IV of the Constitution are devoted to various rights of the individual. The importance attached to these sections is shown by the fact that they come before the chapters on State powers. Although the Constitution is directly applicable law (Art. 6), in relevant cases, the courts have so far not relied solely on the provisions of the human rights sections of the Constitution but have instead tried to refer to a statute implementing the constitutional provisions, not only because the constitutional provisions are sometimes formulated in a rather abstract way but also because the direct application of the Constitution is still quite a strange notion for ordinary courts.

At the beginning of the 1990s, after the experience of the Soviet form of legal positivism,⁶² the Lithuanian political and legal community was looking for a new concept to replace the prevailing formal-positivistic concept of law. Finally, among other legal concepts, the 1992 Constitution incorporated the idea of *ius naturale*. Article 18 of the Constitution reads that “human rights and freedoms shall be natural [or “innate”, Lith. *prigimtinių*].” This idea of natural (innate) human rights, based on human dignity as the origin of all human rights, and their priority over public power, contrasts with the concept of legal positivism, according to which, human rights only exist if they are laid down by the State in the text of positive law. This concept also means that the individual may not be deprived of his or her innate rights and that there is no definitive list of human rights. The birth of the concept of natural human rights in the Lithuanian Constitution was also influenced to a certain extent by the draft Constitution prepared by the American constitutionalists L. Wyman and B. Johnson in 1991, which took the idea of inalienable

62. Although the text of Soviet constitutions was usually formulated very democratically, it was not possible to apply their provisions in the courts. The judiciary had to interpret all provisions of the Soviet constitution and legislation in the light of Soviet ideology and various instructions of the Communist Party. Moreover, the Soviet judiciary, like all other public institutions, could not be regarded as independent since judges could be easily replaced if they did not follow the party line.

rights from the text of the Declaration of Independence (1776). The case law of the Constitutional Court also fosters the concept and terminology of *natural human rights* rather than the terminology of *fundamental rights* adopted in the legal traditions of some other European countries.⁶³ For instance, in a ruling of 9 December 1998, the Constitutional Court relied on this concept in declaring void a provision of the Criminal Code allowing capital punishment. In its case law, the Court has found that natural human rights include the right to life and human dignity (judgment of 9 December 1998), equal treatment of persons (judgment of 7 March 2003), right of access to cultural heritage (judgment of 8 July 2005), the right to ownership (judgment of 27 May 1994). It is also important to say that the contemporary concept of human rights in Lithuania is not limited to its use as a tool against arbitrary use of State power but can also be invoked in legal disputes between private bodies.

2. CATALOGUE OF HUMAN RIGHTS IN THE LITHUANIAN CONSTITUTION

As mentioned before, the Constitution does not contain a definitive list of human rights. However, different chapters of the Constitution do recognize a number of personal rights, political rights and socio-economic rights.⁶⁴ Of course, there are no clear demarcations in this classification since some rights may fall into different groups at the same time. Personal rights are the most important as they are directly linked with the concept of the natural, innate and inalienable rights of a human being..

2.1. *Personal rights*

Chapter II of the Constitution relates to personal and political rights. Firstly, Articles 18 to 32 encompass personal rights (*status personalis*), including the right to life, freedom, personal and family life, human dignity, the right to hold personal convictions and freedom of religion, the freedom to choose one's place of residence, freedom of speech, freedom of ownership and some others. *Habeas corpus* rights (the right to protection from arbitrary detention, see Article 20) can also be assigned to the category of personal rights under the Lithuanian Constitution.

The Constitutional Court has not developed a comprehensive doctrine on personal rights, although it did rule that the death penalty conflicted with a human being's innate natural rights and may not be used in a democratic society (ruling of 9 December 1998). The Court has identified the right to life and to human dignity as the basic human rights without which other human rights would be irrelevant. But the Constitutional Court's heaviest case load with respect to personal rights has involved the restitution of personal rights to ownership of property after the Soviet expropriation in Lithuania in the 1940s. In

63. The contemporary European concept of fundamental rights (*droits fondamentaux*) is much broader than the Lithuanian concept of innate human rights and may include, for instance, the right to good administration, business activities, labour services, consumer protection, etc. The concept of innate human rights is much narrower in this sense and includes only basic personal rights related to human dignity and the state of being human. The concept and terminology of fundamental rights will probably emerge in the Lithuanian legal system in the future under the influence of the terminology of the European Court of Justice and Court of Human Rights and the European Charter of Fundamental Rights.

64. In this context, cultural rights are included in the category social and economic rights.

this context, the Constitutional Court has adopted a rather soft attitude towards the right to restitution of expropriated property and sometimes tends to justify the government's refusal to return property *in natura*, relying on social changes that occurred during the fifty years of Soviet occupation. The government must, of course, provide fair compensation, while expropriated property must serve the needs of society. Another problem that has arisen in the context of restitution is the fact that ordinary legislation has provided that only individuals with Lithuanian citizenship are entitled to restoration of property that was expropriated by the Soviets.

It is interesting to note that the Lithuanian Civil Code (2000) enumerates the following personal rights: the individual's right to life, to human dignity and personal reputation, to private life, to one's name, to one's health and to one's bodily integrity.

2.2. *Political rights*

The human rights provided for in the remaining articles of Chapter II, Articles 33 to 36, are political rights since they concern the individual's right to participate in the governance of the country, to vote in elections and stand for election, the right to criticize the government, the right of assembly and the right of association. Although only Lithuanian citizens have the right to vote in national presidential and parliamentary elections, all permanent residents of the country, regardless of their nationality, have the right to vote and to stand as a candidate in municipal elections (Art. 119). All nationals of EU member states who are permanently resident in Lithuania can vote in elections for or stand for election to the European Parliament.

There is little case law of the Constitutional Court concerning political rights. Interestingly, the Court permanently removed the right of any person who is removed from the office of President of the Republic or as a member of parliament or of the judiciary by impeachment to stand in national elections (ruling of 25 May 2004). It is unclear whether the European Court of Human Rights would find this permanent curtailment of an individual's passive political right to be proportionate under the European Convention.

2.3. *Social and economic rights*

Chapters III and IV deal with social and economic rights. Article 39, for instance, provides that the state should support maternity leave. Article 41 provides that public secondary education shall be free of charge. Articles 49 and 52, respectively, guarantee an individual's right to paid annual holidays and to a retirement pension. Articles 50 and 51 guarantee the right to join a trade union and to strike.

It could be argued that some social and cultural rights are declarative human rights, since their direct application in the court is not always possible.⁶⁵ This view may be supported by the rather abstract formulation of some provisions of the Constitution. For instance, Article 46 says that "the State shall support economic efforts and initiative that are useful to society" and "the State shall defend the interests of the consumer". Article 48 provides that "each person may freely choose a job or business and shall have the right to have proper, safe and healthy conditions of work, to receive fair pay for work [...]". Even Article 41 (which states that "higher education shall be available to everyone according to

65. See, e.g., Caroline Tauber (note 56), p. 226-238.

his or her individual abilities. Citizens who are good at their studies shall be guaranteed higher education at State schools free of charge”) is scarcely implemented in practice in the country.

Nevertheless, it is interesting to note that the Constitutional Court has been issuing a growing number of rulings concerning social rights. Between 2000 and 2012, the Constitutional Court issued about forty judgments concerning the right to compensation for work, the right to a retirement pension or other social rights. In a ruling on 25 November 2002, the Constitutional Court invoked the principle of protection of legitimate interests when it ruled that sums awarded in a salary or a pension may not later be reduced. This ruling was a factor in the government’s decision that pensioners who are employed and receive a salary for their work must also be paid their full pension.⁶⁶

2.4. *The rights of minorities*

The rights of minorities are protected by Articles 37 and 45, which read “[c]itizens belonging to ethnic communities shall have the right to foster their language, culture and customs” and “[e]thnic communities of citizens shall independently manage the affairs of their ethnic culture, education, charity and mutual assistance. Ethnic communities shall be provided support by the State.” The term “minority” does not appear in the text of the Constitution, which uses the term “ethnic community”, which does not include religious or other minorities. In this context, it has to be said that Poles and Russians, who make up about 15% of Lithuania’s total population, have the right to choose to send their children to public primary and secondary schools where education is guaranteed in their respective languages.⁶⁷

There is very little case law of the Constitutional Court concerning minority rights and it is difficult to imagine how the constitutional provisions of Articles 37 and 45 could persuade the State to take positive action. It should be mentioned here that after the restoration of independence in 1990, Lithuanian citizenship was granted to all Soviet immigrants who applied for it and had been residing legally in the territory of Lithuania up to 1989, without any residential or linguistic naturalization requirements. The only requirement for the granting of Lithuanian citizenship was to renounce Soviet citizenship.

2.5. *Constitutional restrictions on human rights*

A concluding remark in this section is that the chapters of the Lithuanian constitution on human rights and their limitations have to be interpreted in light of the European Convention on Human Rights and the case law of the Court of Human Rights in Strasbourg. Despite the absence of any appropriate provision in the text of the Constitution, since 2002 the Constitutional Court has adopted the European concept of “necessary in democratic society” as a test to decide whether restrictions on human rights in the domestic legal system are legitimate. For instance, in a ruling on 14 March 2002, the Court found that the provisions of the *Law on Pharmaceutical Activities* that required

66. See for some critique on this ruling Vaidotas A. Vaičaitis, ‘*The Ruling of the Lithuanian Constitutional Court in favour of pensioners*’, *Teisė* 2003, No. 49, p. 124-133.

67. According to the Law On Education in national minority schools the Lithuanian language and literature, Lithuanian history and geography as well as the basics of citizenship and civic society classes are taught in the state language.

owners of pharmacies to have a higher education in pharmaceuticals are not necessary in a democratic society. Using the same reasoning, in a ruling of 24 March 2003, the Court declared unconstitutional the rule permitting extensive censorship of the correspondence of detained persons.

Although it is not mentioned in the Constitution, the Constitutional Court has accepted the principle of proportionality with respect to restrictions on human rights since as early as 1996. In the beginning it referred only to the case law of the European Court of Human Rights, but since a ruling on 7 January 2000, the Court has accepted this principle as a domestic constitutional principle. Moreover, in a ruling of 2 October 2001, the Court said that the principle of proportionality can be derived from the constitutional principle of the rule of law, which is enshrined in the Preamble of the 1992 Lithuanian Constitution. The same can be said about the principle of legal expectations.

As already mentioned, safeguards for human rights could be strengthened in the Lithuanian legal system if the ordinary and administrative courts applied the Constitution as provided for in Article 6.