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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

DRAFT CONSTITUTION OF THE REPUBLIC OF LITHUANIA
(of 21/27 April 1992)

PART II - Comments on the institutional provisions

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A. INTRODUCTORY REMARKS

The main purpose of this report is to analyse those provisions of the draft constitution of Lithuania which concern organisation and powers of the various authorities. It will therefore focus on Chapters 4, 5 and 6 of the draft Constitution and on the general provisions of Chapter 1, which are indissociable from them.

It should be remembered that the following comments reflect the reaction of a non-Lithuanian lawyer to the draft Constitution. Some of the observations are probably solely due to translation difficulties.

It should also be noted that while some provisions may appear strange to a foreign constitutional lawyer, or even open to criticism, they may present no problem for a Lithuanian lawyer who is familiar with the certain historical traditions or the present political climate in the country. These two reservations should be borne in mind when reading this report, which endeavours to keep as closely as possible to the order of the draft Constitution's chapters and articles.

B. CHAPTER I: THE STATE OF LITHUANIA

The very general provisions of this chapter, which are well protected by virtue of the amendment procedure for the Constitution (see article 156, paragraph 3), are only examined here insofar as they concern problems of organisation and powers of the various authorities.

- Articles 2 and 3

Article 2 lays down the fundamental principle that sovereignty shall be vested in the people. Article 3 does not seem to be very clear, although this may be due to problems of translation. The Lithuanian people consists of citizens, ie Lithuanians, persons of other nationalities who have been permanently resident on the territory of Lithuania and persons who have acquired citizenship of the Republic of Lithuania in accordance with the law. This provision appears to identify three categories of citizen: persons of Lithuanian origin (but how are they to be defined, if not by law?), permanent residents of other nationalities (what does this mean?), and finally persons who acquire citizenship of the Republic of Lithuania. Since all are citizens and enjoy the same rights in principle, what is the purpose of making this distinction?

- Article 4, paragraph 2

It seems somewhat contradictory to state that the people exercises its sovereign power "directly" through elections, given that elections, by their very nature, are an indirect way of exercising sovereignty.

- Article 12

This article, concerning citizenship, should be read in conjunction with Article 3, analysed above. There appears to be a certain discordance in the terminology used in these two articles. In particular, the case of "foreign nationals" is referred to in Article 12, paragraph 2. In addition, the concept of "priority rights of citizenship" referred to in Article 12, paragraph 3 is not clear to a foreign observer.

C. CHAPTER IV: THE SEIMAS

- Article 56

This important provision gives the Seimas (parliament) a preeminent role as the sole representative of the Lithuanian people, and vests exclusive legislative power in it. This preeminent role is already laid down in Article 4, paragraph 1. But the President is also elected by the people and represents the Republic of Lithuania (Article 92). Is there not a certain contradiction here, and indeed with the principle of separation of powers laid down in Article 5, paragraph 3?

- Article 58

The minimum age for election as a member of parliament (27) seems fairly high in comparison with other constitutions. Moreover, the question arises why the Constitution sets a minimum age for members of parliament but not for voters.

- Article 61

The rules banning members of parliament from engaging in any other occupation seem extremely severe. Surely in practice they will only debar large numbers of people from standing for election.

- Article 64

This article contains the classic rule of parliamentary inviolability. However, since the Seimas does not sit permanently, what rules will apply in the event of a member of parliament being prosecuted or arrested outside parliamentary sessions? This seems to need clarification.

- Article 66

This article deals with parliamentary sessions. In certain cases extraordinary sessions may be convened on the initiative of the Seimas itself (paragraph 2). These provisions should be seen in conjunction with Article 88, point 13, which requires the President to convene an extraordinary session or sitting of the Seimas in certain circumstances.

- Article 71

This crucial article describes parliament's powers. The final paragraph vests a kind of residual power in the Seimas, except in respect of issues which are the preserve of the Lithuanian people or the judiciary, and unless the Constitution provides otherwise.

This clause is highly important to the balance of powers between the various authorities. What is to be understood by issues under the exclusive control of the people? Does it refer solely to amendments to the Constitution requiring a popular consensus (Article 156, paragraphs 2 and 3)? Or does it refer implicitly to something else?

The list of parliamentary powers gives rise to several observations.

Point 3: this point deals with referenda, which are invariably initiated by parliament, but neither the issues nor the conditions are laid down. Can any issue be put to the people in this way? Is there not a contradiction between Article 71, paragraph 3, according to which parliament is invariably responsible for initiating referenda, and the fact that citizens have the right to initiate legislation (to be dealt with under parliamentary procedure) according to Article 72, paragraph 3? Finally, if Article 71, point 3 includes the possibility of organising a referendum in the legislative field, the question arises as to the scope of Article 56, paragraph 1, which vests legislative power in parliament alone.

The contradiction appears to be resolved by the last paragraph of Article 74, because in any event bills must first be passed by the Seimas. But in this case, what is the purpose of the referendum? What issues is it expected will be dealt with in this way? Are acts adopted by referendum also subject to review of their constitutionality?

Points 5 and 7

The result of these points is to make the government responsible to parliament under the proposed constitution. Consequently, this is not a presidential system, although it does have some of the characteristics of this type of system. It is important to note that parliament cannot be dissolved. This rules out an element of flexibility specific to parliamentary systems in the event of it proving impossible to form a government which enjoys the confidence of parliament. Mechanisms are admittedly envisaged to resolve crisis situations (Article 102), but it is questionable whether they will be adequate. Accordingly, the principle that parliament cannot be dissolved must be carefully examined.

Points 8 and 9

These points deal with powers to appoint senior judges, and should be read in conjunction with other provisions. With regard to the Constitutional Court, the right of proposal lies with the Chairman (Speaker) of the Seimas (Article 117), whereas in the case of the Supreme Court this power lies with the President of the Republic (Article 88, point 8). It is obviously intended that different arrangements should apply, but the reason for this is not clear.

Point 10

Is responsibility in the area of election law a judicial matter? This is the conclusion suggested by article 119, paragraph 2, which apparently lays down a consultative role for the Constitutional Court in this area. This solution is open to criticism. Why not vest full power in the Constitutional Court to deal with such cases?

Point 14

This point, which requires the Seimas to vote on all international treaties, does not appear to be in harmony with article 145, which lists the types of treaty for which a parliamentary vote is required. An explicit reference to Article 145 should therefore be included. The latter article states that treaties ratified by the Seimas shall form a constituent part of the legal system of Lithuania, but does not determine where treaties stand in relation to the law and the Constitution. We feel that this is a major shortcoming which should be remedied.

- Article 74

This article concerns the majority and quorum requirements for the various types of law and other decisions of parliament. The draft constitution lays down strict requirements for common laws, namely a quorum of two-thirds of members of parliament. Does this not mean that the opposition can effectively block any legislation simply by refraining from taking part in debates and the vote?

- Article 75

This provision on the entry into force of laws does not seem to be very clear. The binding force of a law should not normally depend on its promulgation, but on its official publication (cf Article 9). Moreover, it can be inferred that Article 75 has implications for the general principle of non-retroactivity of legislation? This seems open to doubt.

- Articles 76 and 77

These crucial articles deal with the presidential right of veto. It should be noted that the right to both promulgate and veto laws is specific to the President, and that he exercises this right without ministerial countersignature (Articles 89 and 88, point 17). This means that the function of supreme political arbiter is conferred on the President personally. One possible reason for him to refuse to promulgate a law would be its unconstitutionality. It is, however, somewhat strange that under Article 120 he is only authorised to refer to the Constitutional Court "acts adopted by the government, whereas the government can refer to the Court the question of constitutionality of laws. Whether these arrangements are balanced and coherent merits consideration.

The presidential veto is not absolute : laws can be voted on again on condition that this takes place during the same parliamentary session. It is not clear exactly what this condition entails; in the event of a veto being imposed at the end of a session and it not

being possible to hold a vote during the same session, does the whole legislative procedure have to be started again?

With regard to the special majorities required after a veto, it should be noted that the majority for constitutional laws (two-thirds) is the same as that normally required, whereas for ordinary laws it is higher (three-fifths instead of an absolute majority). These arrangements do not seem to be totally coherent.

- Article 79

Impeachment proceedings (with a three-fifths majority) seem potentially dangerous in the event of political complications. The practical scope of these proceedings is very broad, and covering inter alia judges and members of parliament themselves. At least in certain cases, intervention by the Constitutional Court would seem preferable. In any event, assuming that these proceedings are retained, might it not be wise to increase the majority requirement to two-thirds or three-quarters instead of three-fifths?

- Article 81

It seems somewhat unusual that a special majority (two-thirds) should be required in order to establish parliamentary procedure. The question also arises whether the review of constitutionality also applies to this procedure as under Article 119, paragraph 1 ("other acts adopted by the Seimas").

D. CHAPTER V: THE PRESIDENT OF THE REPUBLIC

- Article 85, paragraph 2

This provision stipulates that for the election of the President to be deemed valid, more than half of the registered voters must have voted. It is not clear what happens if this condition is not met, or if a second election is held and the requirement is still not met.

It is also to be noted that the Constitutional Court (apparently) presents "conclusions" on the proper conduct of elections, including presidential elections (Article 119), but that decision-making power lies with the Seimas (Article 71, point 10). We feel that this solution is open to criticism. Why not make the Constitutional Court responsible for ruling on election proceedings?

- Article 88

This article, which lists the powers of the President, is of fundamental importance. As a rule, the President cannot exercise these powers alone, except in the cases clearly defined in Article 89. Among these exceptions, particular attention should be given to point 7 (appointment of high state officials with parliamentary approval). In other words, the government does not intervene in this area, even though it falls within its normal sphere of competence. This seems an odd arrangement, especially when compared with the decision on army officers (point 9), for which a ministerial countersignature is required.

Special attention should be given to point 8 of article 88. It deals with the appointment of judges, and contains a variety of solutions depending on the type of judge. The dismissal of judges needs to be clarified. This takes us to Article 112, which does not appear to contain sufficient guarantees of independence (in particular the last paragraph).

It simply states that the procedure for removing a judge from office shall be established by the law, which we do not feel is adequate.

Point 14 is lacking in clarity: by what right and on what basis could the President settle disputes over citizenship?

- Articles 91 and 92

The procedure for declaring the President incapable of carrying out his duties for health reasons involves both the Seimas and the Constitutional Court (Article 119, paragraph 2). We have already stated our objections to the Constitutional Court's involvement on a consultative basis.

E. CHAPTER VI: THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA

- Article 95

It is rather unusual for the adoption of a government measure to be subject to a majority vote. This effectively transforms the government, which under a parliamentary system is a collegial body operating on the basis of consensus, into a kind of mini-Parliament. This majority rule would appear to make compliance with the familiar principle that the government is "solidarily responsible" to parliament, as laid down in Article 96, very uncertain.

- Article 101

This article lays down the cases in which the Government must resign. It is rather surprising that a vote of no-confidence should take place by secret ballot. Is it not vital for members of parliament to be obliged to state their fundamental choices openly in these circumstances? Does the secret ballot not open the door to political intrigue? The rule laid down in section 4) of this article (simultaneous resignation of more than half the government) tends, once again, to transform the government into a kind of miniature parliament.

- Articles 102 and 103

These provisions are all the more cricically important as the Seimas cannot be dissolved under the draft constitution. Accordingly, provision has to be made for resolving crisis situations. In the cases described in Article 102, which concern a crisis of confidence at the beginning of a government's term of office, the President of the Republic, acting unilaterally, may (or must?) form a so-called provisional government which can function without parliamentary approval for a limited period of six months. This is an

extraordinary procedure, during which considerable powers are vested in the President, who has the right to appoint and dismiss the Prime Minister and other ministers. Is this an obligation on the President if the conditions laid down in Article 102 are met? Apparently (to judge from the use of the word "shall") this is in fact the case, which seems excessive. In any event, why should this no-confidence procedure be limited to the first six months of a government's term of office? It is not difficult to imagine the government being obliged to resign after this period has expired and the political situation being such that it is impossible to form a new government which enjoys the confidence of parliament. Finally, and above all, it should be noted that Article 102 does not provide a solution to a crisis situation in which government policy is not supported by a majority in parliament. While it is true that a provisional government can function without parliament's approval, it needs laws and a budget in order to govern.

If there is not a majority willing to vote these laws and the budget through, the crisis situation which Article 102 is designed to resolve will continue and even deteriorate further. In other words, we feel that this fundamental provision needs to be rethought.