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## DELIMITATION OF THE POWERS OF THE SEIMAS AND THE GOVERNMENT: SOME ASPECTS OF CONSTITUTIONAL DOCTRINE

Vytautas Sinkevicius

Mykolas Romeris University, Faculty of Law,  
Department of Constitutional Law  
Ateities 20, LT – 08303 Vilnius, Lithuania  
Phone (+370 5) 2714 546  
E-mail v.sinkevicius@mruni.eu

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**Abstract.** *The article deals with the criteria upon which the powers of the Seimas (the Parliament of the Republic of Lithuania) and the Government are delimited in the constitutional jurisprudence of Lithuania. It analyses how the Constitutional Court construes the principle of separation of powers as entrenched in the Constitution and evaluates the meaning of the provision of the Constitution that corresponding 'relations are regulated by law'. If the Constitution provides that certain relations are regulated by means of a law, such relations may be regulated only by means of a legal act, which takes the form of a law, and it is, therefore, not permissible to regulate such relations by Government resolutions or other acts of the executive. The most important elements of legal relations must be regulated (established) by means of a law, whereas Government resolutions might establish the procedure for the implementation of such laws. Rulings of the Constitutional Court reveal that once the powers of a specific branch of state power have been directly established in the Constitution, an institution of state power may not assume the said powers from another state institution. It may not transfer or waive them; and such powers may not be amended or limited by means of a law. The question remains, whether the provision of the Law on the Diplomatic Service whereby the candidacy of a diplomatic representative must be reviewed by the Seimas Committee on Foreign Affairs in advance is not in conflict with the Constitution. In the opinion of the*

*author; this provision of the law may also be interpreted as meaning that as long as this has not been done, the Government may not submit a candidacy for a diplomatic representative to the President of the Republic, and the President of the Republic may not appoint this person as a diplomatic representative. Thus, the actions of the Government, as well as those of the President, would be constrained depending on whether the Seimas Committee on Foreign Affairs has reviewed the candidacy of the diplomatic representative in advance. Since, under the Constitution, the President of the Republic is to appoint and dismiss diplomatic representatives of the Republic of Lithuania upon submission by the Government, it is assumed that the said provision of the Law on the Diplomatic Service permits an institution which is not provided for in the Constitution—the Seimas Committee on Foreign Affairs—to interfere with the powers of the Government and the President of the Republic when appointing diplomatic representatives. This is not in line with the Constitution.*

**Keywords:** *doctrine of separation of powers, system of checks and balances, Constitution, constitutional jurisprudence, budgetary competence of the Seimas, powers of the Government in drafting the state budget, appointment of judges, appointment of diplomatic representatives.*

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## Introduction

The Constitution delimits the powers of the Seimas and the Government. This means that each institution is ascribed a specific area of activity and that it cannot interfere with the competence ascribed to another institution. The jurisprudence of the Constitutional Court of Lithuania ('the Constitutional Court') reveals that the legislator has not always succeed in regulating the legal relations in so that the provision 'The scope of power shall be limited by the Constitution' of Article 5(2) of the Constitution would not be violated. The cases reviewed by the Constitutional Court reveal that the legislative sometimes delegates powers (which, under the Constitution, belong solely to the legislative) to the Government by means of a law, while in other cases it attempts to assume powers which belong to the Government. Therefore, it is important to explore the meaning of the constitutional provision that corresponding 'relations are regulated by law'—to determine the criteria by which constitutional jurisprudence delimits the powers of the Seimas and the Government, and establish the nature of the relationship between laws and Government resolutions.

### 1. The Principle of Separation of Powers in the Constitutional Doctrine

In Lithuania, state authority is organized on the basis of the principle of separation of powers. This principle, together with the principle of a state under the rule of law and other constitutional principles, is fundamental to the constitutional establishment of the

Lithuanian state.<sup>1</sup> The principle of separation of powers determines the system of state institutions, their structure, powers and interrelations.<sup>2</sup> In the constitutional jurisprudence, the principle of separation of powers is defined in the most general sense as meaning that the legislative, executive and judicial powers are separated, sufficiently independent, and that there must be a balance among them.<sup>3</sup> Contemporary constitutionalism, whose main purpose is to limit state power, requires certain guarantees. One of them is a configuration of state power such that each branch—the legislative, the executive and the judicial—have a separate area of activity, their own domain, within which no other branch of state power is allowed to interfere, and where different branches of state power counter-balance each another. It does not allow any branch of state power to concentrate absolute power in its own hands.<sup>4</sup>

According to the Constitution of the Republic of Lithuania, the model of governance is a parliamentary republic, also characterized as a so-called mixed (half-presidential) form of governance. This is reflected in the powers of the Seimas, the President of the Republic, the Government, and the legal features of their relations.<sup>5</sup> The powers granted to the Seimas by the Constitution clearly single out this particular institution from others. A certain imbalance between powers (in the context of the American model) has been noted by most scholars of national legal doctrine.<sup>6</sup> However, the exceptional nature of the powers of the parliament is not necessarily an obstacle for a democratic political regime.<sup>7</sup> Lithuanian constitutional doctrine does not question the fact that the parliamen-

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- 1 The fact that the principle of separation of powers is entrenched in the constitutions European states, as well as in the Constitution of the Republic of Lithuania, was largely determined by the constitutionalism of the United States of America, which is grounded first of all on the principle of separation of powers, the system of checks and balances and the judicial review. See Henkin, L. *Elements of Constitutionalism*. Columbia University, Center for the Study of Human Rights, 1992, p. 2–3.
  - 2 Ch. L. Montesquieu, who regarded despotism and arbitrariness as one of the greatest threats to the state and who was among the first to substantiate the necessity of the principle of separation of powers, wrote that the legislative, executive and judicial powers must be vested in different hands ‘since everything will perish if the three branches of power—the legislative power, the power executing decisions of general character, and the power convicting for crimes or considering disputes of private persons—are joined in one person or institution’. Montesquieu, Ch. L. *Apie įstatymų dvasią* [The Spirit of Laws]. Vilnius: Mintis, 2004, p. 161.
  - 3 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Articles 14, 25(1), 26, 30, 33, 34, 36, 40, 51, 56, 58, 59, 66, 69, 69(1), and 73 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania’ of 21 December 1999. *Official Gazette*. 1999, No. 109–3192.
  - 4 In the context of the concept of the principle of separation of powers as well as the concept of checks and balances, the 12 June 2008 ruling of the Supreme Court of the United States in the case of *Lakhdar Boumediene et al. v. George W. Bush*, No. 06-1195 (553 U.S. (2008)) [interactive]. [accessed 15-01-2010]. <[http://www.oyez.org/cases/2000-2009/2007/2007\\_06\\_1195](http://www.oyez.org/cases/2000-2009/2007/2007_06_1195)> is of utmost importance to constitutional justice of various states; in the said case the US Supreme Court emphasised once again that even under special conditions (war on terrorism) it is impermissible that power be concentrated in one branch of power, and that it is necessary to ensure the judicial review of decisions of the executive power.
  - 5 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of the 10 December 1996 Seimas Resolution “On the Programme of the Government of the Republic of Lithuania” with the Constitution of the Republic of Lithuania’ of 10 January 1998. *Official Gazette*. 1998, No. 5–99.
  - 6 Mesonis, G. Valdžių padalijimo teorija ir jos įgyvendinimo modeliai: kriterijų kokybės problema [The Theory of Separation of Powers and Models of Its Implementation: The Problem of the Quality of Criteria]. *Jurisprudencija*. 2004, 61(53): 14.
  - 7 See e.g., Klima, K. *Teorie vereine moci (vladnuti)*. Praha: ASPI Publishing, 2003, p. 143.

tary model of governance is suitable for a democratic state. It can indeed accommodate a system of state institutions based on the principle of separation of powers and a mechanism of checks and balances that would guarantee human rights and ensure effective implementation of state functions. In contemporary Lithuanian constitutionalism, the principle of separation of powers is naturally embraced, along with other features characteristic of a democratic state under the rule of law, such as the protection of human rights and freedoms, respect for human dignity, the principles of superiority of law, independence of the courts, judicial review of power, representative democracy, etc. On the other hand, the name of the principle of separation of powers alone does not tell us much about the contents of this principle.<sup>8</sup> It is important not only to separate state power into individual branches of power, but also to ensure *a balance of powers*.

The text of the Constitution of the Republic of Lithuania does not contain an express provision that state power be organized according to the principle of separation of powers. Although Article 5(1) of the Constitution provides that state power be exercised by the Seimas, the President of the Republic and the Government, and the Judiciary, paragraph 2 of the same article maintains that ‘The scope of power shall be limited by the Constitution’. It is therefore impossible to derive the principle of separation of powers only from the aforementioned provisions of Article 5. Paragraph 1 identifies the state institutions that are to exercise state power, but it does not define the nature of relations between these institutions. Article 5(1) of the Constitution *entrenches the system of institutions of state power*, since it does not allow (it prohibits) one state institution to concentrate all state power in its own hands. According to this provision of the Constitution, state power must be divided. Article 5(2), stating that ‘The scope of power shall be limited by the Constitution’ is also important, since it is binding upon institutions exercising state power in the sense that not one of these institutions—the Seimas, the Government, the President or the courts—may overstep the powers granted to them in the Constitution. Legal literature reasonably points out that the principle of separation of powers is a *derivative* constitutional principle—derived from various provisions of the Constitution or a combination of provisions. Each of these provisions establishes a certain aspect of the principle of separation of powers. The principle of separation of powers is therefore *composite* and *complex*.<sup>9</sup> Only a systemic understanding of the Constitution as an integral act can reveal the contents of the principle of separation of powers. The contents of this principle are revealed in various provisions of the Constitution, mainly in those that define the powers of the Seimas, the Government, the President and the courts, and the nature of relations between these institutions.

The case law of the Constitutional Court maintains not only that the legislative, executive and judicial powers are to be separate and sufficiently independent, but also that there must be a balance among them; that the Constitution establishes the competence of every institution of state power corresponding to its purpose; that the

8 See also Pfersmann, O. Poniatyje rozdelenija vlastei i problema „vlasty vo vlasty“. *Konstitucionnoje pravo: Vostočnoevropejskoje obozrenije*. 2004, 2(47): 44.

9 Kūris, E. Konstituciniai principai ir Konstitucijos tekstas (2) [Constitutional Principles and the Text of the Constitution (2)]. *Jurisprudencija*. 2002, 24(16): 60.

specific role of a state institution depends on the place of the state power (to which this institution belongs) in the entire system of branches of power and its relation to other branches of power, and on the place of the institution among other institutions of power as well as the relation of its powers to those of other institutions; that after the powers of a particular branch of state power have been directly established in the Constitution, an institution of state power may not assume the powers of another state institution, and may not transfer or waive its own powers; that such powers may not be amended or limited by means of a law (Constitutional Court rulings of 25 October 1995, 21 April 1998, 3 June 1999, 18 October 2000, 26 April 2001, 3 June 2002, 29 October 2003, 13 December 2004, 23 August 2005, 6 June 2006, 2 March 2009).

The principle of separation of powers is not a static one. The Constitutional Court has elaborated new aspects of this principle when addressing certain provisions of the Constitution pertinent to cases under review. The practice of the Constitutional Court reveals that laws and Government resolutions are often in conflict with the Constitution precisely because they violate the principle of separation of powers (in particular, the rulings identify violations of Article 5(2) of the Constitution limiting the scope of power).

The Constitution establishes a number of mechanisms for one branch of power counter-balance another. For instance, under the Constitution, the Seimas can pass laws (Article 67(2)), which the President of the Republic can veto (Article 71(1)), but the veto can be overridden by an absolute majority vote in the Seimas (Article 72(2)). The Constitution provides that the President appoint the Prime Minister, though he/she can only do so if the Seimas has first assented to the candidature of the Prime Minister (Article 84(4)). The President approves the composition of the Government (Article 84(4)), but the Government has the power to act only after the Seimas gives assent to its programme (Article 92(5)). Under the Constitution, only the Seimas may establish and abolish ministries, though it can do so only upon the proposal of the Government (Article 67(8)). The Constitutional Court decides whether acts of the Seimas, the Government and the President are constitutional (Paragraphs 1 and 2 of Article 105). The decisions of the Constitutional Court are final and subject to appeal (Article 107(2)). These and other similar mechanisms of checks and balances do not contradict the principle of separation of powers—they simply prevent any branch of power from dominating the others. On the other hand, the fact that every branch of state power is separated from the others—that every branch of power is autonomous and independent—does not mean that the branches of power are completely isolated from one another.<sup>10</sup> In its ruling of 9 May 2006, the Constitutional Court held that ‘the checks and balances that the judicial power (its institutions) and other state powers (its institutions) have towards each other *may not be treated as mechanisms of the opposition of powers*’ (italics mine). The purpose of the principle of separation of powers is *limitation*—not *weakening*—of state power. Therefore, the principle of separation of powers and the system of checks and balances do not

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10 See also Lane, J-E. *Constitutions and political theory*. Manchester University Press, 1996, p. 94.

deny the interaction of powers. The important thing is that no power may interfere in the competence ascribed to another power.

Under the Constitution, the Seimas is the representation of the nation (Article 55(1)). In its exercise of constitutional powers, the Seimas serves the classical functions of the parliament of a democratic state under the rule of law: it passes laws (the legislative function), carries out parliamentary oversight of the executive and other state institutions with the exception of courts (the oversight function), establishes state institutions, appoints and dismisses their heads and other state officials (the founding function), approves the state budget and supervises its implementation (the budgetary function), etc. The powers of the Seimas are established in various ways. Some of them are expressly established in the Constitution itself, others are established by statutory law, while other powers are derived from the constitutional status of the Seimas as the representation of the nation (the so-called *implicit powers*).

The Government is an institution of the executive. Its powers are established by the Constitution and laws, and they also arise from the constitutional purpose and constitutional status of the Government. The Government is not only an executive, but also a regulatory institution. Everything that is done by the Government as it exercises the competence granted to it by the Constitution and other laws is the undertaking of state governance affairs. The Government attends to the affairs of state governance by adopting resolutions (Article 95(1)). The Government is jointly and severally responsible to the Seimas for its own activities (Article 96(1)). The Seimas may express no-confidence in the Government; in such a case the Government must resign (Item 2 of Article 101(3)).

## 2. What is Meant by the Constitutional Provision 'Regulated by Law'?

The Constitution contains a number of norms which provide that corresponding relations are regulated by law. For example, Lithuanian citizenship may be acquired by birth and on other grounds established by law (Article 12(1)); information concerning the private life of a person may be procured only on the basis of a court decision and only according to the law (Article 22(2)); compensation for material and moral harm inflicted upon a person is to be established by law (Article 30(2)); the founding of political parties is regulated by law (Article 35(3)); working hours are to be established by law (Article 49(2)). There are yet more constitutional provisions (around 50), which explicitly refer to laws or which indicate that certain relations must be regulated by law. According to the Constitution, laws are either passed by the Seimas (Article 67(2)) or adopted by referendum (Article 69(4)). In Lithuanian constitutional jurisprudence, the notion 'a law' is construed literally as encompassing only *those legal acts, which take the form of a law*. In the practice of the European Court of Human Rights, acts of lower power than that of laws are also construed as laws. Thus, legal acts issued by the executive are considered laws. In Lithuanian constitutional law, however, there is very clear

differentiation between ‘laws’ and legal acts passed by the Government or other institutions of the executive. Under the Constitution, Government resolutions, decrees of the President, and the orders of ministers have the status of a sub-statutory legal act and their legal power is lower than that of a law. In the context of the principle of separation of powers, it is very important to determine *which legal relations are can be constitutionally regulated only by laws only* and which legal relations may also be regulated by means of Government resolutions. On the other hand, it is not enough to merely state that, under the Constitution, certain relations must be regulated by means of a law. It is also important to determine *what must be established by law to ensure that the constitutional requirement to regulate those relations precisely by means of a law has been met*.

The jurisprudence of the Constitutional Court has formulated a doctrine that *if the Constitution provides that certain relations be regulated by means of a law then such relations may be regulated only by means of a legal act which takes the form of a law*. The law must be adopted by the subject who, under the Constitution, has the right to pass laws—namely, the law must be adopted by the Seimas or a referendum. Furthermore, the law must be adopted following the legislative procedures established in the Constitution and the Statute of the Seimas. Therefore, if the Constitution provides that certain relations be regulated by means of a law, then such relations may not be regulated by means of legal acts of lower power—Seimas resolutions, Government resolutions, presidential decrees, etc. It should be noted that *the Constitution does not provide for so-called delegated legislation*.<sup>11</sup> The Seimas may not commission—either by a law or any other legal act—the Government to regulate the relations which, under the Constitution, must be regulated only by means of a law. Such relations must be regulated by the Seimas itself by passing appropriate legislation. The jurisprudence of the Constitutional Court shows that it is not always easy for the legislator to decide *which elements of social relations that it regulates must be established by means of a law, and which can be delegated to the Government to regulate*. This problem is often faced when dealing with issues of pensions, social assistance, taxes, and drafting of the state budget. An analysis of the cases reviewed by the Constitutional Court reveals *which elements of legal relations must be established by means of a law*—namely, which requirements must be observed by the legislative *when they regulate relations that, according to the Constitution, must be regulated only by law*.

As already mentioned, one area where the Constitutional Court has had to elucidate the meaning of the constitutional provision ‘regulated by law’, is *pensionary maintenance and social assistance*. The grounds for this regulation are established in Article 52 of the Constitution, which provides that ‘The State shall guarantee to citizens the right to receive old age and disability pensions as well as social assistance in the event of unemployment, sickness, widowhood, loss of the breadwinner, and in other cases provided for by *laws*’ (italics mine). These constitutional provisions mean that society

11 We may agree with Prof. E. Jarašiūnas that ‘the prohibition to delegate the right to the Government to pass laws is an element of the doctrine of protection of the powers of the institution of the legislative power’. See Jarašiūnas, E. *Valstybės valdžios institucijų santykiai ir Konstitucinis Teismas* [The Constitutional Court and Relations among State Institutions]. Vilnius: Teisinės informacijos centras, 2003, p. 199.

undertakes the duty to contribute to the support of such members of society who, due to the reasons defined by laws, cannot support themselves by work or other means, or who cannot do so sufficiently. Measures of social security express the idea of social solidarity and help individuals to safeguard against possible social risks. Thus, social assistance is recognized as a constitutional value. It goes without saying that the contents of such regulation depend on various factors, such as the resources available to the state and society, and the material and financial possibilities. The legislative, when regulating the said relations, has broad discretion: they can design the social support model employing various forms (state, private, mixed), consolidate it in laws, design the pension system, or establish various types of pensions and social support options.

If Article 52 of the Constitution is to be considered in the context of the delimitation of the powers of the Seimas and the Government, it is important to determine the meaning of the provision ‘pensions and social assistance are established *by law*’ (italics mine). Does this provision obligate the legislator to only define the types of pensions and social assistance and then commission the Government to regulate all the rest? In such a case, what are the limits of the powers of the Government? The Constitutional Court has had to consider more than once whether the laws and other legal acts regulating pensions and social assistance were not in conflict with Article 52 of the Constitution precisely because these relations (or elements thereof) were regulated not by means of a law, as required by the Constitution, but by a corresponding Government resolution. By elaborating on what is meant by the provision ‘pensions and social assistance are established *by law*’ of Article 52, the Constitutional Court stated that it is *not only the types of social assistance that must be established by a law, but also the basis for granting social assistance, the criteria for who is qualified to receive pensions, the conditions for receiving a pension, as well as the amounts of pensions.*<sup>12</sup> The constitutional requirements of legal certainty, legal security, and the principle of legitimate expectations also imply that *the grounds, conditions and other elements of old-age and disability pensions, of other kinds of social assistance, which are to be established by means of a law, must be clear and non-discriminatory.* Article 52 of the Constitution also implies that after certain pensionary maintenance is established by means of a law, a duty arises for the state to guarantee this pensionary maintenance to the specified persons on the

12 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Item 1 of Resolution of the Supreme Council of the Republic of Lithuania No. I-619 “On Application of the Republic of Lithuania Law on Individual Income Security” of 27 September 1990, as well as on the compliance of Item 6.1.1 (wording of 6 November 1996), Item 6.1.4 (wording of 6 November 1996), Item 6.1.5 (wording of 6 November 1996), Item 7 (wording of 6 November 1996), and Item 9 of the Regulations on Granting the Social Allowance and Payment Thereof as approved by Government of the Republic of Lithuania Resolution No. 808 “On the Approval of the Regulations on Granting a Social Allowance and Payment Thereof” of 5 July 1996, as well as on the compliance of Item 5.1.1, Item 5.1.7 (wordings of 17 April 2000 and 14 July 2000), Item 5.1.8 (wordings of 17 April 2000 and 14 July 2000), Items 5.4, 5.5.2 and 9 of the Regulations on Granting the Social Allowance and Payment Thereof as approved by Government of the Republic of Lithuania Resolution No. 441 “On the Approval of the Regulations on Granting the Social Allowance and Payment Thereof” of 17 April 2000 with the Constitution of the Republic of Lithuania and Paragraph 1 of Article 10 (wording of 3 November 1994) of the Republic of Lithuania Law on Individual Income Security’ of 5 March 2004. *Official Gazette*. 2004, No. 38-1236.



grounds and in the amounts established in the law; in the area of the relations of pensionary maintenance, a duty arises for the state to follow the constitutional principles of ensuring legitimate expectations and legal certainty. Persons who meet the requirements established in the law have the right to demand that the state grant and pay them this pension. Furthermore, the laws should not be amended too frequently. Otherwise, not only the trust of a person in the state and the law might suffer and the principle of a state under the rule of law would be violated, but also the dignity and well-being of the person might be infringed, and the imperatives arising from Article 52(1) of the Constitution would be violated. Thus, the provision that ‘*pensions and social assistance are established by law*’ of Article 52 of the Constitution obliges the Seimas to establish *all most important elements of the relations of pensions and social assistance precisely by means of a law*. Under the Constitution, the Government is not allowed to do so.

On the other hand, the Constitution *prohibits the Seimas from commissioning the Government, by means of a law, to establish* those elements of the relations of pensions and social assistance, which may be established only by means of a law. For instance, the provisions of the Law on State Pensions *granted the right to the Government to establish* ‘other structures whose activity would be devoted to combating the resistance movement in Lithuania or the perpetration of the genocide of the Lithuanian population’, as well as to approve ‘a list of services provided by and positions held at the said institutions (structures), in which persons *shall not be awarded state pensions for victims*’. These provisions were recognized as being in conflict with the Constitution precisely because the principles established in Article 52 of the Constitution had been disregarded, implying that in some cases persons belonging to particular groups would not have the right to receive the said pension. According to the constitution, such criteria must be specified by a law, and not by a resolution of the Government.<sup>13</sup>

In reality, one is often faced with a need to detail the legal regulation established by laws. The Constitution does not prohibit doing so by legal acts of lower legal power, for example, by Government resolutions or orders of ministers. However, it is permitted that sub-statutory acts (thus, Government resolutions as well) establish only *the procedure of implementation of the laws* regulating the relations of social security and social assistance. Sub-statutory legal regulation may encompass only the establishment of respective *procedures*. On the other hand, it is not always easy to draw *a dividing line in lawmaking between what is implementation of laws and what is establishment of law itself*. Still, the legal regulation established by Government resolutions (sub-statutory legal

13 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Part 4 of Article 11 of the Republic of Lithuania Law on State Pensions, Item 2 of Part 3 of Article 8 of the Republic of Lithuania Law on the Legal Status of Victims of the Occupations of 1939-1990 with the Constitution of the Republic of Lithuania and on the compliance of Items 9 and 12 of the List “The 1939-1990 Occupations Repressive Structures, Services and Positions for Serving in Which Persons Shall not be Awarded State Pensions for Victims” as approved by 3 July 1998 Government of the Republic of Lithuania Resolution No. 829 “On the Approval of the List of the 1939-1990 Occupations Repressive Structures, Services and Positions for Serving in Which Persons Shall not be Awarded State Pensions for Victims” with the Constitution of the Republic of Lithuania and Part 4 of Article 11 of the Republic of Lithuania Law on State Pensions’ of 10 February 2000. *Official Gazette*. 2000, No. 14-370.

regulation) must always be grounded in the law. Furthermore, the Constitutional Court has formulated a doctrine whereby the legislator, by means of a law, may commission the Government, ministries and other institutions of state governance to also detail the legislative legal regulation in situations where such need is objectively brought about by *the necessity in the law-making process to lean upon special knowledge and special (professional) competence in a certain area* (Constitutional Court rulings of 7 February 2005, 5 May 2007, and 2 September 2009). In the legal regulation of the relations of social security and social assistance the so-called ‘special knowledge’ doctrine also means that some powers may be granted to institutions of the executive or to other institutions on the basis of their functions.<sup>14</sup> The Constitutional Court interprets corresponding decisions of the executive as implementation of laws. However, the Constitutional Court has repeatedly asserted in its rulings that a sub-statutory regulation of relations specified in Article 52 of the Constitution *may not establish conditions for appearance of the right of an individual to social assistance and limit the extent of this right*.

The Constitutional Court also follows an analogous approach to the meaning of ‘established by law’ when it interprets the content of the provision ‘Taxes, other payments to the budgets, and levies shall be established by the laws of the Republic of Lithuania’ of Article 127(3) of the Constitution. This constitutional provision is linked to other provisions of the Constitution, including Item 15 of Article 67 of the Constitution, which establishes the powers of the Seimas to impose state taxes and other compulsory payments. When regulating tax relations, the legislator is also bound by the principles of justice and proportionality, separation of powers, a state under the rule of law, equal rights of persons, freedom of individual economic activity and other constitutional principles. When imposing taxes, the legislator is also bound by state obligations arising from Lithuania’s membership in the European Union. The practice of the Constitutional Court reveals that constitutional disputes have frequently occurred precisely because *the Seimas and the Government had reached different interpretations as to which elements of taxes, of other payments to the budget and of levies must be (could be) established only by laws, and which could be established by Government resolutions or acts of yet lower legal power*. Any discussion regarding the powers of the Seimas and the Govern-

14 For example, the Minister of Health, subsequent to proposals of a respective commission of doctors, has the right to establish a list of ailments, whereby persons who suffer from such ailments are recognised as having incapacity. It would not be rational to interpret the provision ‘*social assistance is established by law*’ of the Constitution as meaning that it is the parliament that has to establish the said list of ailments. To establish such a list, special professional medical competence and special medical knowledge are necessary. Therefore, the legislator may commission corresponding institutions of the executive to do so. The provision that the legislator, by means of a law, may also commission the Government, ministries and other institutions of state governance to detail the legislative legal regulation in situations where such need is objectively brought about by the necessity in the law-making process to lean upon *special knowledge and special (professional) competence in a certain area* was formulated in the Constitutional Court Ruling ‘On the compliance of Item 37 of the Regulations Concerning Social Insurance Benefits for Accidents at Work and Occupational Diseases which were confirmed by Resolution No. 506 of the Government of the Republic of Lithuania “On Confirmation of the Regulations Concerning Social Insurance Benefits For Accidents At Work and Occupational Diseases” of 8 May 2000 with Paragraph 1 of Article 29 (wordings of 23 December 1999 and 5 July 2001) of the Republic of Lithuania Law on Social Insurance of Accidents at Work and Occupational Diseases’ of 7 February 2005. *Official Gazette*. 2005, No. 19–623.

ment in the area of taxes inevitably raises the following questions: What are the essential elements of a tax? How can we determine if the essential elements of a tax have been established namely by means of a law? If the expression ‘essential element of the tax’ implies that there are certain less important elements of a tax, does this mean that those elements can be established not by the legislator, but by the Government? These are some of the theoretical and practical questions related to the constitutional provision ‘*taxes are established by laws*’. In one of the first cases regarding taxes, the Constitutional Court asserted that under the Constitution, *the Government has the power to establish the rates of the stamp tax*.<sup>15</sup> Although the Constitutional Court pointed out that ‘the stamp tax, though called a tax, is essentially different from taxes (regular taxes) in their proper sense as its nature is that of a direct recompense’. However, in its ruling of 15 March 1996, the Constitutional Court formulated a principled provision that under the Constitution, it is legally permissible that *the Seimas introduce a stamp tax, while the Government establish the rates of this tax*. The Constitutional Court also followed a similar approach on the question of whether the provisions of the Law on Excises whereby ‘until 1 January 1999 goods subject to excise taxes and their rates *shall be established by the Government*’ are constitutional.<sup>16</sup>

In subsequent cases, the notion that ‘Taxes, other payments to the budgets, and levies shall be established by the laws of the Republic of Lithuania’ of Article 127(3) of the Constitution was considerably corrected. In a way, the sense of this clause was almost completely transformed. In its ruling of 3 June 2002,<sup>17</sup> the Constitutional Court held that under the Constitution, taxes and other obligatory payments to the budget must be established only by means of a law, and that in the course of establishing taxes and other obligatory payments, *the law must determine such essential elements of the tax or other obligatory payment as the object of the tax, the subjects of tax relations, their rights, the amounts (tariffs) of the tax, the terms of payment, the exemptions and the concessions*. Later yet, the Constitutional Court pointed out that such essential elements of the tax as fines and default interest must also be established only by means of a law.<sup>18</sup> Thus,

15 The Ruling of Republic of Lithuania Constitutional Court ‘On the compliance of Items 5, 6, 7, 8, 16, 17, 19, 27.4-27.9, 29, 34, 36 of the stamp tax rates confirmed by the 11 November 1994 Resolution No. 1123 of the Government of the Republic of Lithuania “On the Confirming the Rates of Stamp Tax, as well as the Procedure of Payments and Returning of Stamp Tax” with the Constitution of the Republic of Lithuania, Article 6 of the Law of the Republic of Lithuania on Stamp Tax, as well as Article 6 of the Law of the Republic of Lithuania on Competition’ of 15 March 1996. *Official Gazette*. 1996, No. 25-630.

16 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Item 2 of Part 1 and Part 2 of Article 13 of the Republic of Lithuania Law on Excises with the Constitution of the Republic of Lithuania’ 9 October 1998. *Official Gazette*. 1998, No. 91-2533.

17 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Resolution of the Government of the Republic of Lithuania No. 99 “On the Deductions for Building, Repair and Maintenance of Public Automobile Roads” of 23 February 1993 with the Constitution of the Republic of Lithuania’ of 3 June 2002. *Official Gazette*. 2002, No. 55-2199.

18 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Item 11 of the Procedure of Registration of Value Added Tax Payers which was confirmed by Item 2.4 of Government of the Republic of Lithuania Resolution No. 546 “On Value Added Tax” of 9 May 1996 with the Constitution of the Republic of Lithuania and Paragraph 3 (wordings of 7 April 1994 And 14 October 1997) of Article 6 and Article 15 (wording of 22 December 1993) of the Republic of Lithuania Law on Value Added Tax’ of 2 September 2004. *Official Gazette*. 2004, No. 135-4903.

the powers of the Government in regulating the relations of taxes and other obligatory payments to the budget were considerably curtailed. The Constitutional Court has held that under the Constitution, the Government is allowed to establish the procedure for the implementation of tax laws as well as the procedure for the computation of a particular payment.<sup>19</sup>

In the constitutional jurisprudence, the Constitution is perceived as an integral act wherein provisions are interrelated and constitute a harmonious system. The Constitution is composed of norms and principles—containing letter as well as spirit. The priority of rights and freedoms established in the Constitution—the provision that ‘Human rights and freedoms shall be innate’ (Article 18)—also implies that everything that is linked to human rights and freedoms must be regulated only by laws.

If one had to briefly define the criteria for delimiting a law or resolution of the Government—for delimiting the relation between a law and a Government resolution—one could say that constitutional jurisprudence has gradually developed the following *doctrine*: if the Constitution provides that certain relations are regulated by means of a law, such relations may be regulated only by means of a legal act which takes the form of a law; such relations may not be regulated by legal acts of lower legal power—Seimas resolutions, Government resolutions, presidential decrees, or other sub-statutory acts; in such cases the law must establish all most important elements of the regulated relations; Government resolutions must be adopted on the grounds of laws; if the Constitution does not require that certain relations be regulated by laws, the Government may pass resolutions on the grounds of the powers ascribed to it (the important thing is that it does not interfere with the powers ascribed to another institution); as a rule, a resolution of the Government is an act of applying the norms of a law regardless of whether the Government resolution is a one-time (*ad hoc*) application, or of permanent validity; the principle of a state under the rule of law established in the Constitution also implies a hierarchy of legal acts, requiring that Government resolutions not come into conflict with laws, constitutional laws and the Constitution; Government resolutions may not change the content of the laws; Government resolutions may not contain any legal norms which would compete with the norms of the law (Constitutional Court rulings of 19 January 1994, 26 October 1995, 29 May 1997, 6 May 1998, 15 March 2000, 30 October 2001, 23 April 2002, 7 February 2005). Although in the course of the interpretation of the Constitution, the *functional* (interpretative) approach dominates, when delineating the

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19 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Paragraph 2 of Article 5, Article 27-1, Item 4 of Paragraph 7 (wording of 8 October 2002) of Article 29, Item 1 of Paragraph 2 (wording of 26 June 2001) of Article 56 of the Republic of Lithuania Law on Tax Administration with the Constitution of the Republic of Lithuania and on the compliance of Item 2 of Government of the Republic of Lithuania Resolution No. 1073 “On the Indirect Establishment of the Tax Base” of 3 September 1998, also of the Chapter “Cases of the Indirect Establishment of the Tax Base” and the Chapter “Methods of the Indirect Establishment of the Tax Base” of the Methods of the Indirect Establishment of the Tax Base which were confirmed by the said Government resolution with the Constitution of the Republic of Lithuania and Paragraph 2 of Article 5 of the Republic of Lithuania Law on Tax Administration’ of 17 November 2003. *Official Gazette*. 2003, No. 109–4887.

powers of the Seimas and the Government, the decisions of the Constitutional Court often give priority to the *formal* meaning of the provisions of the Constitution.

### 3. Prohibition to Interfere with the Constitutional Powers Ascribed to other State Institutions

One of the elements of the principle of separation of powers is that *once the powers of a particular branch of state power have been expressly established in the Constitution, another institution of state power may not take over the said powers from another state institution, it may not transfer or waive them; and such powers may not be amended or limited by means of a law*. Although the Constitution has not explicitly established that the Constitutional Court decides disputes regarding the competence of individual state institutions, cases on the question of whether a corresponding Government resolution is not in conflict with a law have frequently been related precisely to the powers (and extent thereof) ascribed to the Seimas and the Government. One area of ‘competition’ between the legislature and the executive is the state budget. Here, certain inconsistency on behalf of the legislator may be noted: in some cases, by means of a law, the legislator delegates the powers to the Government, even though such powers belong only to the legislator, while in other cases, by means of a law, the legislator assumes powers that under the Constitution are ascribed only to the Government. The Constitutional Court has held that in both such cases the powers of the Seimas and the Government in the area of the budget, as established by the Constitution, have been disregarded and the constitutional principle of separation of powers has been violated.

For example, the Government had requested that the Constitutional Court determine whether the provisions of the Law on the Health System, the Law on the Long-term Financing of Science and Education, the Law on the Structure of the Budget and the Statute of the Seimas, which established that *the Government, when preparing a draft state budget, must include certain appropriations (expressed in proportion of the gross domestic product) of the amount established in laws*, in order to finance agriculture, the health system, science and studies, as well as education, were not in conflict with the Constitution. (For instance, Article 39 of the Law on the Health System prescribed that ‘The base amount of the financing of the Lithuanian National Health System activities, including the funds of the state budget and municipal budgets and the funds of the compulsory health insurance fund budget, must account for *no less than 5% of the value of the gross domestic product each year*’). The disputed provisions of the Law on the Structure of the Budget also *obligated the Government to include into the draft state budget the amounts of appropriations to the Seimas, as established by the Board of the Seimas*. The Government substantiated its doubts regarding the constitutionality of the said laws by the fact that the constitutional powers of the Government to independently prepare a draft national budget were limited by prior legislative imposition of specific indicators (expressed in proportion of the gross domestic product) for financing individual functions of the state. The Government asserted that such regulation did not allow

them to properly determine the ‘financing of other state functions and programmes’ and thus violated the constitutional principle of separation of powers. The representatives of the Seimas disagreed with the arguments of the Government and maintained that not all social objectives of the state are of equal value and that the Seimas had the constitutional right to decide which social functions of the state are most important. According to the representatives of the Seimas, by establishing, by means of a law, what proportions of the gross domestic product (in monetary value) would be designated for financing agriculture, the health system, science and education, ‘the Seimas exercised its financial competence and asserted national priorities’ and in so doing ‘neither restricted nor denied the powers of the Government to prepare and submit to the Seimas a draft national budget’.

When reviewing this case, the Constitutional Court first of all had to determine the content of the provisions of the Constitution that established the budgetary competence of the Seimas and the Government. Item 4 of Article 94 of the Constitution provides that the Government shall prepare a draft State Budget. Under Article 130 of the Constitution, the Government shall draw up a draft state budget and present it to the Seimas. Item 14 of Article 67 of the Constitution provides that the Seimas shall approve the draft state budget. Under Article 131(1) of the Constitution, the draft state budget shall be reviewed by the Seimas and approved by law prior to the start of the new budget year. The Constitutional Court emphasized that the Constitution does not contain any legal norms allowing that a draft national budget be prepared and submitted to the Seimas for consideration and approval by a state institution or entity other than the Government. Thus, the Constitution grants the power to prepare the draft national budget to the Government only. The constitutional provision that only the Government enjoys the power to prepare the draft budget means that only the Government and no one else has the power to define, in the draft budget, how much revenue will be received and from which sources, how much funds and for what purposes will be appropriated. When estimating state expenses in the draft budget, the Government is bound by the imperative of an open, just and harmonious civil society, the constitutional principle of separation of powers as well as other constitutional norms and principles. The Government, in the course of preparing the draft national budget, has to observe the state functions established in the Constitution, the existing economic and social situation, the needs and possibilities of the society and the state, the available and potential financial resources and state liabilities, as well as other important factors. The Constitutional Court held that the constitutional notion of the state budget implies a presumption that the drafting (creation) of the state budget, its consideration in the Seimas and its approval by law, as well as its implementation, are separate steps of the budgetary process. It was also held in the same ruling that when drafting the state budget as well as when considering and approving it, the powers of the Seimas as a legislative body and the powers of the Government as an executive body are separate; the constitutional principle of the separation of powers has to be upheld in this area. The Constitutional Court noted that under the Constitution, the Seimas may not establish any legal regulation restricting or denying the powers of the Government established in the Constitution to prepare the draft national budget. The institutions exer-

cising state authority—including the Seimas—may not exceed the powers afforded to them in the Constitution; the interference of one institution of state authority with the powers of another institution of state authority is prohibited by the Constitution. It was indicated in the ruling of Constitutional Court that once the Law on the Health System had established that every year, no less than a certain portion of the national budget and municipal budgets' funds, *as set in advance (expressed in proportion of the gross domestic product)*, had to be allocated to finance the national health system activities, the Government, in the course of preparing the draft national budget for a certain year, had to provide for the amount of allocations to finance the health system activities as established in the Law on the Health System. Such legal regulation *had limited the constitutional powers of the Government in the preparation of the draft national budget for a certain year*, to account for existing social and economic situation, the needs and possibilities of the society and the state, the available or potential financial resources and the liabilities of the state, as well as other important factors. Legal regulations established in the other disputed laws, whereby the Government, in the course of the preparation of the draft national budget, had to include certain portions of expenses (established by the law in advance) into the said draft budget were also assessed in an analogous manner. The Constitutional Court held that such legal regulation established in the laws was in conflict with Item 4 of Article 94 of the Constitution whereby the Government shall prepare a draft state budget and Article 130 of the Constitution whereby the Government shall draw up a draft state budget. Such legal regulation was also recognized as being incompatible with Article 5 of the Constitution, the constitutional principle of separation of powers and the constitutional principle of a state under the rule of law. The Constitutional Court also indicated that, under the Constitution, it is only the Seimas that enjoys the power to approve the budget—that, under the Constitution, the approval of the draft budget (adoption of the state budget) is final point in the creation of the state budget. The constitutional powers of the Seimas to approve the draft state budget also encompass the powers of the Seimas to provide for the financial resources of state budgetary revenues, the estimated state budgetary revenues and their amounts as well as the expenditures of the state budget, the entities to which the finances from the state budget are allocated, the amounts of the appropriations, etc. Thus, when approving the state budget by means of a law, the Seimas also has the right to establish how much funds have to be allocated to finance agriculture, healthcare, education and other areas. Furthermore, the said ruling of the Constitutional Court held that the Seimas may not waive the powers afforded to it by the Constitution to approve the draft budget of the state or transfer these powers to other state institutions, while the latter may not take assume these powers from the Seimas. Otherwise, the constitutional powers of the Seimas to approve the draft state budget would be denied, thus violating the constitutional principle of the separation of powers and Article 5 of the Constitution.<sup>20</sup>

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20 The Ruling of the Constitutional Court of the Republic of Lithuania 'On the compliance of Article 39 of the Republic of Lithuania Law on the Health System, Articles 1, 2 and 3 of the Republic of Lithuania Law on the Long-Term Financing of Science and Education, Paragraph 2 of Article 18 of the Republic of Lithuania Law on the Structure of the Budget and Paragraph 1 of Article 172 of the Statute of the Seimas of the Republic

As noted, there have been situations where the Seimas, by means of a law that it adopted, has delegated budgetary powers to the Government. However, under the Constitution such powers belong to the Seimas itself. For example, on 2 December 1997, the Seimas adopted the Republic of Lithuania Law on the Approval of the Financial Indicators of the 1998 State Budget and Those of the Budgets of Local Governments. Item 4 of Article 10 of the said law established that *the Government or its authorized institution shall be granted the right 'respectively to change the approved appropriations following re-assignment of certain functions of ministries, counties, departments and state services'*. When enforcing this law, the Government adopted several resolutions, reorganizing the Department for Standardization of Lithuania and commissioning the Ministry of Finance to decrease the appropriations approved for the Department for Standardization of Lithuania from the appropriations provided for in the 1998 Budget Law and reappportion these appropriations to other state institutions, which had been given the functions of the Department for Standardization of Lithuania. The Government resolutions had also redistributed the functions of some ministries, whereas the Ministry of Finance was commissioned respectively to reappportion the appropriations provided for in the 1998 Budget Law. The Constitutional Court had to determine whether the specified provisions of the law were not in conflict with the Constitution. The representatives of the Seimas maintained that the Constitution provides that the Government execute the budget and that, having granted the right to the Government to change the approved appropriations, *the Seimas had not transferred its exclusive right to change the budget of the state but merely established additional powers for the Government in the area of the maintenance of the budget of the state*—namely, to reappportion the funds without exceeding the appropriations designated for financing some or other functions of governance. These funds had been reappportioned among the institutions due to the fact that the corresponding functions of governance had been redistributed among them as well, whereas the Seimas had confirmed budgetary appropriations to finance those functions. In the opinion of the representatives of the Seimas, upon reappportioning of the funds, the sum and the purpose of general expenditures, as approved by the law, remained unchanged, whereas the right of the Government to reappportion the appropriations should be seen as a technical rule establishing conditions for a more efficient and prompt utilization of the means of the state budget for the purpose of implementing of the administrative reform. In addition, the representatives of the Seimas emphasized that the Government had acquired the right to reappportion the funds which had been provided for in *appendices* to the Budget Law and, according to the representatives of the Seimas, the Budget Law itself and the total sum of expenditures established therein had remained intact.

The Constitutional Court disagreed with this view. The Court held that the Constitution separates the powers of the Seimas and the Government in the area of creating and executing the budget. Under the Constitution, during the budget year, the Seimas may

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of Lithuania with the Constitution of the Republic of Lithuania' of 11 July 2002. *Official Gazette*. 2002, No. 72–3080.



change the budget, but must do so according to the same procedure, by which it was drafted, adopted and approved (Article 132(2) of the Constitution). Under the Constitution, the state budget shall be approved by the Seimas upon passing a law. It is characteristic of this law that it approves the overall sum of revenues and expenditures. The Budget Law has appendices in which the budget expenditures are apportioned (and particularized) to ministries, departments, state services, enterprises, establishments and organizations; in the appendices to the law, the expenditures of the budget are also apportioned according to other indicators (social economic programmes, titles—by singling out the expenditures designed for general governance of the state, defense, education, medical care, etc.). The Constitutional Court noted that all parts of the budget law (including its appendices) constitute a whole, are inseparably linked and have equal legal power. It is impossible to isolate the appendices from the legal act. If the content particularly set forth therein is changed, consequently, the content of the whole legal act is also changed. The Constitutional Court emphasized that it is impossible to regard the reapportioning of the funds of the budget by the Government, as allowed by the disputed law, as the execution of the budget. The right granted to the Government to reapportion the budgetary funds in cases where the functions of state institutions are changed may not be interpreted only as a technical rule. Once the Government or its authorized institution had been granted the right to change the sums of expenditures provided for in the appendices to the Budget Law for individual managers of appropriations, it follows that the Government or its authorized institution gained the right to amend, by means of its acts (by means of sub-statutory acts) the Budget Law adopted by the Seimas. However, the Budget Law, as any other law, may only be changed by means of parliamentary legislation, and it may not be changed by legal acts of lower legal power. The Constitutional Court ruled that the disputed norms of the law delegated part of the rights of the Seimas in the area of the budget and thus the Constitution (particularly Article 5, whereby the scope of power shall be limited by the Constitution) had been violated.<sup>21</sup>

Under the Constitution, the legislator cannot, by means of laws, establish any such legal regulation whereby subjects not provided for in the Constitution could interfere with the powers ascribed to a corresponding state institution by the Constitution. This is of crucial importance where the autonomy and independence of courts is concerned. Article 109(2) of the Constitution provides that, when administering justice, the judge and courts shall be independent.<sup>22</sup> While evaluating this provision, the Constitutional

21 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Item 4 of Article 10 of the Republic of Lithuania Law on the Approval of the Financial Indices of the 1998 Budget of the State and Those of the Budgets of Local Governments, Item 2 of Government of the Republic of Lithuania Resolution No. 105 “On the Reorganisation of the Department for Standardisation of Lithuania Under the Ministry of Public Administration Reforms and Local Government Affairs” of 27 January 1998, Item 2 of Government of the Republic of Lithuania Resolution No. 117 “On the Transfer of the Right of the Founder of the Lithuanian Zoological Garden” of 30 January 1998, and Item 3 of Government of the Republic of Lithuania Resolution No. 366 “On the Transfer of Certain Functions of the Ministry of Agriculture and Forestry to the Ministry of Environmental Protection and on the Establishment of the Department for Forests and Protected Territories Under the Ministry of Environmental Protection” of 30 March 1998 with the Constitution of the Republic of Lithuania’ of 9 July 1999. *Official Gazette*. 1999, No. 61-2015.

22 In Lithuanian constitutional jurisprudence, various guarantees of the independence of judges and courts are

Court has repeatedly upheld that that the independence of judges and courts is one of the essential principles of a democratic state under the rule of law: when administering justice, courts must ensure the implementation of law as expressed in the Constitution, the laws and other legal acts, guarantee the supremacy of the law and protect human rights and freedoms (Constitutional Court rulings of 6 December 1995, 1 October 1997, 21 December 1999, 8 May 2000, 12 February 2001, 12 July 2001, 4 March 2003, 17 August 2004, 29 December 2004, 16 January 2006, 28 March 2006). The right of the person to judicial defense is inseparable from other norms and principles of the Constitution—the equality of rights, the right to compensation for damages, the right to a proper legal process, etc.<sup>23</sup> Being an autonomous and independent branch of state power, when discharging the functions commissioned to them, courts are not subordinate to the legislature, or to the executive, and the latter two are prohibited from interfering in the activity of the courts.<sup>24</sup>

Under Article 112(2) of the Constitution, Justices of the Supreme Court as well as its President chosen from among them are to be appointed and dismissed by the Seimas upon the submission of the President of the Republic; judges of the Court of Appeals as well as its President chosen from among them are to be appointed by the President of the Republic upon the assent of the Seimas (Article 112(3)); judges and presidents of local, regional, and specialized courts shall be appointed, and their places of work shall be changed by the President of the Republic (Article 112(4)). The powers (as entrenched in the Constitution) of the President of the Republic related to the appointment and dismissal of judges are to be interpreted inseparably from Article 112(5) of the Constitution, wherein it is established that a special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer and dismissal of judges. A special institution of judges provided for by law and provided for in Article 112(5) of the Constitution has the constitutional power to advise the President of the Republic *as regards the promotion of judges of all courts as well as regards their appointment, transfer or dismissal from office*,<sup>25</sup> with the exception of the

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singled out: 1) inviolability of the scope of powers of a judge; 2) inviolability of the person of a judge; 3) guarantees of social (material) character of a judge; 4) self-government of the judiciary as a fully-fledged branch of power; 5) guarantees of financial and material-technical provision of courts (Constitutional Court rulings of 6 December 1995, 18 April 1996, 19 December 1996, 5 February 1999, 21 December 1999, decision of 12 January 2000).

- 23 Abramavičius, A. Teisė į teisminę gynybą Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje [The Right to Legal Defence in the Jurisprudence of the Constitutional Court of the Republic of Lithuania]. *Jurisprudencija*. 2009, 3(117): 22.
- 24 Šinkūnas, H. Valdžių padalijimo principas ir teisminės valdžios vieta valdžių padalijimo sistemoje [The Principle of Separation of Powers and the Place of the Judiciary in the System of Separation of Powers]. *Teisė*. 2003, 49, p. 119.
- 25 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Paragraph 2 (wording of 24 January 2002), Paragraph 3 (wording of 21 January 2003), Paragraphs 4, 5 and 6 (wording of 24 January 2002) of Article 56, Paragraph 3 (wording of 28 January 2003) of Article 57, Paragraph 4 (wording of 24 January 2002) of Article 63, Paragraphs 2 and 3 (wording of 24 January 2002) of Article 70, Paragraphs 2 and 3 (wording of 24 January 2002) of Article 71, Paragraphs 2 and 3 (wording of 24 January 2002) of Article 72, Paragraph 2 (wording of 24 January 2002) of Article 73, Paragraph 1 (wording of 24 January 2002) of Article 74, Paragraph 1 (wording of 24 January 2002) of Article 75, Paragraph 2 (wording of 21

appointment of the justices of the Constitutional Court and their dismissal from office.<sup>26</sup> The Constitution does not allow any such legal regulation whereby the actions of the President of the Republic, when appointing and dismissing judges, would be bound by *decisions of institutions and officials not provided for in the Constitution*. The guarantee of the independence of judges and courts requires a clear separation of the activity of courts from the executive; the activity of courts is not and may not be construed as an area of administration ascribed to any institution of the executive. The Constitutional Court did not support the intentions of the legislator to include the Minister of Justice in the procedure of appointing judges. In its ruling of 21 December 1999, the Constitutional Court held that the provisions of the Law on Courts whereby the President of the Republic was only to appoint and dismiss judges of local and regional courts requiring not only the advice of the Council of Judges, *but also a proposal by the Minister of Justice*, were in conflict with the Constitution. The Constitutional Court emphasized that *‘Once the proposal of the Minister of Justice has been established in the disputed parts of articles of the Law, the recommendation of the Council of Judges becomes devoid of the meaning attached to it by the Constitution, as in such a case the actions of the President of the Republic are conditioned not only by the recommendation of the Council of Judges but also by the proposal of the Minister of Justice, which is not provided for in the Constitution. Such legal regulation violates the procedure for the formation of the corps of judges as established in the Constitution and interferes with the competence of the President of the Republic and that of the special institution of judges provided for in the Constitution.’*<sup>27</sup>

If, in this context, we assess the provisions of Article 31(1) of the Law on the Diplomatic Service<sup>28</sup> related to appointment of diplomatic representatives of the Republic

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January 2003) of Article 76, Paragraph 3 (wording of 24 January 2002) of Article 77, Paragraph 2 (wording of 21 January 2003) of Article 78, Paragraph 2 (wording of 24 January 2002) of Article 79, Paragraphs 3 and 7 (wording of 24 January 2002) of Article 81, Paragraphs 3 and 7 (wording of 24 January 2002) of Article 90, Paragraphs 2 and 5 (wording of 24 January 2002) of Article 119, Items 3 and 4 (wording of 24 January 2002) of Article 120, Paragraph 2 (wording of 24 January 2002) of Article 128 of the Republic of Lithuania Law on Courts, of Item 13 (wording of 4 July 1996) of Paragraph 3 of Article 11, Paragraphs 1 and 3 (wording of 18 April 1995) and Paragraph 4 (wording of 4 July 1996) of Article 17, Paragraph 3 (wording of 18 April 1995) of Article 18 of the Republic of Lithuania Law “The Statute of the Supreme Court of Lithuania” and of Article 1 of Decree of the President of the Republic of Lithuania No. 2048 “On the Dismissal of a Judge of the Regional Court From Office” of 10 February 2003 With the Constitution of the Republic of Lithuania’ of 9 May 2006. *Official Gazette*. 2006, No. 51-1894.

26 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Article 2 of Resolution of the Seimas of the Republic of Lithuania No. X-131 “On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania” of 15 March 2005, Decree of the President of the Republic of Lithuania No. 237 “On Presentation to the Seimas of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania” of 17 March 2005, and of Resolution of the Seimas of the Republic of Lithuania No. X-138 “On the Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania” of 17 March 2005 with the Constitution of the Republic of Lithuania’ of 2 June 2005. *Official Gazette*. 2005, No. 71-2561.

27 The Ruling of the Constitutional Court of the Republic of Lithuania ‘On the compliance of Articles 14, 25(1), 26, 30, 33, 34, 36, 40, 51, 56, 58, 59, 66, 69, 69(1), and 73 of the Republic of Lithuania Law on Courts with the Constitution of the Republic of Lithuania’ of 21 December 1999. *Official Gazette*. 1999, No. 109–3192.

28 The Republic of Lithuania Law on the Diplomatic Service. *Official Gazette*. 1999, No. 7–140.

of Lithuania, we may raise doubts as to whether some elements of the procedure for appointing a diplomatic representative as established in this paragraph are not in conflict with the Constitution. Under the Constitution, the President of the Republic is to appoint and recall, upon the submission of the Government, diplomatic representatives of the Republic of Lithuania to foreign states and international organizations (Article 84(3)). Thus, under the Constitution, questions of appointment and recall of diplomatic representatives to foreign states and international organizations are decided by the President of the Republic and the Government—the latter submits the candidatures of diplomatic representatives to the President of the Republic. Article 31(1) of the Law on the Diplomatic Service provides that a diplomatic representative (ambassador extraordinary and plenipotentiary) is appointed as follows: ‘Having deliberated his candidacy in advance, in the Seimas Committee on Foreign Affairs and having obtained the receiving agreement (*agrément*) of that foreign country, the President of the Republic shall, upon the recommendation of the Government, appoint by a decree, also to be signed by the Minister of Foreign Affairs, a Republic of Lithuania diplomatic representative to the foreign country.’ A diplomatic representative at an international organization is appointed under the same procedure, with the difference that no *agrément* is necessary. Thus, under the Law on the Diplomatic Service, *the candidacy of a diplomatic representative must be deliberated in the Seimas Committee on Foreign Affairs in advance*. What does this provision of the law mean and what effect does the requirement to deliberate the candidacy in the Seimas Committee on Foreign Affairs have? The conformity of the said provision of the law with the Constitution also depends on the answer to this question. The indicated provision of the law would not be in conflict with the Constitution only if one maintained that this provision does not prevent the Government from also submitting the candidacy of a diplomatic representative to the President of the Republic in the situations where this candidacy has not been deliberated in the Seimas Committee on Foreign Affairs in advance. However, this provision of the law may be interpreted in a different manner: it has expressly established a condition to be fulfilled so that a diplomatic representative can be appointed—namely, his candidacy must be deliberated in the Seimas Committee on Foreign Affairs in advance. Thus, as long as this has not been done, the Government is not allowed to submit the candidacy of a diplomatic representative to the President of the Republic. This provision of the law has been interpreted precisely in this manner in the practice of the appointment of diplomatic representatives. The Constitutional Court has not yet reviewed the compliance of this provision with the Constitution. It may be presumed that in the case of a constitutional dispute there might be several possible decisions by the Constitutional Court. One of them could be grounded on the doctrine formulated in the constitutional jurisprudence whereby ‘the legislator is not allowed to establish, by means of laws, any such legal regulation where subjects, which are not provided for in the Constitution, interfere with the powers ascribed to a corresponding state institution by the Constitution’. The requirement established in the law that the candidacy of a diplomatic representative must be deliberated in the Seimas Committee on Foreign Affairs in advance means that as long as this has not been done, the Government is not allowed to submit the candidacy of a diplomatic re-

presentative to the President of the Republic. Therefore, the actions of the Government, as well as those of the President of the Republic, also depend on whether the Seimas Committee on Foreign Affairs has considered the candidacy of the diplomatic representative in advance. Thus, the Seimas Committee on Foreign Affairs—an institution not provided for in the Constitution—interferes with the powers of the Government and the President of the Republic. This is prohibited by the Constitution.<sup>29</sup> A different decision by the Constitutional Court is also possible. It could be grounded on the so-called rule of ‘*correct construction of the content of the law*’ where the disputed provision of the law is interpreted in a manner that is in line with the Constitution. In this case, the provision ‘Having deliberated his candidacy in advance, in the Seimas Committee on Foreign Affairs’ should be interpreted as only meaning that the Seimas Committee on Foreign Affairs *may deliberate the candidacy in advance, but the fact that it has not deliberated the candidacy or has not approved the candidacy is not binding upon the Government or the President of the Republic*—the Government is allowed to submit the candidacy of a diplomatic representative to the President of the Republic, whereas the President of the Republic can appoint this person as a diplomatic representative.

## Conclusions

1. The text of the Constitution of the Republic of Lithuania does not contain an explicit provision that state power is organized according to the principle of separation of powers. This principle is to be attributed to the so-called *complex* or *composite* constitutional principles and *is derived* from various provisions of the Constitution. Only a systemic interpretation of the Constitution, as an integral act, reveals the content of the principle of separation of powers. The content of this principle is revealed in various provisions of the Constitution, first of these being that the powers of the Seimas, the Government, the President of the Republic, as well as those of the courts, and the inter-relations of these state institutions are entrenched.

2. The jurisprudence of the Constitutional Court has developed a doctrine that if the Constitution provides that certain relations are regulated by means of a law, then such relations may be regulated only by means of a legal act that takes the form of a law. In such a case, all the most important elements of legal relations must be regulated (established) by means of a law, whereas Government resolutions might establish the procedure for implementing the laws.

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29 The Law on the Diplomatic Service does not say anything about the consequences, if the Seimas Committee on Foreign Affairs does not approve the candidacy of a diplomatic representative. The law clearly consolidates only the requirement that the candidacy be deliberated in the Seimas Committee on Foreign Affairs in advance. Such formulation of the law is rather ambiguous, since it can also be interpreted also as meaning that the law merely requires the Seimas Committee on Foreign Affairs to deliberate the candidacy and express its opinion about it, but it can also be interpreted as meaning that provided the Seimas Committee on Foreign Affairs has not approved the candidacy, the Government may not submit this candidacy to the President of the Republic, and the President of the Republic may not appoint this person as a diplomatic representative.

3. Once the powers of a specific branch of state power have been directly established in the Constitution, a given institution of state power may not assume such powers from another state institution, it may not transfer or waive them; and such powers may not be amended or limited by means of a law. Under the Constitution, the legislator is not allowed to establish any such legal regulation whereby subjects not provided for in the Constitution might interfere with the powers ascribed to a corresponding state institution by the Constitution.

4. Under the Constitution, the President of the Republic appoints and dismisses diplomatic representatives of the Republic of Lithuania upon the submission of the Government. There are grounds for doubt as to whether the provision of Article 31(1) of the Law on the Diplomatic Service that *the candidacy of a diplomatic representative must be deliberated in the Seimas Committee on Foreign Affairs in advance* is not in conflict with the Constitution, since this provision can be interpreted also as meaning that as long as this has not been done, the Government may not submit the candidacy of a diplomatic representative to the President of the Republic, and the President may not appoint this person as a diplomatic representative. In such a case, the actions of the Government, as well as those of the President of the Republic, would also depend on whether the Seimas Committee on Foreign Affairs has considered the candidature of the diplomatic representative in advance. The said provision of the Law on the Diplomatic Service permits an institution not provided for in the Constitution—the Seimas Committee on Foreign Affairs—to interfere with the powers of the Government and the President of the Republic when appointing diplomatic representatives. This is prohibited by the Constitution.

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## SEIMO IR VYRIAUSYBĖS ĮGALIOJIMŲ ATRIBOJIMAS: KAI KURIE KONSTITUCINĖS DOKTRINOS ASPEKTAI

Vytautas Sinkevičius

Mykolo Romerio universitetas, Lietuva

**Santrauka.** Straipsnyje analizuojama, kokiais kriterijais remiantis Lietuvos konstitucinėje jurisprudencijoje yra atskiriami Seimo ir Vyriausybės įgaliojimai. Parodoma, kaip Konstitucinis Teismas aiškina Konstitucijoje įtvirtintą valstybės valdžių padalijimo principą. Atskleidžiama, ką reiškia Konstitucijos nuostata, jog atitinkamus „santykius reguliuoja įstatymas“. Teigiama, kad jeigu Konstitucijoje nustatyta, jog tam tikrus santykius reguliuoja įstatymas, tai tokie santykiai gali būti reguliuojami tik tokiu teisės aktu, kuris turi būtent įstatymo formą, kad tokių santykių negalima reguliuoti Vyriausybės nutarimais arba kitais vykdomosios valdžios aktais. Tokiu atveju įstatymu turi būti reguliuojami (nustatomi) visi svarbiausi teisinių santykių elementai, o Vyriausybės nutarimais gali būti nustatoma įstatymų įgyvendinimo tvarka. Remiantis Konstitucinio Teismo nutarimais parodoma, jog Konstitucijoje tiesiogiai nustačius konkrečios valstybės valdžios institucijos įgaliojimus, viena valstybės valdžios institucija negali iš kitos perimti tokių įgaliojimų, jų perduoti arba atsisakyti, tokie įgaliojimai negali būti pakeisti ar apriboti įstatymu. Keliamas diskusinis klausimas, ar Diplomatinės tarnybos įstatymo nuostata, jog diplomatinio atstovo kandidatūra turi būti iš anksto apsvaistyta Seimo užsienio reikalų komitete, neprieštarauja Konstitucijai. Ši įstatymo nuostata, autoriaus nuomone, gali būti aiškinama ir kaip reiškianti, kad tol, kol tai nepadaroma, Vyriausybė negali teikti diplomatinio atstovo kandidatūros Respublikos Prezidentui, o Respublikos Prezidentas negali asmens paskirti diplomatinio atstovu. Taigi Vyriausybės, taip pat ir Respublikos Prezidento veiksmus lemty inter alia tai, ar Seimo užsienio reikalų komitetas iš anksto apsvaistė diplomatinio atstovo kandidatūrą. Kadangi pagal Konstituciją diplomatinis atstovas skiria ir atleidžia Respublikos Prezidentas Vyriausybės teikimu, daroma prielaida, kad nurodyta Diplomatinės tarnybos įstatymo nuostata leidžia Konstitucijoje nenumatytai institucijai – Seimo užsienio reikalų komitetui – įsiterpti į Vyriausybės ir Respublikos Prezidento įgaliojimus skiriant diplomatinis atstovus. Teigiama, kad Konstitucija tai draudžia.

**Reikšminiai žodžiai:** valdžių padalijimo principas, stabdžių ir atsvarų sistema, Konstitucija, konstitucinė jurisprudencija, Seimo kompetencija svarstant biudžetą, Vyriausybės įgaliojimai rengiant valstybės biudžetą, teisėjų skyrimas, diplomatinis atstovų skyrimas.

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**Vytautas Sinkevičius**, Mykolo Romerio universiteto Teisės fakulteto Konstitucinės teisės katedros profesorius. Mokslinių tyrimų kryptys: konstitucinė teisė, parlamentinė teisė, konstitucinė jurisprudencija, pilietybė.

**Vytautas Sinkevičius**, Mykolas Romeris University, Faculty of Law, Department of Constitutional Law, professor. Research interests: constitutional law, legislative law, constitutional jurisprudence, citizenship.