



Strasbourg, 3 September 1992
<S:CDL/TASK\CDL9239.A>

Restricted
CDL (92) 39

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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

**PART I - Observations relating to Human
Rights and Fundamental Freedoms**

by Gerard Batliner (Liechtenstein)

On 21/27 April, the Supreme Council presented an impressive Draft Constitution of the Republic of Lithuania for public consideration. If the following personal observations, which relate particularly - but not exclusively - to chapters 2 and 3 of the draft Constitution, focus above all on unanswered questions, or even criticisms, this is with a view to contributing to the debate called for by the Supreme Council. It is also possible that some of the questions originate from the English translation and do not arise in the original Lithuanian version of the draft Constitution.

I. Constitutional framework - the rule of law - general substantive rules

1. The principle of legality

The principle of legality for any activity of the public authorities is a fundamental principle of the rule of law. The draft Constitution contains special clauses relating to criminal law (*nulla poena sine lege*, article 25, para. 2), procedure (article 106, para. 3; article 114) and the imposition of liabilities (article 26). However, the draft Constitution lays down no precise requirements with regard to other activities of the State and in particular of the administration. The wording of article 6, para. 2 does not appear to me to be sufficiently clear to ensure legality and could be clarified or expanded. See, for example, CSCE Cop. 1 5.3, 5.5; BLG article 20, para. 3; CS article 9, para. 1 and 3.

2. Judicial protection - access to the courts

Article 34, para. 1 guarantees the right of appeal to the courts where constitutional rights or freedoms have been violated. Does such a right of appeal extend to rights other than those covered in chapter 2 (see also the observations at II 1 and III 14 below)?

Articles 25, 106, para. 3 and 114 govern judicial procedure in the criminal domain. Even though paras. 3 to 5 of article 114 also relate to other forms of procedure, it would be essential to grant to everyone an unequivocal right of appeal to the courts with regard to all rights and obligations and to any administrative act which may affect them. Neither article 106, para. 1, which gives courts the exclusive right to administer justice, nor article 108, para. 4, which states that the competence of the courts shall be determined by law, is sufficient to

Abbreviations

BLG	Basic Law of Germany (1949)
CCPR	UN Covenant on Civil and Political Rights (1966)
CS	Constitution of Spain (1978)
CSCE Cop.	Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE (1990)
ECHR	European Convention on Human Rights (1950)

guarantee everyone's right of appeal to the courts with regard to all types of right (or obligation). See, for example, article 24 CS; article 20 of the official Swiss draft for a new constitution (1977), which guarantees the principle but admits certain legally specified exceptions. See also the observations at III 9 below.

3. Independence of the courts

The power of the Seimas, following a proposal of the President of the Republic (article 88, sub-para. 8), to dismiss:

- a. under the impeachment procedure (article 79), Constitutional Court judges (article 122, sub-para. 5), Supreme Court and Court of Appeal judges (article 113), before the expiry of their term of office, and
- b. under another procedure (article 112, para. 2), district or local judges, before the expiry of their term of office,

may pose problems regarding the independence of judges and the courts. These comments are not contradicted by article 80, which is concerned rather with the required quorum.

4. The principle of proportionality

It is considered advisable to make explicit reference in a modern constitution to the principle of proportionality, which is fundamental and relates to all decisions of the legislature and other authorities (and not just in the human rights field).

This applies to the prohibition of arbitrary actions (or omissions) - in practice often treated as deriving from the right to equality - which is a key obligation in public matters for all authorities. See, for example, article 9, para. 3 CS; article 5, para. 2 of the official Swiss draft.

5. Public accountability - compensation for damage

It is proposed that article 34, para. 2, which refers to procedural legislation, should be transformed into a substantive rule providing protection against damage caused by the State, and not just in cases involving violations of basic rights. Such an obligation to make reparation for any damage would also include the right to compensation in the case of unlawful arrest or detention (see, for example, article 5, para. 5 ECHR; article 9, para. 5 CCPR). Material protection with regard to a specific situation is provided for in article 153 of the draft Constitution.

II. General observations relating to basic rights

1. Possible human and civil rights and freedoms - their place in the draft Constitution - those possessing rights

The title of chapter 2 of the draft Constitution, the wording of article 34, para. 1 ("constitutional rights or freedoms") and its systematic place in chapter 2 could give rise to difficult questions of interpretation. Are "constitutional rights or freedoms" only those referred to in chapter 2 (articles 18 to 35)? Several at least of the articles in chapter 3 ("Society and the State"), such as articles 36, 38, 39, 40 and 41, as well as article 114 in chapter 7, appear to be basic individual rights which are protected in accordance with article

34, para. 1 of the draft Constitution. There is an acute need for clarity in this area (see, for example, BLG article 93, paras. 4a and b) on what constitutes a basic individual right.

In chapter 3 of the draft Constitution, it is not easy to distinguish the basic rights which confer rights on individuals or citizens from simple (policy) obligations of the State. The very title of chapter 3 - "Society and the State" - could lead to ambiguity. In the case of social rights (e.g. articles 38, 39, 43, para 2, 44, para 2), granting individuals rights vis-à-vis the State which are directly applicable by the courts (article 8) and enforceable can sometimes cause difficulties. At all events, it is prudent to choose a version which clearly distinguishes between basic individual rights and simple obligations of the State.

On the other hand, when a right is conferred on an individual, the Constitution should express this unequivocally: for example, "each person has ...", "no person shall ...". If article 20, para. 1 and article 26 relate to individual rights, they do not satisfy these requirements.

Who possesses these rights? Do legal persons or corporations, for example, also enjoy the protection of article 20, para. 2 (inviolability of correspondence, etc), article 22 (freedom of expression), article 23, para. 2 (religion), article 26 and article 34, para. 1 (right of appeal)? With regard to the granting of certain rights only to citizens of the Republic, see the observations at III 10, 11 and 12 below.

2. Restrictions of basic rights

a. Problem of the general obligations in chapter 2 (article 33)

What is the effect on basic individual rights of non-observation of the Constitution (which rule of the Constitution) and of the laws? Are the listed rights removed or weakened in cases where the Constitution is breached? Should it not be possible to indicate in each article the possible legal restrictions (according to the ECHR model), as, for example, is clearly proposed in article 22, para. 4, article 23, para. 4, article 28, para. 1 and article 32, para. 2 of the draft Constitution?

What is meant in the same article by "legitimate interests of other people" (article 33)? Are "legitimate interests" constitutional (or even basic) rights, rights conferred by statute or other interests with no legal basis? What is the effect of non-respect of "legitimate interests" on basic rights?

b. Problem of restrictions on basic rights with no legal basis

Any restriction of a basic right should have a legal basis. Thus, article 18, para. 1 could be made to read "... restrictions of freedom only upon the order of the court in accordance with the law, and provided ..." (This requirement is not covered by article 106, para. 3, which only relates to investigations.) Article 21, para. 3 could be rewritten as follows: "... when there is a corresponding court order in accordance with the law ..."

c. Problem of potential legally based restrictions

A constitutional right which can be removed simply by ordinary legislation (for example, article 20, para. 3 and also article 26) loses much of its legal force. To counteract such

problems, but also to protect the essence of all basic rights, one could insert in chapter 2, which sets out the basic rights, an article requiring the legislature and all other authorities to respect the substance, or "core", of each such right ("Wesensgehaltsgarantie"), as, for example, is the case with article 19, para. 2 BLG.

3. A common, shared and universal human rights culture

Without underestimating the need to reflect specific national traditions and circumstances, in the human rights field, it is often appropriate to draw on texts which have been tried and tested, clarified and given practical shape both nationally and internationally through a well-established caselaw, for example the European Convention on Human Rights and its protocols (ECHR).

III. The catalogue of different basic rights

1. Right to the protection of life
Abolition of the death penalty
Human dignity

There is no article on the most basic right, the right to life. For example, the first sentence of article 2 of the ECHR reads "Everyone's right to life shall be protected by law." Such a clause protects every individual vis-à-vis the authorities, but also requires the State to protect life (for example, through the criminal law) against interference by other private individuals (the horizontal dimension).

It can also be asked whether the abolition of the death penalty could not be provided for expressly in the Constitution. Such a provision would be consonant with trends in constitutional and international law (see, for example, Protocol N°. 6, ECHR; CSCE Cop. II 17; additional protocol to the American Convention on Human Rights for the abolition of the death penalty (OAS res. 1042)) towards putting an end to this exclusive right of the absolute and sovereign State.

Lastly, would it be possible to add to chapter 2 ("Human and Civil Rights and Freedoms") of the draft Constitution an introduction which opened with an article requiring the State to respect and protect the dignity of every human being (as an individual right)? Such a wording would serve to guide the interpretation of any basic right and could provide a basis for protecting the individual against future perils as yet unknown. See, for example, article 1, para. 1 BLG; article 10, para. 1 CS; art 8 of the official Swiss draft for a new constitution or article 4, para. 1 of the Kolz/Müller proposal for a new Swiss constitution; the preambles to the United Nations Charter, the Universal Declaration of Human Rights and the CCPR and chapter I 5 CSCE Cop.

2. Article 18 of the draft Constitution

"Personal freedom shall be inviolable." Article 5, para. 1 of the ECHR and article 9, para. 1 of the CCPR speak of "liberty and security". The words "in accordance with the law" should be inserted in the second sentence of article 18 ("A person may be prosecuted ...").

What, for example, is the position of a mentally disordered person who places himself or others in danger?

There is no habeas corpus procedure, which would apply to any form of arrest or detention and on which a court would reach a speedy decision (see, for example, article 5, para. 4 ECHR or article 9, para. 4 CCPR).

3. Article 19 of the draft Constitution

Paragraph 2 should be embodied in paragraph 1 and relate not just to the "laws", but also to any action taken by the authorities. The ban on torture should be made to cover any "inhuman or degrading treatment or punishment" as well. See article 3 ECHR; article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; article 7 CCPR. Such a wording would include "torture", "the use of cruel physical force" and "psychological means of influence", but would also go further. Two examples may suffice: keeping a person blindfolded throughout questioning in a criminal investigation or requiring an arrested person to appear naked before the police during police custody would constitute the use not "of cruel physical force", and scarcely "of psychological means of influence", but rather "of physical means", and according to the rules would be "degrading treatment".

4. Article 20 of the draft Constitution

It is suggested that the order of the sentence in the first paragraph (which contains an obligation of the State) be reversed, so that each individual shall be entitled to have his private life respected and guaranteed by the State (that is, an individual right).

In paragraph 3, the reasons for restrictions that are legally possible (for example, national security or to prevent criminal offences) should be listed.

5. Article 21 of the draft Constitution

In paragraph 2, it is proposed that the words "in accordance with the law" are inserted after "corresponding court order" and that possible restrictions (for example, national security) are listed.

6. Articles 22, 51 and 53 of the draft Constitution

In article 22, para. 1, the words "in a peaceful way" may be open to interpretation. The possible restrictions set out in para. 4 could suffice.

The relationship between articles 22 and 51 of the draft Constitution is not sufficiently clear. Does article 51 also create a basic individual right? Under article 22, para. 4, the possible legal restrictions on freedom of expression, including that of the press, are clearly laid down, whereas para. 1 of article 51 appears (arg. e contrario) to allow press restrictions through "the laws".

What is the relationship between articles 22 and 53? Does article 53, para. 2 create a basic individual right?

7. Articles 23 and 52 of the draft Constitution

What is the relationship between articles 23 and 52? Paragraphs 1 and 2 of article 52 permit restrictions through "the law". Article 23, para. 4 limits the possible legal restrictions to specific purposes.

8. Article 24 of the draft Constitution

It is proposed that the words "and the court" are deleted, in order to avoid the impression that equality before the executive authorities (administration) is not required. See, for example, article 3 BLG; article 14 CS.

9. Articles 25, 106 and 114 of the draft Constitution

It appears that the guarantees in articles 25 and 114 focus on criminal proceedings, but it is possible that paras. 3 to 5 of article 114 may extend to other judicial proceedings as well. It is proposed that in chapter 2, besides the criminal field, judicial protection should also be guaranteed unequivocally for all other areas of law (civil and administrative), with the specific forms of protection pertaining to criminal proceedings provided for in articles 25, 106, para. 3 and 114 being added. The impartiality and independence of the courts (see article 25, para. 1) should also be guaranteed for civil and administrative judicial proceedings as basic individual rights and not simply as obligations of the State (article 106, para. 2). This basic right would include the right to a judgment with reasons and pronounced publicly, after a fair and public hearing, within a reasonable time.

With regard to the principle of "nulla poena sine lege" in article 25, para. 2, a more precise wording would be desirable (for example, making criminal legislation non-retroactive).

10. Article 28 of the draft Constitution

Is it necessary to limit this right to Lithuanian citizens, given the possible exceptions (for example, "State security")?

11. Articles 31, 40 and 53 of the draft Constitution

Article 31: Is it necessary to limit freedom of association to citizens? The possible legal restrictions could be specified.

Articles 40 and 52: Do the establishment of trade unions and political parties and the freedom to undertake trade union and political activities constitute basic individual rights?

12. Article 32 of the draft Constitution

Is it justified to limit the right to peaceful assembly to citizens, given the possible legal restrictions in para 2?

In a democratic society, the right to peaceful assembly may include the right to positive action on the part of the authorities to protect meetings against counter-demonstrators, etc.

13. Article 33 of the draft Constitution

See observations at II 2a above.

14. Article 34 of the draft Constitution

Para 1: it is critical for the exercise of this basic right to be able to identify clearly the other basic individual rights (see observations at II 1 above).

The draft Constitution has chosen the "diffuse" system, according to which all the courts apply the Constitution, which is directly applicable (article 8). Any application regarding a violation of "constitutional rights or freedoms" must be submitted to the ordinary courts and there is no individual appeal to the Constitutional Court (articles 116 et seq. e contrario). In cases where a decision or action is based on legislation which conflicts with constitutional rights, there is a form of indirect review by the Constitutional Court (review of legislation), in accordance with articles 107 and 116 et seq.

What is the situation of an individual if the law as such constitutes direct interference in his basic rights, even without the occurrence of a specific administrative or other decision? It appears that individuals can also apply in such cases to the courts (under article 34, para. 1 of the draft Constitution) and the latter will refer the matter to the Constitutional Court (article 107).

Para 2: see the observations at I 5 above.

15. Article 36 of the draft Constitution

The wording of this article could give rise to a number of interpretations (individual right or just an obligation of the State). Para. 3, relating to ownership of real property, is extremely restrictive ("only to citizens").

16. Articles 38, 39, 43, 44 and 48 of the draft Constitution

Experience in other countries shows that it is not easy to grant enforceable social rights above a minimum standard as basic individual rights. Does article 43 include a guaranteed minimum standard of accommodation for homeless people?

17. Article 41 of the draft Constitution

The possible legal restrictions on the right to strike could be specified in the Constitution.

18. Articles 42, 45, 46, 47 and 49 of the draft Constitution

Are these basic individual rights?

19. Articles 54 and 55 of the draft Constitution

Article 54, protecting ethnic communities, and article 55, creating obligations with regard to the protection of future generations, are highly topical and indeed crucial.