

JEVGENIJ MACHOVENKO

ORCID: 0000-0003-2930-3526

Vilnius University

jevgenij.machovenko@tf.vu.lt

HAROLDAS ŠINKŪNAS

ORCID: 0000-0001-8090-1009

Vilnius University

haroldas.sinkunas@tf.vu.lt

Establishment of a judicial system and ensuring independence of judges in Lithuania, 1918–1920

Abstract: The problems of court relations with the other branches forming the constitutional triad of powers (the legislative and the executive) as well as judicial independence are among the most sensitive issues, which never lose their relevance. The article deals with the problems by reference to the constitutional and ordinary law of 1918–1920, the circulars of the Ministry of Justice, other legislation, as well as research papers. A retrospective analysis of certain issues is also presented (by way of establishing links with the Constitution of 3 May 1791 and other historical sources of law). The co-authors have arrived at the conclusion that, while reflecting general observance of the principle of separation of powers and the intention to ensure judicial independence, the Founding Principles of 1918 and 1919, adopted by the State Council, and the Interim Constitution of 1920, adopted by the Constituent Assembly, enshrined the legislative and the executive powers explicitly but judicial power only implicitly (the texts do not even mention courts and the respective principle is derived from the others). Due to the severe shortage of lawyers in 1918–1920, judges were allowed to serve in the executive branch at the same time. The Ministry of Justice explained the law to judges, while judges assisted the executive (such as the police) in discharging their functions. All that contradicted the principles of separation of powers and judicial independence but was accepted as an unavoidable and temporary arrangement. The Ministry of Justice tried to avoid abusing its power and harming the dignity of the judicial system's employees by intrusive oversight, and acted in their regard as discretely as possible. It encouraged judicial independence and activism and demonstrated confidence in the courts.

Keywords: legal history, constitution, court, judicial independence, separation of powers.

Introduction

On the occasion of the centenary of the restoration of Lithuanian and Polish statehoods, it is important to evaluate the national government's first steps in establishing a court system, building its constitutional foundations and solving practical, operational issues. The problems of court relations with the other branches forming the constitutional triad of powers (the legislative and the executive) as well as judicial independence are among the most sensitive issues, which never lose their relevance. This article deals with the mentioned problems by reference to the constitutional and ordinary laws of 1918–1920, the circulars of the Ministry of Justice, other legislation, as well as research papers. A retrospective analysis of certain issues is also presented (by way of establishing links to the Constitution of 3 May 1791 and other historical sources of law).

1. The constitutional foundations for the existence and operation of the court system in 1918–1920

The first constitutional act of the restored Lithuania, that is, the Foundational Principles of the Interim Constitution of the Lithuanian State of 2 November 1918, did not mention courts at all. Commenting on this rare phenomenon in constitutional law, Mykolas Romeris expressed his surprise at the fact that the drafters of this act in the State Council, which included a number of competent lawyers, had neglected to mention courts, and concluded that in those particular circumstances the drafters of the constitution were more concerned with the issue of political power and political authorities rather than with courts.¹

Yet, even later, after the political situation somewhat stabilised, the obvious reluctance of the political branch of the government to provide the judiciary with a proper place at the constitutional level persisted for some time. Adopted by the State Council on 4 April 1919, the Second Foundational Principles of the Interim Constitution of the Lithuanian State again failed to include any provisions on the courts. Nor were they constitutionalised by the Interim Constitution passed by the Constituent Assembly on 2 June 1920.²

When analysing this situation, Mykolas Romeris made yet another assumption that the government of the re-established Lithuanian State made a conscious effort to keep the court under government control, without assigning it an autonomous

¹ M. Maksimaitis, "Historical origins of judicial power in Lithuania", [in:] *The Problems of Judicial Power in Lithuania*, Vilnius 1997, p. 17.

² H. Šinkūnas, "Ensuring judicial independence in the Lithuanian legal system", doctoral dissertation, Vilnius University, Vilnius 2004.

function on a par with individual autonomous institutions. For that, as noted by Mr. Maksimaitis, the Lithuanian government had a serious reason.

First of all, the re-established Lithuania did not have many lawyers, and even those that it had were “hunted” by other emerging states. Therefore, the first Justice Minister Petras Leonas had only 20 qualified Lithuanian lawyers at his disposal, while a similar number of non-Lithuanian lawyers resident in Lithuania usually could not speak, let alone write, Lithuanian.³ It is possible that the Lithuanian government was unable to rely on the newly-established courts and under-qualified judges and could have decided, at least for the period of court organisation and search for candidates to take judicial posts, to keep the courts under its control.⁴

However, there are some considerations that cast doubt on the above-stated version (which is broadly accepted in Lithuanian sources of legal history).

1. Neither the Interim Arrangement for Lithuanian Courts and their Operations, adopted by the State Council on 28 November 1918, nor the circulars of the Ministry of Justice or other legal documents can attest to such a general attitude of the political branch of the government towards the courts. On the contrary, Justice Minister Petras Leonas, for instance, expressed full confidence in the courts and their new staff: “Initially, the State will be short of experienced people for the posts of judges and investigators and the same person will have to be entrusted with both positions, that of the Justice of the Peace and that of the Court Investigator. To be able to occupy both positions, the judge will invite more workers to the Registry; the latter will be appointed, as far as possible, from young lawyers and, after gaining some practice, they will be ready to assume judicial office themselves”.⁵

2. A comprehensive analysis of the constitutional acts of the State Council and the Constituent Assembly confirms that these institutions relied on that version of democratic government, which was called in Mykolas Romeris’s *Konstitucinės institucijos*, volume 1 “Sovereignty”, a classical democratic construction and described as a combination of three principles: (a) disjuncture of the constituent and constituted powers; (b) written constitution; (c) functional division of the constituted power (separation of powers). The latter was enshrined in the Foundational Principles⁶ of 1918 and 1919 as well as the 1920 Interim Constitution⁷, albeit without using the specific term “separation of powers”. However, all three acts contain the term

³ V. Andriulis et al., *Lietuvos teisės istorija*, Vilnius 2002, p. 421.

⁴ T. Birmontienė, E. Jarašiūnas, E. Kūris, *Lietuvos konstitucinė teisė*, Vilnius 2002, p. 774.

⁵ Clarification for the law “Interim Arrangement for Lithuanian Courts and their Operations”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3. All quoted fragments in the authors’ own translation.

⁶ “Founding Principles of the Interim Constitution of the Lithuanian State (adopted by the State Council of Lithuania on 2 November 1918)”, *Lietuvos aidas*, 13.11.1918, 130(178); “Founding Principles of the Interim Constitution of the Lithuanian State. Adopted by the State Council of Lithuania on 4 April 1919”, supplement to *Laikinosios vyriausybės žinios*, no. 6/24a.

⁷ “Interim Constitution of the Lithuanian State”, *Laikinosios Vyriausybės žinios*, 12.06.1920, no. 37–407.

“executive power”, which is commonly used today as well in respect of one of the powers forming the “triad”. While “the State Council considers and decides on interim laws and treaties”, its “Presidium has the executive power, which it exercises through the Cabinet of Ministers, accountable to the State Council” (Articles 5 and 10 of the 1918 Founding Principles). Similar wordings can be found in Articles 8 and 15 of the 1919 Founding Principles⁸ and Articles 4 and 5 of the 1920 Interim Constitution.⁹ In terms of a choice between the “strict” and “moderate” models of separation of powers known in legal history, Lithuania of that period opted for the “moderate” model, because, for instance “Upon appointment to the Cabinet of Ministers, Members of the State Council retain their membership in the State Council” (Article 20 of the 1918 Founding Principles and Article 24 of the 1919 Founding Principles) and “Members of the Constituent Assembly, upon appointment to the Cabinet of Ministers, retain their membership in the Constituent Assembly” (Article 13 of the 1919 Interim Constitution). If the executive is separated from the legislature and accountable to it, the judicial branch of government must be independent in order to oversee the activities of the other powers. Otherwise, separation of powers as the system of checks and balances collapses.

3. The principle of the separation of powers became a harmonious and uniform doctrine in the mid-18th century and, as a constitutional act, was for the first time combined with the recognition of the priority and protection of the rights of an individual in the Virginia Declaration of Rights of 1776: “5. That the Legislative & executive powers of the State shou’d be separate & distinct from the judicial”.¹⁰ The same principle was even more prominently expressed in the French Declaration of the Rights of Man and of the Citizen of 1789: “Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution” (“Art. 16. Toute Société dans laquelle la garantie des Droits n’est pas assurée, ni la séparation des Pouvoirs déterminée, n’a point de Constitution”¹¹). Eventually, such a concept of the constitution became the prevalent one and, in the conditions of the second decade of the 20th century, failure to ensure judicial independence would have meant resistance against the European and global trends in the development of constitutionalism as well as the principles of democracy and the rule of law. The State Council, the Constituent Assembly and the Interim

⁸ “8. The President of the State shall hold the executive power and exercise it through the Cabinet of Ministers, which shall be accountable to the State Council”; “15. The State Council shall consider and decide on laws and treaties”.

⁹ “4. The Constituent Assembly shall pass laws, ratify treaties, approve the State budget and oversee compliance with the law”; “5. Executive power shall be entrusted to the President of the Republic and the Cabinet of Ministers”.

¹⁰ *The Virginia Declaration of Rights, June 12, 1776*, http://www.virginiamemory.com/online_classroom/shaping_the_constitution/doc/declaration_rights (accessed: 11.06.2018).

¹¹ *Déclaration des Droits de l’Homme et du Citoyen*, <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (accessed: 11.06.2018).

Government laboured tirelessly to make sure that the restored Lithuania was recognised by other nations as an independent State. It is therefore hard to believe that the interim government tried to keep the courts under its control at the risk of damaging Lithuania's positive reputation in the world.

4. Back in the second half of the 16th century, Lithuania made its first steps in ensuring court independence (which was enshrined in the Lithuanian Statutes of 1566 and 1588, and by the end of the 18th century the principle of separation of powers had already been implemented as the classical triad of the legislative, executive and judicial branches of government, established “so that the integrity of the States of [the Kingdom of Poland and the Grand Duchy of Lithuania], civic freedom and public order would always remain in balance” (extract from the 1791 Governance Law, Article 5 “Administration or the purpose of public powers”, which specifically addresses this issue). For the first time in the history of the Commonwealth of Two Nations (CTN), the judiciary was separated *expressis verbis* from the other two branches: “The judicial authority shall not be carried out either by the legislative authority or by the King, but by magistracies instituted and elected to that end. And it shall be so bound to places that every man find justice close by and that a criminal see everywhere over him the formidable hand of the national government”.¹² It is doubtful whether it is possible to express more vividly, correctly, and laconically, by means of a constitutional provision, the idea of the mission of the judiciary, its accessibility, and its separation from the other two branches. Article 8 “The Judicial Authority” of the Government Act serves to emphasise the separateness and importance of the judiciary. Much attention is given to the judicial branch in other parts of the Constitution as well.¹³ Even though the principle of the separation of powers was laid down *expressis verbis* for the first time, namely in the Constitution of 1791, a number of its elements were taken from the preceding CTN constitutional acts. In 1918–1920, destroying judicial independence would have meant taking a huge step backwards and basically disregarding the local constitutional tradition, contrary to what the interim Lithuanian government actually tried to do.¹⁴

¹² “Ustawa rządowa”, [in:] *Volumina legum: Prawa, Konstytucje y Przywileie Krolestwa Polskiego, Wielkiego Księstwa Litewskiego y wszystkich prowincyi należących. Na walnych seymiech koronnych od seymu wiślickiego roku 1347 do ostatniego seymu uchwalone*, vol. 9: *Ab anno 1782 ad annum 1792*, Kraków, pp. 220–225.

¹³ About the Constitution of 1791 as a composite document see: J. Machovenko, “The Constitution of the Commonwealth of Two Nations of 1791”, [in:] *Lithuanian Constitutionalism: The Past and the Present*, eds. D. Žalimas, Vilnius 2017, pp. 42–56.

¹⁴ For more details regarding the continuity of the Lithuanian state and its law as well as the efforts made by the Interim Government to observe the Lithuanian constitutional tradition see: J. Machovenko, “Valstybė, viešojo valdžia, suverenitetas ir šių idėjų tęstinumas Lietuvos Valstybės Tarybos konstituciniuose aktuose”, *Parlamento studijos* 24, 2018.

The wish to undermine judicial independence in the conditions of 1918–2010 seems so illogical and harmful to Lithuania that it calls for deeper examination of the issue in searching for a different explanation.

In an attempt to follow the vision of the constituent and constituted powers, whereby sovereignty is enjoyed only by the constituent power, the State Council always stressed that itself as well as the government formed by it were the constituted and interim power, issuing laws and handling all matters on a temporary basis until the Constituent Assembly has gathered and that it was not usurping or assuming the role of the constituent power. That is stated *expressis verbis* in the preamble to the Founding Principles of 2 November 1918: “Until the Constituent Assembly has determined the form of government of the State and its Constitution, the Lithuanian State Council, expressing the supreme power (*suprema potestas*) of Lithuania, is constituting an Interim Government of Lithuania on the following grounds of the Interim Constitution”. The Council was only speaking on behalf of the sovereign and expressing its will.

But is the word “interim” appropriate when talking about courts and justice? Can there be interim justice? How will society interpret judicial power if it is enshrined *expressis verbis* in the Founding Principles, which stress the provisional nature of authority? Temporary nature, emphasised when talking about the legislative and executive powers, is a completely natural and doctrinally supported element, yet the use of the terms “court”, “judicial power” and “justice” in a constitutional act governing the functions of interim public authorities unintentionally misleads the public on the nature of courts and justice. A way out of this is to issue a separate law on courts, even if an ordinary one.

Such a decision would reflect the legal tradition of the Grand Duchy of Lithuania, which tends to focus on the purposefulness, timeliness, effectiveness and economic efficiency of legal regulation as well as flexibility of legal technicalities and procedures. Such flexibility was characteristic of constitutional legislation by the State Council: The “Resolution of the Three-member Presidium” of 18 December 1918 (*de facto* the first amendment to the Founding Principles) was adopted not by the Council but by its Presidium, despite the applicable procedure for the amendment of the Founding Principles, and it was approved by the Council *post factum* on 23 January 1919.¹⁵ The 24 January 1919 Amendment to the Founding Principles, enabling the Cabinet of Ministers to issue provisional laws in certain cases, legalised such activities of the Cabinet *post factum* (the first law passed by the Cabinet of Ministers was the Interim Law on Lithuanian Citizenship of 9 January 1919). In view of the above practice by the State Council, the fact that in the Founding Principles it decided to enshrine the legislative and the executive

¹⁵ M. Maksimaitis, “Apie dvilypę Valstybės tarybos prezidiumo padėtį 1918 metų Lietuvos laikinojoje konstitucijoje”, *Jurisprudencija* 116, 2009, no. 2, p. 17.

powers explicitly, but judicial power only implicitly, while devoting an ordinary law to the latter, should not come as a big surprise.

The fact that Lithuanian authorities did not consider justice a temporary state function and did not treat courts as provisional institutions is attested to by the verbatim report of the 15 May 1920 sitting of the Constituent Assembly: “The task of the Interim Government has been completed. The State Council, the President of the State, the Cabinet of Ministers, the National Audit Office and the Commander-in-Chief of the Armed Forces, who have led Lithuania to the Constituent Assembly, are withdrawing today and handing over rule of the whole country to that high assembly”¹⁶ — not a single court and not a single judge resigned, nor did the Constituent Assembly require that, although by nature it had full and undivided authority, including, therefore, judicial power.

The authorities’ decision not to mention courts in any of the three interim constitutions and merely to devote a separate, if ordinary, law to them, whatever the reasoning and other subjective circumstances behind it, turned out to be very advantageous in terms of ensuring judicial independence. Over a period of less than two years, the powers of the legislative and the executive branches were in principle redistributed three times, but this had hardly any effect on the courts’ system, which was definitely the most stable branch of power in Lithuania in the 1918–1920 period. Successful activities of the Constituent Assembly brought an end to the epoch of provisional constitutional regulation. When drafting the first permanent Lithuanian Constitution¹⁷ (1922), the constitutional foundations of the court system were set out in Chapter Five, succinctly and straightforwardly entitled “The Court”, and its Article 2 declared *expressis verbis* for the first time that “State power is implemented by the Seimas, the Government and the Court”. The Court is seen as one of the three main structural elements of power, existing on a par with the other two — the legislature and the executive.

2. Practical aspects of the activities of Lithuanian courts in the context of judicial independence

The attention that the State Council devoted to the court system and the importance attached by it to the issues of implementation of justice are reflected in the fact that the law on courts¹⁸ was adopted by the State Council on 28 Novem-

¹⁶ Verbatim report of the 15 May 1920 sitting of the Constituent Assembly, http://www3.lrs.lt/pls/inter_archyvas/dokpaieska_arch.showdoc_l?p_id=113362&p_query=&p_tr2=2 (accessed: 11.06.2018).

¹⁷ “Constitution of the Lithuanian State”, *Vyriausybės žinios*, 6.08.1922, no. 100–799.

¹⁸ “Interim Arrangement for Lithuanian Courts and their Operations”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3. It is noteworthy that this law was valid for nearly 15 years,

ber 1918 and became the first ordinary law of the re-established Lithuania and the third legal act of Lithuania, after the 16 February Resolution of the State Council (the Independence Act) and the 2 November Founding Principles of the Interim Constitution. “The Lithuanian State is only being created: there are still no local municipal authorities and local administrations lack civil servants. [...] Without a court, no country can exist even for a day”¹⁹ wrote Justice Minister Petras Leonas in the Clarification on the said law.

In the 1918 law, the Lithuanian court system was structured based on the model of Russian courts which operated in Lithuania before the First World War, after making some adjustments with regard to organisation and competence. The law established a three-tier system of courts of general jurisdiction. The lowest tier of the judicial system in each county or town with a population above 20,000 was to be composed of justices of the peace. Regional courts were to be constituted in former Governorates (Vilnius, Kaunas and Suwałki).²⁰ The Highest Tribunal of Lithuania was designated as the highest judicial authority of the country.

The law allocated competence between the different tiers of the courts to hear civil and criminal cases at first instance and enabled justices of the peace and regional courts to examine complaints against the decisions of administrative bodies and officials in certain cases. Justice of the peace courts tried civil cases where “the value of the object in dispute [was] is equal to or below five thousand roubles (10,000 marks)” (Article 17) as well as criminal cases where the “maximum potential penalty was imprisonment” (Article 27). Regional courts heard, at first instance, all other cases that fell outside the purview of justice of the peace courts (the ones not specified in Articles 17 and 27), also examined appeals²¹ from cases decided by justice of the peace courts. The Highest Tribunal of Lithuania heard criminal cases against the President, the Prime Minister and ministers, instituted by the Seimas (for white collar crime and treason) as the court of first instance, heard appeals from cases decided by regional courts at first instance as well as cassation appeals from cases decided by regional courts on appeal (as of 1921).²² This means that minor cases, first tried by a justice of the peace, could be reviewed twice, while more significant cases, first examined by a regional court, were subject

until it was replaced by the Law on the System of Courts, which was adopted on 11 July 1933 and came into force on 15 September 1933.

¹⁹ A clarification on the law “Interim Arrangement for Lithuanian Courts and their Operations”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.

²⁰ Two regional courts operated in the period in question: in Kaunas and in Marijampolė (previously called Suwałki). The Vilnius Regional Court, established *de jure* in 1918, never started its operations.

²¹ To prove their point, the parties were allowed to submit new evidence to the appellate court, thus implementing a principle characteristic of the Romano-Germanic appeal proceedings.

²² Where the Highest Tribunal decided to annul a decision of a Regional Court, the case would be remitted to a different panel of the Regional Court (i.e., the French model of cassation was introduced).

to a single review; this shortcoming, resulting from copying the judicial system of the Russian Empire, after eliminating a number of tiers, was rectified in 1933, with the adoption of the Law of the Judicial System, which created an additional tier, the Court of Appeal.

Justices of the peace tried cases individually, while other courts decided cases in three-judge panels. It should be noted that initially regional courts trying criminal cases were supposed to function in the form of a jury. Practical implementation of this provision was postponed: “Until a system for the election of jurors is put in place, the Regional Court shall decide cases without jurors” (Article 31). When explaining this provision, Justice Minister Petras Leonas identified the only reason for the postponement: the re-established State lacks local municipal authorities and local administrations, so no one can be charged with the organisation of juror elections.²³ However, no elections were organised later either. When enumerating the relevant reasons, the prominent Lithuanian lawyer, professor and attorney Simonas Bieliackinas mentioned the fear of failure to ensure independence of such a court. It was feared that the activities of jurors could be determined by political and partisan views and that they might be unable to resist external influences due to lack of a legal background.²⁴

Similar considerations are presumed to have prevented the elections of justices of the peace. Justices of the peace were appointed and dismissed by the Justice Minister, while the judges of regional courts and the Highest Tribunal were appointed by the Presidium of the State Council (after the creation of the institution of presidency in 1919 — by the President) at the proposal of the Justice Minister. Each regional court had bailiffs (appointed by the president of the court), court investigators (appointed and dismissed by the Justice Minister) and State attorneys (i.e., prosecutors, appointed and discharged by the Presidium of the State Council or, as of 1919, by the President).

The 15 December 1918 was designated by the 14 December 1918 Order of Justice Minister Petras Leonas as the date of establishment of the judicial system of an independent Lithuania. On that day, the courts were supposed to take over cases from the Germans and to start functioning independently in general.²⁵ The procedure for the takeover of cases was laid down in the Ministry of Justice Circular No. 1 of 13 December 1918.²⁶ The occupiers, however, did not obey the Lithuanian authorities, which led to a number of incidents. The Germans destroyed political

²³ A clarification on the law “Interim Arrangement for Lithuanian Courts and their Operations”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.

²⁴ S. Bieliackinas, “Prisiekusieji sprendėjai (dėl klausimo apie tautos elemento dalyvavimą teisiant)”, *Lietuvos universiteto Teisių fakulteto darbai* 6, 1932, no. 11, p. 8.

²⁵ S. Dvareckas, *Lietuvos teismai 1918–1940 metais*, Vilnius 1997, p. 5.

²⁶ “Ministry of Justice Circular, no. 1”, supplement to *Laikinosios Vyriausybės žinios*, 19.12.1918, no. 1, 8a.

cases and handed over just a small number of criminal cases.²⁷ The conditions in which the first appointed judges started their work are described in the circulars of the Ministry of Justice. For instance: “The Ministry searched for collections of laws in Vilnius and found very little, while bringing them from Russia will not be possible. Therefore, the required collections of laws should be obtained through private channels”.²⁸

Nowadays, the doctrine, legal regulation and practice in the Western legal tradition focus not on the separation of the competencies of the parliament, the government and the courts, but rather on ensuring judicial independence from the legislature and the executive. This independence is categorised and examined in terms of a number of aspects, covering the institutional, procedural and professional independence of judges and courts. From the current perspective, criticism should also be directed towards the unrestricted dismissal of judges, lack of guarantees for judges’ wages and pensions, the fact that the law does not require judges to base their decisions exclusively on the law, etc. Considering that the Justice Minister was forced by circumstances to invite and appoint to judicial positions persons without special training, it is understandable that it would have been unreasonably bold and risky to provide them with some irreplaceability guarantees.

Yet one should not think that judges were selected on a random basis, without due regard to their professional competence, reputation and moral character. “When the Ministry of Justice appoints court officials, it is necessary to make sure, as far as possible, that the appointees meet the requirements laid down in the laws passed by the Russian authorities” (Article 15 of the Law on the Organisation of Lithuanian Courts and Operations Thereof). As a provisional measure against the shortage of lawyers, justices of the peace were allowed to hold hearings at the regional court, while members of the regional court were allowed to hear cases at the Highest Tribunal of Lithuania. Additionally, persons were allowed to hold the positions of a judge, investigator, defence attorney and prosecutor simultaneously (not in the same case, of course). In the absence of legal studies in Lithuanian universities,²⁹ the Law on Judicial Candidates was adopted in 1919.³⁰ According to Article 1 of that law, “in order to train persons to serve as court officials, in particular justices of the peace and court investigators, regional courts shall accept judicial candidates” (Article 1). The requirements applicable to them

²⁷ S. Dvareckas, op. cit., p. 15.

²⁸ “Circular. To the Highest Tribunal of Lithuania, Regional Courts, Justices of the Peace and Court Investigators”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.

²⁹ The attempts to open a university in Vilnius were unsuccessful; the Legal Department of the Higher Courses in Kaunas opened in January 1920; legal studies at the University of Lithuania (in Kaunas) began in 1922 and the first 27 graduates of the Faculty of Law were awarded diplomas in 1924. For more details, see J. Machovenko, M. Maksimaitis, *Vilniaus universiteto Teisės fakultetas 1641–2007 metais*, Vilnius 2008, pp. 133, 135–136, 163.

³⁰ “Law on Judicial Candidates”, *Laikinosios Vyriausybės žinios*, 23.12.1919, no. 18.

are not difficult: “Eligible candidates are persons who have completed secondary school, are proficient in spoken and written Lithuanian and are at least 20 years of age” (Article 2). (In exceptional cases, admission is possible without the said education). To acquire the minimum of professional competencies, judicial candidates had to complete training with a judge, court investigator or State attorney, and, in addition to that practical work, had to study civil and criminal law and procedure, Roman law and the “encyclopaedia of law” (i.e., legal theory) and to pass the relevant examinations given by the judges. The studies would last from one to two years. Having completed the studies, the candidates were appointed to the respective posts.

At first, cases were often heard unprofessionally, without proper application of the law.³¹ For instance: “It has been observed that judicial authorities, instituting and deciding various cases and disputes between private persons and between private persons and public authorities or officials acting on behalf of the State, often fail to follow the laws adopted by the State authorities or the orders of the Interim Government” (from the Ministry of Justice Circular No. 10).³² Therefore, the Ministry of Justice would issue clarifications, such as the following: “Any debts incurred during German occupation and subsequently, when the mandatory payment instrument was the *Ost* currency, must be paid and recovered in the currency in which they were incurred, unless otherwise agreed in each case by the parties involved” (from the Ministry of Justice Circular No. 8).³³

Thus, the Ministry of Justice would take up the work that is currently performed by the Supreme Court, and then the Highest Tribunal of Lithuania (which was established together with the other courts in 1918 but commenced its activities only in June 1919³⁴) had to do its part. Such interpretations of the content of the law could be regarded as interference by the executive in the administration of justice. However, one cannot miss the fact that the Ministry of Justice tried not to abuse its power and not to harm the dignity of the judicial system’s employees by intrusive oversight, and acted in their regard as discretely as possible. “At the start of the work, there will be many doubts, difficulties and misunderstandings. The Ministry is requesting that all important questions should be addressed to it and promises to respond to them as soon as possible. The Ministry will have nothing against court officials coming to the Ministry for clarifications on important issues”.³⁵

³¹ T. Birmontienė, E. Jarašiūnas, E. Kūris, op. cit., p. 775.

³² “Ministry of Justice Circular No. 10. A clarification for judicial authorities”, *Laikinosios Vyriausybės žinios*, 8.10.1919, no. 13.

³³ “Ministry of Justice Circular No. 8. Clarifications for regional courts, court investigators and justices of the peace”, *Laikinosios Vyriausybės žinios*, 28.08.1919, no. 11.

³⁴ S. Dvareckas, op. cit., p. 19.

³⁵ “Circular to the Highest Tribunal of Lithuania, Regional Courts, Justices of the Peace and Court Investigators”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.

Even when interpreting laws, the Ministry of Justice would not miss an opportunity to express great confidence in courts and even entrusted to the justices of the peace issues that now fall within the competence of the Constitutional Court: “The political and social life in our country has undergone deep and wide-ranging changes. Legislative work lags behind life everywhere and always; and in our case, the extraordinary circumstances of our country make it even more difficult for that work to satisfy the demands of life. Therefore, in accordance with Article 24 of the Interim Constitution, the laws that were applicable before the war remain valid to the extent that they do not contradict the principles of that Constitution.

Accordingly, it is for court officials to consider and decide whether a pre-war law is still in effect or not. The guiding principle when determining this issue is that a law that has not been explicitly repealed continues to apply, unless its provisions are clearly in conflict with the democratic system established by our Constitution” (from the Ministry of Justice Circular No. 5).³⁶

Interestingly, the Ministry of Justice sanctioned such actions which could be characterised as interference by the judiciary in the sphere of activities of the executive. For example, Ministry of Justice Circular No. 7 maintained that a justice of the peace has not only the right but also an obligation to assist the police in the investigation where “due to their inexperience, the police are unable to produce enough evidence to establish the guilt of the [offender]”, that is, to gather evidence and prepare the file for prosecution. “This will help prevent a number of mistakes and make it easier to find truth and to serve justice accordingly”.³⁷

From the very start, the Ministry of Justice encouraged judicial independence, activism and good citizenship and urged to avoid formalism, not to bureaucratise the court system, to remember one’s mission, to respect people’s legitimate expectations and, in difficult cases, to follow common sense, conscience and the sense of justice.

“Public authorities, including the officials serving justice, have to labour in the current transitional period, full of change and turbulence. It is not only necessary to preserve order and to protect citizens’ rights, but also to build everything nearly from scratch and to establish a new order, frequently with inexperienced hands. These difficult circumstances require that they should be taken into account and that the work of all authorities be coordinated. Therefore, when administering justice to the people, court officials should not only follow the procedural formalities, but also take the realities of the present day into consideration”.³⁸

³⁶ “Circular No. 5. To regional courts, justices of the peace, court investigators, state attorneys and notaries”, *Laikinosios Vyriausybės žinios*, 4.04.1919, no. 5.

³⁷ “Ministry of Justice Circular No. 7. To justices of the peace and court investigators”, *Laikinosios Vyriausybės žinios*, 22.05.1919, no. 7.

³⁸ “Ministry of Justice Circular No. 7. To justices of the peace and court investigators”, *Laikinosios Vyriausybės žinios*, 22.05.1919, no. 7.

“To make sure that the poor also have access to justice, the indigent status should be granted to them for the purposes of the proceedings. Proof of indigence should not be burdened with formal requirements — the justice of the peace himself must verify the economic conditions of the applicant”.³⁹

In general, the attitude of the Ministry of Justice towards courts is best illustrated by the 10 December 1918 Circular, which sets out what could be described as a manifesto of the judiciary, just as relevant for the judges of today: “In the new State of Lithuania, a free and democratic country, the court must be a true defender of freedom and democracy, but also the protector of order, since there can be no freedom or democracy without order. The court must follow only the law, under which all citizens shall be equal, so that even the most economically deprived can find adequate protection against the more powerful wrongdoers”.⁴⁰

Conclusions

1. While reflecting general observance of the principle of separation of powers and the intention to ensure judicial independence, the Founding Principles of 1918 and 1919, adopted by the State Council, and the Interim Constitution of 1920, adopted by the Constituent Assembly, enshrined the legislative and the executive powers explicitly and the judicial power only implicitly (the texts do not even mention courts and the respective principle is deduced from the others).

2. Due to the severe shortage of lawyers in 1918–1920, judges were allowed to serve in the executive branch at the same time. The Ministry of Justice explained the law to judges, while judges assisted the executive (such as the police) in discharging their functions. All that contradicted the principles of separation of powers and judicial independence but was accepted as an unavoidable and temporary arrangement.

3. The Ministry of Justice tried not to abuse its power and not to harm the dignity of the judicial system’s employees by intrusive oversight, and acted in their regard as discretely as possible. It encouraged judicial independence and activism and demonstrated confidence in the courts.

³⁹ “Circular. To the Highest Tribunal of Lithuania, Regional Courts, Justices of the Peace and Court Investigators”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.

⁴⁰ *Ibid.*

Bibliography

- Andriulis V., Maksimaitis M., Pakalniškis V., Pečkaitis J.S., Šenavičius A., *Lietuvos teisės istorija*, Vilnius 2002.
- Bieliackinas S., “Prisiekusieji sprendėjai (dėl klausimo apie tautos elemento dalyvavimą teisiančią)”, *Lietuvos universiteto Teisių fakulteto darbai* 6, 1932, no. 11.
- Birmontienė T., Jarašiūnas E., Kūris E., *Lietuvos konstitucinė teisė*, Vilnius 2002.
- Dvareckas S., *Lietuvos teismai 1918–1940 metais*, Vilnius 1997.
- Machovenko J., “The Constitution of the Commonwealth of Two Nations of 1791”, [in:] *Lithuanian Constitutionalism: The Past and the Present*, eds. D. Žalimas, Vilnius 2017.
- Machovenko J., “Valstybė, viešoji valdžia, suverenitetas ir šių idėjų tęstinumas Lietuvos Valstybės Tarybos konstituciniuose aktuose”, *Parlamento studijos* 24, 2018.
- Machovenko J., Maksimaitis M., *Vilniaus universiteto Teisės fakultetas 1641–2007 metais*, Vilnius 2008.
- Maksimaitis M., “Apie dvilypę Valstybės tarybos prezidento padėtį 1918 metų Lietuvos laikinojoje konstitucijoje”, *Jurisprudencija* 116, 2009, no. 2.
- Maksimaitis M., “Historical origins of judicial power in Lithuania”, [in:] *The Problems of Judicial Power in Lithuania*, Vilnius 1997.
- Šinkūnas H., “Ensuring judicial independence in the Lithuanian legal system”, doctoral dissertation, Vilnius University, Vilnius 2004.

Historical legal sources

- “Circular No. 5. To regional courts, justices of the peace, court investigators, state attorneys and notaries”, *Laikinosios Vyriausybės žinios*, 4.04.1919, no. 5.
- “Circular. To the Highest Tribunal of Lithuania, Regional Courts, Justices of the Peace and Court Investigators”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.
- Clarification for the law “Interim Arrangement for Lithuanian Courts and their Operations”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.
- “Constitution of the Lithuanian State”, *Vyriausybės žinios*, 6.08.1922, no. 100–799.
- “Founding Principles of the Interim Constitution of the Lithuanian State (adopted by the State Council of Lithuania on 2 November 1918)”, *Lietuvos aidas*, 13.11.1918, 130(178).
- “Founding Principles of the Interim Constitution of the Lithuanian State. Adopted by the State Council of Lithuania on 4 April 1919”, supplement to *Laikinosios vyriausybės žinios*, no. 6/24a.
- “Interim Arrangement for Lithuanian Courts and their Operations”, *Laikinosios Vyriausybės žinios*, 16.01.1919, no. 2–3.
- “Interim Constitution of the Lithuanian State”, *Laikinosios Vyriausybės žinios*, 12.06.1920, no. 37–407.
- “Law on Judicial Candidates”, *Laikinosios Vyriausybės žinios*, 23.12.1919, no. 18.
- “Ministry of Justice Circular No. 7. To justices of the peace and court investigators”, *Laikinosios Vyriausybės žinios*, 22.05.1919, no. 7.
- “Ministry of Justice Circular No. 1”, supplement to *Laikinosios Vyriausybės žinios*, 19.12.1918, no. 1.
- “Ministry of Justice Circular No. 8. Clarifications for regional courts, court investigators and justices of the peace”, *Laikinosios Vyriausybės žinios*, 28.08.1919, no. 11.
- “Ministry of Justice Circular No. 10. A clarification for judicial authorities”, *Laikinosios Vyriausybės žinios*, 8.10.1919, no. 13.

“Ustawa rządowa”, [in:] *Volumina legum: Prawa, Konstytucye y Przywileie Krolestwa Polskiego, Wielkiego Księstwa Litewskiego y wszystkich prowincyi należących. Na walnych seymiech koronnych od seymu wiślickiego roku 1347 do ostatniego seymu uchwalone*, vol. 9: *Ab anno 1782 ad annum 1792*, Kraków.

Online sources

Déclaration des Droits de l'Homme et du Citoyen, <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (accessed: 11.06.2018).

Verbatim report of the 15 May 1920 sitting of the Constituent Assembly, http://www3.lrs.lt/pls/inter_archyvas/dokpaieska_arch.showdoc_l?p_id=113362&p_query=&p_tr2=2 (accessed: 11.06.2018).

The Virginia Declaration of Rights, June 12, 1776, http://www.virginiamemory.com/online_classroom/shaping_the_constitution/doc/declaration_rights (accessed: 11.06.2018).