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**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LITHUANIA**

**COOPERATION OF CONSTITUTIONAL COURTS IN EUROPE –  
CURRENT SITUATION AND PERSPECTIVES**

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**CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS**

## **COOPERATION OF CONSTITUTIONAL COURTS IN EUROPE – CURRENT SITUATION AND PERSPECTIVES**

### **I. Constitutional courts between constitutional law and European law**

In the modern world, there is not a single state in which the national law would operate in isolation. The tendencies of globalisation, which have become stronger in the 21st century in all spheres of life, determine the fact that national constitutional courts, while securing the supremacy of the Constitution—the act of the supreme legal power—and conducting the control over the constitutionality of other legal acts, can no longer refer only to provisions of the national law and ignore the international context. Democracy, the protection of basic human rights and freedoms, the application of fundamental principles of law, and other universal fundamental values are protected not only by national constitutions, but also by international documents—the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also referred to as the Convention, the European Convention on Human Rights) whose provisions are interpreted and applied by the European Court of Human Rights (hereinafter also referred to as the ECtHR), also by the founding Treaties of the European Union (hereinafter—also the EU) and by the Charter of the Fundamental Rights of the European Union (hereinafter—also the Charter), whose uniform interpretation and application is ensured by the Court of Justice of the European Union (hereinafter—also the CJEU). The jurisprudence formulated by those courts is highly significant for constitutional courts when the latter interpret the human rights and other constitutional values entrenched in the national constitutions, therefore, the constitutional courts, among them—the Constitutional Court of the Republic of Lithuania (hereinafter—also the Constitutional Court), while administering constitutional justice, invoke not only the Constitution of their country, but also the provisions of European law and the corresponding jurisprudence interpreting it.

#### **1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?**

According to Paragraph 1 of Article 104 of the Constitution, while in office, justices of the Constitutional Court shall follow only the Constitution of the Republic of Lithuania.

The provisions of the Constitution have entrenched a mechanism which obligates all state institutions and citizens to respect the norms of international and EU law: under Paragraph 1 of Article 135 of the Constitution, in implementing its foreign policy, the Republic of Lithuania shall follow the universally recognised principles and norms of international law, shall seek to ensure national security and independence, the welfare of the citizens and the basic rights and freedoms, and shall contribute to the order based on law and justice. These provisions of the Constitution

consolidate the principle of respect for international law (the following, by the Republic of Lithuania, of the universally recognised principles and norms of international law) and the contribution to the international order based on law and justice.

While construing the provisions of the Constitution related to the obligations undertaken by the state, *inter alia* the obligation to respect the norms of international law, the Constitutional Court has held that the State of Lithuania, when recognising the principles and norms of international law, may not apply any virtually different standards to the population of this country; considering itself a member of the international community possessing equal rights, the State of Lithuania, of its own free will, adopts and recognises these principles and norms, the customs of the international community, and naturally integrates itself into the world culture and becomes its natural part.<sup>1</sup> The observance of international obligations undertaken of its own free will, respect to the universally recognised principles of international law (as well as the principle *pacta sunt servanda*) are a legal tradition and a constitutional principle of the restored independent State of Lithuania.<sup>2</sup>

The Constitutional Court, while construing international obligations of the state, has also formulated the principle of the geopolitical orientation of the State of Lithuania. In the official constitutional doctrine it has been held that the general grounds for the international co-operation (entrenched in the Constitution) of the state are characterised *inter alia* by the fact that the geopolitical orientation of the State of Lithuania is established, which is inseparable from the international obligations of the Republic of Lithuania. The geopolitical orientation of the State of Lithuania is participation of the state in the European integration while being a Member of the EU as well as the striving for ensuring the independence and security of the state by contributing to the creation of international order based on law and justice.<sup>3</sup>

The international obligations (*inter alia* the obligations to take into consideration the European law) undertaken by the state arise from the international agreements of which Lithuania is a party.<sup>4</sup> Paragraph 3 of Article 138 of the Constitution provides that “[i]nternational treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania”. The Constitutional Court noted in one of its early final acts that the Constitution consolidates “the so-called system of parallel adjustment of international and domestic law <...> which is based on the rule that international treaties are transformed in the legal system of a state (i.e. they are incorporated into it)”.<sup>5</sup> While interpreting the place of international treaties in the legal system of the state, the Constitutional Court held that the treaties ratified by the Seimas

<sup>1</sup> The Constitutional Court’s ruling of 9 December 1998.

<sup>2</sup> The Constitutional Court’s ruling of 14 March 2006.

<sup>3</sup> The Constitutional Court’s rulings of 15 March 2011 and 7 July 2011.

<sup>4</sup> In the context of this report, it should be noted that the Republic of Lithuania became a Member State of the Council of Europe on 14 May 1993. On the same day, it also signed the European Convention on Human Rights that was ratified by the Seimas of the Republic of Lithuania on 27 April 1995. The Republic of Lithuania became a Member State of the EU on 1 May 2004.

<sup>5</sup> The Constitutional Court’s ruling of 18 December 1997.

acquire the power of law.<sup>6</sup> Having equalised the legal power of the international treaties ratified by the Seimas and the place that they occupy in the legal system of the state with those of laws, the Constitutional Court also noted that this doctrinal provision cannot be construed as meaning that, purportedly, the Republic of Lithuania may disregard its international treaties, if a different legal regulation is established in its laws or constitutional laws from the one established by international treaties; on the contrary, the principle entrenched in the Constitution that the Republic of Lithuania observes international obligations undertaken of its own free will and respects universally recognised principles of international law implies that in cases when national legal acts (*inter alia* laws or constitutional laws) establish the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied.<sup>7</sup>

The Constitutional Court also acknowledged that another type of international treaties—international treaties not ratified by the Seimas—had mandatory power: in the constitutional jurisprudence it was stated that the international treaties of the Republic of Lithuania not ratified by the Seimas, which were concluded and came into effect after the Constitution had come into force, are also compulsory for subjects of legal relations, but they must not be in conflict with the Constitution as well as laws. In other words, in the legal system of Lithuania the international treaties not ratified by the Seimas have the power of a sub-statutory legal act.

One should bear in mind the fact that the legal system of the Republic of Lithuania is grounded on the fact that any law or other legal act, as well as international treaties of the Republic of Lithuania, must not be in conflict the Constitution. In itself, the provision of Paragraph 1 of Article 7 of the Constitution that any law or other act, which is contrary to the Constitution, shall be invalid (the principle of the superiority of the Constitution) cannot make an international treaty ineffective, however, it means that the provisions of the treaty must not be in conflict with those of the Constitution. Otherwise, the Republic of Lithuania would not be able to ensure the legal defence of the rights of the parties of international treaties, which arise from those treaties, and this, in turn, would hinder one from fulfilling the obligations according to the concluded international treaties.<sup>8</sup> Under Paragraph 3 of Article 105 of the Constitution, it is the Constitutional Court that decides whether provisions of an international treaty are not in conflict with the Constitution. It *inter alia* means that all state institutions, including the Constitutional Court itself, are bound by those provisions of international treaties and the international obligations undertaken by those treaties that are not in conflict with the provisions of the Constitution.

After Lithuania had become a fully-fledged Member State of the EU, the Constitutional Act of the Republic of Lithuania “On Membership of the Republic of Lithuania in the European Union”, which is a constituent part of the Constitution, came into force. Paragraph 2 of the said act

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<sup>6</sup> *Inter alia* the Constitutional Court’s ruling of 17 October 1995.

<sup>7</sup> The Constitutional Court’s ruling of 14 March 2006.

<sup>8</sup> The Constitutional Court’s ruling of 17 October 1995.

provides that legal norms of the European Union constitute a part of the legal system of the Republic of Lithuania, and where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania. According to the construction provided by the Constitutional Court, these provisions establish *expressis verbis* the collision rule, entrenching the priority of application of legal acts of the European Union in cases when the provisions of EU law arising from the founding Treaties of the European Union compete with the legal regulation established in acts of Lithuanian national law (regardless of their legal power), with the exception of the Constitution itself.<sup>9</sup>

All state institutions, *inter alia* the Constitutional Court, while exercising their functions, must invoke these provisions of the Constitution and observe them. Thus, the duty of the Constitutional Court to apply and refer to the European law arises from the obligation entrenched in the Constitution to respect the principles and norms of international law, as well as from the international treaties both ratified and not ratified by the Republic of Lithuania and the obligations undertaken of its own free will insofar as this is not in conflict with the Constitution. Alongside, the Constitutional Court, as well as other state institutions, is thus obliged to take account of the interpretation of these norms and principles as provided by competent international institutions and to invoke such interpretation.

## **2. Are there any examples of references to international sources of law?**

Before analysing the Constitutional Court's case-law in which sources of international law are invoked, one should note that in the course of the deciding of constitutional justice cases such sources are used in a manifold fashion: some of such rulings cite the international legal acts in order to show that the considered legal area is regulated not only by the Constitution, but international instruments as well (i.e. one seeks to disclose the international context); in other cases they are used in the interpretation of certain constitutional provisions (i.e. constitutional provisions are interpreted in the context of the provisions of an international treaty); in other rulings of the Constitutional Court direct references are made to sources of international law; and in some other rulings indirect reference is made to sources of international law—their influence on the Constitutional Court's decisions is implicit, but of no less importance.

### **a) the European Convention on Human Rights**

The European Convention on Human Rights is a source of international law which is most often referred to in rulings of the Constitutional Court. Therefore, it is possible reasonably to assert that it is the international document with the largest authority and the biggest respect and recognition, which is used in the assessment of the compliance of national legal acts with the provisions of the Constitution.

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<sup>9</sup> The Constitutional Court's rulings of 14 March 2006 and 21 December 2006.

As far back as in 1995, in the constitutional justice case in which the relation between the Convention and the Constitution prior to Lithuania's becoming a fully-fledged Party to the Convention, the Constitutional Court held that the European Convention on Human Rights is a peculiar source of international law, the purpose of which is different from that of many other acts of international law. This purpose is universal, i.e. to strive for universal and effective recognition of the rights declared in the Universal Declaration of Human Rights and to achieve that they were observed in the protection and further implementation of human rights and fundamental freedoms. With respect to its purpose, the Convention performs the same function as the constitutional guarantees for human rights, because the Constitution consolidates those guarantees in Lithuania, whereas the Convention—on the international scale.<sup>10</sup> The Constitutional Court's jurisprudence unequivocally acknowledges the fact that the norms of the Convention must be implemented in reality, whilst any violation of those rights and freedoms must not be interpreted as meaning that the laws allegedly provide for something else. It needs to be noted that the Constitutional Court, while considering cases, especially those related to violations of human rights and freedoms, significantly contributes to the application of the Convention's provisions and to the ensuring of the effect thereof.

The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and its provisions are mentioned in more than 50 rulings of the Constitutional Court. The Constitutional Court's jurisprudence has referred to a great many provisions the Convention. Perhaps, the provisions of Article 6 of the Convention, in which the procedural guarantees are enshrined (the right to a fair trial, the right to defence), also Article 10 of the Convention, which guarantees freedom of self-expression and freedom to receive and impart information, as well as Article 1 of Protocol No. 1, which guarantees the protection of the ownership right, were those most often cited in the Constitutional Court's rulings.

As regards any concrete examples of the Constitutional Court's jurisprudence, one should mention a constitutional justice case considered during the early period of the activities of the Constitutional Court, in which the compliance of the legal regulation providing for the death penalty for murder under aggravating circumstances with the Constitution was assessed. In this ruling the decision was reached by invoking not only the provisions of the national Constitution, but also (and especially) those of the Convention. In the Constitutional Court's ruling of 9 December 1998, the provisions of the Constitution that guarantee the right to life were construed in the context of the international documents, *inter alia* those of Protocol No. 6 of the Convention on the abolition of the death penalty (not yet ratified at that time), as well as Recommendation 1246 of the Parliamentary Assembly of the Council of Europe of 4 October 1994 on the abolition of capital punishment and its Resolution 1044 of 4 October 1994, and the conclusion was reached that the analysis of the international documents indicated that the abolition of the death penalty was becoming a

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<sup>10</sup> The Constitutional Court's conclusion of 24 January 1995.

universally recognised norm in Europe. The same ruling acknowledged that the provisions of the law providing for the death penalty were unconstitutional.

The European Convention on Human Rights was significant also for the adoption of other rulings of the Constitutional Court. One should mention the Constitutional Court's ruling of 8 May 2000 on the operational activities, in which one assessed the legal regulation related to the organisation and sanctioning of the mode imitating criminal activities. With reference to Articles 5, 6, 8 and 13 of the Convention, this ruling interpreted the use of undercover investigators and agents, as well as secret means, in detection of crimes, it interpreted the general requirements for independence and impartiality designated for the investigation process of crimes of all types, the human right to the inviolability of private life and the limitation of this right, the right of a person to the defence of his violated rights, the notion of efficient defence, and the human right to freedom and the inviolability of the person. In the said constitutional justice case, the Constitutional Court referred not only to the text of the Convention, but also to the case-law of the European Court of Human Rights, in order to find out whether in similar cases any violations of the aforementioned articles of the Convention had been made.

In its ruling of 29 December 2004 on the restraint of organised crime, subsequent to the petitions of 17 petitioners, the Constitutional Court investigated the provisions of the law related to the application of preventive measures against the persons who, according to the data available, had ties with groups of organised crime. In this ruling the decision was adopted with reference to Articles 5, 6, and 8 of the Convention and Article 2 of Protocol No. 4, on the grounds of which one construed the right of an individual to freedom and to the inviolability of the person, the right to an independent and impartial trial, the right to privacy, the right to move freely and freely to choose the place of residence, the right to leave any country, including one's own, and the grounds of the limitation of the rights and fundamental freedoms of persons.

Subsequent rulings of the Constitutional Court, while deciding most varied constitutional justice cases, also referred to various provisions of the Convention either directly and/or to their interpretation as given by the ECtHR: Article 1 of Protocol No. 1 of the Convention was referred to *inter alia* in the Constitutional Courts ruling of 22 December 2010 on restoration of the ownership rights, in the rulings of 6 February 2012 and 27 February 2012 on paying the awarded social payments, whilst the provisions of Article 6 of the Convention were referred to in the ruling of 16 January 2007 on dismissing of judges, the ruling of 6 December 2012 on the civil written procedure, the ruling of 12 April 2013 on the duty of the holder of a car to provide information about the person who was driving it, the ruling of 5 July 2013 on a bank's bankruptcy etc.

#### **b) the Charter of Fundamental Rights of the European Union**

The Constitutional Court has not adopted any rulings so far in which one would refer *expressis verbis* to the provisions of the Charter of Fundamental Rights of the European Union,

however, the provisions of the Charter, without doubt, are influential in the search for solutions of problems faced by constitutional justice.

**c) other instruments of international law at European level**

The Constitutional Court has also referred to other instruments of international law applicable in Europe:

– the application of the provisions of the European Social Charter (revised)<sup>11</sup> in the Constitutional Court's final acts:

The provisions of Article 12 of the said charter were invoked in the Constitutional Court's ruling of 18 December 1997 on state social insurance contributions paid by foreigners in order to develop the principled provisions of social maintenance and the right to a pension. In the same ruling it was held that, while implementing the norms of constitutional and international law, the state established the right to get social support for not only its citizens but also other persons who legally both reside and work in the Republic of Lithuania providing they are insured or have been insured by compulsory state social insurance.

While interpreting the right to social support and medical aid, as well as the economic, legal and social protection of a family's life, the Constitutional Court's ruling of 5 March 2004 on awarding social allowances to families invoked Paragraph 1 of Article 13 and Article 16 of the European Social Charter (revised).

With reference to the provisions of the European Social Charter (revised), the Constitutional Court's ruling of 20 March 2007 on the minimum monthly salary and the minimum hourly pay interpreted the right to fair remuneration. The provisions of the same charter regarding the right to healthcare and the right of workers to safe and healthy working conditions are mentioned in the Constitutional Court's ruling of 2 September 2009 on awarding a disability pension (pension for lost capacity to work) and its payment and in the ruling of 9 May 2013 on the equalised working week of healthcare workers and the period of their annual leave. The provisions of the European Social Charter (revised) were invoked when one interpreted the duty of the state to create and maintain a system of social security (the Constitutional Court's ruling of 6 February 2012) and in order to protect the rights of pregnant workers at work (the Constitutional Court's ruling of 27 February 2012).

– the application of the provisions of the European Charter of Local Self-Government in the Constitutional Court's final acts:

In its ruling of 18 February 1998, while referring to the European Charter of Local Self-Government, the Constitutional Court construed the main principles of organisation of local self-government and local activities; in the Constitutional Court's ruling of 13 June 2000 in which the constitutionality of some provisions of the Law on Education was investigated, the constitutional

<sup>11</sup> Until 1996—the European Social Charter.

principle of freedom and self-dependence in the municipal activity was construed in the context of the same charter regulating a similar principle; in the context of the provisions of the charter, the same principle was also construed in the Constitutional Court's ruling of 24 December 2002 on the competence of municipal representative and executive institutions; the right of citizens to participate in the conduct of public affairs, which must be implemented through institutions of local governments as provided by the European Charter of Local Self-Government, was defended through the provisions the Constitutional Court's ruling of 28 June 2001 on the establishment and abolishment of local governments, the determination and changing of their territorial boundaries and centres.

It also needs to be mentioned that, in 2004, the Constitutional Court received a petition of an administrative court requesting investigation into the compliance of the law on the procedure of reorganisation and liquidation of establishments of culture and the compliance of sub-statutory legal acts regulating the liquidation and returning of the House of Signatories to the Act of Independence of Lithuania and the House of Artists of Lithuania with *inter alia* the provisions of the European Charter of Local Self-Government. The petitioner had raised the question of the municipal competence to independently decide on issues of the use, liquidation, and reorganisation of establishments of culture. In view of the fact that, as mentioned before, the ratified treaties of the Republic of Lithuania (the European Charter of Local Self-Government is also such a treaty) have the power of law, whereas the Constitutional Court of Lithuania does not conduct investigation into the compatibility between two legal acts of the same legal power and how those two acts comply with one another, the part of the petition in which the petitioner had applied regarding the compliance of the law with the provisions of this charter was rejected, however, the Constitutional Court accepted the part of the petition requesting the investigation into the compliance of the provisions of the government resolution—a sub-statutory legal act—with the European Charter of Local Self-Government. By the way, after the Constitutional Court's ruling of 8 July 2005 on the reorganisation and liquidation of establishments of culture had stated that the impugned legal regulation was in conflict with the provisions of the Constitution, the compliance of the same legal regulation with the provisions of the said charter was not investigated.

– the application of the European Convention on Nationality:

The Constitutional Court has adopted several rulings in which it construed and applied very important and relevant provisions of the Constitution regarding the acquisition, holding and loss of citizenship of the Republic of Lithuania. With reference to the European Convention on Nationality of 1997 (which, by the way, had even been not signed by Lithuania), the Constitutional Court's rulings of 30 December 2003 and 13 November 2006 interpreted the concept of citizenship, the right of the state to define its citizens, and analysed a possibly to hold multiple citizenships. In the said ruling of 13 November 2006 it was held that, according to the Constitution of the Republic of Lithuania, cases of awarding of dual citizenship are exceptionally rare.

– the application of the Universal Charter of the Judge:

In the course of the construction of the principle of judges and courts, in the Constitutional Court's rulings of 21 December 1999 and 22 October 2007, which considered the problems of social maintenance of judges and decided on the social (material) guarantees of judges, a reference was made to the provisions of Article 13 of the Universal Charter of the Judge regulating the remuneration and retirement of judges.

– the application of the European Convention on Transfrontier Television:

While interpreting the notion of advertising, the main rules of advertising, limitations on the length of television commercials, special prohibitions on advertisement of certain types of products, the Constitutional Court's rulings (the rulings of 13 February 1997 and 26 January 2004 on alcohol and tobacco advertising, the ruling of 29 September 2005 on advertising of medicines) referred to the provisions of Articles 11, 13 and 15 of the European Convention on Transfrontier Television.

The provisions of this international convention were also taken into consideration when a constitutional justice case on the status, management and rights of the national broadcaster was being decided (the ruling in that case was adopted on 21 December 2006). This ruling analysed the requirements that must be followed during the broadcast of commercials on televisions, including during the television programmes and shows broadcast by the national broadcaster.

– Other international legal acts applicable in Europe:

While deciding specific constitutional justice issues, in the Constitutional Court's rulings one has made reference to other international documents as well. From among such international documents one should mention the Criminal Law Convention on Corruption of the Council of Europe of 27 January 1999 and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (these documented are pointed out in the aforementioned ruling of 8 May 2000 on the operational activities).

**d) other instruments of international law at international level?**

As for other international instruments, the Constitutional Court rulings have mostly made references to the documents protecting human rights on the international scale, i.e. to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights of 1966, as well as to several other instruments of international law.

– the application of the provisions of the Universal Declaration of Human Rights in the Constitutional Court's final acts:

Paragraph 2 of Article 17 of the Universal Declaration of Human Rights was referred to when the constitutional justice issues related to the protection of the ownership rights and the limitation of those rights were being decided (the Constitutional Court's rulings of 13 December 1993, 27 May 1994, and 8 April 1997), Article 10 of the same declaration was referred to in several cases where the principle of independence of courts and judges was being construed (e.g., the

Constitutional Court's rulings of 5 February 1999, 21 December 1999 etc.). In the aforesaid Constitutional Court's ruling of 9 December 1998 on the abolition of the death penalty, which cited a great many international documents, a reference was made to Articles 3 and 5 of the Universal Declaration of Human Rights through which the human right to life and the prohibition of torture, cruel, inhuman, and degrading treatment or punishment are ensured.

The provisions of the Universal Declaration of Human Rights were invoked also in one of the latest documents of the Constitutional Court—its ruling of 27 February 2012 on the limitation on the payment of awarded maternity and paternity benefits. One of the questions that the Constitutional Court was facing in that case was related to the legal regulation, according to which, an awarded maternity benefit was subject to reduction provided at the time of the payment of such a benefit the person used to receive other income (from work). While emphasising the fact that *inter alia* the provisions of the Universal Declaration of Human Rights guarantee the social maintenance of persons raising children and the special protection of children of mothers, the Constitutional Court held that the targeted benefit paid to mothers for raising a child must not be limited if the person receives other income.

– the application of the International Covenant on Civil and Political Rights in the Constitutional Court's final acts:

The International Covenant on Civil and Political Rights is also mentioned in the Constitutional Court's rulings wherein the issues of the protection of human rights were decided. The provisions of the said covenant were referred to in the aforementioned Constitutional Court's ruling of 9 December 1998 on the abolition of the death penalty, the ruling of 13 November 2006 on citizenship of the Republic of Lithuania, as well as in the ruling of 11 January 2001 on the prohibition of retroactive validity of criminal laws, etc.

– Other international documents applied in the Constitutional Court's final acts:

In addition to the aforesaid international documents cited and referred to by the Constitutional Court in its final acts, it is also possible to mention the Convention Concerning the Protection of the World Cultural and Natural Heritage (the rulings of 27 June 2007 and 9 February 2010 in which the legal acts related to Curonian Spit National Park and Trakai National Park were assessed), the International Covenant on Economic, Social and Cultural Rights which is mentioned in very delicate constitutional justice cases on social issues (e.g. in the ruling of 6 February 2012 in which the legal acts that had reduced social payments during the economic crisis were assessed, the ruling of 27 February 2012 on the limitation on the payment of maternity benefits, etc.), and the Convention on the Rights of the Child that was cited in three acts of the Constitutional Court.

**3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?**

Doubtless to say, the jurisprudence formed by the European supranational courts—the European Court of Human Rights and the Court of Justice of the European Union, in which the interpretation of the norms of the Convention and EU law respectively are presented, is an inseparable part of European law. As mentioned before, the Constitution imposes an obligation to take account of the provisions of European law, whereas all state institutions, including the Constitutional Court, must follow the Constitution.

When speaking about the usage of **the jurisprudence of the European Court of Human Rights** in the course of the deciding of constitutional justice cases, one should note that references had been made to it in final acts of the Constitutional Court before Lithuania ratified the Convention, thus, at the time when neither its provisions nor the official interpretation thereof formed by the ECtHR was binding on Lithuania. The first time the references were made to the Convention and the ECtHR case-law in the Constitutional Court's ruling of 18 November 1994, which interpreted the possibility to limit the right of the legal counsel to meet the defendant face to face (the privacy of legal advice) (a reference was made to Item 3 of Article 6 of the Convention and its interpretation as presented by the ECtHR in the case of *Campbell and Fell v. The United Kingdom*). In its ruling, the Constitutional Court simply quoted the relevant provisions of the Convention and the jurisprudence of the ECtHR, but did not present any wider explanations as regards their significance to the case that it was considering. The Constitutional Court also made references to the ECtHR case-law in two more cases prior to the ratification of the Convention.

It has been mentioned that, prior to the ratification of the Convention, in its conclusion of 24 January 1995, the Constitutional Court, while assessing the relation between the Convention and the Constitution, emphasised that “[t]he Convention for the Protection of Human Rights and Fundamental Freedoms is a peculiar source of international law, the purpose of which is different from that of many other acts of international law. <...> [T]he Convention performs the same function as the constitutional guarantees for human rights, because the Constitution consolidates those guarantees in this country, whereas the Convention—on the international scale.” After the Convention had been recognised as a very significant source of international law, the jurisprudence of the Constitutional Court had subsequently made references to it, as well as to the ECtHR case-law interpreting the provisions of the Convention, on numerous occasions. However, the ECtHR jurisprudence as a source of construction of law was specified *expressis verbis* in the Constitutional Court's rulings much later, after the adoption of the ruling of 8 May 2000, in which it was stated that “the jurisprudence of the European Court of Human Rights as a source of construction of law is also important to construction and applicability of Lithuanian law”. Thus, the Constitutional Court's case-law granted the status of an authoritative source of interpretation of law, first, to the Convention, and, later, to the jurisprudence formed by the ECtHR. It should be noted that, on the grounds of this doctrinal provision formulated by the Constitutional Court, the ECtHR jurisprudence, as a source of construction of law, was invoked in the Constitutional Court's

practically every time when one used to face a question similar to the one that had already been decided at the ECtHR. Even though the ECtHR judgments used not to be the main argument influencing the final decision made by the Constitutional Court, however, the ECtHR judgments have always been authoritative support strengthening the chosen position.

The question of the status of the ECtHR jurisprudence in the Constitutional Court's case-law has recently been tackled again during the consideration of a constitutional justice case inspired by certain differing positions of the ECtHR and the Constitutional Court. In its ruling adopted on 5 September 2012, the Constitutional Court had not only to decide the issue, raised by the petitioner, of the compatibility of the elections law with the Constitution, but also to give an answer of how one should react to incompatibility between the jurisprudence of the ECtHR and that of the Constitutional Court.<sup>12</sup> In this ruling, the Constitutional Court first interpreted the ECtHR jurisdiction and noted that the jurisdiction of the European Court of Human Rights shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto, which arise in the course of consideration of cases between states and individual petitions on violation of provisions of the Convention and protocols thereto and the rights and freedoms entrenched therein, also in the course of the construction of judgments adopted by the European Court of Human Rights and in presenting consultative conclusions on the legal issues of the construction of provisions of the Convention and protocols thereto. Meanwhile, the Constitutional Court's competence is the construction of the provisions of the Constitution. While seeking to delimit the competence of the two institutions that administer justice and protect human rights, the Constitutional Court clearly stated that "<...> the European Court of Human Rights plays an additional role in the implementation of the Convention and protocols thereto; it does not replace the competence and jurisdiction of national courts, nor is it an appeal or cassation instance with regard to judgments of the latter. Even though the jurisprudence of the European Court of Human Rights, as a source for construction of law, is important also for construction and application of Lithuanian law, the jurisdiction of the said Court does not replace the powers of the Constitutional Court to officially construe the Constitution." Having drawn a line between the competencies of the two institutions, the Constitutional Court noted that, on such grounds, "**in itself the judgment of the European Court of Human Rights may not serve** as the constitutional basis for reinterpretation (correction) of the official constitutional doctrine (provisions thereof) if such reinterpretation, in the absence of corresponding amendments to the Constitution, changed the overall constitutional regulation (*inter alia* the integrity of the constitutional institutes—impeachment, the oath and electoral right) in essence, also if it disturbed the system of the values entrenched in the

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<sup>12</sup> It should be noted that the specified Constitutional Court's ruling of 5 September 2012 was adopted in the course of the assessment of the amendments to the election law, which had been adopted by parliament to implement the judgment of the ECtHR Grand Chamber of 6 January 2011 in the case of *Paksas v. Lithuania*, the position formulated wherein was different in substance from that upheld by the Constitutional Court. For more on this intersection of the jurisprudences, see in another part of this chapter (the answer to question 6).

Constitution and diminished the guarantees of protection of the superiority of the Constitution in the legal system.”

Thus, even though recognising the competence of the ECtHR and the importance of the judgments pronounced by the latter, the Constitutional Court pointed out that the meaning of the provisions of the Constitution not always can be disclosed on the grounds of sources of international law, even if they are so influential as the European Convention on Human Rights.

The jurisprudence of **the Court of Justice of the European Union**, which interprets EU law, was legally “recognised” in the Constitutional Court’s case-law even later than that of the ECtHR. The Constitutional Court did so in its 21 December 2006 ruling, although the Constitutional Court’s rulings had long before made numerous references to the norms of EU law and the jurisprudence of the CJEU. The said act of the Constitutional Court noted that after it had been held that the jurisprudence of the European Court of Human Rights as a source of construction of law is also important to the construction and application of Lithuanian law, the same can be said as regards the jurisprudence of the Court of Justice of the European Communities and the Court of First Instance of the European Communities. As in the case of the ECtHR jurisprudence, the CJEU case-law is taken into consideration, however, the adopted decision is determined by the interpretation of the provisions of the national Constitution.

Thus, the Constitutional Court’s doctrine deems the jurisprudence of the supranational courts as a very important and relevant source of construction of law, which is referred to in the course of the consideration of constitutional justice cases.

#### **4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?**

Yes, the Constitutional Court’s jurisprudence is influenced both explicitly and implicitly by the jurisprudence of the supranational European courts. The Constitutional Court refers to the jurisprudence of the CJEU and/or that of the ECtHR when it decides the constitutional justice issues that have been solved and assessed by supranational courts in one or other manner. One most often looks for examples of the European jurisprudence when the questions of protection of human rights and freedoms arise or when it becomes necessary to interpret the legal norms and principles that are invoked not only on the scale of national law, but also on the scale of European law. In the final acts adopted during the all years of the Constitutional Court’s activity more than 90 different judgments of the ECtHR have been referred to and almost 40 judgments handed down by the CJEU have been invoked.

The use of the jurisprudence of the ECtHR and that of the CJEU in the acts of the Constitutional Court has a triple purpose: in some situations the use of the jurisprudence of the supranational courts in the Constitutional Court’s rulings is orientational (supplementary): the examples from the supranational courts as submitted in the rulings supplement and disclose the

international context of the considered issue (for example, when in the constitutional justice cases the aspect of the ownership right is considered in the light of the awarding and paying of social allowances); in other situations the jurisprudence of the ECtHR and that of the CJEU is used in order to strengthen the position formulated by the Constitutional Court (for example, in the constitutional justice case on the concept of the family, in which the ruling was adopted on 28 September 2011); on some rare occasions the jurisprudence of the ECtHR and/or the CJEU may be regarded as the one that plays the harmonising role, where the provisions of the Constitution are construed most favourably in line with the jurisprudence of the ECtHR and the CJEU (for example, the ruling of 15 March 2011 on international military operations, exercises and other events of military co-operation).

It goes without saying, having acquainted with the examples of the jurisprudences of the CJEU and the ECtHR regarding a concrete issue, the Constitutional Court construes and applies the provisions of the Constitution, therefore, the jurisprudence of the supranational courts is used only as a source of inspiration.

**5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?**

The relationship between the jurisprudence of constitutional courts and the jurisprudence of the **ECtHR** depends on a large number of factors: the status of the Convention in national law, the powers of a constitutional court, as well as the respect for principles of democracy.<sup>13</sup> The survey of the Constitutional Court's rulings makes it possible to observe that the provisions of the Convention, as well as the jurisprudence of the ECtHR, had the greatest influence on the first decisions adopted by the Constitutional Court during the first decade of its activity (in 1994–2004). Later, in the Constitutional Court's rulings the text of the Convention is referred to less frequently; however, in deciding the issues concerning the protection of human rights, the Constitutional Court has been drawing on the interpretations of the provisions of the Convention that were formulated by the ECtHR. At the same time it needs to be noted that the influence of the ECtHR on the Constitutional Court's doctrine is also noticeable in the cases where the judgments of the ECtHR are neither quoted nor directly indicated. Prof. Dr. T. Birmontienė, a justice of the Constitutional Court, has separated the following tendencies (for the most part influenced by the doctrine of the ECtHR) in the development of the Constitutional Court's doctrine on the protection of human rights: the doctrine of innate and acquired constitutional rights, the recognition of certain rights as absolute, the recognition of the principles of the indivisibility and integrity of human rights, the

<sup>13</sup> Lapinskas K. Europos tarptautinių teismų ir nacionalinių konstitucinių teismų jurisdikcijos ir jurisprudencijos sąlyčio problemos. [The Problems of the Relationship of the Jurisdiction and Jurisprudence of European International Courts and National Constitutional Courts]. *Konstitucija, nacionalinė teisė ir Europos teisė [Constitution, National Law and European Law]*, pp. 84–85.

recognition of social rights as individual rights, the possibility of the direct defence of the rights consolidated in international documents.<sup>14</sup>

The constitutional justice case in which the ruling of 28 September 2011 on the State Family Policy Concept was adopted could be viewed as one amongst the more interesting Constitutional Court's cases, which received large public attention and drew broad response. In the said constitutional justice case the Constitutional Court investigated the provisions of a legal act in which it was defined what was regarded as family in the Republic of Lithuania. The impugned legal regulation *inter alia* used to establish that family meant spouses and their children. A group of members of the Seimas, the petitioner, had raised the question whether people who live without having registered their union as a marriage could in no case be regarded as a family. The said impugned legal regulation also used to establish that a woman raising her child by herself is an incomplete family. The petitioners deemed such legal regulation to be discriminatory. The representatives of the legislator, who were defending the contested legal act, rationalised that through such legal regulation it was sought to protect the traditional family as well as the institute of marriage as one of the fundamental values of the state. In the case at issue the Constitutional Court was obliged to decide and elucidate in what way family is understood according to the Constitution of the Republic of Lithuania. While searching for the most appropriate and just solution in that case, the Constitutional Court was not only looking for inspiration in the jurisprudence of the European Court of Human Rights, but it was also drawing on the examples from the case-law of the constitutional courts of other foreign countries. In the ruling under discussion the Constitutional Court noted that "[t]he constitutional concept of family must also be construed by taking account of the international commitments of the State of Lithuania that were undertaken after it had ratified the Convention for the Protection of Human Rights and Fundamental Freedoms", as well as that "[t]he European Court of Human Rights, which applies the provisions of the Convention, in its jurisprudence, which is important for the construction of Lithuanian law as a source of construction of law, has more than once analysed the concept of family". Having noted the foregoing, the Constitutional Court proceeded with an analysis of the several judgments given by the ECtHR, in which the concept of family in the sense of the Convention is disclosed. When construing the notions of the traditional and natural family, the Constitutional Court referred to one of the key judgments of the ECtHR concerning the subject matter under discussion—the judgment of 13 June 1979 in the case of *Marckx v. Belgium*. In that judgment the ECtHR held that the concept of family life is not confined to families formed on the basis of marriage and that it may cover other *de facto* relationships; the support and encouragement of the traditional family is in itself legitimate or even praiseworthy, however, in the achievement of this end recourse must not be had to measures

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<sup>14</sup> Birmontienė T. Intersection of the Jurisprudence: In Search of Possible Solutions. *Konstitucinė jurisprudencija*, 2011, No. 1, pp. 293–294.

whose object or result is to prejudice the natural family. In addition, in the aforementioned ruling, the Constitutional Court quoted the judgment of the ECtHR of 27 October 1994 given in the case of *Kroon and Others v. The Netherlands*, in which it is maintained that, when establishing what relationships are encompassed by the notion “family life”, a great number of factors might be taken into consideration, e.g., the living together, permanence of the relationship, the character of the demonstrated mutual obligations, etc., also the judgment of the ECtHR of 26 May 1994 in the case of *Keegan v. Ireland*, and the judgment of 26 September 1997 in the case of *El Boujaïdi v. France*. Having analysed the case-law of the ECtHR, the Constitutional Court summed it up in the following way: “<...> the concept of family analysed in the jurisprudence of the ECHR is not confined to the notion of the traditional family founded on the basis of marriage. <...> [O]ther types of the relationship of living together are also defended in the sense of Article 8 of the Convention, as those which are characterised by the permanence of the relationship between persons, the character of the assumed obligations, common children, etc.” Partly on the basis of the said statements, also the case-law (which will be discussed in another part of this report) of other courts of foreign countries, and other arguments stemming from the Constitution, the Constitutional Court finally decided that the provisions of the Constitution equally protect and defend families other than those founded on the basis of marriage, *inter alia* the relationship of a man and a woman living together without concluding a marriage where such a relationship is based on the permanent bonds of emotional affection, reciprocal understanding, responsibility, respect, shared upbringing of the children, and similar ones, as well as on the voluntary determination to take on certain rights and responsibilities that form a basis for the constitutional institutes of motherhood, fatherhood, and childhood. In summing up the foregoing, it is possible to maintain that the Constitutional Court, when deciding one of the socially most painful constitutional justice cases of topical concern to the public, did not deviate from the case-law formulated by the ECtHR, but took it into consideration and drew on it in its search for the most just decision.

The Constitutional Court has considered a quite large number of constitutional justice cases in the area of social security. When questions regarding the awarding of social payments, the payment and reduction of the awarded payments arise, the Constitutional Court has to deal not only with the issue of social maintenance and social security, but also with that of the protection of the rights of acquired ownership. In such cases the Constitutional Court also substantially draws on the jurisprudence of the ECtHR. For instance, in the constitutional justice case in which the Constitutional Court’s ruling of 4 July 2003 was adopted, the Constitutional Court had to decide on various questions related to the awarding and payment of state pensions to officials and servicemen. The state pension of officials and servicemen is not directly provided for in the Constitution, however, at the discretion of the legislator, it is awarded to persons who for a certain time period served in the armed forces or held the corresponding duties. Under the impugned legal regulation, contested in the aforesaid constitutional justice case, the awarded state pension

payable to officials or servicemen, upon the occurrence of certain circumstances, could no longer be paid or could be reduced. The Constitutional Court pointed out that, according to the Constitution, persons who had been awarded and paid the state pension of officials and servicemen had the right to demand that the payments of that pension be paid further to them in the amounts awarded and paid previously, and that such a social payment needed to be protected as the property of the said persons. It was also held that the awarded and paid pensions might be reduced; as a result of a reform of the system of pensions, some pensions might be abolished and the amounts of other pensions might be reduced, however, in all such cases the legislator was obliged to provide for the mechanism of just compensation to the persons concerned for the losses incurred due to the change of the regulation. The Constitutional Court demonstrated the validity of such a position by giving *inter alia* several examples from the jurisprudence of the ECtHR: in the said ruling it is emphasised that, according to the jurisprudence of the ECtHR, the defence of the rights of ownership applies not only to the objects of the right of ownership that are *expressis verbis* specified by the civil laws of states, but also to economic interests, as indicated in the judgment of the ECtHR of 7 July 1989 in the case of *Tre Traktörer Aktiebolag v. Sweden*, as well as to the rights to a claim of property nature, as emphasised in the judgment of the ECtHR of 20 November 1995 in the case of *Pressos Compania Naviera SA and Others v. Belgium*, the right to a pension resulting from one's employment, as according to the judgment of the ECtHR of 16 September 1996 in the case of *Gaygusuz v. Austria*, and the right to the old-age pension, considered in the judgment of the ECtHR of 4 June 2002 in the case of *Wessels-Bergervoet v. The Netherlands*. The doctrine of the ECtHR was also invoked in elucidating that a person has the right to defend not only the property or possessions that belong to him, but also his legal demands (claims) on the basis of which the claimant may argue that he has at least "a legitimate expectation" to dispose of the property. At the same time it needs to be mentioned that neither the provisions of the Convention, nor the jurisprudence of the ECtHR deny the possibility of reorganising pensionary maintenance and social security: according to the ECtHR, a state enjoys, in regulating social policy, sufficiently broad possibilities of changing the amounts of pensions; however, while amending the legal regulation in this field, it must heed certain requirements: the measures applied must be proportionate to the objective sought; the state's interference must ensure the balance between the general interest of society and the requirement that the fundamental rights of a person be protected. The foregoing was held on the basis of *inter alia* the decision of the ECtHR of 12 October 2000 as to the admissibility in the case of *Janković v. Croatia*, the decision of 23 September 1982 in the case of *Sporrong and Lönnroth v. Sweden*, and other decisions of the ECtHR in this area. Similar problematic issues related to the area of social maintenance and social security have been considered in a large number of other Constitutional Court's rulings, which, in a likewise manner, considerably drew on the experience of the ECtHR. Among the more recent rulings within the said group, one should mention the ruling of 6 February

2012, in which the Constitutional Court had, among other things, to assess the legal regulation establishing, due to a particularly difficult economic situation (the economic crisis of 2009) in the state, the reduction of various social payments. The Constitutional Court held that the reduction in question was permitted if the respective requirements, stemming from the Constitution and construed in the Constitutional Court's doctrine, were observed. In the aforementioned case, as well as in many other cases, the Constitutional Court referred to the case-law of the ECtHR concerning the protection of the right of ownership in the area of social payments and quoted the related judgments of the ECtHR: the judgment of 12 October 2004 in the case of *Kjartan Ásmundsson v. Iceland*, the judgment of 22 October 2009 in the case of *Apostolakis v. Greece*, the judgment of 8 December 2009 in the case of *Wieczorek v. Poland*, the decision of 8 February 2011 as to the admissibility in the case of *Poulain v. France*, the judgment of 25 October 2011 in the case of *Valkov and Others v. Bulgaria*.

Neither does the Constitutional Court avoid drawing on the jurisprudence of the ECtHR in deciding questions related to the application and protection of procedural guarantees. Article 6 of the Convention, as well as the interpretation of the provisions of this article, is important for the Constitutional Court when it uses in its rulings the jurisprudence of the ECtHR. The right to apply to court, the notion of an independent and impartial court, the right to choose an advocate and the right to an advocate as a guarantee of due legal process, as well as other aspects of the judicial process, have been unfolded and developed in the Constitutional Court's jurisprudence on the basis of the corresponding judgments of the ECtHR. Among the rulings substantially influenced by the jurisprudence of the ECtHR, the earlier discussed Constitutional Court's ruling of 8 May 2000 on operational activities can be mentioned. In that ruling the Constitutional Court investigated the compliance of the legal regulation of the mode of conduct imitating a criminal act with the Constitution. The Constitutional Court ruled that the legal regulation providing for the application of the said mode of conduct was not in conflict with the Constitution. Such a decision was made by the Constitutional Court partly by virtue of the jurisprudence of the ECtHR: in the said ruling the Constitutional Court interpreted the use of undercover investigators/agents as well as the use of secret means and methods in the course of detecting crimes and, based on the jurisprudence of the ECtHR, held that, in themselves, secret methods of the detection of crimes and offenders were not in conflict with the Convention, as ruled in the judgment of the ECtHR of 6 September 1978 in the case of *Klass and Others v. Germany*; in addition, the Constitutional Court referred to the interpretation of the application of measures of secret surveillance, as formulated in the judgment of the ECtHR of 25 March 1998 in the case of *Kopp v. Switzerland*, and it analysed the judgment of the ECtHR of 9 June 1998 in the case of *Teixeira de Castro v. Portugal* while elucidating the use of the evidence obtained when the actions of undercover investigators/agents go beyond the allowed boundaries, i.e. when undercover investigators/agents incite the commission of a crime; and in the same case the Constitutional Court also comprehensively clarified and defined the conception and

concept of private life on the basis of *inter alia* the judgment of the ECtHR of 16 December 1992 in the case of *Niemietz v. Germany* and construed the concept “expectable privacy” on the grounds of the reasoning from the judgment of 15 June 1992 in the case of *Lüdi v. Switzerland*.

As the last example of the inspiration derived from the jurisprudence of the ECtHR, the Constitutional Court’s ruling of 6 December 2012 on the constitutionality of civil written procedure should be mentioned. In the said case the petitioners raised the question as to whether the principle of the publicity of the consideration of a case is not violated where courts consider cases under written procedure. In that case the Constitutional Court elucidated the validity of civil written procedure, its necessity, and in certain cases—its indispensability. In the ruling in question references were made to the judgment of the ECtHR of 29 October 1991 in the case of *Helmers v. Sweden* and the judgment of 23 February 1994 in the case of *Fredin v. Sweden*, in which it is pointed out that the right to a public hearing, consolidated in Paragraph 1 of Article 6 of the Convention, embraces the right to an oral hearing, as well as that hearings conducted at first and the only instance must be held orally (the judgment 21 February 1990 in the case of *Håkansson and Sturesson v. Sweden*). Consideration, however, was also given to the judgment of the ECtHR in which it is maintained that the obligation to hold a public hearing is not an absolute one, and that an oral hearing may be dispensed with if a party unequivocally waives his or her right thereto and there are no questions of public interest (the judgment of the ECtHR of 12 November 2002 in the case of *Döry v. Sweden*). In the ruling at issue attention was drawn to the fact that, according to the ECtHR, a waiver to the right to an oral hearing can be done explicitly or tacitly, in the latter case by refraining from submitting or maintaining a request for a hearing, as held in the judgment of 21 February 1990 in the case of *Håkansson and Sturesson v. Sweden* and the judgment of 24 June 1993 in the case of *Schuler-Zgraggen v. Switzerland*, etc. In the opinion of the ECtHR, a hearing may not be necessary due to exceptional circumstances of the case, for example, when it raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties’ written observations (the judgement of 12 November 2002 in the case of *Döry v. Sweden*). Provided a public hearing has been held at first instance, the absence of such a hearing before a second or third instance may accordingly be justified (the judgement of 29 October 1991 in the case of *Helmers v. Sweden*). The foregoing statements not only confirmed, but partly also determined the Constitutional Court’s position formulated in the aforesaid ruling.

While drawing attention to the application of the jurisprudence of the CJEU in the course of adopting the Constitutional Court’s final acts, one needs to note that there are noticeably fewer such cases in the Constitutional Court’s case-law, but this does not imply they are less significant. The case-law of the CJEU was invoked in the Constitutional Court’s rulings not only in deciding on the situations regarding which the position of the CJEU had already been formulated, but also in the case in which the Constitutional Court applied itself to the CJEU for a preliminary ruling regarding the interpretation of an EU legal act.

The necessity for the Constitutional Court to apply to the CJEU arose after it had received the petitioner's request to investigate the constitutionality of a national legal act implementing Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity. Subsequent to the Constitutional Court's application to the CJEU referring the question as to how the respective provision of the aforesaid directive must be construed and what obligations it implies for Member States, on 9 October 2008, the CJEU gave a preliminary ruling. The Constitutional Court assessed and analysed the preliminary ruling given by the CJEU, and after giving it due consideration and while following it, decided the aforesaid case of constitutional justice.

The Constitutional Court referred to the case-law of the CJEU also in the area of trademarks when it was adopting the ruling 27 March of 2009, in which it assessed the provisions of the Law on Trademarks that regulated the protection of and the payment of compensation for the infringed rights of a proprietor of a trademark. In that case the Constitutional Court drew on the case-law of the CJEU while elucidating the limits of the legal protection of a trademark: in the ruling the Constitutional Court noted that, according to the case-law of the CJEU, the essential function of a trademark was to guarantee the identity of the origin of the marked product to the consumer by enabling him to distinguish the product or service from others which have another origin (the judgment of the CJEU of 18 June 2002 in the case of *Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd* (C-299/99), the judgment of 12 November 2002 in the case of *Arsenal Football Club plc v. Matthew Reed* (C-206/01)); and it was pointed out that the limits of the legal protection of trademarks needed to be such that were necessary and at the same time sufficient for the protection of the economic functions of a trademark. On the basis of the judgment of the CJEU of 20 March 2003 in the case of *LTJ Diffusion SA v. Sadas Vertbaudet SA* (C-291/00), the Constitutional Court also held that in the cases where the infringement of the rights of a proprietor of a trademark was manifested in the use of identical signs for identical goods, a likelihood of the confusion of consumers was presumed and did not need to be proved.

EU law, as well as the jurisprudence of the CJEU, which interprets EU law, was similarly invoked in the Constitutional Court's ruling of 3 February 2010 on the reimbursement of non-property damage under compulsory insurance against civil liability of holders of vehicles. The limit established in the national legal acts for reimbursement of non-property damage was construed after having reviewed the directives that regulated the relations in question and concerned the legislation of Member States related to insurance against civil liability of holders of motor vehicles<sup>15</sup>

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<sup>15</sup> Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (so-called First Motor Insurance Directive); Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (so-called Second Motor Insurance Directive); Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (so-called Third Motor Insurance Directive); Directive 2000/26/EC of the European Parliament and of the

as well as after having analysed the cases decided by the CJEU in this area. Having reviewed the judgment of the CJEU of 28 April 2009 in the case (C-518/06) of *Commission of the European Communities v. Italian Republic*, the judgment of 14 September 2000 in the case (C-348/98) of *Mendes Ferreira and Delgado Correia Ferreira*, the judgment of 30 June 2005 in the case (C-537/03) of *Katja Candolin*, the judgment of 19 April 2007 in the case (C-356/05) of *Elaine Farrell*, and the judgment of 24 July 2003 in the case (C-166/02) of *Daniel Fernando Messejana Viegas*, the Constitutional Court drew the conclusion that, based on the directives of the European Union, the Member States remained free to choose a system of compulsory insurance against civil liability as well as the measures for its implementation; that the Member States were obliged to ensure that all persons who suffered damage in a traffic accident receive compensation for that damage, also that the sums of insurance established in the national legal acts of the Member States should be not less than the minimum sums of insurance established in the directives, and that they had to oversee that there was a possibility for owners and holders of vehicles to be covered by the type of insurance in question for a not too excessive insurance premium. On the basis of the foregoing explications, in the aforesaid ruling it was held that a concrete sum established by the legislator to reimburse for non-property damage inflicted in a traffic accident was legitimate, since it was chosen in consideration of *inter alia* the requirements established by EU law.

#### **6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?**

As early as in 1995, subsequent to an application by a group of Members of the Seimas, while assessing the compliance of the provisions of the Convention with the Constitution<sup>16</sup> in its conclusion of 24 January 1995, the Constitutional Court modelled a legal situation of the possible collisions between the Constitution and the Convention. In the said conclusion the Constitutional Court *inter alia* noted that the norms of the Convention could be recognised as being in conflict with the Constitution if: “1) the Constitution established a complete and final list of rights and freedoms, and the Convention set forth some other rights and freedoms; 2) the Constitution prohibited some actions, and the Convention defined them as one or another right or freedom; 3) some provision of the Convention could not be applied in the legal system of the Republic of Lithuania because it was not consistent with some provision of the Constitution”. It is true that the provisions of the Convention then assessed by the Constitutional Court were recognised as being not in conflict with the Constitution, and, for some time, the situations specified in the said

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Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC (so-called Fourth Motor Insurance Directive).

<sup>16</sup> After the Members of the Seimas had raised the question about the non-compliance of the provisions of the Convention with the Constitution, this was a necessary condition for Lithuania to ratify the Convention.

conclusion regarding a possible conflict between the Constitution and the Convention were merely hypothetical.

Today, however, it may be already possible to maintain that, at the time of adopting its ruling of 24 January 1995, the Constitutional Court proved to be rather insightful. After the Grand Chamber of the ECtHR delivered the judgment of 6 January 2011 in the case of *Paksas v. Lithuania*, a situation emerged that in practice, under the Constitution, certain actions were prohibited, but the ECtHR, having examined the petition filed with it, held that it was impermissible to limit the right protected under the provisions of the Convention in the manner as ruled by the Constitutional Court. The difference in the positions of the ECtHR and the Constitutional Court on the question of elections to parliament is an obvious example of a divergence in the jurisprudences of these two institutions. Having in this report (See Question 3 on the Constitutional Court's obligation to take account of the jurisprudence of the ECtHR) at first discussed in what way the aforementioned situation has influenced the development of the Constitutional Court's doctrine on the status of the decisions of the ECtHR, it might be worthwhile considering more closely in what way and why the positions of the two institutions defending human rights have diverged.

The case of *Paksas v. Lithuania* was initiated in the European Court of Human Rights after the Constitutional Court had adopted the ruling of 25 May 2004, in which, as mentioned before, it was held that, under the Constitution, a person who *inter alia* grossly violated the Constitution and breached the oath and, as a result of this, was removed under the procedure for impeachment proceedings from the office of the President of the Republic, the President and a justice of the Constitutional Court, the President and a justice of the Supreme Court, or the President and a judge of the Court of Appeal, or whose mandate of a Member of the Seimas was revoked, could **never** again stand in elections for an office the beginning of holding which requires a person to take an oath to the State of Lithuania. A person who was directly affected by the said Constitutional Court's decision, who was Rolandas Paksas, a former President of the Republic of Lithuania, applied to the court in Strasbourg in defence of his right to stand in elections. Having considered the application, in its judgment of 6 January 2011, the ECtHR ruled that **the permanent** and irreversible **disqualification** from standing in parliamentary elections **is disproportionate** and that, in having established such a disqualification,<sup>17</sup> Lithuania had violated Article 3 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which, as mentioned in the judgment of the ECtHR, consolidates the fundamental principle of an effective political democracy and implies the subjective rights to vote and to stand for election. In the judgment of the ECtHR it is acknowledged that the right at issue is not absolute and that certain limitations of this right are permissible, but that these limitations may not be of a permanent character. While analysing the Constitutional Court's ruling, which had led to such

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<sup>17</sup> Which, as mentioned before, was formulated by the Constitutional Court in its ruling of 25 May 2004.

consequences, the ECtHR recognised that the measure in question—removal from the office held for a breach of an oath and a gross violation of the Constitution—formed part of a self-protection mechanism for democracy through “public and democratic scrutiny” of those holding public office. Nonetheless, the supreme institution defending human rights decided that the prohibition, the imposition of which deprives of the right and possibility for the person concerned on the whole to stand as a candidate in elections to the institution that is the representation of the nation, was too strict, and that, under the provisions of the Convention, “the decision to bar a senior official who has proved unfit for office from ever being a member of parliament in future is above all a matter for voters, who have the opportunity to choose at the polls whether to renew their trust in the person concerned”. The ECtHR emphasised that the “‘free expression of the opinion of the people in the choice of the legislature’ must be ensured in all cases”.

As mentioned before, after the delivery of the said judgment of the ECtHR measures were taken in Lithuania to implement it. The Seimas adopted amendments to the Law on Elections to the Seimas, under which, a person who has grossly violated the Constitution and breached the oath could stand in parliamentary elections after a five-year period following his removal from the office held. Such provisions amending the law evidently were incompatible with the doctrinal provisions formulated in the Constitutional Court’s ruling of 25 May 2004, according to which, a person who has grossly violated the Constitution and breached the oath may never again take up any office (including the office of a Member of the Seimas) the holding of which requires a person to take an oath. Thus, it is no wonder that, with the said Constitutional Court’s doctrine remaining in force, a petition was filed requesting to assess the compliance of the aforementioned amendments to the law with the Constitution.

As it might be predicted from the foregoing, in its ruling adopted on 5 September 2012, the Constitutional Court did not change its position and made it clear that, irrespective of the interpretation of the respective provisions of the Convention, the interpretation of the Constitution in terms of the same question remains unchanged. The Constitutional Court, while resuming the question whether a person who has grossly violated the Constitution and breached the oath may, and when he may, stand in elections for an office (including the office of a Member of the Seimas) the beginning of holding which requires a person to take an oath to the state, pointed out that it might be possible to deviate from the Constitutional Court’s precedents created while adopting decisions in cases of constitutional justice and that new precedents might be created only in the cases when this is unavoidably and objectively necessary, constitutionally grounded and reasoned; in addition, it was held that it was impossible and constitutionally impermissible to reinterpret the official constitutional doctrine (provisions thereof) so that the official constitutional doctrine would be corrected if, by doing so, the system of values consolidated in the Constitution was changed, the guarantees of the protection of the supremacy of the Constitution in the legal system were reduced, and the concept of the Constitution as a single act and harmonious system was denied.

Having noted the foregoing, in the said ruling the Constitutional Court once again held that the constitutional institutes of impeachment, the oath, and the electoral right were closely interrelated and integrated; the change of any element of these institutes would result in the change of the content of other related institutes, i.e. the system of values consolidated in all of the aforementioned constitutional institutes would be changed. Thus, under the Constitution, a person who has grossly violated the Constitution and breached the oath and, as a result of this, was removed under the procedure for impeachment proceedings from the office held, still may never again take up any such an office, indicated in the Constitution, the beginning of holding which is linked to taking an oath provided for in the Constitution. Therefore, as established in response to the judgment of the ECtHR, the legal regulation under which the person in question may stand in elections to the Seimas after a five-year period following his removal from office was assessed as an attempt to overrule a previous Constitutional Court's ruling and the interpretation of the Constitution provided therein and was, consequently, recognised as unlawful: in the ruling it is clearly emphasised that the said regulation "ignores the concept of the constitutional liability for a gross violation of the Constitution and a breach of the oath, which was disclosed in the Constitutional Court ruling of 25 March 2004, and disregards the fact that, under the Constitution, a person who has grossly violated the Constitution and breached the oath and, for the said reason, who has been removed under the procedure for impeachment proceedings from the office held, or whose mandate of a Member of the Seimas has been revoked, may never stand in elections for *inter alia* a Member of the Seimas"; by means of such regulation, "the legislator tried to overrule the power of the Constitutional Court's ruling of 25 May 2004 and violated the prohibition, which stems from Paragraphs 1 and 2 of Article 107 of the Constitution, against repeatedly establishing, by adopting corresponding laws and other legal acts afterwards, the legal regulation which is not in line with the concept of the provisions of the Constitution set forth in a ruling of the Constitutional Court, as well as with the principle of integrity of the Constitution, which is consolidated in Paragraph 1 of Article 6 of the Constitution, the principle of supremacy of the Constitution, which is consolidated in Paragraph 1 of Article 7 thereof, and exceeded its powers established in the Constitution and violated the constitutional principles of separation of powers and a state under the rule of law." Thus, regardless of the concept of the electoral right set forth by the ECtHR according to the Convention, the Constitutional Court has remained faithful to the meaning of the provisions of the Constitution.

As it is clear from the provided arguments, the Constitutional Court and the ECtHR assessed the situation regarding one's ineligibility to stand in parliamentary elections from different positions: in its rulings the Constitutional Court emphasised the allegiance to the State of Lithuania, loyalty, and (in)eligibility to take up a responsible office if once a serious transgression has been committed—a gross violation of the Constitution and a breach of an oath taken to the state; while the ECtHR interpreted the same situation more through the right of the electorate—the citizens of

the state concerned to determine and decide whom they would like to see as their representatives, as well as through the disclosure and interpretation of the concept of the electoral right. Regardless of the final outcome, one may not deny the fact that both institutions in question, each in its respective area, are right, and that the decisions of both of them must be executed. As held by the Constitutional Court, the only way of doing this is to alter the respective provisions of the Constitution; upon such an alteration, the valid interpretation by the Constitutional Court would lose its legal force, as there would no longer be those provisions of the Constitution regarding which it was adopted.

At present the legal regulation establishing that a person who has grossly violated the Constitution and breached the oath may stand in elections for the office of a Member of the Seimas after a five-year period following the breach of the oath, which was adopted in response to the judgment of the ECtHR, is no longer valid from the day of the entry into force of the Constitutional Court's ruling of 5 September 2012, and in the Seimas the Commission on the Constitution has been formed, which is commissioned to prepare the appropriate amendments to the Constitution, the adoption of which would lead to the elimination of the incompatibility between the provisions of the Constitution and the Convention.

**7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?**

In the course of deciding cases courts of general jurisdiction and specialised (administrative) courts apply the provisions of European law and refer to the jurisprudence of European courts, since they, as well as all the institutions of power, are obliged to do so by the provisions of the Constitution, which have been more than once mentioned in this report in relation to the respect for international law and the execution of the state's international obligations, which stem from the agreements ratified and non-ratified by the Seimas. The European Convention on Human Rights and the Founding Treaties of the European Union and the treaties modifying them are international agreements of the Republic of Lithuania, which were ratified by the Seimas and have become part of the Lithuanian legal system; thus, their application in the practice of courts, insofar as their provisions are not in conflict with the Constitution, is obligatory.

Without doubt, the Constitutional Court, which is the guardian of the legal act of the supreme power—the Constitution and an authoritative and the only interpreter of the provisions of the Constitution, by directly applying the provisions of European law, *inter alia* the provisions of European jurisprudence, encourages other Lithuanian courts to follow its example. National courts of general jurisdiction and specialised courts, while being bound by both the decisions of the Constitutional Court and the decisions of the supranational courts, seek in adopting their acts to follow the respective jurisprudence binding on them. And it should be noted that this tendency has recently become considerably stronger.

**8. Are there any examples of decisions by European Courts of justice influenced by the jurisprudence of national constitutional courts?**

It is not easy to establish the influence of constitutional courts to European courts. In their adopted decisions both the ECtHR and the CJEU rarely quote the decisions of national constitutional courts. However, presumably, while seeking to reveal the content of the fundamental universal values which are defended not only under the international documents, but also under the provisions of the national constitutions, the supranational institutions become familiarised with the constitutional doctrine of various states, which influences the formation of the jurisprudence of human rights on the European level in one or another way. And, if such an influence is not reflected in the final text of the judgments delivered by the ECtHR and the CJEU, it does not mean that it was not used in order to form a more detailed picture of the considered case.

There have been cases in the case-law of the ECtHR when, while deciding cases, it used the construction of the provisions of national law provided by the Constitutional Court. In the case of *Ramanauskas v. Lithuania*, in which the judgment was adopted on 5 February 2008, the applicant stated that he had been the victim of entrapment and that he had been denied the opportunity to examine a key witness in criminal proceedings against him, therefore, the principle of fair trial together with Article 6 of the Convention were violated. In this case, while presenting the provisions of national law, the ECtHR quoted the Law on Operational Activity. The constitutionality of this legal act had already been assessed by the Constitutional Court of the Republic of Lithuania in its ruling of 8 May 2000. In this case the ECtHR referred to the construction of the provisions of the national legal act and constitutional assessment thereof provided by the Constitutional Court. In its judgment the ECtHR quoted certain extracts of the Constitutional Court's ruling, *inter alia* the fact that in the opinion of the Constitutional Court, the use of clandestine measures, as such, was not contrary to the European Convention on Human Rights, or indeed the Constitution, as long as such measures were based on legislation that was clear and foreseeable in effect and were proportionate to the legitimate aims pursued. However, the Constitutional Court held that such actions could not be used for the purpose of incitement or provocation to commit a new crime, one cannot trespass on such measures; it is for the courts of general jurisdiction dealing with allegations of incitement or of other forms of abuse of the model to establish in each particular case whether the investigating authorities had gone beyond the limits of the legal framework within which the model had been authorised. While assessing the application of the applicant, the ECtHR noted in its arguments that "the domestic authorities and courts should at the very least have undertaken a thorough examination—as, indeed, the Constitutional Court urged in its judgment of 8 May 2000—of whether the prosecuting authorities had gone beyond the limits authorised by the criminal conduct simulation model <...>, in other words whether or not they had incited the commission of a criminal act." Because of the fact that that the ECtHR did not have enough

evidence that *inter alia* one tried to investigate the fact of whether the said limits had actually been overstepped, it stated a violation of Article 6 of the Convention. As it is obvious, while deciding this case, the ECtHR relied upon the construction provided by the Constitutional Court and referred to it. The ECtHR also referred to the construction provided in the said Constitutional Court's ruling in its case of *Lenkauskienė v. Lithuania*, in which it is emphasised that while seeking to prohibit provocation or incitement by the police officers to commit a crime, the extent of the said powers is defined namely by the case-law of the Constitutional Court set forth in the ruling of 8 May 2000.

In some other considered cases against Lithuania, the ECtHR also quotes the corresponding rulings of the Constitutional Court, refers to the construction and assessment provided in them, emphasises certain statements that are relevant to a particular case. Quite broadly the Constitutional Court's doctrine on restoration of the rights of ownership is quoted in the cases of *Jasiūnienė v. Lithuania*, *Užkurėlienė and others v. Lithuania*, *Aleksa v. Lithuania*. It needs to be noted that having analysed the case-law of the ECtHR in which the Constitutional Court's rulings are mentioned, it is obvious that they are most often referred to while seeking to understand the domestic legal acts and their interpretation, as well as the arguments of the parties if they use the doctrine formulated by the Constitutional Court and not when providing the final assessment.

**The Court of Justice of the European Union** has mostly faced the doctrine formulated by the Constitutional Court also when deciding the "Lithuanian" cases or analysing the remarks of the Lithuanian Government presented in other cases considered by it. We should first of all mention the already discussed Constitutional Court's application to the CJEU with a request to adopt a preliminary ruling. While responding to the Constitutional Court's request, in its judgment *Julius Sabatauskas and others v. Lithuania* of 9 October 2008, the CJEU quotes the collision rule of the EU law and national legislation which was formulated by the Constitutional Court. However, one should note an interesting detail: in its judgment the CJEU quotes not all the doctrinal provision of the Constitutional Court. In the Constitutional Court's ruling of 14 March 2006 which is also quoted in the application to the CJEU, it was held that in case of the collision with the domestic legal norms, the EU legal acts have the priority of application "in the cases where the provisions of the European Union arising from the founding Treaties of the European Union compete with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), **save the Constitution itself**". In the aforementioned judgment the CJEU states that such a collision rule is effective in Lithuanian domestic law, however, it does not quote more precisely that this priority of application of the EU legal acts, under the doctrine of the Constitutional Court, is not effective for the constitutional provisions.

Another case to be mentioned is when the CJEU, while considering a case, referred to the ideas set forth in the jurisprudence of the Constitutional Court, was the CJEU judgment of 12 May 2011 in the case of *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*. In this case the CJEU adopted a preliminary ruling with

reference to the request of the First Vilnius City Local Court. The latter court had been applied to by the applicant, a citizen of the Republic of Lithuania, with a request to issue the Lithuanian civil status documents in which the applicant's surname would be written in accordance with the Polish spelling rules. The Constitutional Court adopted a ruling of 21 October 1999 whose provisions were later on construed in the decision of 6 November 2009. Under the Constitution of the Republic of Lithuania, *inter alia* Article 14 thereof and the construction of this constitutional provision provided by the Constitutional Court, the name and family name of an individual must be entered in the state language in the passport of the citizen of the Republic of Lithuania; the use of non-Lithuanian letters could violate the national interests as then not only the constitutional principle of the state language would be denied but also the activity of *inter alia* state and municipal institutions would be disturbed. It is possible to specify the name and family name of the individual in the original form in other sections for entries of the passport, when the individual requests so. While responding to the received request, the CJEU noted in its judgment that under the European Union law, the Union respects its rich cultural and linguistic diversity, as well as the national identity of its Member States, which includes protection of a State's official national language. Thus, the provisions of European Union law do not preclude the implementation of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language, and held that the objective pursued by national rules such as those at issue in the main proceedings, designed to protect the official national language by imposing the rules which govern the spelling of that language, constitutes, in principle, a legitimate objective capable of justifying restrictions on the rights of freedom of movement and residence and may be taken into account when legitimate interests are weighed against the rights conferred by European Union law. However, such a procedure should not cause serious inconvenience to the persons at administrative, professional and private levels, and it will be for the national court to decide. This case of the CJEU is often mentioned as an example of respect of the CJEU to the national identity and originality.<sup>18</sup> Having summarised the provided provisions of the Constitutional Court's acts and judgments of the CJEU, one may state that in this case the positions of the CJEU and the Constitutional Court regarding the considered question coincided.

## II. Interactions between constitutional courts

The list of the fundamental human rights and freedoms which is consolidated in the constitutions of most European states is common; certain provisions are repeated identically in national constitutions, whereas in other cases, even though the formulas of provisions differ, their

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<sup>18</sup> E.g., see Jarašiūnas E. Keletas nacionalinių teismų ir Europos Sąjungos Teisingumo Teismo bendradarbiavimo problemų [Some Problems in the Cooperation Between the Court of Justice of the European Union and National Courts]. The report was presented in the international conference "Modern Tendencies of Constitutional Justice: The Relation Between National and International Law" held in Vilnius on 5 September 2013.

content is identical. Thus, it should come as no surprise that when deciding a case, a constitutional court of one country takes account of the experience of the constitutional courts of other foreign states that have already faced the similar problems, refers to that experience, takes over their developed practice, investigates the argumentation used and applies it to its own situation. When sharing experiences and searching for the proper practice of constitutional courts of foreign states, sometimes it happens, especially while deciding cases of constitutional justice linked to the protection of human rights, that the decisions of constitutional courts of different states, adopted on the similar question, are rather different; it does not deny the significance of searching for the constitutional practice of foreign states, but, rather, on the contrary—it permits better understanding of the multiple meanings of the construed provision which influences the argumentation of the court. The Constitutional Court of the Republic of Lithuania does not avoid referring to the precedents formulated by the constitutional courts of foreign states.

### **1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?**

While deciding the constitutional justice cases, the problems considered wherein may be common to the legal system of more than one state or related to the questions relevant to most countries, the Constitutional Court of the Republic of Lithuania refers in its rulings to the practice of the constitutional courts of both European and other foreign states.

In some rulings one refers to the experience of foreign states directly—by quoting the decisions of constitutional courts of other states, by mentioning the references to the provisions of the relevant rulings and decisions. In other cases, when a justice is preparing the case for the judicial consideration, he/she searches for suitable examples of constitutional courts of foreign states, similar experience and inspiring ideas. And even though the nearly related practice of the constitutional institution of a foreign state is not mentioned in the final ruling, it does not mean that it, if it was relevant to the considered case, did not help to form certain attitude towards the decided question. In the Constitutional Court's rulings one also quotes the decisions of the constitutional courts of foreign states in order to illustrate the considered situation, to provide its international context, more rarely—while searching for reasoning, strengthening of one's formulated argumentation. They are not considered as independent arguments and are not the factor determining the final decision.

Thus, the Lithuanian Constitutional Court may be attributed to those constitutional courts that refer to the decisions of constitutional courts of foreign states that grant the “documentary power” to such constitutional precedents of foreign states. It means that for the Constitutional Court, when it considers a new and difficult question, the decisions of constitutional courts of foreign states are documentary arguments which, while taking account of certain relevancy criteria, provide a possibility of deciding constitutional disputes more easily. The decisions of constitutional

courts of foreign states, even those perfectly fitting the situation considered by the Constitutional Court, are not granted the power of “persuasiveness” or “decision”,<sup>19</sup> the Constitutional Court is not bound in any way by their experience or their jurisprudence.

**2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?**

There is no such a tendency in the practice of the Constitutional Court of the Republic of Lithuania; belonging to a certain language area is not that criterion on the grounds of which one searches for the examples of case-law of the constitutional courts of foreign states. The cooperation peculiarities of concrete courts are determined by their belonging to the same legal system, the place of the courts with regard to judicial institutions and the nature of the applied material law. While searching for the relevant decisions of the constitutional courts of foreign states, one also takes account of the geographic vicinity, similarity of constitutional system, the situation which is decided and the circumstances of the case, the constitutional provision (a general one defending the human rights or any specific one) which is to be construed, the context of its application (the chosen foreign precedent is related to a concrete case or more general ones), etc.

**3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?**

Having analysed the examples of the Constitutional Court’s rulings in which one refers to the jurisprudence of constitutional courts of foreign states, it needs to be noted that most of such cases were in the spheres that could be at least hypothetically regulated in the similar manner or in which there is the greatest possibility to find an equivalent legal regulation in a foreign state. It needs to be noticed that usually one searches for the foreign constitutional jurisprudence while deciding the legal questions that are to be attributed to the sphere of constitutional law (the power of the Constitutional Court’s rulings, the questions of election law, independence of judges and courts), as well as to the sphere of civil law (the family concept, reduction of the awarded social benefits, etc.).

One of the examples when, in the course of the deciding of a case not only the jurisprudence of the ECtHR, but also the experience of constitutional courts of foreign states was analysed could be the aforementioned constitutional justice case in which it was decided regarding the constitutional concept of the family. The Constitutional Court’s ruling of 28 September 2011 referred not only to the previously discussed postulates about the concepts of the traditional and natural family formulated in the doctrine of the ECtHR, but also analysed the formed practice of

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<sup>19</sup> See more Maus Didier. Referring to Foreign Case Law and the Dialogue Between Constitutional Courts. *Konstitucinė jurisprudencija*, 2009, No. 4 (16), pp. 155–156.

most other states the constitutional courts whereof had also to answer the question what is considered as a family in their state. A separate item is designed in the ruling to present the practice of constitutional courts of foreign states. It is specified in the ruling that under the judgment of the Constitutional Court of the Czech Republic of 20 February 2007 (No. 568/06), legal protection as a family can also be enjoyed by a social group of persons living outside the institution of marriage, or a group of persons not related by blood, among whom there are nonetheless the abovementioned emotional and other ties (persons living together as mates, partners living together with a child that was born to one of the parents from another relationship, etc.); in its decision of 28 May 1998, the Constitutional Court of the Republic of Slovenia held that it is not possible to interpret the statutory provisions defining a family so that only a living community of two adults and a child is counted as a family, or so that a living community should lose the (legal) status of a family because of the loss of one of the parents, thus, it follows then that a living community of a mother with one or more children must be considered a family; in its ruling of 18 April 2007, the Constitutional Court of the Republic of Croatia noted that marriage and common-law marriage are constitutionally recognised family unions. The ruling assessed also the practice of the constitutional courts of foreign states which, as regards the family issue, differs from the aforementioned one: it noted that the Constitutional Court of Hungary had held that “marriage and family is the most fundamental and most natural community of the citizens forming the society” (decision of the Constitutional Court of Hungary of 26 February 1990 (No. 4/1990)) and that the state’s obligation of protecting the institutions of marriage and family as specified under Article 15 of the Constitution does not imply any obligation to protect the partnership forms outside the marriage bond (decision of the Constitutional Court of Hungary of 15 December 2008 (No. 154/2008)); in its decision of 29 July 2011 the Constitutional Council of the French Republic provided the interpretation to the effect that spouses, persons having concluded a partnership agreement, and those living in cohabitation have a different status, and held that the legal regulation under which the compensatory pension (*pension de reversion*) is granted exclusively to the spouse of a deceased person, and is granted neither to a cohabitant, nor a partner, is not in conflict with the Constitution; the jurisprudence of the Federal Constitutional Court of Germany (ruling of the Federal Constitutional Court of Germany of 9 April 2003 (No. 1493/96, 1724/01) and ruling of 20 September 2007 (No. 855/06)) was also analysed in the same ruling. The Constitutional Court of the Republic of Lithuania, having summarised in its ruling of 28 September 2011 that the construction of the concept of the family in the jurisprudence of the constitutional courts of the aforementioned foreign countries is not uniform, the family is defined by taking into consideration the plurality of forms of family life prevailing in society at a particular period of time, as well as the demographic, economic and social changes in the life of society, decided that, under the Constitution of the Republic of Lithuania, the family is the relationship of a man and a woman living together with or without concluding a marriage which is based on the permanent bonds of

emotional affection, reciprocal understanding, responsibility, respect, shared upbringing of the children and similar ones, as well as on the voluntary determination to take on certain rights and responsibilities. As it is obvious, while searching for the answer to the question raised by the petitioners what the family is, the Constitutional Court studied both the jurisprudence of other foreign states that is in line with its final decision and the jurisprudence that states the opposite, and only after it has drawn the general picture about the already existing solution to this problem, it gave its own answer.

A quite detailed analysis of the constitutions of foreign states and jurisprudence of their constitutional courts is carried out in the Constitutional Court's ruling of 25 October 2011 regarding the consequences of recognition of a legal act as being in conflict with the Constitution. It might be explained by the fact that in this case a question attributed namely to the sphere of constitutional law was decided which must have been assessed in one or another way by most constitutional courts. In this ruling, as in the previously discussed example, one sought to consider and to provide as a part of the ruling as much varied practice of foreign states illustrating the decided situation as possible. In the said constitutional justice case the petitioners impugned a provision of the Law on the Constitutional Court as non-permitting to prescribe whether the legal act which was recognised as being in conflict with the Constitution is no longer valid from its adoption, or from the day of the adoption of the Constitutional Court's ruling. In other words, the petitioners had an objective to find out whether, in Lithuania, the legal power of the Constitutional Court rulings may be retrospective. Before giving its answer, the Constitutional Court analysed the legal situation of foreign states. The ruling reviewed the provisions of the Constitution of the Portuguese Republic, the Federal Constitutional Law of the Republic of Austria, the Constitution of the Republic of Poland and the Constitution of the Republic of Slovenia which regulate the impact of the decisions of constitutional courts and the possibilities to apply them retrospectively, and the extracts from the 23 April 1992 decision (No. U-I-105/91) of the Constitutional Court of the Republic of Slovenia, the 3 November 1982 ruling (No. 620/78, 1335/78, 1104/79, 363/80), the 10 November 1998 decision (No. 1057/91, 1226/91, 980/91), the 4 December 2002 decision (No. 400/98, 1735/00) and the 6 March 2002 decision (No. 17/99) of the Federal Constitutional Court of Germany, the 25 February 1992 decision (No. 10/1992) of the Constitutional Court of the Republic of Hungary and the 21 December 2009 judgment (No. 2009-43-01) of the Constitutional Court of the Republic of Latvia, in which the interpretation of the corresponding constitutional justice institutions on the considered question, was provided. The same ruling also reviewed some provisions of the statutory regulation of certain states. While summing up the legal regulation of foreign countries and the practice of their constitutional courts in the ruling, one noted that in some of the states the provisions establishing in concrete cases the legal power of decisions of the constitutional courts in terms of the time aspect, *inter alia* as to when decisions of the Constitutional Court are effective retroactively (*ex tunc*), are *expressis verbis* entrenched in the Constitution (Austria, Poland,

Portugal), while in other states this is also regulated by the Law on the Constitutional Court (Germany, Slovenia, Spain), and in some of these states the right to establish, to a certain extent, as to when decisions of the Constitutional Court are effective retroactively (*ex tunc*) is conferred, by law, on the courts executing constitutional control (Greece, Hungary, Slovenia). While deciding regarding the legal power of the rulings adopted by the Constitutional Court, in this case it was maintained that from Paragraph 1 of Article 107 of the Constitution no obligation arises for the legislator to consolidate the legal regulation establishing that a legal act recognised as being in conflict with the Constitution is no longer valid from its entry into force. Thus, in this constitutional justice case the Constitutional Court did not directly decide the question of the retrospective power of its acts, but just noted that it is not necessary to establish in a law that the rulings of the Constitutional Court are effective retroactively. The interesting point is that the Constitutional Court actually came back to this question in another case in which it formulated certain provisions of the official constitutional doctrine regarding the retroactive power<sup>20</sup> of the Constitutional Court rulings, thus, one may reasonably state that the experience of the constitutional courts of foreign states collected in one constitutional justice case is not useless, as one uses it and refers to it in other similar considered cases, finally, by referring to it, one expands his legal horizon and deepens his general understanding of the knowledge of constitutional justice.

It has been mentioned that in the practice of the Constitutional Court one can find also such examples of rulings in which it is referred to the practice of constitutional justice institutions of non-European countries. In the Constitutional Court's ruling of 1 October 2008, the question of the exceptional right of political parties to nominate candidates in the multi-member constituency was decided. While searching for a solution in this constitutional justice case, one analysed the role of political parties and their public function to a large extent. In order to reveal and understand it properly, the Constitutional Court referred not only to the jurisprudence of the Constitutional Tribunal of the neighbouring Poland (the ruling of the Constitutional Tribunal of the Republic of Poland of 14 December 2004), but also to the US Supreme Court's ruling of 15 October 1968 in the case of *Williams v. Rhodes*, in which it was held that "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot, and thus denied an equal opportunity to win votes" and the Supreme Court of Canada's decision of 27 July 2003 in the case of *Figuroa v. Canada*, in which it was noted that "political parties have a much greater capacity than any one citizen to participate in the open debate and they act as a vehicle for the participation of individual citizens in the political life of the country". Having assessed the importance of political parties in public life, as it was done also in the aforementioned decisions of foreign states, in this ruling the Constitutional Court decided that the impugned legal regulation was not in conflict with the Constitution.

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<sup>20</sup> The Constitutional Court's decision of 19 December 2012.

#### **4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?**

It is rather difficult to answer unambiguously whether the rulings adopted by the Lithuanian Constitutional Court and the doctrinal provisions formulated therein influence the jurisprudence of constitutional courts of other states and how namely this influence is shown. As a rule, the Constitutional Court does not receive any information or references about the fact whether somebody has become acquainted with the constitutional doctrine formulated by it and referred to it, as well as how often and in which states it was done. Sometimes this comes to light when the justices meet each other in bilateral conferences with the representatives of other constitutional courts, sometimes it becomes clear when the Constitutional Court is addressed and requested concretely whether it has not formulated the constitutional jurisprudence on one or another topic.

As far as it is known, the Latvian Constitutional Court has referred to the interpretation and construction of the provisions of the Constitution provided in the rulings of the Lithuanian Constitutional Court for several times. It is possible to mention a few examples from which it is obvious in which spheres the Latvian Constitutional Court was inspired by the rulings of the Lithuanian Constitutional Court. In the Latvian Constitutional Court's judgment of 8 November 2006, in which the compliance of the legal regulation on the state pensions with the Constitution was assessed, one referred to the provisions of the Lithuanian Constitutional Court's ruling of 5 February 2005 to the effect that the legal regulation of social security depends on the material situation of the state and the legislator, while taking account of these factors, has freedom of discretion to decide what social benefits and to whom to award. In another case on the pensions of state officials in which the decision of 4 January 2007 was adopted, the Latvian Constitutional Court quoted the Constitutional Court's ruling of 23 April 2002 concerning the state pensions of prosecutors and soldiers, in which it was emphasised that in passing laws under which pensions are granted, one must follow the principle of equality of persons before the law which obliges one to legally assess the homogeneous facts in the same manner and prohibits from the arbitrary assessment of the facts that are the same in essence, in a different manner; it also needs to be noted that this principle allows one to provide, by law, for different legal regulation in respect to certain categories of persons who are in different situations and that the variety of social life may determine the manner and content of legal regulation. The Latvian Constitutional Court also took account of the conclusion made in that ruling of the Lithuanian Constitutional Court to the effect that while establishing the procedure of calculation and recalculation of state pensions for the officials and soldiers for service, the legislator differentiates this procedure while taking account of different conditions of service, the formerly valid legal regulation of pensionary maintenance, the held post, the period of service, the category, the education etc., and recognised such legal regulation as complying with the Constitution. The Latvian Constitutional Court, *inter alia* having acquainted with the jurisprudence of the Lithuanian Constitutional Court, has drawn a conclusion

that the social benefits which are awarded in certain cases to the different groups of people, while taking account of the circumstances, do not violate the principle of equal rights. This example obviously shows the fact that in certain cases the constitutional courts of several states really consider the cases of rather similar nature, thus, the familiarisation with the constitutional jurisprudence of neighbouring states is very meaningful. In the sphere of social security, the Latvian Constitutional Court's judgment concerning the old age pensions of 1 January 2007 referred to the Lithuanian Constitutional Court's ruling of 25 November 2002 and its provisions regarding the protection of the rights of ownership.

In addition to the constitutional justice cases in the sphere of social security, the Latvian Constitutional Court has quoted the rulings of the Lithuanian Constitutional Court while deciding a case in which it *inter alia* construed the principle of the independence of courts and judges: the Latvian Constitutional Court's judgment of 5 November 2004 concerning the lay judges appointed to deputise the judge quoted the provisions of the Lithuanian Constitutional Court's ruling of 21 December 1999 regarding the appointment of judges, in which it had been emphasised that the independence of judges and courts is one of the essential principles of a democratic state under the rule of law and that the duty of the courts, while administering justice, is to ensure the implementation of rights consolidated in the Constitution and laws and to protect the human rights and freedoms. The same judgment also referred to the Lithuanian legal regulation which does not yet provide for the institute of lay judges in general. However, the interesting point is that one day the possibility to consolidate the institute of assessors in the legal system had been widely discussed in Lithuania, therefore, it might happen that one day such a situation may appear when the Lithuanian Constitutional Court, if it assesses the compliance of the introduction of the institute of lay judges with the Constitution, will search for the experience of the Constitutional Court of neighbouring Latvia on that question. The neighbouring State of Latvia, similarly as Lithuania, having regained its independence faced the problem of the restitution of the rights of ownership, thus, it is not difficult to understand that a lot of complaints related to this problem reached their courts, including the constitutional courts. Such cases were also considered by the Lithuanian Constitutional Court which held in its ruling of 20 June 1995 that neither the Supreme Council of 1990, nor the executive authorities formed by it were responsible for the occupation of Lithuania carried out half a century before and its consequences, thus, the Supreme Council had an unquestionable right to choose how the problem of the restitution would be solved and it chose a limited restitution; and this statement of the Lithuanian Constitutional Court was quoted in the Latvian Constitutional Court's judgment of 1 December 2002 concerning the compliance of the Law on Land Reform with the Constitution.

According to the representatives of the Polish Constitutional Tribunal, in the final texts of the final acts adopted by them no concrete ruling of the Lithuanian Constitutional Court is mentioned, however, these rulings are read in the stage of preparation of the case, they are

referred to in order to make certain generalisation that is presented to the justices that consider the cases. There were cases in the rulings of the Polish Constitutional Tribunal when the Lithuanian legal regulation was analysed while seeking to illustrate a certain decided situation.

The Constitutional Court of the Czech Republic, while deciding a case concerning restoration of the rights of ownership for churches, in its ruling of 1 July 2010 noted that in the jurisprudence of constitutional courts of other states (including Lithuania) one emphasises the historic role of churches in society. The Lithuanian Constitutional Court's ruling of 13 June 2000 was specified as one of the sources of such a statement.

#### **5. Are there any forms of cooperation going beyond the mutual acknowledgment of court decisions?**

The justices of the Lithuanian Constitutional Court not only are interested in the jurisprudence of constitutional courts of other states but have also started the informal cooperation of other forms with the colleagues from the constitutional courts of foreign states. The Constitutional Court of the Republic of Lithuania has the closest relations with its neighbours, the Latvians and the Polish with whom the justices regularly meet during the bilateral annual conferences.

The cooperation on the professional ground with the Polish Constitutional Tribunal has already lasted for twenty years, as from the very establishment of the Constitutional Court. The delegation of the Constitutional Court was invited to Warsaw to get acquainted with the work of the Constitutional Tribunal in July 1993. Being established in 1985, it had already gained quite some experience. From the informal meetings in the first years, quite soon it was decided to organise the bilateral conferences, and up to now already sixteen such conferences have taken place. In those conferences the reports were presented and the participants discussed on the topics chosen in advance, reviewed the most important constitutional justice cases, shared the experience. The topic of the conference is usually chosen by the court organising the conference and this topic is relevant for the work of both courts, as, for instance: the problems of interpretation of constitutional norms, final acts of institutions of constitutional control and their impact upon the decisions of courts of general jurisdiction, the development of constitutional principles in the constitutional jurisprudence, the relation between the constitutional courts and courts of general jurisdiction, the constitutional grounds of activity of parliamentary investigation commissions, the budget and public finance as constitutional values, the budgetary competence of the parliament, the construction and interpretation of law, the constitutional grounds of natural environmental protection, property and the protection of property, the protection of the right to information, the constitutional grounds of economic freedom, social rights, and the grounds of the construction of constitutional justice acts. In the relations of cooperation of the Polish Constitutional Tribunal and the Lithuanian Constitutional Court, there appeared also the traditions of informal and friendly communication: the

guests from Poland always participate in the official ceremony of farewell with the justices of the Constitutional Court whose term of office has expired and the official welcome of the justices whose term of office has just begun, and from the year 2003 the President and justices of the Lithuanian Constitutional Court are permanently invited to come to Warsaw and to participate in the events of commemoration of the Constitution of 3 May 1971.<sup>21</sup> Not only the justices, but also the employees of the apparatus of the Constitutional Court go to the Constitutional Tribunal to share their work experiences.

Similar and very friendly relations of mutual formal and informal cooperation have been established also with another neighbour—the Latvian Constitutional Court. Bilateral meetings that later became bilateral conferences have been organised since the establishment of the Latvian Constitutional Court in 1996. The following topics have been chosen for the conferences: the role of constitutional courts in the context of the membership in the European Union (the relation of the competences of the Court of Justice of the European Union and the constitutional courts of the Member States), the protection of the fundamental social rights of a person (*inter alia* the right to pension), the *ultra vires* conception and its application, the constitutional aspects of environmental protection, the problems of election law in the constitutional jurisprudence, the constitutional control in the field of state finances, legitimate expectations (legal certainty), the equality of persons, the rule of law, the due process of law, and the right to a fair trial. During the conferences the most important problems of jurisprudence of the Lithuanian and Latvian constitutional courts are also reviewed and other relevant questions of constitutional justice are discussed.

In September 2012 in Vilnius the first bilateral conference of the justices of Lithuanian and Ukrainian constitutional courts took place. On 24 October of the same year the memorandum between the Constitutional Court of the Republic of Lithuania and the Constitutional Court of Ukraine was signed regarding the development of cooperation whereby they agreed to maintain and develop their relationship, to organise in rotation the bilateral meetings of their representatives on the questions of constitutional justice relevant to both countries, to exchange the adopted decisions, opinions, rulings, as well as the legal material, scientific and experts' researches, to organise the mutual visits of their representatives in order to gain the experience of activity, exchange information and share work experience on the level of their structural units.

The Lithuanian Constitutional Court is also related with the constitutional courts of other states, even though the relations are not so permanent and have no permanent traditions. The delegations of justices of constitutional courts of various countries visit the Constitutional Court. During such visits also the meetings of justices of two states take place in which one inevitably shares the information about the recently adopted rulings, considered problems and formulated

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<sup>21</sup> The Basic Law of the Polish-Lithuanian Commonwealth adopted by the Four-Year Seimas. This Constitution is considered as the first European Constitution and the second written Constitution in the world after the Constitution of the United States of America of 1787. In the honour of this Constitution, the 3rd of May is a national holiday in Poland.

doctrinal provisions. For example, in 2004, the delegation of justices of the Armenian Constitutional Court and the justices from the Hungarian Constitutional Court visited our Constitutional Court, the justices from the Czech Constitutional Court paid their visits in 2005 and 2007, whereas in 2007 also a delegation of the justices of the Supreme Court of Israel and the justices of the Constitutional Court of the Republic of Croatia were also welcomed, in 2007 the justices from the Constitutional Courts of Portugal and Slovenia visited our Constitutional Court, and in 2009 we met the representatives from the Romanian Constitutional Court.

The Constitutional Court organises multilateral international scientific conferences during which meetings take place and experience is exchanged on the concrete questions of constitutional justice with the representatives from the constitutional courts of other states. In this context the most recent conference might be mentioned which took place on 5 September 2013 and was held on the occasion of the 20th anniversary of the Constitutional Court. The representatives from the institutions of constitutional justice from 15 foreign countries, and not only from the neighbouring ones, but also from more distant states of Europe and Eastern Asia, participated in this event, they discussed on the relation between national and international law. The justices of the Lithuanian Constitutional Court also actively participate in the conferences held on various occasions by other foreign countries, present their reports and bring back new ideas for the decision of constitutional justice cases from them.

Finally, one must note that the Constitutional Court of the Republic of Lithuania is a member of the European Commission for Democracy through Law (the Venice Commission) which actively participates in the Venice Forum that is namely intended for the courts to communicate with each other and to get the information on various considered cases of constitutional justice easier. While preparing the constitutional justice cases for judicial consideration, one widely refers to the database of constitutional jurisprudence CODICES which is created and administered by this Commission, in which the most important decisions of the institutions of constitutional justice of most states of the world and their summaries in English and French can be found. The most important decisions of the Constitutional Court and their summaries are also sent to this database.

The benefit of such mutual cooperation of courts and justices is undoubted. The regular dialogue between the justices which takes place during the bilateral and multilateral meetings and conferences strengthen the interrelations between the institutions of constitutional justice, contributes to the improvement of qualification of justices and grants the possibility to exchange jurisprudence. The justices may share experience, discuss relevant questions of constitutional jurisprudence and search for the ways to solve the difficult problems that arise in constitutional justice cases. If in the constitutional jurisprudence there are no proper legal precedents which could help to decide the case, it is very useful to ascertain what arguments were used and what decision was adopted in a similar situation by the constitutional justice institutions of other states with similar constitutional values. The continuous dialogue of justices and the possibility to use

various databases of the decisions of institutions of constitutional justice create the conditions for the court to take account of the practise of courts of foreign states and international courts and to take over the best practice.

### **III. Interactions between European courts in the jurisprudence of constitutional courts**

The European Convention on Human Rights and the international mechanism of the protection of human rights created on the ground of it is considered to be the oldest and most effective, and the judgments of the European Court of Human Rights—absolutely one of the most authoritative sources of the formation and development of the jurisprudence in the field of the protection of human rights. The fundamental rights and the protection of human rights are undeniably considered also as a constituent part of the general principles of the EU law and are defended by the Court of Justice of the European Union. Upon coming into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights of the European Union acquired the compulsory legal power; it consolidates the human rights which partially include those rights that have previously been defended by the provisions of the Convention. Thus, if there is a possibility for the competence of the ECtHR and the CJEU to coincide, it is obvious that the intersection of their jurisprudences is inevitable; there have already been such cases in practice. Different construction of the same rights is certainly problematic for the Member States and their institutions, including courts, to which both the judgments of Luxembourg and the judgments of Strasbourg are compulsory.

#### **1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?**

There have not been any cases in the practice of the Constitutional Court when in the procedure of preparation of a case one faced such judgments of the ECtHR in which the references are provided to the EU law or the judgments of the CJEU and that would be significant for the case decided by the Constitutional Court, therefore, it would be fair enough to state that such a situation does not have any direct impact on the final acts adopted by the Constitutional Court. As it has been mentioned on more than one occasion in this report, both the jurisprudence of the ECtHR and the jurisprudence of the CJEU are an important source of construction of law when the Constitutional Court considers constitutional justice cases. Therefore, if one found the references in the judgments adopted by one of them, let us say the ECtHR, to the judgments of another authoritative court, one could get the more detailed picture of the situation and to refer to the position of both courts in the national practice. That, by the way, has happened: in the practice of the Constitutional Court there are examples of the rulings referring to the jurisprudence formed

on the corresponding question by both the ECtHR and the CJEU (for example, the Constitutional Court's ruling of 27 February 2012 on Awarding and Limitation of Maternity Benefits), however, it was not determined by the fact that in the jurisprudence of the ECtHR the references to EU law would be used.

## **2. How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?**

In addressing the inverse situation, i.e. the influence of national constitutional courts on the relationship between the ECtHR and the CJEU, one is led to believe that this influence should be indirect, more of the type that permits the supranational courts to acquire understanding in what way the common constitutional values are construed in the constitutional doctrines of different countries. Both the ECtHR and the CJEU consider applications filed by Member States and their citizens. From the time when the Charter on Fundamental Rights of the European Union, which defends human rights, assumed an obligatory legal force, certain situations are possible when the same human right can be defended both under the provisions of the Charter and those of the Convention; thus, an application concerning a respective question can be considered by the court in Strasbourg as well as the court in Luxembourg. In seeking to better understand a problem faced by the applicants and to find out in what way the contents of the defended right is defined in the state concerned, these courts will inevitably have to become familiar with the jurisprudence of the Constitutional Court of that country. It might also be possible that, in the event of certain divergences between the decisions of the ECtHR and the CJEU, a doctrine formulated by a certain national Constitutional Court could help these courts to reach a necessary compromise solution. As there are no such cases in the practice of the Constitutional Court of Lithuania, in this respect it would be possible to discuss only the implicit influence of the Constitutional Court on the ECtHR and the CJEU, and only the influence on each of these courts taken separately, which has already been done in the previous part of this report.

## **3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?**

As mentioned before, when preparing constitutional justice cases for judicial consideration, the Constitutional Court, as a rule, examines the case-law of both the ECtHR and the CJEU in relation to the case under preparation. If there are any differences regarding the examined issue between the jurisprudence of the CJEU and the jurisprudence of the ECtHR, these differences are usually determined at the stage of the preparation of the case. In most cases such differences in the jurisprudence between the two supranational courts are not reflected in the text

of a ruling adopted by the Constitutional Court: in deciding a constitutional justice case, the Constitutional Court, as a rule, opts to draw on and follow the jurisprudence of that court whose jurisprudence better responds to the position formulated by the Constitutional Court. Other situations, however, are also possible, as, for example, when in a ruling of the Constitutional Court consideration may be given to the case-law formulated by both international courts in order to comprehensively provide the international context relevant to the case and to demonstrate that even the jurisprudence of the European courts gives no unequivocal answer for the solution of the constitutional justice case under consideration. In such a case the Constitutional Court will, while making a final decision, follow the case law of the supranational court that more closely corresponds to its own view.