BERICHTE UND URKUNDEN

Opinion of the Constitutional Court of Lithuania in the Case Concerning the Conformity of the European Convention on Human Rights with the Constitution of Lithuania

*Vilenas Vadapalas**

On May 14, 1993 Lithuania signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) and the Protocols No. 1, 4 and 7 thereto. It became evident that Lithuanian legislation, which in part was inherited from the old Soviet system, should be brought into conformity with the provisions of the Convention.

On February 11, 1994 the President of the Republic of Lithuania established the Working Group for the analysis of the conformity of the provisions of the ECHR with the Constitution of the Republic of Lithuania. On the basis of the proposals made by a Working Group, the President of Lithuania addressed the Constitutional Court with a petition for a determination as to whether Arts. 4, 5, 9 and 14 of the ECHR and of Art. 2 of Protocol No. 4 to the ECHR are consistent with the Constitution of Lithuania.

According to Art. 105 of the Constitution of Lithuania[1] the Constitutional Court is entitled to present opinions concerning the conformity of international treaties of Lithuania with the Constitution. The Seimas (Par-

* Dr. jur., Chairman of the Department of International and Constitutional Law at Vilnius University. *Ad hoc* expert of the Constitutional Court of Lithuania in the present case.

[1] For the English text of the Constitution of the Republic of Lithuania see: Parliamentary Record/Seimas of the Republic of Lithuania, 1992, No.11, 2–30. It should be noted that the English versions of the texts of legal instruments reproduced in the Parliamentary

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

liament) and the President may request an opinion from the Constitutional Court in cases concerning international treaties (Art. 106 of the Constitution). However, a final decision regarding the consequences of possible nonconformity lies within the competence of the Seimas.

1. Content of the Petition

The President's Petition that the Constitutional Court decide whether or not the provisions of the ECHR or Protocols thereof are inconsistent with the Constitution was intended to initiate the procedure for amending the Constitution. The President concluded in this Petition that comparative analysis of some corresponding articles of the Convention and Protocols thereto and of the Constitution shows their inconsistencies. Furthermore, the President pointed out that:

> "the Republic of Lithuania having once ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms could not fulfill its international obligations since Art. 7 of the Constitution of the Republic of Lithuania stipulates that 'any law or other act which contradicts the Constitution shall be invalid.'"[2]

1.1. First point of the Petition: Nonconformity of Art. 4 paragraph 3a of the ECHR with Art. 48 of the Constitution.

The wording of the corresponding texts is as follows:

ECHR, Art. 4 (extract)

> 2) No one shall be required to perform forced or compulsory labour.
>
> 3) For the purpose of this Article the term "forced or compulsory labour" shall not include:
>
> a) any work required to be done in the ordinary course of detention imposed according to the provisions of Art. 5 of this Convention or during conditional release from such detention;
>
> (...)

Constitution, Art. 48 (extract)

> Labour which is provided by law for persons convicted by a tribunal shall not be deemed as forced labour either.

Record are unofficial. This article does not necessarily follow these texts; relevant texts and the extracts of the Conclusion of the Court were translated by the author of this article.

[2] See: Lietuvos Respublikos Konstitucinio Teismo Isvada "Del Europos Zmogaus teisiu ir pagrindiniu laisviu apsaugos konvencijos 4, 5, 9 ir 14 straipsniu ir jos Ketvirtojo protokolo 2 straipsnio atitikimo Lietuvos Respublikos Konstitucijai", Valstybes Zinios 1995, No. 9, § 199, 22–30. The English text of the Conclusion will be published in Rulings and Decisions of the Constitutional Court of the Republic of Lithuania, Vol. 4.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

The President's opinion: The Constitution provides that every criminal penalty may include the duty of a convicted person to work. This principle is implemented *inter alia* by Art. 29 of the Penal Code which provides for correctional work as a criminal penalty. According to the President:

> "[t]he rule laid down by the Convention provides for a duty to work only in the ordinary course of detention or during conditional release from detention. Thus, the rule provided for by the Convention is shorter in its content than that of the Constitution, allowing for the conclusion that Art. 4 paragraph 3a of the Convention is incompatible with Art. 48 section 5 of the Constitution."

1.2. Second point of the Petition: Nonconformity between Art. 5 paragraphs 3 and 4 of the ECHR and Art. 20 of the Constitution. The corresponding texts have the following content:

ECHR, Art. 5 (extract)

> 3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. (...)
>
> 4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Constitution, Art. 20 (extract)

> A person arrested *in flagrante delicto* must, within 48 hours, be brought to court for the purpose of determining, in the presence of the detainee, the validity of the detention.

The President's opinion: Firstly, the ECHR established a procedural guarantee which is broader than that of the Constitution as it states that every arrested or detained person shall be brought before a court, whereas the Constitution deals only with a person arrested *in flagrante delicto*. Secondly, Art. 5 paragraph 4 of the Convention stipulates that a judge should decide on the lawfulness of the arrest, whereas according to the Constitution the court must determine the validity of the arrest. This difference is essential, since a lawful arrest is always valid *per se*, while a valid arrest may be unlawful. Thirdly, it is doubtful whether the term "promptly" as used in the Convention is consistent with the rule of 48 hours provided for by the Constitution. All of this allows for the conclusion that the rules established by Art. 5 paragraph 4 of the Convention are inconsistent with Art. 20 of the Constitution both in content and scope.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

1.3. Third point of the Petition: Nonconformity of Art. 9 paragraph 2 of the ECHR with Art. 26 of the Constitution.

The corresponding texts read as follows:

ECHR, Art.9 (extract)

2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Constitution, Art. 26 (extract)

A person's freedom to profess and manifest his or her religion or beliefs may be subject only to those limitations prescribed by law and only when such restrictions are necessary to protect the safety of society, public order, a person's health or morals, or the fundamental rights and freedoms of others.

The President's opinion: Art. 9 paragraph 2 of the Convention allows only restrictions on a freedom to manifest religion or belief, while Art. 26 of the Constitution stipulates that a freedom to profess and manifest religion or belief could be restricted. "It should be noted that the Convention, as well as the Constitution, distinguishes between the freedom to profess and freedom to manifest religion or beliefs as two different freedoms allowing for the conclusion that the Convention does not provide for the possibility to restrict a freedom to profess [religion or beliefs]. Therefore the conclusion should be drawn that Art. 9 paragraph 2 of the Convention by its extent contradicts section four of the Art. 26 of the Constitution."

1.4. Fourth point of the Petition: Nonconformity between Art. 14 of the ECHR and Art. 29 of the Constitution. The corresponding texts are the following:

ECHR, Art. 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Constitution, Art. 29 (extract)

A person may not have his rights restricted in any way, or be granted any privileges, on the basis of his or her sex, race, nationality, language, origin, social status, religion, convictions, or opinions.

The President's opinion: "The Convention prohibits only so called 'negative' discrimination, while the Constitution prohibits both – 'negative' and 'positive' (granting of privileges) discrimination. In addition, the Convention provides a more extensive list of grounds of discrim-

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

ination. The Constitution does not mention 'colour' or 'association with a national minority'. These two aspects allow for the conclusion that Art. 14 of the Convention is inconsistent in its extent with section two of Art. 29 of the Constitution."

1.5. Fifth point of the Petition: Nonconformity between Art. 2 of Protocol No. 4 to the ECHR and Art. 32 of the Convention. The corresponding texts are the following:

Protocol No. 4 to the ECHR, Art. 2 (extract)

1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Constitution, Art. 32 (extract)

Citizens may move and choose their place of residence in Lithuania freely, and may leave Lithuania at their own will.

The President's opinion: Art. 2 of Protocol No. 4 to the ECHR provides for everyone's right of liberty of movement and freedom to choose residence, whereas the Constitution limits freedom of movement only to citizens. Thus Art. 2 of Protocol No. 4 is inconsistent with Art. 32, section one of the Constitution.

2. *The Opinion of the Constitutional Court*

The Opinion of the Constitutional Court of January 24th, 1995 is the first opinion of the Constitutional Court of Lithuania.[3] Since the Court began its activities in early 1993 it issued only rulings concerning the conformity of laws and other legal acts with the Constitution. The difference between the rulings and the opinions of the Constitutional Court consists of the different binding force of such acts of the Court: a ruling precludes an application of the law or other act (or part thereof) which, according to this ruling, is inconsistent with the Constitution, and has the power of

[3] Art. 105, section 3, of the Constitution stipulates: "The Constitutional Court shall present opinions concerning:

1) the violation of election laws during presidential elections or elections to the Seimas;

2) whether the President of the Republic of Lithuania's health is not limiting his or her capacity to continue in office;

3) the conformity of international treaties of the Republic of Lithuania with the Constitution; and

4) the compliance with the Constitution of concrete actions of Seimas members or other State officers against whom impeachment proceedings have been instituted."

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

law (Art. 72 sections 1 and 2 of the Law on the Constitutional Court[4]). As far as an opinion is concerned, it has the force of a recommendation, since Art. 107 section 3 of the Constitution states that "on the basis of the opinions of the Constitutional Court, the Seimas shall have a final decision (...)."

The Opinion of the Court may be divided into six parts. The first part is devoted to the question of applicability of international treaties and of the ECHR, in particular, in the Lithuanian domestic legal system; the remaining five parts answer the points of the President's Petition.

1. The Relationship between International Treaties and the Lithuanian Legal System

The analysis of the general question of assimilating international treaties into the Lithuanian domestic legal system made by the Constitutional Court is of great importance to Lithuanian judicial practice. This question has never been raised before by any Lithuanian courts, including the Constitutional Court.[5] In general, Lithuanian courts have been rather conservative in changing their traditional jurisprudence based exclusively on domestic law sources. The novelty of the issue may also be due to the fact that provisions of Lithuanian domestic law still have some unresolved contradictions in this area.

The Law on International Treaties of the Republic of Lithuania of May 21, 1991[6] provided for the monistic approach of the Lithuanian legal

---

[4] For the English text of the Law on the Constitutional Court see: Parliamentary Record/Seimas of the Republic of Lithuania, 1993, No. 3, 2–28.

[5] Notwithstanding that Lithuania was not yet a State Party to the ECHR, the 1994 Constitutional Court in two rulings referred to the ECHR and the case-law of its organs. In the *Case concerning the Compliance of the Law of the Republic Lithuania on Appending and Amending the Law on the Procedure and Conditions of the Restoration of the Rights of Ownership to Existing Real Property* (Ruling of 27 May 1994) the Court, referring to Art. 17 of the Universal Declaration of Human Rights and Art. 1 of the First Protocol to the ECHR, concluded, that "the right to possess property is one of the most significant human natural rights, and a person may not be arbitrarily deprived of it" (Rulings and Decisions of the Constitutional Court of the Republic of Lithuania, Vol. 2, 79). Dealing with the right of an arrested person to a defense in the *Case concernig the Compliance of Art. 58 section 2 paragraph 3 of the Code of Penal Procedure with the Constitution of Republic of Lithuania* (Ruling of 18 November 1994) the Court referred to Art. 6 of the ECHR and to the Judgement of the European Court of Human Rights in the *Campbell and Fell* v. *United Kingdom* (1984) case (Valstybes Zinios, 1994, No. 91, 42–43).

[6] For the English text of the Law on International Treaties of the Republic of Lithuania see: Parliamentary Record/Seimas of the Republic of Lithuania, 1992, No. 5, 2–5.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

system to the relationship between international treaties and domestic laws. Art. 12 thereof provided that "[i]nternational treaties of the Republic of Lithuania shall have the force of law on the territory of the Republic of Lithuania." This provision means that, first, the international treaties of Lithuania are directly applicable under Lithuanian law, and second, international treaties and the laws of Lithuania are on the same level. Nevertheless, it does not give any answer to the question of superiority in the relationship between treaties and Lithuanian domestic laws. It might also be noted that Lithuanian legislation does not contain any provision concerning the relationship between general international and domestic law. Moreover, there is still no Lithuanian case-law on this issue.

The Constitution of the Republic of Lithuania adopted by the Referendum of October 25, 1992 chose a more limited but nevertheless general monistic approach to international treaties, speaking only about ratified international treaties. Art. 138 section 3 of the Constitution sets forth that "[i]nternational treaties which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania."

It seems, according to this article, that treaties which do not need the ratification have no direct effect on Lithuanian law without a separate domestic enactment or amendment (transformation).[7] In any event, without the appropriate amendments to the Law on International Treaties of 1991, the question of the legal effect of such treaties still appears unresolved.[8]

It should also be noted that the contradiction between Art. 12 of the Law on International Treaties, providing for a general monistic approach to all international treaties, and Art. 138 of the Constitution, limiting this

---

[7] Except the treaties which have entered into force without ratification before the new Constitution was adopted. All such treaties should have a force of law according to the Law on International Treaties of 21 May 1991. For example, on 12 March 1991 the Parliament enacted the Resolution stipulating that it "decides to accede to the International Covenant on Economic, Social and Cultural Rights, to the International Covenant on Civil and Political Rights and to the Optional Protocol of the International Covenant on Civil and Political Rights." This Resolution of accession does not contain formal ratification of these international instruments. See: Lietuvos Respublikos Aksciausiosios Tarybos ir Lietuvos Respublikos Prezidiumo dokumentu rinkinys, T. 3, Vilnius: Valstybinis leidybos centras, 1991, 25–26.

[8] Art. 12 of the Draft Amended Law on International Treaties prepared in 1994 by the Legal Department of the Ministry of Foreign Affairs of Lithuania stipulates:

"The international treaties of the Republic of Lithuania which are entered into force have binding force in the Republic of Lithuania.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

approach only to ratified treaties, has not yet been resolved due to the fact that the Law on the Procedure for the Enforcement of the Constitution of the Republic of Lithuania of 6 November 1992 stipulates in Art. 2 that

> "[l]aws, other legal acts, or parts thereof which were in force on the territory of the Republic of Lithuania, shall be effective provided that they do not contradict the Constitution and this Law, and shall remain in force until they are declared invalid or coordinated with the provisions of the Constitution."[9]

Starting with an examination of the legal nature of the provisions of the ECHR and referring to its Art. 1[10] the Court states as follows:

> "Therefore every State should effectively implement the provisions of the Convention (or protocols thereto which this State has ratified) with the aim of fulfilling fully its obligations undertaken under the Convention.
>
> This general principle is directly linked with the relationship between international and internal (national) law of States in general, and in particular with the problem of human rights and freedoms. At present, the so-called parallel system of harmonisation of international and internal law, based on the principle that international treaties are transformed (incorporated) into the internal law of a State, is probably the most common in Europe. Such a method of implementation of international treaties is provided for by the Constitution of the Republic of Lithuania as well.
>
> The European Convention for the Protection of Human Rights and Fundamental Freedoms is a particular source of international law whose aim differs from the aims of other international legal instruments. This aim is universal – to seek that the rights proclaimed in the Universal Declaration of Human

---

International treaties of the Republic of Lithuania in force which are ratified by the Seimas of the Republic of Lithuania have legal force of laws in the Republic of Lithuania.

When an international treaty of the Republic of Lithuania which is ratified and entered into force provides for rules which differ from the laws of the Republic of Lithuania, the provisions of the international treaty of the Republic of Lithuania shall apply.

When an international treaty of Lithuania which is in force and does not require ratification provides for rules which differ from the regulations of the Republic of Lithuania, the provisions of the international treaty shall apply."

I think that such a provision differentiating between treaties requiring ratification and other treaties would create an unjustified difference of legal force of treaties in domestic law. Therefore, it seems that the fourth part of this Draft Article should be withdrawn; the first part might be clarified by amending it with the formula "and are directly applicable in the Lithuanian legal system."

[9] For the English text of the Law on the Procedure for the Enforcement of the Constitution of the Republic of Lithuania see: Parliamentary Record/Seimas of the Republic of Lithuania, 1992, No. 11, 30–31.

[10] Art. 1: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

> Rights should be universally and fully recognized and respected in the protection and implementation of human rights and fundamental freedoms. In this respect the Convention plays the same role as the constitutional guarantees of human rights; the Constitution provides for such guarantees within the country, whereas the Convention does it on an international level."

It should be noted that the general remark made by the Court about transformation as a method of implementation of international treaties recognized by the Lithuanian Constitution is correct in the sense that the act of ratification of a treaty incorporates it into the Lithuanian legal system (Art. 138 of the Constitution provides that "international treaties which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania" [emphasis added]. Speaking more exactly, this method of domestic implementation of treaties is, rather, an adoption, which means that ratified treaties have direct effect on the Lithuanian legal system without a separate domestic enactment or amendment of domestic laws (i.e. transformation). In other words, ratified international treaties should be directly applicable under Lithuanian law. As for the prevailing method of domestic implementation of the ECHR in Europe, it should be added with respect to the remark made by the Court about "the parallel system of harmonisation of international and internal law" that, as far as the States Parties to the ECHR are concerned, the treaty provisions are applied as municipal law in most of these States.[11]

The Constitutional Court found that the above-mentioned provision of Art. 138 of the Constitution about the incorporation of a ratified treaty into the Lithuanian legal system "means with regard to the Convention that, when ratified and entered into force in Lithuania, it will form a constituent part of the legal system of the Republic of Lithuania and should be implemented as the law of the Republic of Lithuania. Its provisions correspond to the level of laws in the system of the sources of law of the Republic of Lithuania, since Art. 12 of the Law on International Treaties of the Republic of Lithuania stipulates that 'the international treaties of the Republic of Lithuania shall have the force of law on the territory of the Republic of Lithuania.'"

---

[11] See: J.A. Frowein, European Convention on Human Rights (1950), in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Inst. 8 (1985), 185; The Convention and Domestic Law, in: R.St.J. Macdonald/F. Matscher/H. Petzold (eds.), The European System for the Protection of Human Rights, 1994, 28–29.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

The Court reaffirmed the well-known general conclusion of the European Court of Human Rights that the ECHR does not provide for how States Parties are to implement internally the relevant obligations undertaken under the Convention.[12] With regard to the means of implementation of the provisions of the ECHR, the Constitutional Court has referred to Art. 13[13] of the ECHR and pointed out:

"Therefore, State law-enforcement bodies should directly apply the norms of the Constitution, as well as implement the provisions of the Convention. Such provisions should become a constituent part of internal law, and there should be no room for obstacles as to their application by the courts and other law-enforcement bodies.

Besides, it should be emphasised that the Convention does not require, as this would be impossible, that the norms of internal law of a State should be identical in their wording with the content of the norms of the Convention. Furthermore, the Convention does not strictly stipulate the means by which the rights and freedoms established by the Convention should be implemented. Here, it is very important to determine so-called margins of appreciation, i.e. to establish sufficiently effective legislative protection of the rights defined by the Convention. The State bodies determine such 'margins of appreciation' in the framework of jurisdiction granted to them by the Constitution. (...)

Nevertheless, the provisions of Sections two, three, four and five of the Convention mean without any doubt that the rules of the Convention should really be implemented, and a breach of rights and freedoms it guarántees can not be justified by invoking the fact that the laws of a State provide otherwise. Such an operation of the provisions of the Convention is due to the fact that a State Party to the Convention must secure the application of the rules of the Convention in its internal legal system. However, international treaties, as well as this Convention, operate differently in different areas of legal life. Concrete means and forms of their implementation are provided for by the laws of the Republic of Lithuania. Civil law provides for the direct applicability of international treaties in the form of the resolution of their collision with the norms of the laws of the Republic of Lithuania in the following way: if international treaties of the Republic of Lithuania prescribe rules other than those established by the laws of the Republic of Lithuania, the provisions of the relevant international treaty shall apply (Art. 606 of the Civil Code and Art. 482 of the

---

[12] *Swedish Engine Drivers' Union* case, Judgement of 6 February 1976, Publications of the European Court of Human Rights, Series A, 1976, Vol. 20, 18.

[13] Art. 13: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Code of Civil Procedure). In criminal law such a method of resolving the collision of norms is not applied. In such cases the criminal laws and laws of criminal procedure of the Republic of Lithuania are directly applicable, and international treaties are directly applicable only in cases provided for by such laws (Art. 7(1) of the Penal Code and Arts. 20, 21, 21(1), 21(2), 22, 22(1) and 22(2) of the Code of Penal Procedure). If in the case of application of penal law there are doubts about the possibility of enforcement of human rights guaranteed by the Convention, the question should be resolved by means of constitutional review, asking whether or not the law contradicts the Constitution. On the other hand, the rights provided by the Convention can not be ensured directly without applying the internal legal instruments. In other words, if only the direct applicability of the Convention were recognized, the above-mentioned rights could not be ensured, as the Convention itself establishes neither the means of implementation of such rights in States where the Convention was ratified nor the responsibility of the authors of breaches of rights; the necessary procedures and a special jurisdiction of the law-enforcement bodies are not established either. Here the rule *ubi jus ibi remedium* is clearly applicable: when the law establishes a right, it provides for a remedy to protect it. Such remedies in the legal system of a State are established by the laws of this State. The Convention provides for such remedies only for cases when the dispute concerning the established rights becomes a matter of international jurisdiction."

The conclusion which could be drawn according to the reasoning of the Court is that Art. 138 of the Constitution provides for the incorporation of international treaties into the Lithuanian legal system by way of ratification; this gives the ECHR the legal force of law (according to the Court: "[...] when ratified and entered into force in Lithuania it will form a constituent part of legal system of the Republic of Lithuania and should be implemented as the law of the Republic of Lithuania.") If this is so, it is unclear why the Court concluded that "if in the case of application of penal law there are doubts about the possibility of enforcement of human rights guaranteed by the Convention, the question should be resolved by means of constitutional review, asking whether or not the law contradicts the Constitution. On the other hand, the rights provided for by the Convention can not be ensured directly without applying the internal legal instruments." Moreover, the Court implicitly recognized that the Convention is directly applicable in Lithuanian law and found that there was no inconsistency between the ECHR and the Constitution.

The Constitutional Court subsequently turned to an examination of the role of Art. 7 of the Constitution with respect to the merits of the case.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Art. 7 provides: "Any law or other act which contradicts the Constitution shall be invalid." This, according to the Court, "can not invalidate the international treaty, i.e. the Convention, however, it requires that the provisions of the international treaty should not contradict the provisions of the Constitution, otherwise it would be questionable how to implement the Convention in the internal law of the Republic of Lithuania."

The Court found an interesting meaning for the notion of a contradiction with the Constitution, pointing out:

> "The provisions of the Convention could be considered inconsistent with the Constitution if:
>
> 1. The Constitution etablished an exhaustive and full list of rights and freedoms, although the Convention established other rights and freedoms;
>
> 2. The Constitution prohibited any acts, although the Convention defined these acts as a right or freedom;
>
> 3. Any provision of the Convention could not be made applicable in the legal system of the Republic of Lithuania because it was inconsistent with any provision of the Constitution."[14]

The Court found that there is no such inconsistency in the sense of points 1 or 2 of this formula. It should be emphasized that the Court's conception of the conformity of the provisions of the ECHR with the Constitution is far removed from the formal linguistic conformity of corresponding texts. As it stated, "the conformity (relationship) of the norms of the Constitution and the Convention should be essential, logical, but not identical in wording. A formal linguistic interpretation of human rights alone can not be accepted by the very nature of human rights." As for point 3, the Court decided on it when answering the concrete points of the Petition of the President of Lithuania.

2. Answer to the First Point of the Petition

The Constitutional Court pointed out that it was erroneous to interpret Art. 48 of the Constitution as providing for correctional labour. This article does not mention correctional works as a criminal penalty. The expression "labour which is provided by law for persons convicted by a tribunal" does not mean that the laws should establish a correctional labour penalty.

---

[14] The last point of "inconsistency" would be more clear if the Court used the expression "if it precludes the applicability of any provision of the Constitution because of its nonconformity with the Constitution."

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Making reference to the case-law of the European Court of Human Rights[15], the Court concluded that the provisions of Art. 4, paragraph 3a, of the Convention did not necessarily prohibit forced labour which does not deprive the liberty of persons convicted for criminal offences. As the Court stated, Art. 4 of the ECHR links work required to be done with the requirements of Art. 5 thereof, i.e. with the legality of the detention or with conditional release from detention. It is important to note that the work required should not pass the limits of what is usual, and the work to be done may be aimed at reintegration of a person into society.

Therefore, the Court came to the conclusion that Art. 4, paragraph 3a, of the Convention did not contradict the Constitution.

3. Answer to the Second Point of the Petition

The Court first of all noted that there was not enough in the wording of the corresponding provisions of the ECHR and the Constitution to conclude that they were inconsistent. The Court found:

> "... if the Constitution does not establish any particular rights, freedoms or guarantees, or constructs them in different manner, it does not mean that such rights and their enforcement may not be guaranteed in the legal system of the Republic of Lithuania. They may be and indeed are provided for in other legal instruments and are implemented in practice. Besides, they may be ensured by applying the Convention on the basis of Art. 138, section 3, of the Constitution. The provisions of the Convention may not be applicable only if such provisions contradict the Constitution."

Comparing the formulations "to bring promptly before a judge" and "to bring to court within 48 hours", the Court concluded that there was no inconsistency. Here, the Court made reference to relevant case law of the organs of the Convention, recognizing that four days in ordinary cases and five days in exceptional cases corresponded to the requirement to bring an arrested person promptly before a judge. The Court also referred to relevant Articles of the Constitutions of some States Parties to the Conventions providing for a term of 48 hours (Art. 28 of the Constitution of Portugal and Art. 13 of the Constitution of Italy) or 72 hours (Art. 17 of the Constitution of Spain).

---

[15] *Van Droegenbgoek* case, Judgement of 24 June 1982, Publications of the European Court of Human Rights, Series A, 1982, Vol. 50, 32–60.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

It should be added that until now the rule of bringing an arrested person to court within 48 hours provided for by the Art. 20 of the Constitution of Lithuania is not yet in force. The Law on Procedure for the Enforcement of the Constitution of the Republic of Lithuania of 6 November 1992 (Art. 8) made the following reservation: "The provisions of section 3 of Art. 20 of the Constitution of the Republic of Lithuania shall become applicable once the laws on criminal procedure of the Republic of Lithuania are coordinated with this Constitution." This was not done. The rule which is still applicable is that the lawfulness of an arrest is to be decided within 72 hours by the procurator who is entitled to order a release of an arrested person or to prolong an arrest.

The Court further found no contradiction between the requirement that "everyone who is arrested or detained (...) shall be brought before a judge" and the provision that "a person detained *in flagrante delicto* must ... be brought to court." Implemented together on the basis of Art. 138 of the Constitution, both provisions may be substituted for one another and form a single legal guarantee.

Finally, the Court came to the conclusion that there is no contradiction between the provision of Art. 5, paragraph 4, of the Convention, which stipulates that a judge should decide on the l a w f u l n e s s of the arrest, and the provision of Art. 20 of the Constitution, which requires that a court must determine the v a l i d i t y of the arrest. Both the Constitution and the Convention require that a court should decide on the lawfulness and validity of the arrest. The Court concluded that:

> "one can not interpret section 3 of Art. 20 of the Constitution by separating it from the whole text of this article as well as of other provisions of the Constitution establishing guarantees of legality. Section 2 of the Article mentioned above provides that '[n]o person may be arbitrarily arrested or detained. No person may be deprived of freedom except on the grounds, and according to the procedures, established by law.' Such provisions basically establish the principle of determining the lawfulness of the detention of a person as a general rule. That is why the term 'validity' employed by Art. 20 means more than only a causality of facts; it means the same thing as the term 'lawfulness'".

Therefore the Court concludes that Art. 5 of the ECHR does not contradict the Constitution of the Republic of Lithuania.

4. Answer to the Third Point of the Petition

The Court found that Art. 9 of the ECHR did not distinguish between the right to profess and the freedom to manifest religion or belief. Al-

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

though the Constitution provides for the possibility to establish limitations on freedom to profess and manifest religion or belief, this was only a different wording. The Court pointed out that there was no possibility to restrict the freedom to profess a religion or belief because it is impossible to restrict such a moral category as a religious faith or belief. Here the Court referred to the English and French texts of Art. 18 of the International Covenant on Civil and Political Rights, where the corresponding wording "freedom to have" or "la liberté d'avoir" was used. This wording does not mean any external manifestation of religion or belief, which may be subject to legal restrictions. *Lex non cogit ad impossibilia* – law does not require the impossible.

The Court concluded that "[t]herefore this provision of the Constitution did not entail any negative consequences with regard to freedom of religion and belief in the legal system of the Republic of Lithuania, and no law restricts freedom to profess religion or belief." Thus, according to the Opinion, there is no contradiction between Art. 9 of the ECHR and the Constitution.

5. Answer to the Fourth Point of the Petition

The Court concluded that so-called positive discrimination does not mean the granting of privileges or imply inequality before the law. The Constitution provides for the universally recognized specific rights inherent to some groups of people, namely, to persons belonging to national minorities.

Art. 29 of the Constitution stipulates that "a person may not have his rights restricted in any way, or be granted any privileges, ...". This formula corresponds to the expression employed in Art. 14 of the ECHR providing that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground ...". The fact that the Constitution does not mention the terms "colour" and "association with a national minority" is nothing more than a difference in the wording. The Court also mentioned some other differences in wording, for example, "social origin" (Convention) and "social status" (Constitution) as having no implications for the general principle of non-discrimination provided for in both the Convention and the Constitution.

The Court stated that Art. 14 of the ECHR does not contradict the Constitution.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

6. Answer to the Fifth Point of the Petition

"The Constitutional Court notes that Art. 2 of Protocol No. 4 to the ECHR, containing the rule that 'everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence', consists of two interrelated constituent parts. One entails the right of a person to move freely and to choose freely his residence; the second means that this right is guaranteed only to persons lawfully residing in the territory of the State concerned. Lawful residents may be nationals, as well as foreigners or stateless persons. The residence of a national within the territory of his State is always lawful. Art. 32, section 3, of the Constitution stipulates: 'A citizen may not be prohibited from returning to Lithuania.' The conditions of entry or leaving the country for a foreigner or a stateless person are established by the internal law of the State. Such conditions are established by the Law of the Republic of Lithuania on the Legal Status of Foreigners in the Republic of Lithuania.[16]

Foreigners, as well as the stateless persons residing lawfully in the Republic of Lithuania according to the Law mentioned above, enjoy the same rights and freedoms as citizens of the Republic of Lithuania, unless the Constitution of the Republic of Lithuania, other laws of the Republic of Lithuania, or international treaties of the Republic of Lithuania provide otherwise. Therefore, the provisions of Protocol No. 4, applied in the legal system of Lithuania, together with the provisions of the Law on the Legal Status of Foreigners in the Republic of Lithuania, would cover each other. One practical question still to be answered is whether or not a foreigner or a stateless person is lawfully in the territory of Lithuania for the purpose of full enjoyment of his right to move and choose freely his residence.

Taking into consideration all this the conclusion should be drawn that Art. 2 of Protocol No. 4 of the ECHR does not contradict the Constitution of Lithuania."

There is no doubt that the Conclusion of the Constitutional Court on the conformity of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of Lithuania accelerated the accession of Lithuania to the Convention. On 27 April 1995 the Seimas ratified the Convention and Protocols No. 4, 7 and 11 thereto.

---

[16] For the English text of the Law on the Legal Status of Foreigners in the Republic of Lithuania see: Parliamentary Record/Seimas of the Republic of Lithuania, 1992, No. 5, 5–10.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Ratification of the European Convention on Human Rights would seem to have been a significant step towards effective incorporation of human rights standards into the Lithuanian legal system. It may be observed that the text of the Law on Ratification of the ECHR enacted by the Lithuanian Parliament reflects *per se* a situation of transition of the domestic legal system of Lithuania.[17]

A reservation made for one year and concerning the right of arrested or detained person to be brought before a judge (Art. 5 paragraph 3 of the Convention) signifies that an old Soviet norm providing that the prosecutor is entitled to sanction arrest of persons on suspicion of having committed an offence still remains in force. Under Art. 104 of the Code of Criminal Procedure of the Republic of Lithuania arrest of such persons

---

[17] Law of the Republic of Lithuania, 27 April 1995, No. I-865, Vilnius: On the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Fourth, Seventh, and Eleventh Protocols to the Convention (official translation):

1. On the basis of Art. 138 of the Constitution of the Republic of Lithuania, the Seimas of the Republic of Lithuania ratifies, subject to the below reservations and declarations, the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 14 May 1993 and the Fourth, Seventh and Eleventh Protocols to the Convention.

2. Pursuant to Art. 64 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the following reservations are made in respect of Par. 3 of Art. 5 of the above-mentioned Convention:

1) The Republic of Lithuania makes a reservation that under Art. 104 of the Code of Criminal Procedure of the Republic of Lithuania, the right to sanction arrest of persons on suspicion of having committed an offence shall also be vested in the prosecutor. The reservation shall remain in effect for one year after the coming into force of the above-mentioned Convention in the Republic of Lithuania.

2) The Republic of Lithuania makes a reservation that the provisions of Art. 5 of the above-mentioned Convention shall not apply to national defence servicemen in the cases when disciplinary penalty – arrest – is applied to them in accordance with the Disciplinary Regulations.

3. Pursuant to Arts. 25 and 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the following declarations have been made:

In respect of Art. 25 of the Convention: The Republic of Lithuania declares that it recognizes for a three-year period the competence of the European Commission of Human Rights to receive petitions from any natural person.

In respect of Art. 46 of the Convention: The Republic of Lithuania declares that it recognizes for a three-year period as compulsory the competence of the European Court of Human Rights in all matters concerning the interpretation and application of the present Convention.

The declarations of the Republic of Lithuania in respect of Arts. 25 and 46 of the Convention shall also apply to the Fourth and Seventh Protocols.

I promulgate this Law passed by the Seimas of the Republic of Lithuania.
President of the Republic Algirdas Brazauskas (Valstybes Zinios 1995, No. 37, § 913, 2–3).

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

can be ordered by a court, judge or prosecutor. In practice in about 70 % of cases an arrest of suspected persons is still ordered by the prosecutor without bringing a person before a court or a judge.

The Lithuanian declaration made under Art. 25 of the Convention is of limited scope. Lithuania declared that "it recognizes for a three-year period the competence of the European Commission of Human Rights to receive petitions from any natural person", while Art. 25 of the Convention provides a competence of the Commission to "receive petitions (...) from any person, non-governmental organization or group of individuals" (emphasis added). One can have doubts about the validity of such unilateral limitation of the scope of Article 25 of the Convention, especially in the light of the conclusions of the European Commission and the Court of Human Rights in the *Loizidou* case[18] accepting only restrictions *ratione temporis* with regard to the scope of this Article.

The Parliament has not yet ratified the First Protocol to the European Convention. A reason could be found in the difficulties of effective implementation in Lithuania of Art. 1 of the First Protocol, protecting the right to property. These difficulties are linked with the restitution of property nationalized by the Soviets and with the extensive and complex privatization process in Lithuania. Nevertheless, it should be noted that the Parliament of Lithuania decided to proceed to ratification of the First Protocol in the course of one year after the ratification of the Convention.

Incorporation of European human rights standards into the domestic legal system is a complex process. In fact, the decision of the Constitutional Court on the conformity of the European Convention on Human Rights with the Constitution of Lithuania was one stage in this process and a prerequisite for facilitating all subsequent steps. Final harmonization of the Lithuanian legal system with the European Convention on Human Rights is still necessary and has yet to be completed.

---

[18] 1993, Petition No. 15318/89, decision of the Commission on Admissibility of 8 July 1993, para. 29; decision of the Court of 23 March 1993 on Preliminary Objections, case No. 40/1993/453/514, paras. 88–89.

http://www.zaoerv.de
© 1995, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht